Unmixing Mixed Agreements: Challenges and Solutions for Separating the EU and its Member States in Existing International Agreements

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To be published in N. Levrat, Y. Kaspiarovich, C. Kaddous and R.A. Wessel (Eds.), *The EU and Its Member States' Joint Participation in International Agreements*, Oxford: Hart Publishing, 2022, 287-304

1. Introduction

The practice of concluding mixed agreements – agreements to which both the European Union (EU) and its Member States are parties – is one of the hallmarks of the Union's external activities.[1] No other international organisation has a division of competences with its Member States that is so complex as to lead to this type of international agreements. In classical international law parlance, we would call such agreements 'multilateral' as they comprise more than two contracting parties. Yet, it is a truism that within the EU, the practice is much more complex. The main reason for the EU and its Member States to resort to mixed agreements is that in many areas the EU still lacks the competence to sign and conclude the more comprehensive international agreements without the participation of its Member States. As for the EU Member States, they would not be competent to conclude such agreements on their own whenever the related competences have been transferred to the Union. Concluding these agreements would lead to a breach of the obligations under the EU treaties.

[1] As a lot has been written on this topic, we refer to some key publications only: Henry G Schermers, 'A Typology of Mixed Agreements', *Mixed Agreements* (Kluwer Law and Taxation Publ 1983); Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law International 2001); see also contributions in this edited book: Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited : The EU and Its Member States in the World* (Hart Publishing 2010); Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity*, (Brill|Nijhoff 2020); Eleftheria Neframi, *Les accords mixtes de la Communauté européenne : aspects communautaires et internationaux* (Bruylant 2007); Christine Kaddous 'Les accords mixtes', Niki Aloupi, Catherine Flaesch-Mougin and al. (eds), *Les accords internationaux de l'Union européenne* (Éditions de l'Université de Bruxelles 2019) 301-343.

From an EU law perspective, mixed agreements are usually analysed through the prism of their negotiation and ratification by the Union and its Member States, with a clear focus on the division of competences. Thus, the participation of EU Member States in different types of mixed agreements has inspired a legal classification in terms of 'obligatory', 'facultative', and even 'false' mixity.[2] As also further analysed below, in principle, the type of mixity depends on the *nature* of competence of the EU in relation to the conclusion of an international agreement.[3] In other words, the competence division and the nature of the Union's competence[4] are the key elements in determining whether Member States' participation is necessary (obligatory) or just possible (facultative). This issue is usually analysed in both a pre-[5] and post-negotiation context.[6]

The question of the 'degree' of participation of the EU and its Member States in a mixed agreement dates back to the early years of the EU's external activities. The practice of annexing declarations of competence was sometimes required by EU treaty partners in order to determine the respondent party in case of a dispute[7], and eventually a responsible party.[8] Although,

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[2] See the chapter by Gesa Kübek and Joni Heliskoski in the volume.

[3] See in general, Allan Rosas, 'Mixity Past, Present and Future: Some Observations', Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020) 8–18; On the debate about 'obligatory' v. 'facultative' mixity after Opinion 2/15, see among others: Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) 14 European Constitutional Law Review 231; David Kleimann and Gesa Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15' <https://papers.ssrn.com/abstract=2869873> accessed 22 June 2020; Gesa Kübek and David Kleimann, 'The Singapore Opinion or the End of Mixity as We Know It' (*Verfassungsblog: On Matters Constitutional*, 23 May 2017); Daniel Thym, 'Mixity after Opinion 2/15: Judicial Confusion over Shared Competences' (*Verfassungsblog: On Matters Constitutional*, 31 May 2017); Hannes Lenk, 'Mixity in EU Foreign Trade Policy Is Here to Stay: Advocate General Sharpston on the Allocation of Competence for the Conclusion of the EU-Singapore Free Trade Agreement' (2017) 2 European Papers No 1; European Forum; Insight of 26 March 2017; www.europeanpapers.eu; page 357; Laurens Ankersmit, 'Opinion 2/15 and the Future of Mixity and ISDS' (*European Law Blog*, 18 May 2017); David Kleimann, 'Reading Opinion 2/15 Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General' [2017] EUI Working Papers.

[4] For political considerations regarding the choice for mixity, see among others: Sophie Meunier and Kalypso Nicolaïdis, 'EU Trade Policy: The Exclusive versus Shared' Competence Debate' in Maria Green Cowles and Michael Smith (eds), *Risks, Reform, Resistance, and Revival* (Oxford University Press 2000); on 'EU External Competence', see Andrea Ott in: Ramses A Wessel and Joris Larik, *EU External Relations Law: Text, Cases and Materials* (Bloomsbury Publishing 2020).

[5] Cremona (n 3).

[6] Guillaume Van der Loo and Ramses A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 Common Market Law Review 735; Kleimann and Kübek (n 3); Marise Cremona, 'The Withdrawal Agreement and the EU's International Agreements' [2020] European law review 237.

[7] Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' 17 European Foreign Affairs Review 491.

[8] The international responsibility of the EU is an uneasy issue *per se*, for a detailed analysis see: Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016); also the chapter by Andrés Delgado Casteleiro and Cristina Contartese in this volume.

declarations of competence were considered by the CJEU as being "a useful reference base",[9] this practice did not flourish, simply because it was very difficult to update the declarations with regard to the evolving nature of EU external competences. Moreover, it has always been quite difficult to draw a clear dividing line between EU and Member States competences in the agreements. This brings us to the core of the present contribution: the difficulty to 'unmix' a mixed agreement with a view to the distribution of competences. Strangely enough, this difficult task has not been extensively addressed earlier and became of particular importance in the context of Brexit and the legal debate on the UK's participation in EU international agreements as a third state.[10]

Among other things, Brexit provides the legal community with a very concrete instance of the unpacking of mixed agreements. Rather than discussing whether mixity is needed in a certain situation, Brexit forces us to approach the issue from the opposite perspective and to witness the dissolution of mixity. 'Taking back control' implies the reclaiming of competences by the UK that were previously exercised by the EU, and an 'unmixing' exercise seems necessary to better assess the division of competences between the EU and its Member States, as it reveals how a former EU Member State can actually leave/denounce/not apply an agreement to which it became a party as an EU Member State.[11] This process also helps to better understand the nature of mixed agreements under both EU and international law.

In this chapter, we try to answer the classic but still complex question of how to differentiate between EU and Member States' competences and responsibilities under mixed agreements. In order to address this question and try to disentangle mixed agreements, we will structure our chapter as follows. In the first part, we will address possible reasons to 'unmix' existing agreements. In the second part, we will analyse legal tools that might be used to

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[9] *Commission v Irland (Mox Plant)* [2006] ECLI:EU:C:2006:245 (CJEU) [109].

[10] Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and Its Member States' (2018) 55 Common Market Law Review 101; Joris Larik, 'Brexit, the Withdrawal Agreement, and Global Treaty (Re-)Negotiations' [2020] American Journal of International Law 1; Jed Odermatt, 'Brexit and International Law: Disentagling Legal Orders' 31 Emory International Law Review 24; Cremona (n 5); the same debate regarding UK's participation in the EEA agreement: Ulrich G Schroeter and Heinrich Nemeczek, 'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area' (2016) 27 European Business Law Review : EBLR 921; Christophe Hillion, 'Brexit Means Br(EEA)Xit: The UK Withdrawal from the EU and Its Implications for the EEA' (2018) 55 Common Market Law Review 135; also the chapter by Habib Touré and Christine Kaddous in this volume.

[11] On Brexit and EU external relations law, see especially: Ramses A Wessel, 'You Can Check out Any Time You like, but Can You Really Leave?: On "Brexit" and Leaving International Organizations' (2016) 13 International Organizations Law Review 197; Joris Larik, 'Brexit, the Withdrawal Agreement, and Global Treaty (Re-)Negotiations' (2020) American Journal of International Law 1; Joris Larik, 'EU External Relations Law and Brexit: "When Pluto Was a Planet"' (2020) Europe and the World: A law review; Jed Odermatt, 'Brexit and International Law: Disentagling Legal Orders' 31 Emory International Law Review 24.

separate EU and Member States' competences under a mixed agreement. Finally, in the third part, we will see how this plays out in a concrete situation by using the CETA agreement in the Brexit context as an example. More specifically, we will analyse the UK's participation in CETA beyond the transition period in order to draw lessons about the possibility to disentangle EU and Member States' competences in mixed situations.

2. Reasons to 'unmix' mixed agreements

Having recourse to mixed agreements is a very 'convenient' way to evade difficult questions concerning the exact delimitation of competences. After all, to the outside world, the EU and its Member States are in these situations often presented as one single party.[12] As Chamon argues: "In terms of competences, mixity is convenient because it allows the precise division of competences between the EU and the member states to be held in abeyance. By concluding the agreement as one meta-party, all matters under the agreement are by definition covered in terms of competences."[13] As the decision to opt for mixity is exclusively based on EU law (and perhaps on national democratic considerations), reasons to 'unmix' international agreements should perhaps first of all be found in that legal order. At the same time, there can also be international (treaty) law reasons to disentangle EU and Member State competences.

a) The respondent party status

In fact, a first reason to disentangle EU mixed agreements finds its basis in international law and flows from a third party's needs to determine the respondent party from the EU side in the case of a dispute arisen under a mixed agreement. In this case the 'unmixing' is related to establishing the correct respondent. This is particularly important in case of the need to attribute a wrongful act to a particular party and trigger international responsibility.[14] As we have seen, declarations of competence, have not proven to be particularly useful, due to the dynamic nature of the competence division.

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[12] See on the complexities related to this 'EU party', Sabrina Schaefer and Jed Odermatt in this volume.
[13] Merijn Chamon, 'Provisional Application of Treaties: The EU's Contribution to the Development of International Law' (2020) European Journal of International Law; Guillaume Van der Loo and Ramses A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 Common Market Law Review 735 at 738.
[14] See further the contribution by Andrés Delgado Casteleiro and Cristina Contartese in this volume.

b) A Member State leaving the EU

A very concrete reason to 'unmix' certain agreements is provided when a Member State is leaving the EU. With regard to the distribution of competences between the EU and its Member States, the question arises to which extent the withdrawing state would or could continue to remain a party to EU mixed agreements after it has left the EU. Considering that an EU Member State concludes mixed agreements in two capacities – as a State party on the basis of its own international capacity and as an EU Member State by virtue of art. 218 TFEU[15] – it may also need to negotiate its withdrawal from mixed agreements. Reasons to reconsider the status of the withdrawing state as a party to existing mixed agreements may flow from both EU and international (treaty) law as well as from the provisions of a specific mixed agreement.

c) A Member State denouncing a mixed agreement while remaining an EU Member State

The question of the distribution of competences between the EU and its Member State may also come up in case a Member State decides to denounce a mixed agreement to which it is a party, while remaining an EU Member State. While the situation may be more difficult to imagine in the case of bilateral agreements, withdrawing from larger (global) multilateral agreements is perhaps easier to envisage. In the case of its intention to withdraw from an existing mixed agreement, the Member State would first of all need to find a solution under EU law in order to identify provisions of the agreement it would continue to be bound by as an EU Member State by virtue of art. 216(2) TFEU.[16] At the same time, under international treaty law, third parties will most probably have to be informed, and even renegotiations may be in order.[17] After all, in this situation, the Member State would become fully accountable not only for those areas for which it co-signed the agreement in the first place, but also for (even) less well-defined parts of the agreement falling under shared competences.

An example of this uneasy situation can be found in Italy's withdrawal from the Energy Charter Treaty (ECT),[18] despite the fact that this case is quite specific. The ECT was signed in

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[15] Especially through the participation of MS' governments during the whole procedure enshrined in art. 218(2) TFEU, Consolidated version of the Treaty on the Functioning of the European Union 2016 (OJ C 202): 'The Council shall authorize the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them'.

[16] For this issue, refer to: *AG Sharpston on the Opinion 2/15 on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore* [2016] ECLI:EU:C:2016:992 (CJEU), footnote 29.

[17] Cf. Article 54 VLCT. Article 55 VLCT becomes relevant in case a withdrawal of an EU Member States results in the number of the parties falling below the number necessary for the entry into force of the agreement.

[18] For this particular case, see: Gaetano Iorio Fiorelli, 'Italy Withdraws from Energy Charter Treaty' (*Global Arbitration News*, 6 May 2015), authors are perfectly aware of the very complex situation of the ECT under the

1994 by the EU, Euratom and 51 States and entered into force in 1998.[19] Under EU law it is a mixed agreement, as both the EU and its Member States are parties to it. In 2009, with the entry into force of the Lisbon Treaty, the EU gained an exclusive competence in the field of foreign direct investments (FDI).[20] In terms of the distribution of competences under EU law, the ECT could nowadays have been easily concluded as an EU only agreement. Furthermore, after the transfer to the EU of the competence over FDI, the debate with regard to incompatibility of intra-EU investment dispute settlement systems with EU law arose.[21] According to art. 26(4) of the ECT, an investor can bring a dispute against a contracting party before an arbitral tribunal. Such a dispute can also arise in an intra-EU setting. It is worth reminding that the ECT did not include a disconnection clause with regard to the relationship between the EU and its Member States. In 2014, Italy decided, in accordance with arts. 47 and 49 of the ECT, to withdraw from this treaty. Of course, such a decision can be considered as being fully respectful of EU law, especially today with regard to the recent *Achmea* judgement.[22] Probably, for this reason the Italian decision was not opposed by the EU in terms of the distribution of competences between the EU and Italy as the Commission did not initiate an infringement procedure against Italy for the violation of art. 216(2) TFEU. However, it also reveals the nature of the ECT as either an 'incomplete' mixed agreement, or as a multilateral agreement. As Rao argues, following the *Achmea* judgment, even if Italy is no longer a contracting party to the ECT, a foreign investor (also an EU investor in theory) can still bring a claim against the EU in case of a wrongful act committed by Italy.[23] Of course, such a scenario might lead to an infringement procedure under art. 259 TFEU to transfer responsibility back to Italy. This example shows that today almost the entire scope of the ECT is covered by EU exclusive competences, and that Italy thus remains bound by this agreement on the basis of art. 216(2) TFEU as an EU Member State.

EU law and refer to the following literature for a more detailed analysis: Graham Coop, 'Energy Charter Treaty and the European Union: Is Conflict Inevitable?' (2009) 27 Journal of Energy & Natural Resources Law 404; Matthew Happold and Thomas Roe (eds), 'European Union Law and the Energy Charter Treaty', *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011); Jan Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 15 Journal of International Economic Law 85; Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law' (2011) 48 Common Market Law Review 31.

[19] Rafael Leal-Arcas, *Commentary on the Energy Charter Treaty* (Edward Elgar Pub 2018).

[20] Meunier Sophie, 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment' (2017) 55 JCMS: Journal of Common Market Studies 593.

[21] Kleinheisterkamp (n 16).

[22] *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158 (CJEU).

[23] Giammarco Rao, 'The Withdrawal of a European State from the ECT in Light of the Achmea Case' (2018) 3 European Investment Law and Arbitration Review Online 154.

d) A Member State is unwilling or unable to ratify

Comparable, but nevertheless different, is the situation where a Member State is unable or unwilling to ratify an agreement. The situation of an *unwilling* Member State is less obvious, but might occur when a Member State had voted against the decision to conclude the agreement in the Council, and subsequently refuses to ratify the agreement. A similar situation may occur after a change of government in a Member State, where the new government sees it as its democratic duty to no longer live up to the obligation to try and ratify the agreement as soon as possible. Both situations would result in a violation of a number of EU (and possibly also international[24]) rules and principles,[25] but the Council in the end may be faced with a situation that would be difficult to resolve politically.

A situation in which a Member States is *unable* to ratify is more familiar and may occur on the basis of a negative referendum or a national parliament refraining from providing the necessary approval. The situation occurred, for instance, when the Belgian parliament did not immediately approve CETA,[26] or when the Netherlands government was faced with parliamentary objections based on referendum results with regard to the EU-Ukraine Association Agreement.[27]

In these situations, an 'unmixing' exercise may be necessary to, for instance, allow for a split of the original agreement into an EU-only and a mixed agreement, as was done in the case of the EU-Singapore agreement after *Opinion 2/15* and may still be necessary for CETA in case of domestic ratification problems.

e) Deciding on the scope of provisional application

Another situation in which an 'unmixing' exercise – or at least a concrete mapping of the various competences – may be helpful concerns the provisional application of mixed agreements. Usually, the Council's decision regarding the conclusion and provisional

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[24] While there is no obligation to ratify, article 18 of the VLCT does contain the obligation for a state "[…] to refrain from acts which would defeat the object and purpose of a treaty" after its signature.
[25] Guillaume Van der Loo and Ramses A Wessel (n 6).
[26] See the chapter by Manon Damestoy and Nicolas Levrat in this volume.
[27] As it was the case with the referendum in Netherlands regarding EU-Ukraine DCFTA: Ramses A Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement' (2016) 1 European Papers - A Journal on Law and Integration; Guillaume Van der Loo, 'The Dutch Referendum on the EU-Ukraine Association Agreement: Legal Options for Navigating a Tricky and Awkward Situation' (*CEPS*, 8 April 2016); Reuters, 'Dutch Referendum Voters Overwhelmingly Reject Closer EU Links to Ukraine' *The Guardian* (7 April 2016); Kaddous (n 1).

application of an international agreement list the provisions of the agreement to be applied provisionally.[28] This list helps to determine the distribution of competences between the EU and its Member States under an international mixed agreement and not only reveals which parts of the agreements are already functional in practical terms, but may also help national parliaments to understand which provisions of the agreement form part of a national approval procedure as part of the ratification by Member States.[29]

In these situations, the distribution of competences under EU law is crucial. In all four mentioned cases, it is important to determine the provisions of a mixed agreement covered by EU exclusive and shared competences, and provisions covered by EU Member States' exclusive competences, if of course such a thing still exists.[30]

2. How to 'unmix' a mixed agreement?

While the reasons to analyse a delimitation of competences may be clear, the question of how to proceed in doing that remains a difficult one. As mixed agreements are products of EU law, legal solutions should primarily be found there. Thus, following the life-time of an agreement and the procedure enshrined in art. 218 TFEU, we can identify four legal instruments relevant for our 'unmixing' exercise. First, the legal bases for the conclusion of a mixed agreement should be considered as a useful tool to determine the nature of competences the agreement is based on within the EU legal order. However, negotiation mandates are usually secret or outdated. In the case of CETA, for instance, the Council's decision allowing the Commission to start negotiating CETA was issued in April 2009. When in 2016 the agreement was ready to be signed, the distribution of competences within the EU had changed dramatically with the entry into force of the Lisbon treaty. Second, the CJEU's case law, especially under the opinion procedure of art. 218(11) TFEU, is particularly helpful to shed some light on the division of competences.[31] Third, Council decisions on the provisional application of a mixed agreement usually provide a clear list of competences and their scope

[28] Merijn Chamon, 'Provisional Application of Treaties' (n 13).
[29] See also Sabrina Schaefer and Jed Odermatt in this volume.
[30] Bruno De Witte, 'Exclusive Member State Competences: Is There Such a Thing?' in Sacha Garben and Inge Govaere in *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing 2017).
[31] *Opinion 1/94,* Competence of the Community to conclude international agreements concerning services and the protection of intellectual property 1994 I-05267 ECLI:EU:C:1994:384 (CJCE, 15 November 1994); *Opinion 2/15 on the conclusions of the Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2017:376 (CJEU, 16 May 2017).

within the agreement. Finally, the declarations of competence, that were briefly discussed above, might still be a useful legal tool. We will turn to each of these tools in more detail.

a) The EU legal basis for and the classification of mixed agreements

The most sensible way to disentangle a mixed agreement would be to look at the legal basis of the negotiation directives adopted by the Council. The main problem here, however, is the evolutionary nature of EU external competences as the competence division may have changed after the period of negotiation and conclusion. Another clue could be found in the nature of mixity, whether it is 'obligatory' or 'facultative'. Yet, despite multiple efforts to classify mixed agreements, in terms of internal distribution of competences, and legally justify their necessity, it appears that sometimes political considerations take over and it is not always clear why the Council in the end opted for mixity.[32] Thus, the choice for a mixed agreement may not always reflect legal reality, making the disentangling exercise even more difficult.

For some time now, the notion of 'facultative mixity' has been helpful to make sense of the situations in which the Council actually has a choice to opt for mixity.[33] While the absence of any Member States' competences (e.g. a pure trade agreement) would lead to an 'EU-only' agreement, and a shared 'coexistent' competence (e.g. development cooperation) would lead to an obligatory mixed agreement, a choice for mixity does exist in situations of shared 'concurrent' competences (e.g. environmental policy) or parallel competences (e.g. CFSP).[34] The decision for mixity or EU-only is usually taken within the Council following the procedure enshrined in art. 218 TFEU; more precisely, when it adopts "a decision authorising the opening of negotiations"[35] (although CETA shows that this decision may also be taken at a later stage). Even the CJEU, the ultimate instance to "insure that in the interpretation and

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[32] Cremona (n 3); see also: Meunier and Nicolaïdis (n 4); Meunier Sophie, 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment' (2017) 55 JCMS: Journal of Common Market Studies 593; Christine Kaddous, 'De quelques défis liés à la conclusions des accords mixtes', *Liber Amicorum Antonio Tizzano – De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (G. Giappichelli 2018) 448-459; or, it might also function the other way around when an agreement is designed to be signed as a mixed one but it is sign by the EU only, see the example of the association agreement with Kosovo given in: Wessel (n 13), footnote 11.

[33] Schermers (n 1); also contributions by Marc Maresceau, 'A Typology of Mixed Bilateral Agreements', as well as by Ramses A. Wessel, 'Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements', in: Hillion and Koutrakos (n 1); and for a more detailed analysis: Chamon and Govaere (n 3); Allan Rosas, 'Mixity Past, Present and Future: Some Observations' in Merijn Chamon and Inge Govaere (eds), EU External Realtions Post-Lisbon (Brill | Nijhoff 2020).

[34] Rosas (n 32).

[35] Art. 218(3) TFEU, Consolidated version of the Treaty on the Functioning of the European Union 2016 (OJ C 202.

application of the Treaties the law is observed",[36] for a moment lost the logical path of reasoning why an international EU agreement must be mixed.[37] The Court later corrected what seemed to have been an interpretative mistake in *Opinion 2/15* on the direct relationship between shared competences and mixity[38] in its *Germany v. Council* (OTIF) judgment:

> Admittedly, the Court found, in paragraph 244 of that Opinion, that the relevant provisions of the agreement concerned, relating to non-direct foreign investment, which fall within the shared competence of the European Union and its Member States, could not be approved by the Union alone. However, in making that finding, the Court did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area.[39]

It follows from the reading of this paragraph, that despite the fact that the EU could have concluded the international agreement on the basis of a combination of exclusive and shared competences, it had to conclude it in a mixed form to get the required majority within the Council. The degree to which the EU external relations law community reacted to the neglect of the facultative mixity option in Opinion *2/15*,[40] clearly revealed the importance of the issue in the debates.

Political consideration aside, a clear legal justification for an agreement to be mixed is needed to avoid the legal conundrum that facultative mixed agreements might lead to. Especially, when the only way to control the exercise and the division of competences between the EU and its Member States in a mixed agreement is through the art. 218(11) TFEU Opinion procedure before the CJEU. The usefulness of this procedure was already clear from earlier

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[36] Art. 19 TEU, Consolidated version of the Treaty on European Union 2016 (OJ C 202).

[37] See the debate following the *Opinion 2/15 on the conclusions of the Free Trade Agreement between the European Union and the Republic of Singapore* [2017] ECLI:EU:C:2017:376 (CJEU) on facultative and mandatory mixity; Kleimann and Kübek (n 3); Guillaume Van der Loo, 'The Court's Opinion on the EU-Singapore FTA: Throwing off the Shackles of Mixity?' [2017] CEPS Policy Insights; Lenk (n 3); also in numerous blogposts: Kübek and Kleimann (n 3); Ankersmit (n 2); Thym (n 3).

[38] *Opinion 2/15 on the conclusions of the Free Trade Agreement between the European Union and the Republic of Singapore* [2017] ECLI:EU:C:2017:376 (CJEU) [244]; in the paragraph 243 the Court states that investments, other than FDI, are not part of the CCP and thus fall within shared competences. Following it concludes that 'the envisaged agreement (with Singapore) cannot be approved by the European Union alone'.

[39] *Federal Republic of Germany v Council of the European Union (OTIF)* [2017] ECLI:EU:C:2017:935 (CJEU) [68].

[40] See this recent study: Chamon and Govaere (n 3); also: Merijn Chamon, 'Provisional Application of Treaties: The EU's Contribution to the Development of International Law' (2020) European Journal of International Law; see also contributions by Eleftheria Neframi, 'The Dynamic of the EU Objectives in the Analysis of the External Competence', and by Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' in: Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations Law* (1st edition, Nomos 2018).

cases such as Opinions *1/94*[41] and *2/15*,[42] in which the Court extensively analysed the distribution of competences under, respectively, WTO agreements and the 'new generation' free trade agreement between the EU and Singapore. For the purpose of the present contribution, however, it is not at all helpful that the choice for mixity is sometimes based on purely political considerations, rather than on agreed legal classifications. This renders a disentanglement on the basis of legal arguments more difficult. As Chamon argues:

> "The traditional and among practitioners still prevailing view is that the choice for mixity (in so far as mixity is not legally required) is a purely political one: Member States may and will insist on being involved as parties to the agreement whenever the agreement is not wholly covered by EU exclusive competences. That approach significantly hampers the EU in its external action, which begs the question whether the political choice for (facultative) mixity should not somehow be legally qualified and, if so, how this could be done, without imposing EU exclusivity."[43]

While a thorough analysis of competences and of the 'type of mixity' may indeed be helpful in delineating the respective competences, the fact remains that the very nature of mixed agreements is that EU Member States sign and conclude these agreements alongside the EU as *proper* contracting parties. As we have seen, this implies that they must ratify (the complete) mixed agreement according to their internal constitutional requirements, despite the fact that some parts of the agreement are not covered by Member State competences. 'Unmixing' exercises may be helpful to indicate to national parliaments where the national competences lie. At the same time, they may limit the arguments to be used by national parliaments and exclude areas that are clearly (and exclusively) covered by EU competences.[44] The classic problem with mixed agreements is that the non-acceptance by one single Member State of a mixed agreement can block its entry into force for all other Member States and external treaty partners. Of course, such a situation creates legal uncertainty, not just for the parties, but also for other stakeholders (such as, for instance, investors). After many years of intense negotiations and the eventual official signing of the treaty, a non-ratification leads to obvious frustration. On the one hand, one may perhaps not blame national parliaments (or voters in a

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[41] *Opinion 1/94,* Competence of the Community to conclude international agreements concerning services and the protection of intellectual property 1994 I-05267 ECLI:EU:C:1994:384 (CJCE, 15 November 1994).
[42] *Opinion 2/15 on the conclusions of the Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2017:376 (CJEU, 16 May 2017).
[43] Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' in: Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations Law* (1st edition, Nomos 2018) 165.
[44] A case in point was the above-mentioned refusal by the Cypriot parliament to approve CETA. Merijn Chamon and Thomas Verellen, 'Whittling Down the Collective Interest' (*Verfassungsblog Staging*, 7 August 2020); 'Halloumi Cheese Puts EU's Canada Trade Deal to the Test' *POLITICO* (4 August 2020).

referendum) for using this last resort approach when there has been a lack of transparency and democratic consultation during the negotiation procedure. On the other hand, it is clearly problematic (and perhaps not even democratic) when one (small) Member State representing just a fraction of the population in all parties can block the entire ratification process,[45] and in particular when this is done with reference to a part of the agreement that falls under EU exclusive competence.

b) The Council's decision on provisional application

A tool that, at least *prima facie*, seems more accurate is the decision by the Council on the provisional application of an agreement as it provides a solid reference for a division of competences between the EU and its Member States under a mixed agreement. After all, only those provisions covered by EU competences can provisionally be applied. As held by Chamon: "Provisional application allows federal polities such as the EU, where both levels of government are constitutionally competent to act (independently) on the international plane, to pursue effective external action, minimizing the cumbersome effects of the polity's complex internal division of competences."[46] Sometimes, however, provisional application of an EU agreement might last for years without the agreement ever being ratified by all EU Member States ('incomplete mixity').[47] Over time, the division of competences may have changed, for instance in the basis of new interpretations by the Court. But more importantly, the Council decision was not adopted with the idea of 'unmixing' in mind. Its objective was to allow for certain parts of the agreement to become functional prior to a full entry into force of the agreement. Admittedly, here as well, political arguments may have played a role on deciding on what could provisionally be applied and this could affect the practical value of this tool to 'unmix' international agreements. At the same time, in terms of legitimacy, the decision taken by the Council on the provisional application of an agreement is approved at least by the majority of Member States and not by a single state, as in the case of ratification.

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[45] Merijn Chamon and Thomas Verellen, 'Whittling Down the Collective Interest' (*Verfassungsblog Staging*, 7 August 2020), as well as the discussion following this blog post with comments by Ramses A. Wessel and Wolfgang Weiss. Interestingly enough Chamon and Verellen argue that: "the Cypriot parliament rejected the agreement over the issue of the protection of Halloumi cheese. If this is indeed the case, the Cypriot representatives acted ultra vires. Appellations of origin come under the exclusive competence of the EU in the framework of the Common Commercial Policy". It suggests that Cypriot MPs cannot refuse the ratification of the CETA on the substantial ground falling under EU exclusive competences. It seems to suggest that it would be possible to divide a bilateral facultative mixed agreement in terms of EU and MS' competences and participation as separate contracting parties.

[46] Chamon, 'Provisional Application of Treaties' (n 13) 31–32.

[47] Guillaume Van der Loo and Ramses A Wessel (n 6).

c) Declarations of competence

To what extent can so-called declarations of competence be helpful for an 'unmixing' exercise? From an international (treaty) law perspective, it is difficult to attribute a *sui generis* nature to an EU mixed agreement, thus regular rules need to be followed. The division of competences between the EU and its Member States is part of the internal law of a contracting party.[48] As long as an agreement is concluded by more than two parties, it is usually classified as a multilateral agreement. However, the notion of 'contracting party' in an EU mixed agreement is blurred and EU legal doctrine seems to agree on the bilateral nature of EU mixed agreements which are concluded with one third party only.[49] For example, in the CETA agreement contracting parties are identified as follows: "Canada, of the one part, and the EU and its MS, of the other part, hereafter jointly referred to as the 'Parties'".[50]

According to international treaty law, the status of the 'contracting party' to an international agreement implies that a state ratifying an agreement participates in it in its full capacity.[51] AG Sharpston defends the same position in her opinion regarding the distribution of competences in the EU-Singapore FTA:

> If an international agreement is signed by both the European Union and its constituent Member States, both the European Union and the Member States are, as a matter of international law, parties to that agreement. That will have consequences, in particular in terms of liability for a breach of the agreement and the right of action in respect of such a breach. For the sake of transparency within the European Union and in the interests of the third country (or countries) with which that international agreement is being concluded, it would therefore seem desirable for such decisions to indicate very clearly the precise aspects of shared competence which the Member States (acting in their capacity as members of the Council) have agreed shall be exercised by the European Union, on the one hand, and which are (still) being exercised by the Member States, on the other hand. A declaration of competences annexed to the agreement in question would, it seems to me, also not come amiss.[52]

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[48] See more extensively on this issue also Sabrina Schaefer and Jed Odermatt in this volume.
[49] See the contribution by Panos Koutrakos, 'Managing Brexit: Trade agreements binding on the UK pursuant to its EU membership', in: Juan Santos Vara and Ramses A Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2020).
[50] 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 L 11) 1057. See more extensively on the otion of 'EU party' Sabrina Schaefer and Jed Odermatt in this volume
[51] Art. 14 'Consent to be bound by a treaty expressed by ratification, acceptance or approval', Vienna Convention on the Law of Treaties (1969) 1969 (1155 UNTS 331 ('VCLT')).
[52] *AG Sharpston on the Opinion 2/15 on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore* [2016] ECLI:EU:C:2016:992 (CJEU) [76].

AG Sharpston advocated a more transparent approach regarding the distribution of competences between the EU and its Member States under a mixed agreement for the sake of legal certainly with regard to third States. A declaration of competence annexed to EU mixed agreements would not "come amiss" as it would allow third States to correctly address the responsibility for a breach of the agreement.[53] In practice, the issue of international responsibility of the EU and its Member States under a mixed agreement would not appear to cause problems in terms of attribution of a wrongful act[54] as the EU would usually claim responsibility in different international fora even in 'mixed' situations.[55]

The classic problem with declarations of competence, however, is that they have hardly been helpful in practice. They are often attached to international agreements at the request of third state parties who are (understandably) confused by the division of competences in the EU. At the same time, the question remains to what extent these declarations provide a fully correct picture of the division of competences, also given the fact that they are hardly ever updated.[56] Any future role for this type of declarations should thus imply a more precise and dynamic description of the division of competences, based on legal criteria.

The above short analyse shows once more that numerous legal practices of the EU as a polity are problematic from an international law perspective.[57] From that perspective, EU mixed agreements are perhaps the most problematic case, as they aggregate all possible inconsistencies with international treaty law.[58] While the focus of the present chapter is on EU law, an international law perspective should always be part of any 'unmixing' exercise, as the concrete example below will also testify.

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[53] Casteleiro (n 8); also: Emilija Leinarte, 'The Principle of Independent Responsibility of the European Union and Its Member States in the International Economic Context' (2018) Journal of International Economic Law.
[54] See the contribution by Andrès Delgado Casteleiro and Cristine Contartese in this edited volume.
[55] Gracia Marín Durán, 'Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model' (2017) 28 European Journal of International Law 697; Plarent Ruka, *The International Legal Responsibility of the European Union in the Context of the World Trade Organization in Areas of Non-Conferred Competences* (Springer International Publishing : Imprint: Springer 2017); Angelos Dimopoulos, 'The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities' (2014) 51 Common Market Law Review 1671; Jan Kleinheisterkamp, 'Financial Responsibility in European International Investment Policy' (2014) 63 International and Comparative Law Quarterly 449.
[56] Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and Its Member States' (n. 10)
[57] Casteleiro (n 8); also: M Lickova, 'European Exceptionalism in International Law' (2008) 19 European Journal of International Law 463; or: Paz Andrés Sáenz De Santa María, 'The European Union and the Law of Treaties: A Fruitful Relationship' (2019) 30 European Journal of International Law 721.
[58] Schroeter and Nemeczek (n 13); also: Nicolas Levrat and Yuliya Kaspiarovich, 'Are EU Member States Still States According to International Law?' (2019) GSI Working Papers.

3. The practice of 'unmixing' a mixed agreement

The Brexit context is highly relevant for the topic of this chapter as it provides us with a very concrete and practical reason to come up with answer to what may have struck some as largely theoretical. The question came up whether the UK can remain bound by EU mixed agreements, or at least by those parts which are not covered by EU exclusive competence.[59] Is it possible for the UK to 'take back control', meaning taking back competences that were once conferred to the EU, and remain fully bound by EU mixed agreements as a third party (turning the bilateral mixed agreements into trilateral agreements)? EU Member States are bound by mixed agreements both as a matter of EU law (art. 216(2) TFEU) and as matter of international law (art. 26 VCLT and customary international law). Furthermore, they are also bound by possible specific provisions on withdrawal in the respective mixed agreement. AG Sharpston argues that:

> Finally, where an international agreement is signed by both the European Union and its Member States, each Member State remains free under international law to terminate that agreement in accordance with whatever is the appropriate termination procedure under the agreement. Its participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the European Union (and the fact that the European Union may have played the leading role in negotiating the agreement is, for these purposes, irrelevant). If the Member State were to do so, however, the effect of Article 216(2) TFEU will be that — *as a matter of EU law* — it continues to be bound by the areas of the agreement concluded under EU competence (because it is an EU Member State) unless and until the European Union terminates the agreement. The ability to act independently as an actor under international law reflects the continuing international competence of the Member State; the fact that the Member State remains partially bound by the agreement even if, acting under international law, it terminates it reflects not international law but EU law.[60]

Consequently, since the end of the transition period, as a matter of principle, the UK is no longer bound by EU-only agreements as it was only bound by these as matter of EU law.[61] The situation may be different with regard to mixed agreements as in that case the UK is bound

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[59] See also the chapter by Habib Touré and Christine Kaddous in this volume.

[60] *AG Sharpston on the Opinion 2/15 on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore* (n 51) [77], the footnote 29 to this paragraph states: "I leave to one side the question whether, if a Member State were unilaterally to withdraw from an agreement concluded by both the Member States and the European Union without first engaging in dialogue with the EU institutions (in particular, with the Commission and the Council), that might be considered contravene the duty of sincere cooperation under Article 4(3) TEU".

[61] It was already mentioned on numerous occasions: Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and Its Member States' (2018) 55 Common Market Law Review 101; Jed Odermatt, 'Brexit and International Law: Disentagling Legal Orders' 31 Emory International Law Review 24; Joris Larik, 'Brexit, the Withdrawal Agreement, and Global Treaty (Re-)Negotiations' (2020) American Journal of International Law 1.

both by virtue of EU and international law due to its individual ratification.[62] In order to address this issue, we will need to identify relevant law applicable to the UK post-Brexit, aiming to analyse its participation in existing EU mixed agreements. Clearly identifying the law governing different types of relations under a mixed agreement, would allow us to 'unmix' it and to see to what extent the UK might remain a contracting party. However, this issue cannot be discussed in a legal vacuum. For this reason, political considerations and the will of all contracting parties should be taken into account. In general, if a former EU Member State is no longer willing to be considered as a contracting party to EU mixed agreements, even if theoretically it could do so, and prefers to conclude 'roll-over' agreements with the rest of the world, it can perfectly do so. As trade is one of the major concerns of the UK's post-Brexit agenda, we chose to look at mixed (comprehensive) trade agreements, and more precisely at CETA.

a) The UK's participation in EU mixed trade agreements

The Withdrawal Agreement (WA) between the UK and the EU was signed on 17 October 2019 and entered into force on 1 February 2020.[63] As is well-known, art. 126 WA[64] envisaged a transition period for the UK until the end of 2020.[65] The WA also included provisions regarding the application of international agreements to which the UK is a party (as a former EU Member State) ensuring continuous participation of the UK in EU international agreements during the transition period.[66] The UK thus remained bound by all EU international agreements during the transition period by virtue of EU law (art. 216(2) TFEU) as enshrined in the WA, on the one hand, and by virtue of international law, on the other hand.[67] However, only substantive EU law was applicable to the UK during the transition period, also with regard to its participation in EU international agreements.[68] The UK was not allowed to participate in

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[62] See also: Marise Cremona, 'Making Treaties and Other International Agreements: The European Union' in Curtis A Bradley (ed), Marise Cremona, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019).
[63] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020 (OJ L 29) ('WA').
[64] Art. 126 ibid.
[65] Art. 132 ibid.
[66] Art. 129(1) Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020 (OJ L 29): "Without prejudice to Article 127(2), during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly, as referred to in point (a)(iv) of Article 2".
[67] Cremona, 'The Withdrawal Agreement and the EU's International Agreements' (n 6).
[68] Art. 129(2) Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020 (OJ L 29): "During the transition period,

international institutional settings resulting from EU international agreements.[69] Whether this was in conformity or not with international treaty law remains doubtful. Art. 129 WA included a very interesting footnote which stated: "The Union will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements".[70] As Koutrakos argues: "From a policy point of view, given the scope and depth of the WA, it may be difficult to envisage third states raising obstacles to this course of action".[71] Practically, we would agree. However, from the perspective of international law, it is problematic. The fact that the UK was not supposed to participate in the institutions of EU international agreements might be a reason for EU treaty partners to invoke a fundamental change of circumstances under international treaty law[72] or to initiate the negotiation of more favourable conditions under the agreement (something which, however, has not yet occurred in practice with a view to the EU agreements).

At the same time, one may argue that the notification proposed in the footnote to art. 129(1) WA was not really relevant for external treaty partners. After all, the WA is concluded between the EU and the UK and is not supposed to have any effect on third parties.[73] If EU external treaty partners to mixed agreements wish to raise objections, they may claim a proper denunciation of the agreement by the UK according to agreement's provisions (again, something that has not occurred).[74]

All in all, the UK enjoyed relative legal security with regard to its participation in EU international agreements until the end of the transition period. Furthermore, the UK was allowed to negotiate its own trade agreements with the rest of the world without breaching the

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representatives of the United Kingdom shall not participate in the work of any bodies set up by international agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly (...)".

[69] For a detailed analysis of the withdrawal agreement, see:_ Steve Peers, 'EU Law Analysis: Analysis 1 of the Revised Brexit Withdrawal Agreement: Overview' (*EU Law Analysis*, 18 October 2019); Steve Peers, 'EU Law Analysis: Analysis 2 of the Revised Brexit Withdrawal Agreement: Transition Period' (*EU Law Analysis*, 18 October 2019); Steve Peers, 'EU Law Analysis: Analysis 3 of the Revised Brexit Withdrawal Agreement: Dispute Settlement' (*EU Law Analysis*, 18 October 2019); Steve Peers, 'EU Law Analysis: Analysis 4 of the Revised Brexit Withdrawal Agreement: Citizens' Rights' (*EU Law Analysis*, 19 October 2019).

[70] Footnote to the art. 129(1) Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

[71] Panos Koutrakos, 'Managing Brexit: Trade agreements binding on the UK pursuant to its EU membership', in: in: Juan Santos Vara and Ramses A Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2020)79.

[72] Art. 62 'Fundamental change of circumstances', Vienna Convention on the Law of Treaties (1969). Yet, as also indicated by the ICJ in the 1997 *Gabcikovo-Nagymaros* case, the conditions for invoking 62 VLCT are very restrictive.

[73] Art. 34 'General rule regarding third States', ibid: 'A treaty does not create either obligations or rights for a third State without its consent'.

[74] Larik (n 11) 458.

principle of sincere cooperation.[75] Art. 129(4) WA provided the UK with a "flexible reading of the duty of sincere cooperation".[76] The trade and cooperation agreement (TCA) concluded between the EU and the UK to govern their relationship beyond Brexit does not address this specific issue.[77]

Thus, in the field of EU exclusive competence, the UK has 'taken back control' and has been and is negotiating agreements with third countries. This can be seen as forming part of the 'Global Britain' post-Brexit trade strategy.[78] To a large extent, the UK, has been copy-pasting existing EU trade deals with third countries as part of its 'roll-over' strategy.[79] On the basis of art. 129(4) WA, these new agreements could enter into force after the transition period only.

The remaining question is whether former EU Member States could remain a party to EU bilateral mixed agreements as a third state. Again, Brexit may offer some insights. After the entry into force of the TCA, the loyal cooperation duties between the UK and the EU no longer applies and a simple protocol or declaration to each agreement suffices to disentangle EU and UK competences under mixed agreements. In this scenario, the UK would remain bound by the same EU mixed agreements but only as matter of international and UK law.[80] While theoretically possible, this option does no longer seem to be on the table, given the UK's activities to replace ('roll-over') existing EU agreements by UK agreements with third states. At the same time, as one of the present authors has argued elsewhere, a situation like this could perhaps be possible in the case of large multilateral agreements, but is less well understandable

[75] Art. 4(3) TEU, Consolidated version of the Treaty on European Union 2016 (OJ C 202).
[76] Art. 129(4) WA states that the UK: "[…] may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union"; alsoPanos Koutrakos, 'Managing Brexit: Trade agreements binding on the UK pursuant to its EU membership', in: Vara and Wessel (n 69) 82.
[77] Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) (OJ 2020 L 444).
[78] Tim Robinson and Jon Lunn, 'Brexit Reading List: Global Britain' (2020) House of Commons Library Briefing Paper 8338; also: Pauline Zittel, 'Brexit and a "Global Britain": International Trade Agreements and the Ambitious Exit Strategy of the United Kingdom' (2020).
[79] See Adam Lazowski, 'Copy-pasting or negotiating? Post-Brexit trade agreements between the UK and non-EU countries' and Panos Koutrakos, 'Managing Brexit: Trade agreements binding on the UK pursuant to its EU membership', especially the list of already 'copy-pasted' agreements, p.81, in: Juan Santos Vara and Ramses A Wessel (n 69).
[80] Panos Koutrakos, 'Managing Brexit: Trade agreements binding on the UK pursuant to its EU membership', in: Vara and Wessel (n 69) 77.

in the case of bilateral agreements to which the UK was merely a party on the basis of its EU membership.[81]

The main challenge for the UK, as also pointed out by Larik, is to settle the post-Brexit relationship with the EU under mixed agreements.[82] It is also what seems to be explicitly requested by the Canadian government before settling any trade agreement with a post-Brexit UK.

b) The UK's participation in CETA and the challenge of 'unmixing' it

The UK's post-Brexit international trade policy was to negotiate roll-over agreements with the rest of the world in order to secure continuous trade on agreed terms and not fall back on WTO conditions. This "Global Britain" strategy implies (re)-negotiations with external treaty partners. Some treaty partners are more willing to negotiate than others. As regards Canada, its position is very clear:

> When the transition period ends on December 31, 2020, the UK will no longer be bound by the EU's treaties with third countries, including CETA. Canada-UK bilateral trade would no longer benefit from any CETA preferences and would be based on WTO rules, including most-favoured nation (MFN) tariffs on goods.
>
> Now that the UK has left the EU, it will have the jurisdiction to negotiate trade agreements. And once there is more clarity on the UK's trade relationship with the EU, Canada intends to re-engage with the UK to discuss how our bilateral trade relationship can be strengthened. Any future trade agreement between Canada and the UK would be influenced by the UK-EU trade negotiations, as well as any unilateral UK approaches.
>
> Whatever the outcome of the UK-EU trade negotiation, Canada's trade with the EU will continue to be governed by the terms of CETA.[83]

It thus appears that the Canadian government did not consider any possibility of the UK's continued participation in CETA after the transition period. This may first of all be read as a confirmation of the bilateral nature of CETA. But it can also be perceived as a negotiation strategy, as the UK seems to propose more advantageous trade conditions to Canada without

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[81] Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and Its Member States' (n. 10)

[82] Joris Larik, 'Brexit, the Withdrawal Agreement, and Global Treaty (Re-)Negotiations' [2020] American Journal of International Law 1, 458: "In any event, for external trade partners with which the UK intends to negotiate new agreements, the challenge remains that the UK is yet to clarify its future relationship with the EU, which will commence at the end of the transition period".

[83] 'Brexit and United Kingdom-European Union Trade Negotiations: Summary Information for Canadian Companies' (*Government of Canada, Trade Commissioner Service*, 18 November 2019).

CETA.[84] Another important element with regard to Canada's position *vis-à-vis* CETA is that even without the UK's participation, the agreement will continue to govern trade relations between Canada, the EU and its remaining 27 Member States. Furthermore, CETA is currently provisionally implemented,[85] and it is interesting to note that it was already ratified by the UK as early as 17 May 2017.[86]

All in all, the question remains whether we can apply the legal tools that were presented above to this situation. This would call for a short assessment of CETA's legal basis under the EU law, the CJEU case law, the Councils' decision on provisional application and the existence of a declaration of competence.[87] It seems that the most useful tool to 'unmix' CETA has been the Councils' decision concerning the provisional application of the agreement. According to this decision "parts of the Agreement falling within the competence of the Union may be applied on a provisional basis, pending the completion of the procedures for its conclusion".[88] Art. 1 of the decision lists the exceptions and limitations to the provisional application, meaning provisions of CETA not falling within the EU exclusive competences. In practice, this decision indeed allows for a certain degree of disentangling of EU and Member States competences in the agreement.

4. Conclusion: One Cannot Unscramble Scrambled Eggs

The present chapter sought to turn a classic problem in EU external relations law upside down by not looking at reasons for mixity, but for tools to 'unmix' existing international agreements concluded by the EU and its Member States. We have analysed several reasons why disentangling EU and Member States competences would be necessary and we assessed the various tools to be able to do that.

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[84] Panos Koutrakos, 'Managing Brexit: Trade agreements binding on the UK pursuant to its EU membership', in: Vara and Wessel (n 69) 82, the author argues: "Another example of how the policy of rollover agreements did not take sufficient account of the broader trade policy reality is illustrated by the absence of an agreement with Canada. The publication by the British Government on the 13 March 2019 of its temporary tariff rates policy, according to which 87 per cent of imports by value would be eligible for tariff free treatment, removed any incentive for Canada to extend automatically the post-Brexit application of the CETA to the UK".

[85] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (Art. 30.7) OJ L 11.

[86] Dominic Webb, 'CETA: the EU-Canada free trade agreement', House of Commons Briefing Paper No 7492, 7 May 2019.

[87] No declaration of competence was annexed to CETA.

[88] Council Decision (EU) 2017/38 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, OJ L 11, (4).

While a combination of these tools can indeed provide quite an accurate line of demarcation between the competences, there is no perfect solution and this exercise may remain somewhat messy. Indeed, it proves quite difficult to unscramble scrambled eggs. This should not come as a surprise, as mixed agreements have the advantage that there is no need to be that precise on the division of competences, at least not towards third parties. These agreements sometimes deliberately allow the EU and the Member States to simply leave some issues open, knowing that under international law they are all bound and will be able to solve potential disputes internally on the basis of EU law.

The, perhaps somewhat disappointing, conclusion would be that there does not seem to be a hundred percent watertight way to 'unmix' mixed agreements. Despite the existence of legal tools, the division of competences is dynamic and changes over time. Furthermore, as mixity is not just a legal exercise, 'unmixing' may also be influenced by political considerations. Nevertheless, both the recent withdrawal of a Member States and the increasingly active role of national parliaments, reveal the need for the EU institutions to become more precise on the division of competences at the time of the conclusion of mixed agreements.