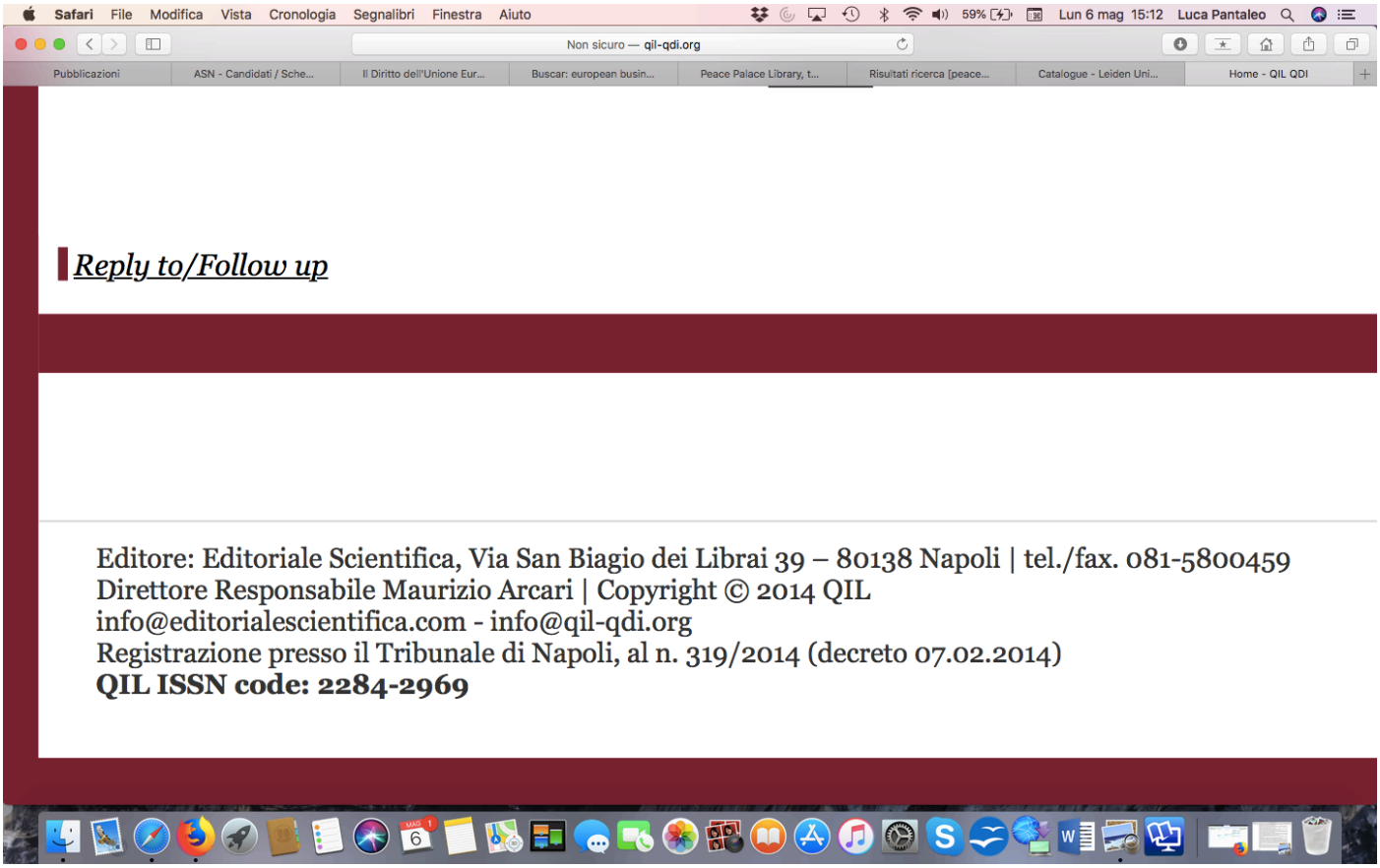

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The provisional application of CETA: Selected issues

Luca Pantaleo[*]

1. *Introduction*

The application of international treaties on a provisional basis is a common practice in international law. It is governed by Article 25 of the Vienna Convention on the Law of Treaties (VCLT), according to which it may extend to a treaty as a whole, or to parts of it, as agreed by the Parties. Provisional application brings a treaty into force, in much the same way as entry into force does. The main difference is the provisional nature of such legal force, which translates into the ability of the Parties to terminate the (provisionally applied) treaty more easily that they can terminate a treaty that is fully in force.[1] However, to borrow from Lefeber, there is 'no doubt that a provisionally applicable treaty constitutes a binding and enforceable legal instrument between States'.[2] Provisional application is therefore equivalent to entry into force as far as the legal effects at the international level are concerned.[3]

From a policy perspective, provisional application has proved a viable instrument to ensure expediency in the application of international treaties pending the completion of the (often lengthy and complex) do-

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[1] According to art 25(2) VCLT, 'the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty'.

[2] See R Lefeber, 'Treaties, Provisional Application', Max Planck Encyclopedia of Public Intl L (2015) 16.

[3] For a different view on the provisional application of treaties see the early but still interesting study carried out by P Picone, *L'applicazione in via provvisoria degli accordi internazionali* (Jovene 1973).

mestic constitutional procedures required for ratification. Many international treaties have been applied on a provisional basis, and often for extended periods. The most famous example is the General Agreement on Tariffs and Trade (GATT), which had been applied provisionally from 1947 to 1994.[4] In the practice of the EU, almost all free trade agreements (FTAs) concluded in recent years have been provisionally applied pending their respective entry into force.[5] The attractiveness of such an international law instrument is particularly obvious for the EU. Given that EU FTAs are always concluded in the form of mixed agreements for which 28+1 ratifications are necessary, one can easily see that provisional application offers a formidable antidote against potentially chronic delays.

The provisional application of EU FTAs has remained uncontroversial for many years as demonstrated by past practice. However, the announcement that important FTAs such as CETA would also be provisionally applied has given rise to a fierce legal and political debate across the EU and its Member States (MS).[6] The German Constitutional Court has imposed a number of conditions on the provisional application of CETA;[7] and Belgium was able to cast its vote in favour of it within the

[4] See MH Arsanjani, M Reisman, 'Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards' in E Cannizzaro (eds), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011), 88.

[5] See, among many, Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of 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 [2010] OJ L127/1, and Council Decision 2012/735/EU of 31 May 2012 on the signing, on behalf of the Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/1.

[6] See Council Decision 2017/38/EU of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/1080 (CETA Decision).

[7] In particular, it stated that: a) provisional application is not contrary to the German Constitution inasmuch as it applies exclusively to those parts of CETA that lie indisputably within the scope of the competences of the European Union, and b) as long as Article 30.7(3)(c) CETA is interpreted as allowing Germany to unilaterally terminate the provisional application. For an English summary of the decision see Bundesverfassungsgericht, 'Applications for a Preliminary Injunction in the "CETA" Proceedings Unsuccessful', Press Release No 71/2016 (13 October 2016) <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html>.

Council only after it had issued a declaration that offered 'political assurances' to the government of Wallonia, whose approval was required under Belgian constitutional rules.[8] It should be noted, however, that these domestic incidents have little bearing on the effects of provisional application under international law (see below, Section 3).

This paper does not aspire to give a comprehensive account of all the legal issues that arise in connection with the provisional application of a far-reaching agreement such as CETA. That would prove a massive task to perform within the limited space available. This author has therefore decided to focus on three issues that will be analysed in as many sections. The following section (Section 2) will examine whether provisional application is mandatory under CETA by analysing the text of Article 30(7) CETA and comparing it with the provisions concerning provisional application included in other similar agreements. Section 3 will examine whether, and under what conditions, partial provisional application is allowed under the rules of CETA, when they are read in conjunction with the law of treaties. Section 4 will examine the legal effects of the announced exclusion of CETA's Investment Court System (ICS) from provisional application.[9] Finally, Section 5 will present some conclusions.

2. *Is provisional application mandatory?*

A question that has arisen in the debate surrounding the provisional application of the Energy Charter Treaty (ECT) concerns the mandatory, or voluntary, nature of such provisional application. The relevant provision of the ECT (Article 45(1) and (2)(a)) is famously a particularly complex one. It reads as follows:

> '(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, *to the*

[8] Among the assurances in question, the declaration states that Belgium has taken note of the 'droit de chaque partie à mettre fin à l'application provisoire du CETA conformément à son article 30.7'. See RTL, 'La Belgique se met d'accord sur le CETA: voici le texte de la position belge' <www.rtl.be/info/belgique/politique/la-belgique-se-met-d-accord-sur-le-ceta-voici-le-texte-de-la-position-belge-862642.aspx#integ>.

[9] See CETA Decision (n 6) art 1(1)(a).

> *extent* that such provisional application is not inconsistent with its constitution, laws or regulations.
> (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.'[10]

Article 45 ECT contains two different clauses on provisional application in paras 1 and 2 respectively. There has been a discussion concerning the interpretation of these two clauses. Arsanjani and Reisman have argued that they should be interpreted conjunctively. According to this view, Article 45(2)(a) lays down 'a legally defined power which may only be exercised on account of a real inability' of a Party to provisionally apply the ECT.[11] In other words, para 2 should be read in combination and in light of para. 1, in the sense that a declaration under para 2 would only be permissible in case provisional application is incompatible with the Party's 'constitution, laws or regulation', as stated in para 1. This interpretation has been rejected by the case law in both the *Kardassopoulos* and the *Yukos* award,[12] where two different Arbitral Tribunals have stated that provisional application could be carved out by a Party 'whether or not there in fact exists any inconsistency between "such provisional application" of the ECT and a signatory's constitution, laws or regulation'.[13] A thorough examination of that debate goes well beyond the purpose of this article. Suffice it to say, the Tribunals found that in the absence of a declaration under para 2, provisional application was indeed mandatory under Article 45(1) ECT, in that it established 'a binding obligation for each signatory to apply the ECT provisionally'.[14] This is the case, unless an incompatibility with the Party's domestic law could be demonstrated.

[10] Emphasis added.
[11] Arsanjani, Reisman (n 4) 98.
[12] See *Ioannis Kardassopoulos and Georgia*, Decision on Jurisdiction, ICSID Case No ARB/05/18, para 228; as well as *Yukos Universal Limited (Isle of Man) and The Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 227, paras 262-269.
[13] See *Yukos* (n 12) para 262.
[14] ibid.

Interestingly enough, this state of affairs has been replicated in the EU-Singapore FTA. The relevant EU-Singapore provision (Article 17.12(4)) states as follows:

> '(a) This Agreement *shall be* provisionally applied from the first day of the month following the date on which the Union and Singapore have notified each other of the completion of their respective relevant procedures. The Parties may by mutual agreement fix another date.
> (b) In the event that certain provisions of this Agreement *cannot* be provisionally applied, the Party which *cannot* undertake such provisional application shall notify the other Party of the provisions which cannot be provisionally applied.'[15]

The use of the imperative mood 'shall' seems to leave no doubt as to the mandatory and automatic nature of provisional application under this agreement. In much the same way as under the ECT, a Party can only be exempted from provisional application *to the extent that it is unable* to provisionally apply one or more provisions of it.[16]

CETA takes a completely different approach. According to Article 30.7(3):

> '(a) The Parties *may provisionally apply* this Agreement from the first day of the month following the date on which the Parties have notified each other that their respective internal requirements and procedures necessary for the provisional application of this Agreement have been completed or on such other date as the Parties may agree.
> (b) If a Party *intends not to provisionally apply* a provision of this Agreement, it shall first notify the other Party of the provisions that it will not

[15] Emphasis added.

[16] One might wonder whether the reference to the concept of inability should be understood as implying legal and/or political inability. Legal inability would cover only instances of an established incompatibility between national law and provisions of the agreement. From this perspective, art 17.12(4) EU-Singapore FTA could be considered an almost identical reproduction of the equivalent ECT provision. However, it seems also possible to interpret this provision as encompassing the political inability of a Party to give effect to the agreement on a provisional basis. Under this category would fall, for example, the case of a domestic (national or local) parliament vetoing provisional application resulting in the political inability of the national government to successfully complete the internal constitutional requirements necessary for the approval of provisional application.

> provisionally apply and shall offer to enter into consultations promptly.'[17]

A textual interpretation of this provision, in accordance with Article 31(1) VCLT, provides for an easy and straightforward answer to the question concerning the mandatory nature of provisional application. Contrary to the ECT and the EU-Singapore FTA, CETA leaves this choice entirely up to the discretion of the Parties, who may or may not apply the agreement on a provisional basis. This solution is also in line with the law of treaties and, in general, with the contractual freedom of the Parties under international law. This said, it is also clear that once the Parties have agreed on the very decision to provisionally apply the agreement, CETA will have the same binding nature as an agreement fully entered into force (see above). As is well-known, both the EU and Canada have already committed to give effect to CETA on a provisional basis.[18] The problem therefore becomes the scope of its provisional application and the conditions under which partial exclusions can be agreed upon. This is the issue analysed in the next section.

3. *Partial provisional application of CETA: 'all or nothing' vs 'piecemeal' and 'pick and choose'*

A second important question that has emerged (again) in the context of the ECT is whether partial provisional application is possible, and if so, under what conditions. This question seems to be of crucial significance under CETA, too.

It is useful at this stage to briefly examine the *Yukos* case. The Respondent State in that dispute argued that Article 45(1) ECT in fact required, 'a "piecemeal" approach which calls for the analysis of the consistency of each provisions of the ECT with the Constitution, laws and regulations of the

[17] Emphasis added.

[18] At the time of writing, both the EU and Canada have completed their internal procedures to give effect to CETA on a provisional basis and it would seem that the only remaining (political) obstacle is a still outstanding agreement on Canadian import quotas of European cheese. See Zoran Radosavljevic, 'CETA start hits snag over cheese quota dispute with Canada' Euractiv (London, 19 June 2017) <www.euractiv.com/section/ceta/news/ceta-start-hits-snag-over-cheese-quota-dispute-with-canada/>.

Russian Federation'.[19] Put differently, the Respondent maintained that the clause, 'to the extent', contained in Article 45(1) ECT had to be interpreted as allowing a Party to prevent the provisional application of those provisions of the ECT which were incompatible with its domestic law.[20] By contrast, the Claimant submitted that provisional application could be excluded only insofar as *provisional application as such* was incompatible with the Party's constitution, laws or regulations. In other words, Yukos supported an 'all or nothing' proposition, which would exclude *a priori* all possibilities of a partial provisional application of the ECT.[21]

As is well known, the Tribunal agreed with the Claimant. It did so by embarking on a rather interesting interpretive exercise. In essence, it relied on both a literal and teleological interpretation of Article 45(1) ECT. On the one hand, it stated that the lack of any explicit reference to partial provisional application in the text of the ECT was a clear indication that the Parties had conceived it as referring to the agreement as a whole, and not just to parts of it.[22] On the other hand, it found that allowing a State to modulate provisional application freely in accordance with its internal law would undermine the object and purpose of the ECT.[23] The granting of such a far-reaching discretionary power would have had to have been agreed to unambiguously by the Parties, which it was not.

The position taken by the Arbitral Tribunal in *Yukos* is certainly questionable. In particular, it would seem only logical to interpret the 'to the extent' clause as meaning (literally) that the agreement is to be provisionally applied insofar as it is not incompatible with the domestic laws of a Party. This reading seems to be supported by versions of the ECT written in (equally authoritative) languages other than English.[24] In addition, it is extremely difficult, if not impossible, to find evidence that provisional application is *per se* prohibited under any domestic legal system. The framers of CETA seem to have learned from the ECT experience on

[19] See *Yukos* (n 12) para 292.

[20] The Respondent had a clear interest in making such arguments. It in fact claimed that the dispute brought by the Claimant was not arbitrable under Russian law as it fell within the exclusive competence of domestic courts. See *Yukos* (n 12) para 361.

[21] See *Yukos* (n 12) paras 295-300.

[22] ibid para 311.

[23] ibid para 312.

[24] In this sense see the critical remarks made by T Gazzini, 'Provisional Application of the ECT in the Yukos Case' (2015) ICSID Rev: Foreign Investment L J 293, 297-299.

partial provisional application. Article 30.7(3)(b) explicitly recognizes that the Parties might not intend to provisionally apply single provisions of the agreement. In this sense, it contemplates a 'piecemeal', or 'pick and choose', approach. This very broad discretionary power granted to the Parties seems to have only one procedural, and one substantive, limitation. Procedurally, the Parties are under an obligation to notify the other Party of the provisions that they do not intend to apply on a provisional basis and to offer to enter into consultations on the matter. Substantively, the provision states that:

> 'Within 30 days of the notification, the other Party may either object, in which case this Agreement shall not be provisionally applied, or provide its own notification of equivalent provisions of this Agreement, if any, that it does not intend to provisionally apply. If within 30 days of the second notification, an objection is made by the other Party, this Agreement shall not be provisionally applied.'

Put differently, the second part of the provision under examination depicts three different scenarios: a) The other Party raises an unconditional objection that prevents the agreement from being provisionally applied altogether; b) the other Party sends a notification of acceptance regarding the exclusions notified to it without raising its own carve-outs; and, c) the other Party sends a notification of acceptance regarding the exclusions notified to it *and* raises its own carve-outs. In the latter scenario, the Party that sent the first notification can still raise a final unconditional objection preventing the agreement from being provisionally applied altogether. In short, the only substantive limitations to CETA's partial provisional application are determined by the (lack of) agreement between the Parties. As long as the Parties have an accord, partial provisional application is entirely permissible under CETA.

It seems safe to affirm that Article 30.7(3) CETA is to be regarded as a direct reflection of the Tribunal's findings in the *Yukos* award. On that occasion, the Tribunal clearly stated that the possibility to provisionally apply a treaty only in part needs to be agreed to explicitly by the Parties, which is what the Parties have done in CETA. Most importantly, the final section of Article 30.7(3)(b) CETA seems to confirm the principle established by the Tribunal in *Yukos*, according to which provisional application is, in principle, meant to reference the agreement in its entirety –

unless otherwise agreed to by the Parties. The relevant section states as follows:

> 'The provisions that are not subject to a notification by a Party *shall be provisionally applied* by that Party from the first day of the month following the later notification, or on such other date as the Parties may agree, provided the Parties have exchanged notifications under subparagraph (a)'.[25]

From the EU's perspective, this circumstance may have far-reaching consequences. It should be borne in mind that the Parties to any provisional application are only the EU and Canada.[26] The fact that provisional application is, in principle, referred to the entire agreement means that it equally covers parts of the agreement falling within the competence of the Union, and parts of the agreement falling within the competence of the Member States, unless it is indicated otherwise in the notification addressed to Canada and the latter agrees. To be sure, the notification must identify the exact provisions that are excluded from provisional application. Statements of a general nature would not seem to suffice. Take, for example, Recital 4 of the CETA Decision. It states that '[p]arts of the Agreement falling within the competence of the Union may be applied on a provisional basis'.[27] Along the same lines, Article 1(1)(d) merely stipulates that, 'the provisional application of Chapters 22, 23 and 24 of the Agreement shall respect the allocation of competences between the Union and the Member States'.[28] It is argued that, as far as international law is concerned, these vague statements will not suffice to exclude from provisional application the parts that do not fall within Union competence,

[25] Emphasis added.

[26] The whole provision devoted to provisional application seems in fact to refer only to these two Parties. First of all, the provision has clearly a bilateral structure in that it speaks of notification due by one Party to 'the other Party' rather than 'the other Parties'. Even more explicit is Article 30.7(4), which concludes the provision in question. It states that 'Canada shall submit notifications under this Article to the General Secretariat of the Council of the European Union or its successor. The European Union shall submit notifications under this Article to Canada's Department of Foreign Affairs, Trade and Development or its successor'. This seems to be a clear indication that only these two Parties will approve provisional application and exchange notifications if need be.

[27] See CETA Decision (n 6) recital 4.

[28] ibid art 1(1)(d).

even if such sentences are replicated in the notification addressed to Canada. In fact, the division of competence is an entirely internal issue that cannot not affect the rights of a third country under an international agreement concluded by the EU.

According to a general rule of international law codified in Article 27 VCLT,[29] a State cannot invoke the provisions of its internal law as an excuse for its failure to comply with a treaty, unless the violation of an internal provision concerns the competence to conclude treaties, and 'was manifest and […] of fundamental importance'.[30] These rules of international law apply to provisional application, too.[31] In my opinion, it could hardly be maintained that the internal EU rules on the division of competence are safeguarded by Article 46 VCLT. Such rules are surely of fundamental importance. However, it is doubtful whether they can be considered manifest within the meaning of the law of treaties, as is demonstrated by the veritable deluge of cases brought before the Court of Justice of the European Union on this very matter.[32] In addition, there exists EU practice extending provisional application to matters not covered by EU competence. To mention but the most famous examples, the cases of the EU-Korea FTA and the EU-Peru/Colombia FTA.[33] As a consequence, the implications of a clause stating that provisional application will not affect the internal division of competences are therefore unclear by definition, unless the parts that are not subject to provisional application are clearly identified and brought to the attention of the other Party.

[29] It could also be argued that for a non-EU country that has concluded a treaty with the EU and its MS, EU law would constitute *res inter alios acta*. This position has been maintained by an Arbitral Tribunal in *RREEF (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S. à r. l. v Kingdom of Spain*, Decision on Jurisdiction, ICSID Case No. ARB/13/30, para 74.

[30] See art 46 VCLT.

[31] Lefeber (n 2) 17.

[32] The last episode of the competence saga is the recent CJEU Opinion on the EU-Singapore FTA. See Avis 2/15 *Accord de Libre-Échange avec Singapour* (CJEU, 16 May 2017). For an overview of the case-law on the division of competence under the Common Commercial Policy (CCP) see M Andenas, L Pantaleo, 'Beyond Parallel Powers. EU Treaty-Making Power Post-Lisbon' in M Andenas, T Bekkedal, L Pantaleo (eds), *The Reach of Free Movement* (Asser Press 2017, forthcoming).

[33] See the thoughtful considerations made by D Kleimann, G Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15' EUI Working Paper No 2016/58 (2016) 15-18 <http://cadmus.eui.eu/handle/1814/43948>.

The impact of this argument might be negligible in practice for two reasons. First, the practice extending provisional application beyond the boundaries of EU competence is a clear indication that, if there is willingness at political level, this is simply not an issue. However, as far as CETA is concerned it should be borne in mind that the respect of the division of competence is one of the conditions 'imposed' by the German Constitutional Court in order to endorse the German approval of provisional application.[34] In this sense, it can probably be maintained that, in the case of CETA, such political consensus does not exist. Secondly, in light of Opinion 2/15, there are supposedly only two parts of CETA that do not fall within EU exclusive competence: namely, portfolio investment and the ICS.[35] Both these parts will admittedly be excluded from provisional application.[36] If that will be the case – in other words, if Canada accepts such exclusions – the competences still lying with the Member States will not be affected by provisional application, in practice.

4. *Excluding the ICS from provisional application: what impact on the rights of investors?*

The third, and final, question that will be examined in this article exclusively concerns the investment chapter. Given its controversial nature, however, it seems valuable to discuss what impact excluding the ICS from provisional application would have on the rights of investors from both Parties.

Needless to say, the fact that the ICS will not be provisionally applied does not mean that investors from both Parties will not have rights under CETA as of the first day of its provisional application. As already stated above, provisional application is virtually equivalent to entry into force when it comes to its binding nature and legal force. Therefore, CETA standards will be enjoyed by investors of the two Parties, so long as the provisions granting substantive rights will not be carved out by means of reciprocal notifications exchanged between the Parties. Based on the CETA Decision approved by the Council, it can be assumed that some

[34] Bundesverfassungsgericht [7].
[35] See Opinion [30] paras 225-256 and 285-293 respectively.
[36] See CETA Decision (n 6) art 1(1)(a).

substantive standards will be excluded (ie expropriation), but most of them will be provisionally applied.[37] However, in accordance with Article 30.6(1) CETA, private parties will not be able to invoke the agreement before domestic courts.[38] In other words, CETA will not have direct effects. If the ICS will be provisionally applied, this provision would not be a cause of concern for private parties. However, the exclusion of the ICS from provisional application might mean that investors from both Parties will have no remedy available pending entry into force. On the one hand, the ICS will not be active. On the other hand, domestic courts will not have the power to hear claims based on the rights conferred by CETA. It is true that investors could still litigate before domestic courts by invoking domestic law. But that is an entirely different matter, as such possibility already exists with or without CETA. Does this mean that during provisional application, investors will have rights but no means to enforce such rights?

In reality, it seems that there will be at least some remedies available. First and foremost, there will be the remedies generally offered by international law to the Parties to the agreement and, indirectly through diplomatic protection, to private parties. In addition, CETA establishes a State-to-State dispute settlement (SSDS) under Chapter 29. Based on the CETA Decision approved by the Council, we can assume that this part will not be excluded from provisional application. A detailed analysis of the SSDS is outside the scope of this article. For the purpose of this article, it seems sufficient to emphasise that such a mechanism could represent a viable alternative to address violations of CETA in the transitory period between provisional application and entry into force. It is also likely that, pending entry into force, private parties might seek commercial arbitration based on contract clauses in order to make up for the absence of a neutral arbitral forum with the jurisdiction to hear treaty claims.[39] It is argued that there could yet be another, more attractive and more logical, possibility available to private parties.

[37] ibid.

[38] The provision reads as follows: 'Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.'

[39] This would be a somewhat ironic side-effect of the exclusion of the ICS from provisional application, considered that commercial arbitration offers less guarantees in

According to the CETA Decision, the exclusion of the ICS from provisional application translates into the carving out of all related procedural provisions laid down in Chapter 8 CETA (particularly, Article 8.18 to Article 8.45). This is fairly logical. It would make little sense to exclude the establishment of the ICS, while simultaneously allowing the provisions concerning, for example, mediation to be provisionally applied. Given that mediation is conceived as a non-confrontational mechanism that precedes a dispute and that is, in principle, devised to facilitate a settlement, it is only logical not to mediate a dispute which might not be arbitrable for several years pending entry into force. This also means that the statutes of limitations set out in Chapter 8 will be suspended pending entry into force. As an example, Article 8.19(6)(b) stipulates that an investor must bring a claim no later than 3 years after the date on which the investor first acquired or should have acquired knowledge of the breach of CETA of which it is allegedly a victim. The rationale of such a provision and other similar ones, is clearly to sanction the deliberate inaction of an investor in order to, on the one hand, avoid possible abuses of the ICS (ie abuse of process), and, on the other hand, to favour an expeditious settlement of disputes that may arise from CETA. It is therefore argued that the exclusion of the ICS from provisional application will create a suspension of the procedural time limits whose *ratio legis* is to avoid the misuse of litigation on the part of the investor. Such time limits will only start running as of the first day of entry into force.

Based on this interpretation, investors from both Parties will have the right to bring an arbitral claim for a breach of CETA which occurred during provisional application, and to the extent that it concerned a provision of CETA that has been provisionally applied, as soon as the agreement will have entered into force in a conclusive manner. This interpretation could compensate for the legal vacuum left by the exclusion of the ICS from provisional application.

terms of transparency and accessibility of the proceedings than investment arbitration does. Which is precisely one of the main complaints often made by detractors of the ICS.

5. *Conclusions*

There are surely many more issues concerning the provisional application of such an innovative agreement like CETA than this article has been able to cover. For example, the question concerning the definition of a Party for the sake of provisional application has only been dealt with in a cursory way and would certainly deserve further investigation. Additionally, the so-called 'sunset clauses' contained in CETA cry out for further analysis.[40] This author is preparing a longer study on this subject where these, and other, questions will be examined more thoroughly. However, and despite not being comprehensive, the analysis carried out above allows to present some conclusions.

First of all, contrary to a number of other similar agreements, CETA does not impose on the Parties the obligation to provisionally apply it. The Parties have the power to choose whether to agree on such provisional application, and under what terms. In other words, and this is the second conclusion reached above, partial provisional application is permissible under CETA. However, the examination of the text of the agreement seems to suggest that provisional application is, in principle, conceived as covering the entire agreement. The exclusion of single provisions must be made explicitly and clearly in the exchange of notifications that the Parties are meant to send each other in order to give effect to provisional application. In general terms, this provides an interpretative framework that seems to favour provisional application over its exclusion. Any ambiguity concerning the coverage of provisional application will most probably be resolved by the interpreter in favour of provisional application. Finally, the arguments proffered above suggest that the exclusion of the ICS from provisional application will entail a general suspension of the procedural rules laid down in Chapter 8, making it possible for investors to bring an arbitral claim concerning events that occurred during provisional application only once the agreement is in force.

[40] That is the case, for example, of art 30.9(2) CETA.