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THE PRINCIPLE OF SINCERE COOPERATION IN EU EXTERNAL RELATIONS LAW

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Abstract

The present thesis focuses on the principle of sincere cooperation and aims to investigate the contribution of this principle to the external action of the Union with specific reference to international agreements. The thesis analyses the contribution of the principle of sincere cooperation to the exercise of the Union's external competences to conclude international agreements and to the subsequent compliance with those agreements in the EU legal order. In this way the thesis will consider how the external dimension of the principle influences the EU's action on the international plane and the relationship between international and European law within the EU legal order.

After a brief introduction, Chapter 2 examines the provision enshrining the principle of sincere cooperation, article 4(3) TEU, in the context of EU external relations law. It presents the state of the art as to the interpretation of the principle and takes an analytical perspective to navigate the meaning and limits of the clause. This sets the stage for the next two chapters which discuss the operation of the principle of sincere cooperation with reference to its three segments when on the one hand, the Union undertakes international commitments through international agreements, and, on the other, when it complies with them in its legal order.

Chapter 3 analyses the contribution of the principle of sincere cooperation from the point of view of the Union's exercise of its external competence to enter into international commitments, concluding international agreements and participating in international bodies. The principle of sincere cooperation is here conducive to the EU's external action for the Union to attain internal and external policy objectives through the instrument of international agreements but also to establish itself as a global actor on the international plane.

The Chapter starts by locating the principle of sincere cooperation in the broader framework for the exercise of external competences to delineate the independent value of the principle with regard to the exercise of EU external competences. Next, the Chapter examines three ways in which the Union may exercise its competence and the resulting obligations of sincere cooperation binding the Member States. First, it is submitted that the principle of sincere cooperation enables the Union to exercise its external competences on its own going forward with a strategy or common action agreed at EU level. Second, sincere cooperation has been considered paramount with regard to mixed agreements, in which the Court found that

the principle entails a particular "duty of close cooperation" applying from the negotiation of an agreement to its implementation, which it is put forward entails a multiplicity of obligations incumbent on the Member States. Third, when the Union may not engage directly on the international plane, it will rely on the Member States acting on its behalf, adapting in this way to the existing structures of the international legal order. Here too the Member States remain bound by the principle of sincere cooperation.

Chapter 4 addresses the role of the principle of sincere cooperation in the Union's compliance with its international agreements with regard to the implementation of international agreements (Section A) and their enforcement (Section B) within the EU legal order. The Chapter begins by highlighting the relationship between the Union and the Member States within that between international and EU law in the EU legal order. Then, Section A focuses on the obligations deriving from sincere cooperation in the implementation of the EU's commitments starting from the premise that international agreements concluded by the Union constitute an integral part of the EU legal order and are binding on the Union and the Member States according to article 216(2) TFEU.

In particular, Section A examines how the principle of sincere cooperation affects (i) the implementation of different types of agreements, (ii) the intra-EU effects of international agreements, and (iii) the CJEU's jurisdiction to interpret international agreements. With regard to the implementation of international agreements, it is noted that the legal basis of an agreement does not portray the competence to implement an agreement within the EU legal order and might also not settle the extent of the competence exercise by the Union. Particular attention is dedicated to mixed agreements, "incomplete" mixed agreements, and mixed agreements characterised by a parallel rather than joint exercise of competences by the Union and the Member States. Next, the Section considers the intra-EU dimension of international agreements which appears problematic from the point of view of EU law. First with regard to possible conflicts and ensuring that they are decided in favour of EU law upholding its primacy, but also with reference to the uniform interpretation of EU law and the maintenance of mutual trust between the Member States which could be put in jeopardy if some Member States could apply a conventional regime or a treaty instead of the applicable EU law provisions. In addition, the use of disconnection clauses is analysed as a tool which could fulfil an obligation of sincere cooperation to avoid the intra-EU dimension of an international agreement. Last, this Section

addresses the principle of sincere cooperation as an element that shapes the jurisdiction of the CJEU to interpret international agreements.

Section B looks instead at the contribution of the principle of sincere cooperation to the enforcement of international agreements taking place within and outside the EU legal order. Within the EU legal order, the Member States are bound by an obligation of sincere cooperation to comply with an international agreement concluded by the Union to avoid it being found liable on the international plane in accordance with the *Kupferberg* ruling. Moreover, the principle creates obligations that concern the judicial review of implementing measures in light of international agreements concluded by the Union which may rest on the CJEU or on the domestic courts according to whom is tasked with the implementation of the specific commitments. When the enforcement of international commitments takes place outside the EU legal order through the decisions of, among others, international courts, quasi-judicial and interpretative bodies established by agreements concluded by the Union, Member States can also be understood to be bound by substantive and procedural obligations of sincere cooperation including among others: to give effect to a decision of an international body following a determination of direct effect made by the CJEU; to ensure effective legal protection for rights deriving from EU law; to prioritise EU law in case of conflicting decisions; to allow *ex-post* review of compatibility of an agreement with the EU Treaties by the CJEU; and to coordinate responsibility for violations.

On the basis of the analysis conducted in the previous chapters, Chapter 5 draws some final conclusions. It is put forward that the principle of sincere cooperation contributes to the field of EU external relations law supporting the well-functioning of the Union, the development of EU external relations law including the relationship between EU law and international law, and the EU's actorness on the international plane. Even though the principle may not be considered an all-encompassing answer to the issues arising from the external action of the Union as a non-unitary international actor, it contributes and could contribute to address tensions that exist transversally within the field of EU external relations law. The application of duties of sincere cooperation with respect to four major tensions is highlighted: between conferred competences and Union tasks and objectives, the EU's and the Member States' actorness on the international plane, the EU's global actorness and the preservation of the

essential characteristics of the EU legal order, and conflicts between EU law and international agreements concluded by the Union.

Abstract in Italian

La tesi ha ad oggetto il principio di leale cooperazione e mira ad approfondire il contributo di questo principio alle relazioni esterne dell'UE, con particolare riferimento agli accordi internazionali. Il presente studio analizza l'applicazione del principio di leale cooperazione nell'esercizio delle competenze esterne dell'Unione in relazione alla conclusione di accordi internazionali e all'adempimento degli obblighi da essi derivanti nell'ordinamento UE. Pertanto, la tesi considera come la dimensione esterna del principio influenzi la condotta dell'UE sul piano internazionale, nonché la relazione tra obblighi internazionali e diritto unionale nell'ordinamento UE.

Dopo una breve introduzione, il capitolo 2 si focalizza sull'articolo 4(3) TUE, contenente il principio di leale cooperazione, rispetto al diritto delle relazioni esterne. Innanzitutto, viene approfondito lo stato dell'arte in merito all'interpretazione del principio; dopodiché il capitolo si propone di analizzarne i contorni ed il contenuto. Questa analisi costituisce la base dei capitoli successivi, i quali si occuperanno specificatamente dell'applicazione del principio di leale cooperazione con riferimento ai suoi tre alinea all'assunzione di obblighi internazionali da parte dell'UE attraverso la conclusione di accordi internazionali, nonché l'osservanza degli obblighi da essi derivanti.

Il capitolo 3 si focalizza sul contributo del principio di leale cooperazione all'esercizio da parte dell'Unione delle sue competenze esterne finalizzate all'assunzione di obblighi internazionali, stipulando accordi con Stati terzi e partecipando nelle attività degli organi da questi istituiti. Il principio di leale cooperazione, in tal caso, agisce in favore dell'azione esterna, potenziandola affinché l'Unione possa non solo raggiungere i propri obiettivi di policy interni ed esterni tramite lo strumento degli accordi internazionali, ma anche affermarsi come attore globale sul piano internazionale. Il capitolo colloca dapprima il principio di leale cooperazione nel più ampio contesto dell'esercizio delle competenze esterne dell'Unione per delinearne il valore aggiunto. Successivamente, viene esaminato l'esercizio delle competenze esterne da parte dell'Unione in tre situazioni, evidenziando gli obblighi derivanti dal principio di leale

cooperazione che ne risultano. In primo luogo, Il principio di leale cooperazione dà la possibilità all'Unione di esercitare le sue competenze esterne e procedere con una strategia o azione comune concordata a livello europeo. Inoltre, il principio è considerato essenziale per quanto concerne gli accordi misti in quanto la Corte ha stabilito che dia origine ad un "obbligo di stretta cooperazione" che trova applicazione dalla negoziazione di un accordo alla sua attuazione, traducendosi in una molteplicità di obblighi per gli Stati membri. In ultimo, qualora l'Unione non potesse agire direttamente sul piano internazionale, potrà affidarsi agli Stati membri, anche in virtù degli obblighi derivanti dal principio di leale cooperazione, per agire in suo conto adattandosi in questo modo alle strutture esistenti nel diritto internazionale.

Il successivo capitolo 4 si concentra sul ruolo del principio di leale cooperazione nella fase dell'osservanza, da parte dell'Unione, degli accordi internazionali conclusi con particolare riferimento alla loro attuazione (sezione A) e al loro enforcement (sezione B) nell'ordinamento unionale. Viene qui posta particolare attenzione ai rapporti tra l'Unione e gli Stati membri all'interno della relazione tra diritto internazionale e diritto dell'UE. Partendo dal presupposto che gli accordi internazionali conclusi dall'Unione costituiscono parte integrante dell'ordinamento unionale e sono, pertanto, vincolanti per l'Unione e gli Stati membri ai sensi dell'articolo 216(2) TFUE, la sezione 4A approfondisce gli obblighi derivanti dal principio di leale cooperazione nell'attuazione degli obblighi dell'UE.

Nello specifico, la sezione A esamina come il principio di leale cooperazione influenzi (i) l'attuazione di diversi tipi di accordi internazionali (ii) l'applicazione di accordi internazionali intra-UE e (iii) la giurisdizione della CGUE per l'interpretazione degli accordi internazionali. Per quanto concerne l'attuazione degli accordi, occorre menzionare che la base giuridica di un accordo non esprime la competenza per l'attuazione dello stesso nell'ordinamento unionale, non essendo necessariamente rappresentativa della misura in cui vi è stato l'esercizio di una competenza da parte dell'unione. I risvolti di questa circostanza assumono particolare rilevanza negli accordi misti, nell'ambito dei quali gli Stati Membri assumono un obbligo internazionale verso uno o più stati terzi a fianco dell'Unione. Il capitolo pone quindi particolare attenzione agli obblighi derivanti dal principio di leale cooperazione nell'attuazione degli accordi misti, misti ed incompleti e accordi misti caratterizzati da un esercizio delle competenze da parte dell'Unione e degli Stati Membri che si può definire parallelo, anziché congiunto. In seguito, questa sezione considera la dimensione intra-UE di alcuni accordi che

appare problematica per il diritto dell'UE. In primo luogo, per quel che riguarda possibili conflitti e la salvaguardia della primazia del diritto UE, ma anche con riferimento all'interpretazione uniforme ed al mantenimento della fiducia reciproca tra gli Stati membri. Questa potrebbe essere messa in discussione se alcuni Stati membri potessero scegliere di dare preminenza ad una convenzione internazionale piuttosto che al diritto UE. La tesi esamina quindi l'uso delle clausole di disconnessione quale strumento per adempiere ad un obbligo derivante dal principio di leale cooperazione volto ad evitare l'applicazione intra-UE di un accordo. Infine, la sezione A guarda al principio di leale cooperazione come elemento che contribuisce a definire la giurisdizione della CGUE nell'interpretazione di accordi internazionali.

La sezione B considera invece il contributo del principio di leale cooperazione per quel che concerne l'enforcement degli accordi internazionali, sia all'interno sia all'esterno dell'ordinamento UE. Nell'ordinamento UE gli Stati membri sono vincolati al rispetto di un accordo concluso dall'Unione anche per non esporre quest'ultima alla responsabilità sul piano internazionale, come stabilito dalla sentenza *Kupferberg*. Inoltre il principio crea obblighi che riguardano la revisione giudiziaria delle misure adottate per l'adempimento di accordi internazionali conclusi dall'Unione che può ricadere sulla CGUE o sui giudici nazionali in base alle competenze di attuazione degli specifici obblighi in oggetto. Quando invece l'enforcement degli accordi internazionali avviene al di fuori dell'ordimento UE, attraverso per esempio le pronunce di organi internazionali per la risoluzione delle controversie istituiti da tali accordi, gli Stati membri sono vincolati da obblighi sostanziali e procedurali di leale cooperazione. Tali obblighi possono includere, tra gli altri, l'obbligo di dare attuazione ad una decisione di un organo internazionale a seguito di una determinazione del suo effetto diretto da parte della CGUE; assicurare la protezione giurisdizionale effettiva per diritti derivanti dal diritto europeo; dare priorità al diritto europeo in caso di decisioni confliggenti; permettere una revisione ex-post della compatibilità di un accordo con i trattati europei; infine, quello di coordinare le responsabilità per possibili violazioni.

Sulla base dell'analisi condotta nei precedenti capitoli, il capitolo 5 presenta alcune riflessioni conclusive. Si evidenzia come il principio di leale cooperazione dia un triplice contributo al diritto delle relazioni esterne dell'UE. Il principio supporta il buon funzionamento dell'Unione, lo sviluppo del diritto delle relazioni esterne e della relazione tra diritto internazionale e diritto

dell'UE, ed anche dell'UE come attore sul piano internazionale. Sebbene il principio non possa considerarsi una risposta universale alle problematiche che caratterizzano l'azione esterna dell'UE come attore non unitario, l'applicazione del principio di leale cooperazione contribuisce e può contribuire in particolare ad affrontare quattro fondamentali tensioni che contraddistinguono le relazioni esterne dell'UE in maniera trasversale, cioè a dire: la tensione tra competenze attribuite e compiti ed obiettivi dell'Unione; la presenza dell'UE e degli Stati membri quali attori sulla scena internazionale; l'UE quale attore globale e la salvaguardia della sua autonomia; conflitti normativi tra il diritto unionale e gli accordi internazionali conclusi dall'Unione.

CHAPTER 1

Introduction

Sincere cooperation has become a pivotal principle in the field of EU external relations law. Enshrined in article 4(3) TEU, the principle of sincere cooperation establishes reciprocal duties of assistance between the Union and the Member States as well as positive and negative obligations resting on the Member States to enable the Union to achieve its tasks and objectives. As a derivative, non-unitary actor under international law, the Union shares the international scene with its Member States. It is this coexistence between the Union and the Member States that, more than in the internal field, challenges the unity and coherence of Union action. Internally, the principle of sincere cooperation is intertwined with that of primacy and direct effect to establish and maintain a common legal space through the application and enforcement of Union law within the multilayered structure of the EU legal system. Externally, sincere cooperation has fulfilled a variety of functions, among which overcoming the absence of a clear-cut competence divide, addressing the difficulties for the Union to act as an international organisation within a state-centric international legal order, as well as safeguarding the Union's autonomy. Notably, next to the exercise of its external competence and the achievement of internal and external policy objectives through its external action, the principle of sincere cooperation has also enabled the Union to affirm itself as a global actor. As put forward by Eckes, the ability to self-rule in the 21st century necessitates the EU to act with third countries and other international organisations and, for doing so, to be recognised as an international actor.[1]

The present thesis focuses on the principle of sincere cooperation and investigates the contribution of the principle to shaping the external action of the Union and the interplay between international and EU law in the EU legal order. This is a perspective that has not yet been sufficiently developed by the existing literature, and the thesis aims to offer an understanding on how this multifaceted principle applies with regard to its three segments and can be relied upon to address new or perduring legal questions in the field of EU external relations law. The thesis puts forward that the principle of sincere cooperation is not only the

[1] C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (OUP 2019), p. 238.

defining feature of the relationship between the Union and its Member States, but is also a defining element of the application of international law commitments in the EU legal order. On the one hand, it is the principle that allows the Union to "fit" into international law's constructs and; on the other hand, it regulates the integration of international law within the EU legal order and protects the autonomy of the EU, understood as its capacity to act according to the EU Treaties and in turn to fulfil its purpose.

1.1 Problem statement and research question

The expansion of the EU's external competences by the Lisbon Treaty brought to light a number of legal questions and challenges for the EU legal order which were evidenced by an increase in litigation in the area of EU external relations law. Despite striving to be an autonomous actor, the EU remains a composite actor with its Member States which continue to pursue their own foreign policies. It is in this context that the role of sincere cooperation has become increasingly visible, mediating differing positions and addressing frictions between the European and the international legal order.

The Lisbon Treaty broadened substantially the Union's competences internally and, in turn, externally, but it also included a variety of ambitious external objectives in articles 3(5) and 21 TEU widening the scope for Union action. This has created all but marginal controversies among Member States and institutions as common action may be initiated at Union level in more and more areas, including those previously falling within Member States' competences. Disagreements have concerned not only the division of competences strictly speaking but the underlying policy choices of the Union as well. For example, horizontal competence disputes show the opposing positions of the EU's institutions with regard to the determination of the actor that should represent the Union such as in *Commission v Council* (*Antarctic MPA)*[2], and *Commission v Council (IMO)*[3] and *Commission v Council (Gabonese Republic).*[4] Conflicts have also emerged with regard to the operation of the Union's external competences *vis-à-vis* the Member States such as in *Germany v Council (COTIF I)* in which the

[2] Joined cases C-626/15 and C-659/16 *Commission v Council (Antarctic MPAs)* ECLI:EU:C:2018:925.
[3] Case C-161/20 *Commission v Council (IMO)* ECLI:EU:C:2022:260. See further, E Kassoti, M Vatsov, 'The Curious Incident of the Commission at the IMO – Commission v Council (IMO)' (26 April 2022) Op-ed EU Law Live https://eulawlive.com/op-ed-the-curious-incident-of-the-commission-at-the-imo-commission-v-council-imo-by-eva-kassoti-and-mihail-vatsov/
[4] Opinion of AG Kokott, case C-551/21 *Commission v Council (Fisheries Partnership Agreement with the Gabonese Republic)* ECLI:EU:C:2023:579.

CJEU clarified that the Union may exercise alone its implied shared competences,[5] or in *Germany v Council (OIV)* in which was held that the Union may adopt a position according to article 218(9) TFEU even if it is not a party to an agreement.[6] Like prior to the Lisbon Treaty, litigation over the legal basis of international agreements and decisions within their decision-making bodies has continued, which can be seen in cases such as *Commission v Council (Kazakhstan)* and *Commission v Council (Armenia)* which may also impact the vertical and horizontal competence divide.[7] With regard to disagreements on substantive aspects of Union action which have led to litigation, cases include instances in which a Member State introduced an individual proposal such as in *Commission v Sweden* (*PFOS)* [8], or voted against a Union position, as it appears in a recently filed infringement action against Hungary for voting against the Union's position at the WHO.[9] Moreover, other problematic issues did not result in litigation at the Court but are illustrative of the hesitation, if not resistance, by the Member States to follow through with common action at Union level. Among others, the phenomenon of the missing ratifications to mixed agreements such as with the Association Agreement (AA) with Ukraine and the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA).[10] Challenging the unity and coherence of Union action are furthermore cases in which Member States take positions or express views that may be in contrast with those of the Union or against the position of other Member States such as in the case of the reservations to the Istanbul Convention.[11]

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[5] Case C-600/14 *Germany v Council (COTIF I)* ECLI:EU:C:2017:935.

[6] Case C-399/12 *Germany v Council (OIV)* ECLI:EU:C:2014:2258.

[7] Case C-180/20 *Commission v Council (Armenia)* ECLI:EU:C:2021:658); C-244/17 *Commission v Council (Kazakhstan)* ECLI:EU:C:2018:662.

[8] Case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203.

[9] European Commission, February infringements package: key decisions (15 February 2023) INFR(2020)2364 https://ec.europa.eu/commission/presscorner/detail/en/inf_23_525 (accessed on 12 September 2023).

[10] See P Van Elsuwege, 'The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements' in S Lorenzmeier, R Petrov, and C Vedder, *EU External Relations Law—Shared Competences and Shared Values in Agreements with the EU and Its Eastern Neighbourhood* (Springer 2021); G Van der Loo, R A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 Common Market Law Review 735; R A Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement' European Papers (European Forum Highlight of 22 December 2016) https://www.europeanpapers.eu/en/europeanforum/eu-solution-deal-dutch-referendum-result-on-the-eu-ukraine-association-agreement 1305.
; M Chamon, T Verellen, 'Whittling Down the Collective Interest- CETA, Facultative Mixity, Democracy and Halloumi' (7 August 2020) Verfassungsblog https://verfassungsblog.de/whittling-down-the-collective-interest/

[11] Some Member States clearly stated the reservations of other Member States were unlawful. On reservations to the Istanbul Convention see P Koutrakos, V Soņeca, 'The Future of the Istanbul Convention before the CJEU' in N Levrat, Y Kaspiarovich, C Kaddous, R A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2022).

The consistent and strengthened presence of the Union on the international plane also led to a progressive increase of its recognition as an international actor which, in turn, resulted in more possibilities for it to engage from an international law perspective, for instance, through the addition of REIO clauses to international agreements. Questions concerning the EU's autonomy with respect to international law emerged prominently, highlighting a tension between the EU being a global actor and the safeguard of its legal system's essential characteristics. Notable cases relate to dispute settlement, the well-known Opinion 2/13 (ECHR) but also more recently Opinion 1/17 (CETA), which draw the constitutional limits of the EU's participation in the international legal order. In a circular way, if an agreement might affect the autonomy of the EU legal order, EU law imposes a limit to the external action of the Union.[12] Problematic areas also concerned the implementation of international agreements within the EU legal order such as the intra-EU effects of international agreements as evidenced by Opinion 1/20 (Draft modernised Energy Charter Treaty).[13] Other questions continued as regards to the scope of the CJEU's interpretative jurisdiction on mixed agreements[14] and the review of the legality of secondary EU law with regard to international agreements concluded by the Union.[15]

Far from being an exhaustive collection of case law, the above paragraphs highlight some of the current and enduring legal and institutional questions that characterise the field of EU external relations law. It can be observed that often the Union's non-unitary character on the international plane is both the point of departure of Union external action and the point of arrival, fundamental for allowing the Union to act on the international plane becoming a global actor, but also to act according to its international commitments internally. In this context, as the prime principle shaping and regulating the relationship between the Union and the Member States, the principle of sincere cooperation is of immediate interest.

The principle of sincere cooperation has been subject to ample literature driven by the developments of the CJEU's jurisprudence. Existing scholarly works have largely focused on the principle as a driver of further integration highlighting how it has been progressively

[12] J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI, MWP 2016/07).
[13] Opinion 1/20 (Draft modernised Energy Charter Treaty) ECLI:EU:C:2022:485.
[14] Case C-741/19 *Moldova v Komstroy* ECLI:EU:C:2021:655.
[15] See among others case C-123/21 P *Changmao Biochemical Engineering v Commission* ECLI:EU:C:2023:708, Opinion of AG Ćapeta, case C-382/21 P *EUIPO v KaiKai* ECLI:EU:C:2023:576.

interpreted by the CJEU to limit the action of the Member States at the international level.[16] Most notably, from imposing a best-effort obligation,[17] to a duty of abstention.[18]

The present thesis seeks to contribute to the existing legal scholarship by analysing the external dimension of principle of sincere cooperation distinguishing its three segments and addressing the following research question: *how does the principle of sincere cooperation contribute to the exercise of the EU's external competence to conclude international agreements, to the implementation of its international commitments, and their enforcement within the EU legal order?* In turn, it will delve into the largely unexplored question of how the principle of sincere cooperation affects the interplay between EU law and international law within the EU legal order and investigate how the principle can be used to address some of the legal questions posed by recent developments and case law.

A renewed analysis on the principle of sincere cooperation seems furthermore all the more relevant in the current political context in which the Union membership is changing through potential enlargement and withdrawal which are a further challenge to the successful meeting of the Member States' interests to speak with one voice internationally. On the one hand, there is the possibility of a future enlargement to the east as a result of the war in Ukraine, which may bring further States to the decision-making table;[19] and, on the other hand, with the example of the withdrawal from the Union given by Brexit, the intricacies of ending its status as a Union Member State at the international level. By creating a bridge between Union competences and objectives, the principle of sincere cooperation may provide an avenue for effective action at Union level. Not only it prioritises Union action where a

[16] A Delgado Casteleiro, J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 ELR 524; K Reuter, 'Competence Creep via the Duty of Loyalty? Article 4(3) TEU and its Changing Role in EU External Relations' (unpublished PhD Thesis EUI 2013); P Koutrakos, 'In Search of a Voice: EU law Constraints on Member States in International Law-making' in R Liivoja and J Petman (eds), *International Law-Making – Essays in Honour of Jan Klabbers* (Routledge 2014); P Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in M Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2018); C Hillion, 'Mixity and Coherence: The Significance of the Duty of Cooperation' in C Hillion, P Koutrakos (eds), *Mixed Agreements Revisited: The EU and the Member States in the World* (Hart Publishing 2010).

[17] For example, a duty to cooperate turning to a procedural duty to consult in case C-266/03 *Commission v Luxembourg* ECLI:EU:C:2005:341, paras 57-66.

[18] See case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203, paras 69-105.

[19] European Commission, 'The European Commission recommends to Council confirming Ukraine, Moldova and Georgia's perspective to become members of the EU and provides its opinion on granting them candidate status' (17 June 2022) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3790 (accessed 15 September 2023). See further on future enlargement the Report of Franco-German Working Group on Institutional Reform "Sailing on the High Seas: Reforming and Enlarging the EU for the 21st century" (18th September 2023).

common strategy has been agreed but it can also provide a framework to reconcile divergent Member States' interests while staying loyal to the Union's objectives.

1.2 Defining the research question

The thesis locates the principle of sincere cooperation in the broader context of the interaction between international and EU law through the lens of EU law. In doing so, it aims to showcase the multifaceted application of sincere cooperation as a foundational principle of the EU legal order which characterises the relationship between the Union and the Member States, but also that between EU and international law. The thesis focuses in particular on examining the contribution of the principle of sincere cooperation when the Union concludes international agreements and when it complies with the commitments it has undertaken. International agreements are, in fact, a central part of the EU's external action. The Union is a party to an ever-growing number of agreements concluded with third countries all over the world and participates in treaties that regulate a wide variety of subject matters such as trade, human rights, environmental protection, to cite some.[20]

The analysis builds on the existing literature and intends to provide an original perspective on the principle of sincere cooperation. First, it adopts the Union's point of view as opposed to focusing on the restrictions that the principle of sincere cooperation poses to the Member States' individual action on the international plane. While limiting the action of the Member States is a consequence of the application of the principle, its purpose is rather to ensure that the Member States cooperate with the Union for it to be able to act, to attain its objectives, and ultimately to remain a project that works. Looking specifically at the conclusion of international agreements and their compliance, the analysis seeks to offer an understanding of how the application of the principle of sincere cooperation advances the Union's external action. Second, the thesis aims to contribute to a largely underdeveloped literature on the application of the three segments of the principle transversally across EU external relations law, including in the external dimension of the principle and its subsequent internal reflection. In this way, this work attempts to offer new insights on the content of the obligations deriving from sincere cooperation to address open questions in the field. Last, the

[20] For an account of the treaties concluded by the Union see the Council Database of Treaties and Agreements https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/ (accessed 30 January 2024)

thesis aims to further the debate on the interplay between EU law and international law by investigating how the obligations of sincere cooperation between the Union and the Member States impact the respect of international law and the safeguard of the EU's autonomy when the Union acts on the international plane, engaging and complying with international agreements.

The methodology of the research is doctrinal and relies primarily on the jurisprudence of the CJEU next to academic writings. The Court has had a decisive role both in operationalising the principle of sincere cooperation through concrete duties for the institutions and the Member States, and in shaping the relationship between EU and international law through its case law. Through the Court's pronouncements it is in fact possible to monitor the understanding of the principle within the EU legal order which may otherwise remain implicit in the practice of the relations between the Member States and the EU institutions. Starting from the letter of the principle in article 4(3) TEU and the jurisprudence of the Court, the thesis describes, analyses, and evaluates the application of the principle of sincere cooperation identifying the obligations deriving from its three segments when the Union exercises its external competences and complies with its international commitments in its legal order. This is in order to highlight how the principle can be relevant to novel and still unresolved legal issues of EU external relations law either in line with or departing from the current interpretation of the principle.

Concerning the scope of the analysis, the thesis does not address the Common Foreign and Security Policy (CFSP) because it differs significantly from the other common policies of the Union. As clarified by article 24(2) TEU, it is characterised by a "progressive process-like development"[21] in which the Union's competence to conduct, define and implement a common policy is based on the development of mutual political solidarity among the Member States and on an increasing convergence of their actions.[22] To do so, this policy entails its own specific rules and procedures including a specific provision on loyalty, article 24(3) TEU, which is also applicable next to article 4(3) TEU.[23] Moreover, due to the limited jurisdiction of the

[21] B Van Vooren, R A Wessel, *EU External Relations Law: text cases and materials* (CUP 2014), p. 95.

[22] Art. 24(2) TEU "Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions".

[23] Art. 24(3) TEU "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The

CJEU with regard to the CFSP (but for the non-affectation clause in article 40 TEU and restrictive measures according to article 275 TFEU) judicial enforcement of any obligations of sincere cooperation in this field is limited. In fact, there has not been a role for the CJEU in considering and framing the application of article 4(3) TEU that can be compared to that of the other policy areas. Also, in terms of scope, the research will not examine the role of the principle of sincere cooperation with regard to the existence and nature of EU external competence but will focus on the Union's exercise of its external competence. It is worth mentioning, however, that the principle of sincere cooperation is at the basis of the ERTA pre-emption doctrine which determines the exclusive nature of the EU's external competence if an international agreement might affect EU rules or alter their scope. A concise reference will nonetheless be made to the legal framework for the Union's exercise of external competences including the types of competences, the choice of legal basis, and the procedure for concluding international agreements before discussing the exercise of Union external competence. This is in order to view the operation the principle of sincere cooperation in the broader context that characterises the conclusion of international agreements and highlight the independent value of the principle with regard to the exercise of EU external competences.

Next, the role of the principle of sincere cooperation will be examined in different modalities for the exercise of Union competence, when the EU acts directly to pursue a strategy at the international level alone, together with the Member States, and indirectly when it cannot engage on the international plane and will rely on the Member States as its "trustees".

Once agreements are concluded and implemented in the EU legal order, sincere cooperation also is pivotal for the Union's compliance with such agreements. A further distinction is made between the implementation and the enforcement of international agreements. The term "implementation" will refer to the incorporation of international agreements in the EU legal order. This is a task often performed by the Union and the Member States, which starts from the premise that international agreements concluded by the Union constitute an integral part of the EU legal order and are binding on the Union and the Member States according to article 216(2) TFEU. Both articles 216(2) TFEU and article 4(3) TEU provide

Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council and the High Representative shall ensure compliance with these principles".

that the Member States must comply with international agreements binding on the Union, but the second has a broader relevance because it simultaneously requires compliance with existing and prospective EU law. The term “enforcement” will instead be used to indicate a process that enables the review of the observance of international obligations of the EU and the Member States and compels compliance**.** The research will consider situations in which enforcement takes place within the EU legal order by the CJEU and national courts as well as outside, resulting from the decisions of an international body or tribunal.

1.3 Structure

The thesis is developed in five chapters, including this Introduction and the Conclusion.

Chapter 2 provides the state of the art as to the interpretation of the principle of sincere cooperation in the literature and case law and navigates the meaning and limits of the principle as provided in article 4(3) TEU. Next, Chapters 3 and 4 constitute the heart of the thesis addressing respectively the contribution of sincere cooperation to the exercise of Union competence and to the compliance with international agreements that the Union has undertaken within its legal order.

Chapter 3 focuses on the principle of sincere cooperation when the Union exercises its external competences to conclude international agreements and participate in international organisations. In particular, the Chapter will address three main instances in which the principle of sincere cooperation has been applied emerging from the jurisprudence of the CJEU: when the Union seeks to pursue a strategy at the international level (3.4.1), when the EU acts jointly with the Member States through the instrument of mixed agreements (3.4.2), and when the Union may not engage directly on the international plane and will rely on the Member States as its “trustees” (3.4.3).

Chapter 4 is dedicated to how the principle of sincere cooperation affects the Union’s compliance with international agreements and balances the competing claims of autonomy and respect for international law. In the process of compliance with international agreements concluded by the Union, the Member States are bound by the principle of sincere cooperation like for other EU instruments. More specifically, this chapter is further divided in two sections addressing respectively the implementation (A) and enforcement (B) of the international commitments of the Union. In particular, the Section on implementation (A) examines how

the principle of sincere cooperation affects the implementation of different types of agreements concluded by the Union as well as agreements binding the Member States (4A.1), the intra-EU application of international agreements (4A.2), and the CJEU's jurisdiction to interpret international agreements (4A.3). The Section on enforcement (B) analyses the role of sincere cooperation in the enforcement of the Union's international commitments including when it is carried out within the EU legal order with the involvement of the CJEU (4B.2) through procedures initiated at EU or national level; and outside the EU legal order, resulting from the decision of an international body or tribunal (4B.3).

On the basis of the analysis conducted, Chapter 5 will then provide some concluding remarks.

CHAPTER 2

The Principle of Sincere Cooperation in article 4(3) TEU

This Chapter aims to provide a detailed analysis of article 4(3) TEU. It will briefly recall the history of the provision to then elaborate on its wording, normative character, and context within article 4 TEU. Lastly, an analysis of the addressees, content and scope of the principle will be carried out to set the stage for the next chapters of the thesis.

2.1 An introduction to article 4(3) TEU

The Lisbon Treaty brought ground-breaking changes in the constitutional framework of the Union, and a significant increase in the competences conferred to it. Nonetheless, the principle of sincere cooperation, codified as early as in article 86 of the Treaty of Paris setting up the European Coal and Steel Community (ESCS), did not see a significant evolution in the following treaties and remained almost unchanged from the 1950's.[24] Especially in the context of the external relations of the Union, however, scholarly literature unanimously highlights that there has been an evolution in its interpretation by the CJEU, including its increasing affirmation as a foundational principle of the EU legal order.[25]

Modelled after article 86 ECSC, the "loyalty clause" was inserted in the Rome Treaty on the initiative of the German delegation in article 5 EEC.[26] There are no records, however, as to why the founding Member States decided to include a clause making explicit an obligation to cooperate with the Union.[27] De Baere and Roes suggest that the drafters might have been inspired by the treaties founding other post-war international cooperation initiatives around the same time, such as the UN Charter (1945)[28] and the Statute of the Council of Europe

[24] Art. 86 ECSC read "Member States undertake to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community's tasks. Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4."

[25] For a comprehensive account see B Van Vooren, R A Wessel, *EU External Relations Law: text cases and materials* (CUP 2014), pp. 189-207; see A Delgado Casteleiro, J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 ELR 524.

[26] G De Baere, T Roes, 'EU Loyalty as Good Faith' (2015) 64 ICLQ, p. 831.

[27] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), pp. 10-11; G De Baere, T Roes, 'EU Loyalty as Good Faith' (2015) 64 ICLQ, p. 834.

[28] Art. 2(2) UN Charter "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter"; art. 5 UN Charter "All Members shall give the United Nations every assistance in any action it takes in accordance

(1949)[29]. As noted by Klabbers, "loyalty clauses" or clauses that spell out an obligation to cooperate to fulfil the objectives of a treaty are not a mere reaffirmation of the principle of *pacta sunt servanda,* but underline a spirit of loyalty and support that characterises the membership to an international organisation.[30] Indeed, in the context of international institutional law, these provisions can be seen as the basis for obligations that are not explicitly specified in an organisation's constitution.[31] In its Advisory Opinion in the case *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the ICJ notes that the WHO and Egypt are bound by the principle of good faith to cooperate and in para. 48 writes that it:

> *"[…]takes as its starting point the mutual obligations incumbent upon Egypt and the Organization to cooperate in good faith with respect to the implications and effects of the transfer of the Regional Office from Egypt. The Court does so the more readily as it considers those obligations to be the very basis of the legal relations between the Organization and Egypt under general international law, under the Constitution of the Organization and under the agreements in force between Egypt and the Organization."*[32]

Without referring to the concept of good faith, article 5 EEC read as follows:

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

Later, article 10 EC restated the same two indents[33] and the first significant changes can be seen with the Lisbon Treaty. Current article 4(3) TEU reads:

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with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action". See G De Baere, T Roes, 'EU Loyalty as Good Faith' (2015) 64 ICLQ, p. 832.

[29] Art. 3 of the Statute of the Council of Europe "Every member of the Council of Europe must […] collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

[30] J Klabbers, *An Introduction to International Institutional Law* (2nd ed, CUP 2009), pp. 175-176.

[31] T Zhunussova, 'What Does It Take To Be A Loyal Member? Revisiting The 'Good Membership' Obligations in the Law of International Organizations (2022) EJLS 14(1), p. 68.

[32] ICJ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [20 December 1980]. The case at hand concerned the possible transfer of the WHO seat for the Eastern Mediterranean Regional Office from Egypt to Jordan. The World Health Assembly submitted a request for an Advisory Opinion to the ICJ on the modalities of the transfer according to the Agreement of 25 March 1951 between the World Health Organisation and Egypt. Drawing from the mutual obligations of the Organisation and the host State to cooperate, the Court formulates three concrete obligations (para. 49).

[33] Art. 10 EC "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives"

What immediately meets the eye is that the first paragraph entails some additional elements. Unlike previous versions, there is the first mention of the term "principle of sincere cooperation", a wording which will be addressed later. Secondly, not only the Member States but also the Union is given an obligation to assist, expressing that sincere cooperation has a mutual character. Such mutual nature of the principle is a significant aspect of the new European legal order and for multilevel governance in particular in the context of the external relations of the EU, where Member States remain competent to act on the international plane. Other important differences lie in the provision within the broader context of the Treaties. As the Lisbon Treaty has removed the pillar structure, article 10 EC shifted from the first pillar to the TEU, making it applicable to the Union as a whole. At the same time, the TEU also retains a provision on loyalty in the context of title V on the Common Foreign and Security Policy (CFSP), which displays a stronger link to the concept of solidarity.[34] As argued by Klamert, through the Lisbon Treaty a "unionisation" of the principle of sincere cooperation with regard to the former third pillar is more clearly identifiable than with regard to the CFSP, which maintains a different provision, article 24(3) TEU.[35] Furthermore, unlike prior versions, paragraph 3 and its three segments are within the context of a longer article 4 TEU on the relationship between the Member States and the Union.

An in-depth analysis of article 4(3) TEU will follow in the next paragraphs which will address its terminology and normative character (2.2), its new positioning within the broader context of article 4 TEU (2.3), and, lastly, delve into the analysis of the three segments of article

[34] On solidarity see M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), pp. 35-41; J Czuczai, 'The Principle of Solidarity in the EU Legal Order – Some Practical Examples after Lisbon' in J Czuczai, F Naert (eds), *The EU as a Global Actor: Bridging Legal Theory and Practice* (Brill 2017), pp. 145-165; F Casolari, *Leale Cooperazione tra Stati Membri e Unione Europea: Studio sulla partecipazione all'Unione al tempo delle crisi* (Editoriale Scientifica 2020), pp. 61-72.

[35] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 11.

4(3) TEU- which are not always distinguished by the Court[36]- highlighting the addressees, content, and scope of the provision (2.4).

2.2 An overview of preliminary contentious issues: terminology and normative character

2.2.1 A flexible terminology for a flexible principle

The principle of sincere cooperation has been defined as "the single most dynamic provision in the legal order".[37] Given its wide application across policies and including both the internal and external action, the literature coined a variety of terms attempting to define this principle, and the CJEU has not been particularly helpful in pointing towards one direction.[38] Even now that the principle has a name, namely "principle of sincere cooperation" neither the Court nor the literature has been truly consistent. Aside from the literature and case law prior to the Lisbon Treaty (when the principle did not have a name), one reason for this inconsistency lies in the translation of the very name of the principle. The English version of the Lisbon Treaty reads "sincere cooperation", whereas in the majority of the other EU languages the first paragraph writes literally the "principle of loyal cooperation", for example "*principio di leale cooperazione*", "*le principe de loyauté communautaire*", and "*Grundsatz der loyalen Zusammenarbeit"*. Indeed, within the literature in the English language, some have drawn a distinction between the two concepts, considering the principle of loyalty as a principle separate from that of sincere cooperation.[39] Nonetheless, as this terminological issue does not arise in the other language versions, the two terms will be considered as synonyms and will be used as such throughout the thesis.[40] Arguably however, it is interesting to note that

[36] T Roes, 'Limits to Loyalty: The Relevance of Article 4(3) TEU' (2015) Cahiers de Droit Européen, pp. 262-263.

[37] J Temple Lang, 'General Report: The Duties of Cooperation of National Authorities and Courts and the Community Institutions under Article 10 EC Treaty' in Vol. 1, XIX F.I.D.E. Congress (2000, Helsinki), 373–426, quoted by J. Temple Lang, 'The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections' (2001) 26 European Law Review 84; S. Hyett, 'The Duty of Cooperation: A Flexible Concept', in A Dashwood, C Hillion (eds), *The General Law od EC External Relations* (Sweet & Maxwell 2000), 248.

[38] For example, "duty of genuine cooperation", "duty of cooperation", "principle of sincere cooperation" "principle of loyalty".

[39] S Hyett, 'The Duty of Cooperation: a Flexible Concept' in A Dashwood, C Hillion (eds), *The General Law od EC External Relations* (Sweet & Maxwell 2000), p. 248.

[40] Many authors arrive at this conclusion see M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 33; Delgado Casteleiro, 'Loyalty in External Relations Law: The Fabric of Competence, Autonomy and Institutional Balance' in E Neframi, M Gatti (eds) *Constitutional Issues of EU External Relations Law* (Nomos 2018), p.387-388; C Hillion, M Chamon, 'Facultative Mixity and Sincere Cooperation' in Chamon, Govaere (eds), *EU External Relations Post- Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p. 90.

whilst the term "sincere" points to the concept of good faith in public international law, the adjective "loyal" most clearly reminds of federal loyalty. These are two souls that coexist in the principle but also within the EU as an international organisation as well evidenced by Casolari[41] and Saluzzo.[42]

2.2.2 Sincere cooperation's normative character: in between definitions

Another notable terminological incongruity questions the normative character of sincere cooperation as it can be noticed that the Court refers to sincere cooperation both as duty and principle.[43] From a textual perspective, article 4(3) TEU itself refers to sincere cooperation as a principle. In its early case law in the context of EU external relations, the Court did not recognise article 4(3) TEU as a self-standing principle which could give rise to obligations but rather as providing the backdrop of other provisions stated in the Treaty.[44] As evidenced by cases such as *Inland waterways* and *IMO*,[45] the Court later took a different approach in its jurisprudence, considering that the principle can be an independent source of obligations, for example, it derived duties to inform and consult.[46] Independent obligations for Member States were identified also with regard to their individual action on the international plane when concluding international agreements with third states.[47] In the context of joint action between the Union and the Member States, the CJEU derived a specific "duty of close cooperation" from the principle of sincere cooperation which should be distinguished from the principle itself. The duty of close cooperation is triggered from the initiation of mixed action and aims

[41] Casolari finds three mayor elements coexiting in the principle of sincere cooperation: federal, good faith and supranational See, F Casolari, *Leale Cooperazione tra Stati Membri e Unione Europea: Studio sulla partecipazione all'Unione al tempo delle crisi* (Editoriale Scientifica 2020), pp. 4-26. S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Ledizioni 2018), p. 23.

[42] S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Ledizioni 2018), p. 23.

[43] See for example, case C-433/03 *Commission v Germany* (2005) EU:C:2005:462, para. 64 "duty of genuine cooperation"; case C-246/07 *Commission v Sweden* (2010) EU:C:2010:203, para. 77 "the obligation to cooperate in good faith", Opinion 2/13 EU:C:2014:2454, para. 173 "principle of sincere cooperation".

[44] See Case 78/70 *Deutsche Grammophon* ECLI:EU:C:1971:59, para. 2 "This provision lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme."

[45] Case C-433/03 *Commission v Germany* EU:C:2005:462, case C-266/03 *Commission v Luxembourg* ECLI:EU:C:2005:341, case C-45/07 *Commission v Greece (IMO)* ECLI:EU:C:2009:81.

[46] See E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev, p. 323. See also for example C-459/03 *Commission v Ireland* (*Mox Plant*) ECLI:EU:C:2006:345.

[47] Case C-433/03 *Commission v Germany* EU:C:2005:462; case C-266/03 *Commission v Luxembourg* ECLI:EU:C:2005:341.

to mitigate the implications of mixity to ensure unity in the external action of the Union;[48] whereas the principle operates more broadly- even at a systemic level- and can apply in a variety of circumstances.[49]

Understanding the division of rules and principles from Dworkin classic theory, the highly casuistic approach that has characterised the application of article 4(3) TEU should further discourage from considering the provision as a rule or duty *per se* as it does not apply in an unconditional, all or nothing way but it rather has a role in the determination of other, more specific obligations.[50] Indeed, principles function as the basis for the formulation of solutions through which to solve a legal issue, and as the foundation for subordinate principles and rules which concretise the application of a principle in a certain context.[51] As presently worded, article 4(3)TEU goes beyond the mere statement of a commitment to cooperate by articulating more tangible obligations for the Member States in its second and third segments. A discussion on the normative content of sincere cooperation will follow below but, especially in the most recent case law, the CJEU defined obligations stemming from sincere cooperation clearly indicating an obligation of result either of a procedural (e.g. to inform) or substantive (e.g. to refrain from acting) character.

The literature shows a wide range of interpretations attempting to define sincere cooperation such as: an expression of the *pacta sunt servanda* principle,[52] a structural principle that governs the relations of EU and the Member States in the external relations of the Union,[53] a federal principle,[54] an overarching principle from which concrete cooperation duties are derived,[55] a principle of interpretation,[56] a principle embodying the effectiveness of EU

[48] C Hillion, M Chamon, 'Facultative Mixity and Sincere Cooperation', in Chamon, Govaere (eds) *EU External Relations Post- Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p. 86-87.

[49] Remaining in the context of mixed international action Hillion and Chamon note that the principle of sincere cooperation encompasses phases prior to the start of common action, including whether the EU ought to act independently or through a mixed arrangement.

[50] R Dworkin distinguishes rules from principles by the fact that rules always apply in an unconditional, all-or-nothing way, whereas a principle will only act as a guide in a decision-making process. R Dworkin, 'The Model of Rules' (1967) 35 The University of Chicago Law Review, pp. 25-26.

[51] See among others R Kolb *Good Faith in International Law* (Hart Publishing 2017), pp. 3-4.

[52] P Koutrakos, *EU International Relations Law* (Hart Publishing 2006), pp. 184–185.

[53] See Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance' in M Cremona, B De Witte (eds), *EU Foreign Relations Law Constitutional Fundamentals* (Hart Publishing 2008). Sincere cooperation is defined as a relational principle.

[54] G De Baere, *Constitutional Principles of EU External Relations* (OUP 2008), p. 253.

[55] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 12.

[56] G De Baere, T Roes, 'EU Loyalty as Good Faith' (2015) 64 ICLQ, p. 829.

law,[57] a principle which generates obligations which amount to a comprehensive duty of loyalty.[58] As this shows, there is not a univocal way of understanding sincere cooperation as all the above highlight the versatility and its in-depth reach in the EU legal order. As argued by Klamert, this rather "innocuous" provision can entail all of the above when approached from different perspectives.[59] The characterisation of sincere cooperation as a principle would thus better encapsulate the multifaceted nature of the concept which takes concrete shape through specific duties, including a duty of close cooperation in mixed external action. What emerges from a combined reading of the case law and the literature is that it is a principle which embodies broadly framed commitments (to assist, to take appropriate measures, to facilitate and to refrain), which create procedural and sometimes substantive obligations.

Once determined that sincere cooperation can be understood as a principle, the follow up question is: what kind of principle? Sincere cooperation has been referred to as a general principle of EU law, as argued by Temple Lang even "the most important one, because it would be the legal basis of the obligation on all national courts and authorities to comply with all other general principles".[60] Indeed, the principle of sincere cooperation applies throughout the Treaties and has the general and comprehensive character that is inherent to general principles.[61] The existence of a broader principle of sincere cooperation within the EU legal system seems to be referred to by the Court when it argues that *"that provision [here art.5 EEC] is the expression of the more general rule imposing on Member States and the Community institutions mutual duties of genuine cooperation and assistance"*.[62] It is also important to highlight that there are other Treaty articles that embody a concept of loyalty and cooperation with the Union.[63] To cite some examples, an inexhaustive list includes: article 24(3) TEU, which even though does not refer to an obligation of loyalty or sincere cooperation, refers to support

[57] E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev, p. 359.
[58] C Eckes, Disciplining Member States: EU Loyalty in External Relations' (2020) 22 CYELS, p. 85 "The obligations flowing from the principle of sincere cooperation within the European Union (EU) legal order are best understood as amounting to a comprehensive duty of EU loyalty."
[59] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 1.
[60] J Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' (2007) 31 FordhamIntlLJ, p. 1532.
[61] See on the feature of "general and comprehensive character of general principles of law" case C-101/08 *Audiolux SA v GBL* ECLI:EU:C:2009:626.
[62] Case C-44/84 *Hurd v Jones* ECLI:EU:C:1986:2, para. 38.
[63] M Klamert argues that sincere cooperation is a *lex generalis* and that other provisions in the treaty are *lex specialis*. M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), pp. 13-14.

by the Member States "in the spirit of loyalty"[64]; article 13 TEU establishing a horizontal obligation of cooperation among EU institutions;[65] article 351 TFEU on international agreements concluded by the Member States prior becoming Members of the EU, which reproduces the negative obligations incumbent on the Member States found in article 4(3) TEU;[66] and article 288 TFEU where there is an element of loyalty and cooperation evidenced by the transposition and implementation of directives.[67]

Nonetheless, Klamert points out that sincere cooperation is usually considered a general principle in a rather non-technical manner, without regard to the implications of such a determination.[68] Indeed, loyalty does not encompass common characteristics distinguishing general principles from other sources of Union law.[69] Unlike for example direct effect and supremacy, sincere cooperation has a legal basis in the Treaties, and at the same time, it is not directly effective nor constitutes a standard for review of Union legal acts.[70] Moreover, rather than deriving from the laws and constitutional traditions of the Member States, sincere cooperation seems to be deduced from the "premises on which EU law is based".[71] In the literature, this becomes clearly apparent when scholars analyse how loyalty underpins many core characteristics of EU law, such as supremacy and state liability.[72] Cremona notes that sincere cooperation is not usually included in the list of general principles, but rather qualifies

[64] Art. 24(3) TEU "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council and the High Representative shall ensure compliance with these principles."

[65] Art. 13(2) TEU "[..] The institutions shall practice mutual sincere cooperation".

[66] Art. 351 TFEU "To the extent that such agreements are not compatible with the Treaties, the Member State or Member States concerned shall take appropriate steps to eliminate the incompatibilities established. Member states shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude."

[67] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 24; B Guastaferro, 'Sincere Cooperation and Respect for National Identities' in R Schütze and T Tridimas, *Oxford Principles of the European Union law* (OUP 2018), p. 357.

[68] Takis Tridimas argues that the value of a classification of general principles is limited as reported by M Cremona, 'Structural Principles and their Role in EU External Relations Law' (2016) 69 Current Legal Problems, p. 50

[69] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 250.

[70] On the contrary this is the case for fundamental rights.

[71] See inter in *Brasserie du Pêcheur* the Court qualified both effectiveness and the obligation to cooperate as 'principles inherent in the Community legal order'.

[72] F Casolari, *Leale Cooperazione tra Stati Membri e Unione Europea: Studio sulla partecipazione all'Unione al tempo delle crisi* (Editoriale Scientifica 2020), pp. 23-26, T Roes, 'Limits to Loyalty: The Relevance of Article 4(3) TEU' (2016) Cahiers de droit européen No 1, p. 254 and 257, M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), pp. 71-80, C Eckes, 'Disciplining Member States: EU Loyalty in External Relations' (2020) 22 CYELS, p. 5.

along with conferral, autonomy, and institutional balance as a structural principle of EU law.[73] This highlights the nature of sincere cooperation as a constitutional principle rather than a principle of a substantive nature, but does not *per se* exclude its further qualification as a general principle of EU law.

The article 4(3) TEU has a strong institutional and constitutional component. It is a foundational principle that regulates the relationship between the Member States and the Union as a relationship based on cooperation. The definition of sincere cooperation as a structural principle can be appreciated for the immediate understanding of the role of the principle in the EU legal order. As regards to its characterisation as a general principle of EU law, sincere cooperation defies some of the characteristics shared by other general principles notwithstanding displaying a self-standing and autonomous character which, as put forward by Ziegler, is a core feature of general principles of EU law.[74] A determination of whether sincere cooperation is the expression of an overarching, uncodified obligation of cooperation/loyalty beyond article 4(3) TEU, needs to be assessed looking at the Treaties as a whole, but also considering other non-legal aspects. At a fundamental level the answer to such question engages with the deeper issue of the nature of the EU. If we understand the Union though the lens of neofunctionalism we would be drawn to read a broader notion of loyalty within the principle of sincere cooperation in order to create "'something more' […] in a common governance enterprise".[75] On the contrary, adopting an intergovernmental conception we would perhaps read the principle of sincere cooperation at face value, as a tool to ensure that such enterprise is "functional".[76]

[73] Within structural principles Cremona identifies sincere cooperation within the subcategory relational principles as it governs the relationship between legal subjects. M. Cremona 'Structural Principles and their Role in EU External Relations Law' (2016) 69 Current Legal Problems, p. 52.

[74] P J Neuvonen, K S Ziegler, 'General Principles in the EU Legal Order: Past, Present and Future Directions' in K S Ziegler et al. (eds), *Research Handbook on General Principles in EU Law Constructing Legal Orders in Europe* (Edward Elgar 2022), p.11.

[75] See K Reuter, 'Competence Creep via the Duty of Loyalty? Article 4 (3) TEU and its Changing Role in EU External Relations' (unpublished doctoral thesis EUI 2013), pp. 38-39.

[76] For a brief account on the theories of neofunctionalism and intergovernmentalism see respectively the chapters by C Strøby Jensen, 'Neofunctionalism' and M Cini, 'Intergovernmentalism' in M Cini, N Pérez-Solórzano Borragán (eds), *European Union Politics* (OUP 2019).

2.3 Re-housing under article 4 TEU: a change of meaning for the principle of sincere cooperation*?*

While under the preceding Treaties it was a stand-alone provision, sincere cooperation in article 4(3) TEU is now grouped together with two distinct provisions, articles 4(1) and (2) TEU. As Klamert argues, this has fundamentally changed the normative context in which loyalty is placed in comparison to the prior Treaties.[77]

Article 4(1) TEU makes explicit the consequences of article 5 TEU, namely that competences not conferred to the Union remain with the Member States.[78] According to Casolari, this negatively formulated conferral provision is not without significance as he concludes that the *full mutual respect* mentioned in the loyalty clause requires first a strict observation of the allocation of competences between the Union and its Member States.[79] Further repetitions of the same statement on competences are found in article 5(2) TEU and in Declaration 18.

The second paragraph of article 4 TEU is instead more novel and entails a so-called "national identity clause".[80] Its current formulation stems from the works of the European Convention drafting the treaty establishing a constitution for Europe.[81] According to Guastaferro, the clause's main objective was to avoid encroachment of Union action upon Member States' prerogatives in the so-called complementary competence areas where harmonisation measures are ruled out. One of the proposals suggested was to draw a list of competences exclusive to the Member States but it was not deemed suitable as it conveyed an upside-down picture of the principle of conferral, namely that the Treaty would grant competences to the Member States rather than the other way around. The final formulation of article 4(2) TEU presents a more balanced solution highlighting the concept of national

[77] M Klamert, T*he Principle of Loyalty in EU Law* (OUP 2014), p. 19.

[78] Article 4(1) TEU "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States".

[79] M Casolari, 'EU Loyalty and the Protection of Member States' National Interests: A Mapping of the Law' in M Varju (ed), *Between Compliance and Particularism* (Springer 2019), p. 59.

[80] Article 4(2) TEU "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

[81] In the working documents it was referred as the "Christophersen clause" bearing the name of its proponent, Mr. Henning Christophersen see B Guastaferro, 'Sincere Cooperation and Respect for National Identities' in R Schütze and T Tridimas, *Oxford Principles of the European Union law* (OUP 2018), pp. 366-367.

identities as inherent in Member States' fundamental political and constitutional structures. In addition, specific emphasis is given to national security as the sole responsibility of each Member State.

Some scholars discussed the relationship between article 4(2) TEU and loyalty in article 4(3) TEU. Klamert highlights that article 4(2) TEU and the principle of sincere cooperation have different foundations, loyalty is the underlying basis of supremacy, whereas article 4(2) TEU has been qualified as a principle that opposes the supremacy of Union law. Guastaferro argues that the second paragraph of article 4 TEU safeguards "national identities" and "essential state functions", almost as to counterbalance the duties of loyalty enunciated in the following paragraph.[82] However, in the case law of the Court, article 4(2) TEU has so far not taken such a role. It has been used mainly to review national measures against the internal market freedoms,[83] was invoked in regards to the vertical division of power between a Member State and their national autonomies,[84] but also more limitedly to review EU law.[85] In his opinion in *Criminal proceedings against M.A.S., M.B*, Advocate General Bot mentioned the two clauses together, giving in this way the impression that a violation of national identities would also represent a violation of the EU's duties under the loyalty clause.[86] On this line of reasoning, others deem that the respect for national identities is also part of the principle of sincere cooperation. Vedder argues that the respect of 'national identities' in article 4(2) TEU would be an emanation of the general principle of loyalty and that there would be a tension between this provision and the principle of solidarity.[87] On the contrary, Guastaferro highlights that the

[82] B Guastaferro, 'Sincere Cooperation and Respect for National Identities' in R Schütze and T Tridimas, *Oxford Principles of the European Union law* (OUP 2018), p. 380: 'I would therefore contest the assertion that loyalty is not counterbalanced by article 4(2) TEU on the protection of national identities'.

[83] As an independent ground of derogation see Opinion of AG Maduro, case C-213/07 *Michaliniki* ECLI:EU:C:2008:544, para. 32, case C-51/08 *Commission v Luxembourg* ECLI:EU:C:2011:336, para. 72; as a legitimate objective see Opinion of AG Maduro, case C-160/03 *Spain v Eurojust* ECLI:EU:C:2004:817, para. 24; a rule of interpretation not relying directly on the provision but developing a reasoning based on the protection of national identities and constitutional traditions, cultural values e.g. case C-36-02 *Omega Spielhallen-und Automatenaufstellungs-GmbH* ECLI:EU:C:2004:614, para. 32.

[84] Case C-127/12 *Commission v Spain* ECLI:EU:C:2014:2130, para. 42. The Court had no jurisdiction to rule on Spanish constitutional law and condemned Spain for a violation of free movement of capital. Spain had argued that a national measure allows autonomous communities to establish a number of tax deductions.

[85] See further B Guastaferro, 'Sincere Cooperation and Respect for National Identities' in R Schütze and T Tridimas, *Oxford Principles of the European Union law* (OUP 2018), pp. 372-374.

[86] Opinion of AG Bot, case C-42/17 *Criminal proceedings against M.A.S., M.B* ECLI:EU:C:2017:564, para. 18 cited by F Casolari 'EU Loyalty and the Protection of Member States' National Interests: A Mapping of the Law' in M Varju (ed), *Between Compliance and Particularism* (Springer 2019), p. 59.

[87] C Vedder, 'Art. I-5' in C Vedder and W Heintschell von Heinegg (eds), *Europäischer Verfassungsvertrag* (Nomos 2007).

caselaw of the Court does not suggest that loyalty should oblige the Union, in a general manner, to take account of interests of individual Member States for preserving their national identity.[88] In addition, she defines the duties deriving from loyal cooperation, mainly addressed to the Member States, as a "unitary twist", and the duty to respect national identities, mainly addressed to the Union, as the "pluralist twist" of the European integration process.[89] Such "pluralist twist", however, as rightly pointed out by Larik, does not entail a requirement "to prompt or facilitate the Member States to maintain 'polyphony' in the external action of the Union".[90]

The application of article 4(2) TEU remains largely uncharted territory in the external action. In the recent Opinion 1/19 TEU the Court was presented with an argument asserting that there is no duty to ratify an international agreement which is in contrast with a Member State's constitution pursuant to article 4(2) TEU.[91] The Court briefly addresses this point stating that in the envisaged Council Decision Member States were not obliged to exercise their competences. Thus, they would not be required to implement measures contrary to their constitutions, and, in turn, there is no violation of article 4(2) TEU. Significantly, the Court's statement seems to imply *a contrario* that if Member States were required to exercise their retained competences against their constitutions, there would be a breach of article 4(2) TEU.

The change of context from an individual provision to a more comprehensive provision on the relationship between the Union and the Member States is a notable development which shall be taken into account in the interpretation of the principle of sincere cooperation. The inclusion of reciprocal duties of "assisting and respecting" is already a limitation to the integrationist force of the principle of loyal cooperation.[92] At the same time, as will be argued in the following paragraphs, the mutual nature had limited concrete weight in the determination of duties incumbent on the Union institutions. As it will be shown in section 2.4.3, article 4(3) TEU is limited to actions falling within the scope of EU law, whereas article 4(2) TEU seems to go further protecting national interests beyond the realm of EU law.

[88] B Guastaferro, 'Sincere Cooperation and Respect for National Identities' in R Schütze and T Tridimas (eds), *Oxford principles of the European Union* (OUP 2018), pp. 377.
[89] ibid, p. 353.
[90] J Larik, 'Sincere Cooperation in the Common Commercial Policy: Lisbon, a "Joined-Up" Union, and "Brexit" Sincere Cooperation and the CCP' in M Bungenberg et al. (eds), *European Yearbook of International Economic Law* (European Yearbook of International Economic Law 2017) 8, p. 107.
[91] Opinion 1/19 (Istanbul Convention) of 6 October 2021 ECLI:EU:C:2021:832, paras 189-191.
[92] F Casolari 'EU Loyalty and the Protection of Member States' National Interests: A Mapping of the Law' in M Varju (ed), *Between Compliance and Particularism* (Springer 2019), p. 59.

Therefore, article 4(2) TEU seems to draw a demarcation line on "inner limits" of the principle of sincere cooperation, namely the core constitutional identities of the Member States.

2.4 An analysis of article 4(3) TEU: addressees, content, and scope

As mentioned earlier, the principle of sincere cooperation in article 4(3) TEU embodies broadly worded duties to ensure the achievement of Union action in the provision's three segments. More specifically there are three positive duties: a mutual duty of respect and assistance between Union institutions and Member States, a duty for the Member States to take all appropriate measures for the fulfilment of obligations arising out of the Treaties or resulting from the acts of the institutions of the Union, and to facilitate the achievement of the Union's tasks. A negative duty entails refraining from any measure which could jeopardise the attainment of the Union's objectives. When referring to article 4(3) TEU, the Court does not always clearly distinguish between the different segments of the provision. It often quotes the latter in its entirety without specifying whether it is applying a duty to take all appropriate measures, duty to facilitate, or a duty to refrain. As pointed out by Roes, in some cases they largely overlap, for example in the case of directives.[93] While there might not be therefore a rigid characterisation, some conceptual differences can be identified when looking at different segments of the provision. The next paragraphs will analyse the main features of article 4(3) TEU as interpreted by the Court looking at the following aspects: to whom are the duties addressed (2.4.1), what is the normative content of the obligations (2.4.2), what is their scope (2.4.3), and, lastly, the impact of the content and scope of sincere cooperation on the actions of the Member States (2.4.4).

2.4.1 Addressees of article 4(3) TEU

Pursuant to article 4(3) TEU, the principle of sincere cooperation is incumbent upon the Union and the Member States. Even before the explicit mention of the mutual character of the provision, the Court deemed that the principle entailed a reciprocal duty of loyalty between the Union and the Member States in article 10 EC in the case *IMO*.[94] Therefore, a question arises as to whether the addition of the wording "in full mutual respect" and "assist each

[93] T Roes, 'Limits to Loyalty: The Relevance of Article 4(3) TEU' (2016) 1 Cahiers de Droit Européen, p. 263.
[94] Case C-45/07 *Commission v Greece (IMO)* ECLI:EU:C:2009:81, paras 24-25. In an internal setting see mutual duties or cooperation in case 52/84 *Commission v Belgium* ECLI:EU:C:1986:3, para. 16.

other" is a mere incorporation of the CJEU's case law or rather signals a change in the meaning of the principle. The lack of further interpretation on the mutuality of the obligations in the Court's case law renders such a determination uncertain. According to Guastaferro, the mutual character of the principle of sincere cooperation might "solicit an evolving understanding of the principle of sincere cooperation, comparable to the one existing in unitary regional states".[95]

It is significant to note that the last two segments of article 4(3) TEU are only addressed to the Member States, whereas obligations for both Member States and EU institutions "to respect and assist" are referred to in the first segment of the provision. Thus, one could suggest that only the duties to respect and assist are the truly mutual obligations. Such a disparity in the duties of cooperation can be seen in the judgment *IMO* when the CJEU formulated the EU institutions' duties towards the Member States in a very broad manner, leaving them more leeway compared to the Member States. In that case, Greece argued that by not allowing it to discuss its proposal in the Marsec committee (a preparatory body within the Union) the Commission violated its duty of cooperation. The Court ruled that *"in order to fulfil its duty of genuine cooperation under article 10 EC, the Commission could have endeavoured to submit a proposal (…) and allowed a debate on that subject"*[96]. When compared to the second segment of article 4(3) ("Member States shall take any measure general or particular"), "endeavouring to submit" has a rather weak normative content. Some scholars also argue that Member States would not be able to invoke a breach of the principle of sincere cooperation, given that no concrete obligation was breached for the purpose of an action for failure to act.[97] On the contrary, Member States could be -and have been- held accountable by the Commission.

Obligations deriving from the principle of sincere cooperation also concern the Member States' judicial branch. This is both in terms of an obligation to cooperate between the national courts and the CJEU, but also at a systemic level as an obligation of the Member States to ensure that national courts can fulfil their function as an integral part of the EU

[95] B Guastaferro, 'Sincere Cooperation and Respect for National Identities' in R Schütze and T Tridimas (eds), *Oxford principles of the European Union* (OUP 2018), p. 366; F Casolari, 'EU Loyalty and the Protection of Member States' National Interests: A Mapping of the Law' in M Varju (ed), *Between Compliance and Particularism* (Springer 2019), p. 381.

[96] Case C-45/07 *Commission v Greece (IMO)* ECLI:EU:C:2009:81, para. 25.

[97] See among others B Van Vooren and A Wessel, *EU External Relations Law. Text, Cases and Materials* (2014 CUP), p. 200.

judicial system, responsible for the application of EU law. In Opinion 1/09 on the creation of a Unified Patent Court, the CJEU held that:

> *"pursuant to the second subparagraph of [a]rticle 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law*".[98]

Therefore, in Opinion 1/09 a system in which a judicial body external to the EU legal system can interpret and apply future EU regulations defies the role of both the CJEU and the national courts jeopardising the autonomy of the EU legal order, as well as their relationship in the context of preliminary rulings.

Other subjects bound by duties of loyalty include the EU institutions themselves. It should be mentioned that there is another provision, article 13(2) TEU, which entails a horizontal obligation of sincere cooperation which applies between the EU institutions.[99] This is a specific facet of the principle of sincere cooperation in the interinstitutional context which complements the vertical one of article 4(3) TEU known as institutional balance.[100] An example of the application of this principle can be seen in the *Hybrid Acts* case.[101] Here, the Council was found in violation of its duty to cooperate for adopting decisions concluded by the representatives of the Member States as members of the Council as well as in their capacity as sovereign States under public international law. According to the Court, this altered the procedure for concluding international agreements under article 218 TFEU introducing a *de facto* requirement of unanimity in the Council.[102] The principle of institutional balance may further be viewed as underpinning two judgments concerning the rights of the European

[98] Opinion 1/09 ECLI:EU:C:2011:123, para. 68.
[99] Art. 13(2) TEU. On institutional balance see P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU law' (2019) 68 ICLQ 1.
[100] See for example J Larik, 'Pars Pro Toto: The Member States' Obligations of Sincere Cooperation, Solidarity and Unity' in M Cremona (ed) *Structural principles in EU external relations law* (Hart Publishing 2018), p. 185.
[101] Case C-28/12 *Commission v Council (Hybrid acts)* EU:C:2015:282.
[102] See T Verellen, 'On Hybrid Decisions, Mixed Agreements, and the Limits of the New Legal Order: *Commission v Council "(US Air Transport Agreement)*' (2016) 53 CMLRev 741. The CJEU approached this case from the point of view of interinstitutional cooperation even though as the Member States took part in the hybrid acts a possible violation of sincere cooperation could also be identified.

Parliament under article 218(10) TFEU.[103] In these cases the Court found that the Council violated the Parliament's right to be fully and immediately informed at all stages of the treaty-making procedure which prevented the exercise of the Parliament's right to scrutiny with regard to international agreements on CFSP matters.[104]

Thus, it can be observed how the principle of sincere cooperation operates through two axes, between the Union and the Member States, and horizontally between the EU institutions. Notwithstanding that, as mentioned, with regard to the vertical relationship between the EU and the Member States obligations are mainly tailored to the Member States. Both lines of cooperative duties are significant for the functioning of the external action of the Union. On the one hand, because the Member States are actors on the international plane and coordination must be sought to advance Union strategies and objectives. On the other hand, horizontal cooperation is significant due to the varied roles that the institutions can play in the conduct of external policies and the obligation to ensure consistency in the different areas of EU external action.[105]

2.4.2 Normative content of article 4(3) TEU

The second and third segments indicate three obligations on the Member States namely "shall take all measures", "shall facilitate", and "shall refrain". As became clear already in very early cases, the principle does not elaborate on the nature of these obligations. Are these best effort obligations or obligations of result? The literature is unanimous in highlighting a development towards obligations of result, sometimes in a highly critical manner.[106]

The early case law shows a tendency towards a best effort obligation, in other words, stating that close cooperation is necessary without further elaborating how Member States and institutions should concretely fulfil this obligation.[107] In ruling 1/78, the Court held that

[103] Case C-658/11 *Parliament v Council (Mauritius)* ECLI:EU:C:2014:2025; Case C-263/14 *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435. Even though the judgements were not decided on the basis of article 13(2) TEU, the Court's interpretation of the Parliaments' right under article 218(10) TFEU is motivated by the maintenance of the role of each institution involved in treaty-making. See case C-263/14 *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435, para. 72. P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU law' (2019) 68 ICLQ, pp.16-18.

[104] Case C-658/11 *Parliament v Council (Mauritius)* ECLI:EU:C:2014:2025, para. 86; case C-263/14 *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435, para. 84.

[105] Art. 21(3) TEU.

[106] See inter alia see A Delgado Casteleiro, J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) European Law Review 36.

[107] Case C-1/78 *on Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports* ECLI:EU:C:1978:202, para. 36.

close cooperation between the institutions and the Member States was necessary for the implementation of the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports. The CJEU clearly determined which areas should be implemented by the Member States and which by the Union according to the division of competence and appeared to consider that the implementation of the respective parts fulfilled the duty of cooperation.[108] Another relevant example is Opinion 2/91 on ILO Convention No 170 on Safety in the Use of Chemicals at Work. Here the Member States, as members of the ILO, represented the Union in areas falling within its exclusive competence. The Court held that *"it is important to ensure that there is a close association between institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into"*.[109] The Court repeated this finding in Opinion 1/94 further adding that *"the duty to cooperate is all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which are inextricably interlinked, and in view of the cross-retaliation measures established by the Dispute Settlement Understanding"*.[110] A more tangible understanding of sincere cooperation can instead be seen in *FAO Fisheries Agreement*. This case concerned a written arrangement between the Council and the Commission for voting and speaking rights within the FAO. The Court acknowledged that such an arrangement *"represents fulfilment of that duty of cooperation between the Community and the Member States"*.[111] While consistently highlighting the relevance of the duty of close cooperation, in these cases the Court provided no substantive guidance as to how the duty of cooperation should be shaped, showing a rather abstract conception of sincere cooperation.

Subsequently, in the context of an EU negotiating mandate for an international agreement, it became clear that close cooperation might be more than an obligation of best endeavours. In two judgments *Commission v Germany* and *Commission v Luxembourg,* known as the *Inland waterway* cases, Germany and Luxembourg concluded bilateral agreements on inland waterway navigation, while Community negotiations were underway towards a multilateral convention on the same topic. The Court rejected the applicability of the ERTA pre-emption doctrine but found that the two Member States breached the duty to cooperate

[108]A Delgado Casteleiro, J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 ELR, p. 256.
[109] Opinion 2/91 *Convention No 170 ILO on Safety in the Use of Chemicals at Work* ECLI:EU:C:1993:106, para. 36
[110] Opinion 1/94 *(WTO Agreement)* ECLI:EU:C:1994:384, para. 108.
[111] Case 25/94 *Commission v Council (FAO Fisheries Agreement)* ECLI:EU:C:1996:114, para. 49.

loyally with the Union. As pointed out by Wessel and Van Vooren, these judgments are instrumental in determining the moment from which the duty of close cooperation applies.[112] The Court states that *"the adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted community action at international level"*.[113] As such the adoption of a decision to negotiate an international agreement is a marker in the policy timeline which triggers a duty of close cooperation. According to the Court, such a duty is *"if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation"*.[114] This appears to leave a degree of flexibility as to how to ensure close cooperation, but shows that a duty of abstention would not be a farfetched interpretation. In the judgment concerning Germany, the Court indicated that the adoption of the Council Decision *"required closer cooperation and concerted action with the Commission"*. Furthermore, *"[c]onsultation with the Commission was all the more necessary"* in light of a Gentlemen's' agreement for the negotiation procedure, which provided for close cooperation between the Commission and the Member States, highlighting the prominent role of the Commission as the Union negotiator.[115] Here, the Court makes a first connection between consulting the Union institutions as a way to comply with article 10 EC, and the two Member States were thus responsible for breaching a duty to inform and consult. However, in the case concerning Germany, the Court did not accept the fact that Germany ratified and implemented its bilateral agreements, notwithstanding consultations took place prior to the adoption of the Council Decision.[116] According to the Court, the fact that Germany ratified and implemented the agreements after the Council Decision was adopted jeopardised the implementation of that Decision and, in turn, the attainment of the objectives of the Treaties.[117] Arguably, Germany acted in line with the best effort obligation referred to in the prior case law by engaging with the Commission during the negotiation of the agreements. However, as indicated by the Court, a duty to consult the Commission also applies at the stage of ratification and implementation. Van Vooren and Wessel hold that consulting the

[112] See B Van Vooren, R A Wessel, *EU External Relations Law. Text, Cases and Materials* (CUP 2014), p. 198 and on the policy timeline pp. 192-193.
[113] Case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462, para. 66.
[114] ibid; case C-266/03 *Commission v Luxembourg* ECLI:EU:C:2005:341, para. 59.
[115] Case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462, para. 70.
[116] ibid, para. 68.
[117] ibid, para. 69.

Commission at the point of ratification would entail a *de facto* request of permission to act.[118] At the same time they highlight that, given the policy timeline, the requirement incumbent on Germany is not unreasonable considering that it "had agreed to multilateral negotiations within the Council, and should have not circumvented that process".[119] Last but not least, Germany's commitment to denounce the agreements as soon as a multilateral agreement had been concluded by the Union was also deemed unfit to comply with article 10 EC, as it would not facilitate the negotiations of the Commission and would therefore have no practical effect.[120]

An obligation to inform and consult can also be seen as a way to preserve the exclusive jurisdiction of the CJEU in the *Mox Plant* litigation. In this case, Ireland instituted proceedings against another (then) Member State, the UK, before the Tribunal of the Law of the Sea (ITLOS). The Commission informed Ireland that this was a matter under the exclusive jurisdiction of the CJEU, but Ireland proceeded nonetheless with the litigation.[121] As follows, the Commission brought an infringement proceeding against it, in which the Court stated that *"the obligation of close cooperation within the framework of a mixed agreement involved on the part of Ireland, a duty to inform and consult the competent Community institutions prior to instituting dispute settlement proceedings […] within the framework of the Convention"*.[122] Thus, due to the absence of cooperation in the form of informing and consulting with the Commission, Ireland violated article 10 EC.

A less doubtful approach as to the normative content of sincere cooperation can be seen in the case *Commission v Sweden (PFOS),* in which there is a clear determination of a duty to refrain from acting, also termed a "duty to remain silent".[123] In this case, both the EU and the Member States were parties to the Stockholm Convention on Persistent Organic Pollutants (POPS) exercising a shared external competence in the field of the protection of the environment. Sweden proposed twice the inclusion of "PFOS" to the list of hazardous substances within the Council and it was agreed not to propose the addition of this substance

[118] B Van Vooren and R A Wessel, *EU External Relations Law. Text, Cases and Materials* (CUP 2014) and an analogous argument by A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 ELR, p. 531.
[119] B Van Vooren and R A Wessel, *EU External Relations Law. Text, Cases and Materials* (CUP 2014), p. 193.
[120] Case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462, para. 72.
[121] Case C-459/03 *Commission v Ireland (Mox Plant)* ECLI:EU:C:2006:345, paras. 50-57.
[122] ibid, para. 179.
[123] A Delgado Casteleiro, J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 ELR, p. 523.

to the Annex A of the Convention at that moment.[124] Eleven months after its initial proposal, Sweden submitted unilaterally a request to add PFOS to the Convention. AG Maduro, providing his opinion on the case, was clear in pointing out that, even though such a substance was not included in relevant EU legislation and Sweden could unilaterally propose it on the basis of its retained competence, it breached the duty of cooperation.[125] The AG argued that as long as the European Union's internal processes are at work, the Member States should refrain from acting "for a reasonable period of time". Even though he did not analyse what would be a reasonable time, his conclusion was that Sweden should have waited for a clarification on the Union's position before being allowed to act independently. The CJEU also found a violation of sincere cooperation, focusing instead on the existence of a community strategy. It ruled that a strategy does not need a specific form, but the content of that position needs to be established to the requisite legal standard.[126] *In casu,* this was fulfilled by Council meeting minutes and conclusions. When comparing this source of obligations of cooperation to, for example, Council decisions or Commissions proposals, such duty of cooperation applies much earlier, already at the stage of discussions within the Council. The Court ultimately concluded that Sweden went against an existing community strategy not to include PFOS, among others for economic reasons, and violated the duty of sincere cooperation by acting unilaterally proposing the addition of this substance.

A duty to remain silent and not to depart from an agreed Union position was at stake most recently in the case *Commission v Germany* also known as *COTIF II*.[127] An initial dispute between Germany and the Council arose from the process of amending the Convention concerning International Carriage by Rail (COTIF) under the auspices of the Revision Committee of the Intergovernmental Organisation for International Carriage by Rail (OTIF). On the day prior to the 25th session of the OTIF Revision Committee, the Council adopted Decision 2014/699/EU establishing the position to be adopted on behalf of the EU including the division of competence between the EU and its Member States regarding the exercise of voting rights.[128] Germany disagreed with the adoption of the Council decision stressing the lack of

[124] Case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203, para. 89.
[125] Opinion of AG Poiares Maduro, case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2007:361, para. 47.
[126] Case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203, paras 76-77.
[127] See action of annulment brought previously by Germany case C-600/14 *Germany v Council* (2017) ECLI:EU:C:2017:935.
[128] It was adopted on the basis of article 91(1) TFEU in conjunction with article 218(9) TFEU, which requires qualified majority voting in the Council.

competence of the Union with regard to the proposed amendments which it considered to come under shared competence, and ultimately voted against the Commission's proposal at the OTIF Revision Committee. In the present infringement action, the Commission sought to address Germany's conduct. The Court found that Germany breached the duty of cooperation by going against a decision of the Council. It held that "*compliance on the part of the Member States with a decision adopted by the Council under article 218(9) TFEU is a specific expression of the requirement of unity in representation of the European Union, arising from the obligation of sincere cooperation"*.[129]

Perhaps the most stringent interpretation of sincere cooperation yet can be seen in AG Kokott's Opinion in the case *Commission* v *Council (Vietnam)*.[130] Unfortunately, the case was withdrawn and therefore the CJEU did not provide its conclusions. In this case, the Commission brought proceedings against the Council for the participation of the Member States in a Union decision on the accession of Vietnam to the WTO. The Council argued that in an area of shared competence[131] it had complete freedom to decide whether EU competence should be exercised or whether it should be left to the Member States. The AG however thought differently stating that "the Member States within the Council may not obstruct optimum efficacy of action by the Community with the object of themselves becoming involved alongside the Community(...) the duty of genuine cooperation [article 4 (3) TFEU] requires the Member States to do everything possible to facilitate the exercise of the Community's powers and to abstain from any measure which could jeopardise the attainment of the objectives of the EC Treaty". Here the AG appears to deny the Member States the political choice of mixity because it might be in contrast with the commitment to facilitate the exercise of the Community's powers enshrined in article 4(3) TEU. The AG's argument is premised on the fact that the "interest in the most effective and coherent representation at international level as is possible" may require the Council to exercise its full powers and the Member States to refrain from becoming involved alongside the Union.[132] Leaving aside the fact that the Court has later confirmed that the Council can choose whether to exercise its powers allowing facultative

[129] Case C-620/16 *Commission v Germany* (2019) ECLI:EU:C:2019:256*,* para. 94.
[130] Opinion of AG Kokott, case C-13/07 *Commission v Council* (2009) ECLI:EU:C:2009:190, paras 83-84.
[131] IP and trade in services, then shared in former art. 133(5) EC and now exclusive in the CCP.
[132] Opinion of AG Kokott, case C-13/07 *Commission v Council* ECLI:EU:C:2009:190, para. 83.

mixed agreements,[133] the conclusion by the AG is of notable interest because it entails the possibility of an obligation to refrain from acting (i.e. concluding a mixed agreement alongside the Union) without the existence of a prior community strategy or concerted action, which was so far present in the other cases.[134]

From the point of view of its normative content, the principle of sincere cooperation initially identified mere indications to endeavour to cooperate, and progressively took the shape of concrete duties. For example, failing to inform and consult the Commission in *Mox Plant* or opposing a Union position in *COTIF II*.[135] Next to the division of competences, which impacts the ability of the Member States to engage on the international plane from a substantive point of view (for example concluding an international agreement with a third country in an area of EU exclusive competence), these cases show that the principle of sincere cooperation also has a tangible impact on the Member States' actions on the international plane, while acting as a cooperation tool for the exercise of a competence. Several authors have indeed questioned whether article 4(3) TEU acts as a competence conferring article.[136]

Each segment of article 4(3) TEU will be further analysed individually in the next section attempting to outline the scope of the broadly framed commitments included in article 4(3) TEU.

2.4.3 Scope of article 4(3) TEU

When discussing the scope of the principle of sincere cooperation it should be pointed out that the principle applies to all Union competences irrespective of the competence divide.[137] As well explained by Roes, article 4(3) TEU requires however what he terms a "*juncto*-norm".[138]

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[133] See cases such as C-600/14 *Germany v Council* (COTIF I) ECLI:EU:C:2017:935 or Opinion 1/19 ECLI:EU:C:2021:832.

[134] For an argument in favour of a more stringent duty of cooperation in cases of facultative mixed agreements see C Hillion and M Chamon, 'Facultative Mixity and Sincere Cooperation' in M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p.98.

[135] See the works of Temple Lang for an extensive identification of duties deriving from the principle of sincere cooperation, J Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC' (2007) 31 Fordham International Law Journal 1483.

[136] See among others G De Baere '"O where is faith? O, where is loyalty?" Some Thoughts on the Duty of Loyal Cooperation and the Union's External Environmental Competences in light of the PFOS Case' (2011) 36 ELR, p. 417-418; S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Ledizioni 2018), pp. 293-295; K Reuter, 'Competence Creep via the Duty of Loyalty? Article 4 (3) TEU and its Changing Role in EU External Relations' (unpublished doctoral thesis EUI 2013).

[137] Case C-266/03 *Commission v Luxembourg* (2005) ECLI:EU:C:2005:341, para. 58, and case C-433/03 *Commission v Germany* (2005) ECLI:EU:C:2005:462, para. 64.

[138] T Roes, 'Limits to Loyalty: the relevance of article 4(3) TEU' (2016) 1 Cahiers de Droit Européen, p. 262.

Member States can only be loyal "to something" which is indicated in article 4(3) TEU as "obligations", "tasks", and "objectives". Therefore, it becomes important to understand the meaning and role that these concepts have in regards to the principle of sincere cooperation.

Segment 1 and segment 2 of article 4(3) TEU present a similar formulation, respectively "tasks *flowing from the Treaties* and "obligations *arising out of the Treaties*", which give the Court broad discretion to go beyond the strict text of the Treaties in determining duties implicitly contained therein.[139] Segment 2 further adds "obligations *arising from acts of the institutions*" whose scope is also potentially broad, for example a voting arrangement in an international organisation or a Union position such as in the case *COTIF II*.

Segment 3 instead refers to "facilitating Union's tasks" and "refraining from any measure that could jeopardise the attainment of Union objectives". The meaning of "tasks" and "objectives" has not been clarified in the Court's case law. The word "tasks" intuitively points to a more specific meaning compared to "objectives". In practice, however, as the Court rarely indicates which of the three segments and which obligation it is referring to, there has not been a straightforward differentiation between the two.[140] An explicit example of the difference between tasks and objectives within the Treaties can be seen in the Protocol 4 on the Statute of the European System of Central Banks and of the European Central Bank.[141] While "tasks" is generally referred to only in regards to the duties of EU institutions, "objectives" are mentioned in numerous Treaty provisions.

Without forgetting that the attainment of common objectives is the very *raison d'etre* of the Union in article 1 TEU,[142] a list of very general internal and external objectives is provided

[139] ibid, p. 261.
[140] ibid, p. 262.
[141] Art. 2 "Objectives": "In accordance with Article 127(1) and Article 282(2) of the Treaty on the Functioning of the European Union, the primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, it shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119 of the Treaty on the Functioning of the European Union".
Art. 3 "Tasks": "In accordance with Article 127(2) of the Treaty on the Functioning of the European Union, the basic tasks to be carried out through the ESCB shall be: to define and implement the monetary policy of the Union; to conduct foreign-exchange operations consistent with the provisions of Article 219 of that Treaty; to hold and manage the official foreign reserves of the Member States; to promote the smooth operation of payment systems.
[142] Art. 1 TEU states "[b]y this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common".

for in article 3 TEU including the sustainable development of Europe, a highly competitive social market economy, and a high level of protection and improvement of the quality of the environment. In its relations with the wider world the Union sets high objectives, among others: contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, the eradication of poverty and the protection of human rights.[143] Still, reference to Treaty objectives is made in many other articles, such as in article 5 TEU on conferral, subsidiarity, and proportionality, but also in article 19(1) TFEU on the Union's anti-discrimination policy and in article 26 TFEU on the internal market. In fact, most parts of the TFEU on the policies of the Union use the term "objectives" to refer to the aims the Union must or may pursue in the respective areas. The Treaties also speak of objectives with regard to the Common Foreign and Security Policy (CFSP) in article 21(2) TEU.

At the same time, it is important to point out that the third segment of article 4(3) TEU does not indicate which objectives it refers to, whether the more systemic objectives of the Treaties, or to specific Treaty provisions or to objectives within legislative acts.[144] In addition, the lack of reference to objectives "*of the Treaties"* but rather solely to objectives *"of the Union"* calls for a wide reading of the term. Arguably, the Court has also derived objectives implicit in the system of the Treaties which could give rise to obligations of loyalty. For example, the unity in the international representation of the Union specific to its external action, but also the equality among the Member States and effective judicial protection now codified in the Treaties.[145]

It is interesting to note that after the Lisbon Treaty, the Court has no longer linked article 3 TEU directly in relation to article 4(3) TEU. Larik observes that compared to the 1957 Rome Treaty, the current objectives are much broader and more general, and their role has changed.[146] Objectives now include ambitious goals, and he claims that they no longer

[143] Art. 3(5) TEU.
[144] The objectives of a directive, for example in case C-129/96 *Inter-Environnement Wallonie* ECLI:EU:C:1997:628 where the Court derived a duty to refrain from taking any measure that could seriously jeopardise the result prescribed by a directive during its transposition period.
[145] In case C-128/78 *Commission v UK* ECLI:EU:C:1979:32 the Court established, in light of the principle of loyalty and of equality among Member States, that the Member States are prevented from profiting from their own wrong. Now the principle of equality is provided for in article 4(2) TEU. Effective judicial protection is instead codified in articles 19 TEU and 47 of the Charter of Fundamental Rights of the EU (CFR).
[146] J Larik, 'From Speciality to a Constitutional Sense of Purpose: on the Changing Role of the Objectives of The European Union' (2014) 63 ICLQ, p. 954.

circumscribe the Union's powers, a function now fulfilled by articles 2-6 TFEU listing the competences of the EU. Another reading is given by Klamert, who argues that, in some contradiction to the wording of article 4(3) TEU, the mere objectives of Union action as reported in multiple Treaty articles are not sufficient to trigger the application of loyalty-based duties for the Member States. According to him, objectives should have been concretised by policy choices and, therefore, the existence of common rules or a common strategy is propaedeutic to derive duties of loyalty for the Member States. Even in the *ERTA* judgment, where the main argument of the Court was based on a combined reading of former article 5 EEC and article 3 EEC on transport policy, the Community had enacted a common policy in the field of transport. Similarly, in *PFOS*, the Court's holding was not focused on an objective of unity in the international representation of the Union but relied on the existence of a Union strategy and on the adverse consequence of precluding the Union to exercise its voting. He therefore argues that the Treaty objectives by themselves cannot provide the point of reference for the duties contained in article 4(3) TEU. As argued by Roes, the "lack of normative oomph" of general objectives is evidenced in cases concerning taxation matters.[147] The Treaties used to include a general commitment for the Member States to enter into negotiation with each other with the view of securing the abolition of double taxation within the Community. In *Leclerc* the Court was asked whether the principle of loyal cooperation could rule double taxation incompatible with free movement of capital. In that case, the Court did not find a violation, Roes claims due to the lack of harmonising legislation.[148]

Article 4(3) TEU refers to the objectives of the Union, which are not only accomplished by the EU but also by the Member States in areas in which they retain competence. As evidenced by the case *Hurd*, Member States' agreements outside the EU legal order might give rise to loyalty duties when harming a Union objective, in this case the well-functioning of the institutions.[149] This preliminary ruling procedure concerned the domestic taxation of the UK applicable to European Schools, a selected group of schools established by two international agreements for the schooling of children of employees of the then Communities. Notwithstanding that taxation is a matter for the individual Member States, the Court held

[147] T Roes, 'Limits to Loyalty: The Relevance of Article 4(3) TEU' (2016) 1 Cahiers de Droit Européen, p. 271
[148] Case C-299/83 *Leclerc* ECL:EU:C:1985:1 cited by T Roes, 'Limits to Loyalty: The Relevance of Article 4(3) TEU' (2016) 1 Cahiers de Droit Européen, p. 270. At the same time, in this case the Court deems article 5 EEC not capable of creating independent obligations.
[149] Case C-44/84 *Hurd v Jones* ECLI:EU:C:1986:2, paras 44-45.

that Member States are prohibited from taxing the salaries paid by the European Schools if the burden of such taxation is to be borne by the Union's budget. This is because otherwise, the Court argued, the Member States could unilaterally interfere with the system adopted for financing the Community and for apportioning financial burdens between them.[150] More recently, another situation where an agreement of the Member States may create duties of sincere cooperation concerns the Termination Agreement (TA), the multilateral treaty among the Member States established in order to end intra-EU bilateral investment treaties (BITs), which were ruled incompatible with the autonomy of EU law in the *Achmea* judgment.[151] Upon the refusals of the United Kingdom and Finland to sign the TA, the Commission started infringement proceedings against them, in this way enforcing the commitment to terminate their intra-EU BITs.[152] Even though the content of the infringement notices is not public, it seems reasonable to believe that the breach of the principle of sincere cooperation could be among the grounds raised by the Commission. Indeed, the notice cites "failing to effectively remove intra-EU Bilateral Investment Treaties (BITs) from their legal orders" and "the United Kingdom and Finland did not sign the plurilateral treaty alongside other Member States" and that "they have failed to engage in any discussion with the Member States concerned to proceed with the bilateral termination of their intra-EU BITs".

Another aspect worth noting is that the second part of the third segment of article 4(3) TEU refers not just to actual harm but also potential harm to Union objectives. This is at the heart of the ERTA doctrine, namely the pre-emption of Member States' action upon the risk that common rules might be affected, or their scope altered. Potential harm gives a substantial margin of appreciation to the Court to identify whether there is a risk of countering Union objectives, beyond the existence of EU competence and common rules.[153] For example, the ERTA doctrine could not play a role in case *Commission v Sweden (PFOS)* where the

[150] ibid, para. 48.
[151] Case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158, para. 60.
[152] May infringements package: Key decisions (14 May 2020) https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859 (accessed 30 January 2024).
The Member States adopted three declarations all affirming a commitment to terminate their intra-EU BITs, see Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection; Declaration of the Member States of 16 January 2019 on the enforcement of the judgment of the Court of Justice in Achmea and on investment protection in the European Union (commitments of Finland, Luxembourg, Malta, Slovenia and Sweden); Declaration by Hungary of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union.
[153] Case C-246/07 *Commission v Sweden (PFOS)* (2010) ECLI:EU:C:2010:203, paras 69-71.

competence over the protection environment is shared and the substance PFOS was not yet regulated at EU level. But the Court found that such unilateral action by Sweden could harm a Union strategy not to add PFOS *inter alia* for economic considerations and thus is in violation of the principle of sincere cooperation. There is no balancing exercise: the Court does not clarify whether it is implying that such economic considerations (or their disregard) would be of such an importance to outweigh Sweden's right to autonomous action.[154] Especially concerning the potential future harm to Union objectives, the threshold for an objective to be jeopardised becomes a point of contention and is the most far-reaching application of the principle. Roes argues that the requested level of harm is normally higher when EU objectives are read in conjunction with their implementing rules, compared to more general objectives which have less normative force and are less easily jeopardised.[155]

From this discussion, is seems apparent that there are no clear limits to the scope of the principle of sincere cooperation. Especially the notion of "Union objectives" is inherently broad, as well as (even though to a lesser extent) the expressions "tasks" and "obligations" which arise/flow from the Treaties. By applying irrespective of the competence divide, sincere cooperation also operates within the broader scope of EU law, namely also to those Union objectives that can be attained at least partially by the Member States. Therefore, Member State action can be scrutinised according to the principle of loyal cooperation where it is liable to affect the achievement of Union objectives. Last but not least, sincere cooperation also acts to safeguard the attainment of Union objectives from potential future harm.

2.4.4 At the intersection between the normative content and scope: implications for Member States and Union action on the international plane

The previous paragraphs analysed the addressees, normative content, and scope of the principle of sincere cooperation. When looking at these three aspects in conjunction, the determination of these elements is vital -aside for a better understanding for the principle *per se*- to determine the Member States' space for autonomous action on the international plane. The Court used to have a very vague understanding of the principle of sincere cooperation as

[154] G De Baere, '"O where is faith? O, where is loyalty?" Some Thoughts on the Duty of Loyal Cooperation and the Union's External Environmental Competences in light of the PFOS Case' (2011) 36 ELR, p. 415.
[155] T Roes, 'Limits to Loyalty: The Relevance of Article 4(3) TEU' (2016) Cahiers de Droit Européen, p. 281.

mainly an obligation of best effort, which increasingly turned to obligations of result, outlining clear positive or negative obligations for the Member States. At the same time, the scope of the article in terms of "obligations", "tasks", and "objectives" to which it is linked might not always be clear, especially in regards to the objectives of the Union, which go beyond the competence divide and affect the scope of EU law. With specific reference to the external action of the Union "objectives" encompass not only objectives of its internal and external policies but also the objective of becoming an international actor that can pursue consistent external policies.

It is important to note that the interplay between Union objectives and conferral already affects and restricts Member State action at the international level from a substantive perspective. The Court has constructed a broad concept of pre-emption in the external action of the Union in article 3(2) TFEU which is broader than in the internal field.[156] As the Court ruled in Opinion 2/15, competences can be implied externally without the need for the field to be completely covered by common rules.[157] As argued by Neframi, if the objectives pursued by the Union and the Member States are the same, still the Member States will not be able to regulate that area as their action might affect common rules or alter their scope triggering ERTA pre-emption.[158]

The principle of sincere cooperation is most visible in competences which are shared or retained by the Member States and is concerned with the exercise of such competences. A point raised by Chamon is whether duties of loyal cooperation should differ and intensify according to the type of competence involved. For example, as regards to the external action of the Union, Member States might act as trustees exercising an exclusive external competence of the Union (e.g. in the case of UNCLOS) without the Union being a member of the international convention or organisation. Another instance could be the national ratification of facultative mixed agreements concluded by the Union and the Member States, where an agreement could (in theory) have been concluded by the Union alone.[159] The Court however has consistently applied the principle irrespective of the nature of the competences

[156] E Neframi, 'The Dynamic of the EU Objectives in the Analysis of the External Competence' in E Neframi, M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018), p. 75.
[157] Opinion 2/15 (Singapore FTA) ECLI:EU:C:2017:376, paras 180-181.
[158] E Neframi, 'The Dynamic of the EU Objectives in the Analysis of the External Competence' in E Neframi, M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018), p. 76.
[159] C Hillion, M Chamon, 'Facultative Mixity and Sincere Cooperation' in M Chamon, I Govaere (eds) *EU External Relations Post- Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p. 98.

at stake focusing on the existence of a Union concerted action. Indeed, the intensity of the sincere cooperation does not seem to be altered whether we are referring to an obligation, task or objective.

At a more fundamental level, Delgado and Larik wonder whether increasingly stringent duties on Member States' action on the international plane might create a less active Union, thus less able to fulfil its goals and the Treaty objectives which can be obtained outside Union action.[160] Some objectives of the EU external action might indeed be achieved entirely or partially by the Member States rather than the Union, and Member States' initiatives might contribute "to push" towards the attainment of Union objectives, arguably as in the case of *PFOS*. In this context, a sign of a possible change by the Court on the role of the Member States acting on the international plane could be identified in the case *Antarctic MPA.*[161] Here, the Court recognised the special position of some Member States as parties of the Canberra Convention and the Antarctic Treaty and their prerogatives under international law.[162] In comparison with the previously mentioned *PFOS* case, the Court did not consider the repercussions of the Member States' unilateral actions on future EU rules as it did in *PFOS*. At the same time, in the context of the external action of the Union interpreting sincere cooperation as creating duties of result may be significant because Member States simultaneously conduct their own foreign policy on the international plane. As exemplified by the *PFOS and COTIF II* judgments, Member States can take actions which were not in compliance with a previously agreed Union strategy or position. In the *COTIF II* case, Germany argued that the infringement action against it was inadmissible because the alleged conduct exhausted all of its effects in the context of the 25th session of the OTIF Revision Committee, and it was already terminated prior to the expiry of the Commission's reasoned opinion.[163] The CJEU disagreed, stating that the effects of infringing a Council Decision under article 218(9) TFEU went further than the decision-making process in question, because they reflected on the action of the Union within that international organisation, and *"may, inter alia, call into question the unity and consistency of the EU's external action"*.[164] Compared to the internal

[160] A Delgado Casteleiro, J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 ELR, p. 539.
[161] Joined cases C-626/15 e C-659/16 *Commission v. Council (MPA-Antarctic) (2018)* EU:C:2018:925.
[162] ibid, paras 127-128.
[163] Case C-620/16 *Commission v Germany (COTIF II)* ECLI:EU:C:2019:256, para. 31.
[164] ibid, para. 47.

legal order there is thus an additional concern, not only that the Union fulfils its objectives but also that it does so in a way that allows it to be an international actor, which can justify a more stringent interpretation of the principle of sincere cooperation.[165]

2.5 Concluding remarks

The analysis carried out above focused on the multifaceted nature of the principle of sincere cooperation as enshrined in article 4(3) TEU and attempted to outline its contours. "Sincere cooperation is not to be understood as an end in itself, but as an inherently goal-oriented concept".[166] Even though it is a principle, the text of article 4(3) TEU provides indications for applying it to concrete cases, namely positive and negative obligations. In the external relations of the Union, it can be observed how article 4(3) TEU searches for a balance between allowing the Member States to take independent action on the international plane but at the same time ensuring that they do not go against obligations, tasks, and objectives of the Union including that of becoming an international actor. In this way the principle addresses what Klabbers notes as the "fundamental tension" characterising international organisations.[167] On the one hand, IOs are independent from their members, but at the same time also inherently dependent on them.[168] The case law of the CJEU on article 4(3) TEU so far shows that, in most cases, the principle of sincere cooperation can constrain the Member States' action when they act jointly with the Union, on its behalf, but also when they act independently on the international plane. It can be observed that the limiting role of the principle of sincere cooperation on the international action of the Member States finds some commonalities with the limitations that the principle of good faith imposes on treaty parties in the context of treaty law, in particular with regard to in international institutional law.[169] The literature highlights a shared understanding that good faith restricts the treaty-based discretion available to the

[165] See C Eckes, 'Disciplining Member States: EU Loyalty in External Relations' (2020) 22 CYELS 85, who argues that the more stringent application of sincere cooperation to the EU's external action may be functionally justified but needs better explication.
[166] J Larik, 'Sincere Cooperation in the Common Commercial Policy: Lisbon, a "Joined-Up" Union, and "Brexit" sincere cooperation and the CCP' in M Bungenberg et al. (eds.), *European Yearbook of International Economic Law* (European Yearbook of International Economic Law 2017) 8, p. 87.
[167] J Klabbers, *An Introduction to International Institutional law* (2nd ed, CUP 2009), p. 35.
[168] ibid, p. 36.
[169] S Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence, p. 58.

parties guiding their actions "so as not to put the object and purpose of the relevant treaty at risk".[170]

[170] U Linderfalk, 'General Principles as Principles of International Legal Pragmatics: The Relevance of Good Faith for the Application of Treaty Law' in M Andenas, M Fitzmaurice, A Tanzi, J Wouters (eds), *General Principles and the Coherence of International Law* (Brill 2019), p. 112. See also R Kolb, *Good Faith in International Law* (Hart Publishing 2017), pp. 159-160, S Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 40.

CHAPTER 3

The Principle of Sincere Cooperation in the Exercise of Union External Competence

3.1 Introduction

This Chapter aims to analyse the role played by the principle of sincere cooperation when the Union engages on the international plane exercising its external competences through the conclusion of international agreements and the participation in international organisations. The EU's participation in international organisations is here referred to not only with regard to the accession of the Union to another IO but also to the adoption of acts by the bodies of such organisation. Even though sincere cooperation has been understood as one of the constitutional principles underpinning the Court's finding that the Union has implied external competencies and that the internal exercise of pre-emptive competences leads to supervening external exclusivity (ERTA doctrine), the establishment of Union competence will not be addressed in the present thesis, except to describe the system of EU external competences and recall the state of the art. The Chapter will thus not delve into the question of attribution of external competences but rather will start from the assumption that the Union has external competences which are exercised on the international plane.

The Chapter will begin by recalling the legal framework for the Union's exercise of external competences and will refer to the types of competences, the choice of legal basis, and the procedure for concluding international agreements. This will be used to locate the principle of sincere cooperation in the ambit of EU external relations law. Next, three main contributions of the principle of sincere cooperation linked to the exercise of external Union competence will be examined. In particular, it is submitted that, first, sincere cooperation enables the Union to go forward with a strategy or common action devised at EU level both for concluding international agreements and in the context of the participation in international organisations. Second, sincere cooperation is paramount for the management of mixed agreements including their process of conclusion, the determination of the extent and consequences of the competence exercise by the Union, and in the coordination of representation and voting rights. Third, the final section will consider situations in which the

Union may not engage on the international plane and relies on the Member States as its trustees.

3.2 Setting the stage: the system of EU external competences

3.2.1 Existence and nature of EU external competences

The Lisbon Treaty shows a clear strengthening of the Union's powers and ambitions to shape its position as an international actor. Article 21 TEU codifies numerous objectives of the EU's external action, but notable developments can be seen also in terms of the institutional structure with the European External Action Service (EEAS). The EU regularly engages in international organisations and concludes international agreements with third countries and with the Treaty of Lisbon an attempt has been made to clarify the Union's competences and procedures for treaty-making. A first important aspect is the explicit recognition of the EU's legal personality as a subject of international law in article 47 TEU. Indeed, unlike states, international organisations are endowed with treaty-making capacity only when this is conferred upon them and do not enjoy an inherent treaty-making capacity.[171] Next to the articles asserting the possibility of concluding international agreements in selected areas including in the common commercial policy (CCP) and development cooperation, a broader treaty-making capacity of the Union was already reflected early on in cases such as *ERTA*.[172] With the Treaty of Lisbon, article 216(1) TFEU expressly refers to the possibility of concluding international agreements and provides for a dedicated procedure in article 218 TFEU, including a procedure for the adoption of positions in a body established by an agreement in article 218(9) TFEU. Moreover, the Union may enter into international agreements establishing international organisations.[173] Specifically, article 220 TFEU addresses the relations with other existing international entities including the organs and agencies of the UN, the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE), and the Organisation for Economic Cooperation and Development (OECD). Particular types of international agreements are also referred to in articles 217 and 219 TFEU. The former entails the establishment of an association, a privileged relationship, between the Union and a third

[171] See by contrast art. 6 VCLT.
[172] Case C-22/70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32.
[173] Opinion 1/76 ECLI:EU:C:1977:63, para. 5.

country or international organisation.[174] Article 219 TFEU instead concerns the conclusion of agreements on an exchange-rate system for the euro in relation to the currencies of third States and modifies the procedure for concluding international agreements outlined in article 218 TFEU, providing for an obligation of the Council to consult the European Central Bank when deciding the arrangements for the negotiation and conclusion of these agreements which need to express a single Union position.[175]

In its jurisprudence, the Court drew a distinction between the *existence* and the *nature* of the EU's external competences.[176] In a nutshell, the existence concerns the question of whether the Union has been empowered to act in a certain area, whereas the nature of the external competence refers to the type of competence, exclusive or shared, which can determine the exclusion of the Member States. With regard to the existence of Union external competence, competences may be stated explicitly in the Treaties such as, among others, the CCP (article 207 TFEU), development cooperation (article 209 TFEU), and the protection of the environment (article 191 TFEU), or may be implicitly derived from the Treaties or secondary EU law.[177] The general conditions for the existence of external competence to conclude international agreements can be found in article 216(1) TFEU. In the words of Cremona "[w]e might say that [a]rticle 216(1) TFEU renders explicit the doctrine of implied powers. Alongside the specific external policies of the Union, it provides a clear legal basis for what is elsewhere referred to as the 'external dimension of its other policies'".[178] Article 216(1) TFEU provides that the Union may conclude an agreement with third countries when (i) the Treaties so provide, (ii) the conclusion of the agreement is necessary to achieve one of the objectives referred to in the Treaties, (iii) is provided for in a legally binding Union act, or (iv) is likely to

[174] Article 8 TEU also provides for the possibility of the Union to develop special relationships with neighbouring countries and, for this purpose to conclude international agreements. Van Elsuwege and M Chamon note that this article has never been used as a legal basis to conclude international agreements and put forward the understanding that it consists of a political provision. P Van Elsuwege, M Chamon, "The meaning of 'association' under EU law-A study on the law and practice of EU association agreements"" (February 2019) Study for the AFCO Committee European Parliament, p. 14 <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2019)608861> accessed 7th September 2023.

[175] Art. 219(3) TFEU. In addition, in art. 219(4) TFEU it is specified that Member States may still negotiate in international bodies and conclude international agreements without prejudice to the Union's competence with regard to the economic and monetary union.

[176] Opinion 1/03 ECLI:EU:C:2006:81, paras 114-115.

[177] See Opinion 1/03 ECLI:EU:C:2006:81 para. 114, *Commission v Council (ERTA)* ECLI:EU:C:1971:32 paras 15-16.

[178] M Cremona, 'EU External Relations: Unity and Conferral of Powers' in L Azoulai (ed) *The Question of Competence in the European Union* (OUP 2014) p.73.

affect common rules or alter their scope. Therefore, in principle, implied external competences exist in parallel to internally conferred competences for the obtainment of the objectives of the Treaties. This endows the Union with the power to use international treaties as a mean to attain internal as well as external policy objectives. While the existence of implied external competences has not given rise to much controversy, disputes in the CJEU's jurisprudence have predominantly focused on the nature of such competence.

The nature of the EU's external competences may be exclusive or shared. The conditions for exclusivity are elaborated in article 3 TFEU. Its first paragraph indicates competences which are *a priori* exclusive,[179] and the second paragraph details the conditions in which a competence becomes exclusive also called "supervening exclusivity". Three conditions are outlined namely, when (i) it is provided for in a legislative act, (ii) it is necessary to exercise an internal competence, or (iii) may affect common rules or alter their scope.[180] Therefore, unless a competence meets the criteria for exclusivity, it will be considered shared, which describes the majority of Union external competences. As it is the case for the internal competences of the Union, shared external competences can be pre-emptive (article 4(2) TFEU) and complementary (such as development and humanitarian aid in article 4(4) TFEU). Furthermore, other external competences can have a supporting and coordinating character (article 6 TFEU) or constitute a *sui generis* category in the case of the CFSP.[181]

3.2.2 Existence and exclusivity of external competences: articles 216(1) TFEU and 3(2) TFEU

Leaving aside the condition of explicit external competences ("where the Treaties so provide"), it can be seen that there is a strong similarity between articles 216(1) TFEU and 3(2) TFEU. A distinction between the two provisions has however been recognised by the Court in *Germany v Council* (*COTIF I*), where it concluded that article 216(1) TFEU has a broader scope than article

[179] Art. 3(1) TFEU "The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy".

[180] Art. 3(2) TFEU.

[181] Several labels have been given to the CFSP such as that of a "parallel" competence constituting a *sui generis* category of EU external competence in B Van Vooren, R Wessel, *EU External Relations Law. Text, Cases, and Materials* (CUP 2014), p. 105 or a "hybrid" competence in A Ott, 'EU External Competence' in J Larik, R Wessel (eds), *EU External Relations Law Text, Cases and Materials* (1st ed, Bloomsbury Publishing 2020), p. 70.

3(2) TFEU.[182] As follows, the conditions for the existence and exclusivity of EU competence will be compared.

3.2.2.1 Necessity

The requirement of necessity has been considered only in a limited manner in the case law of the Court. It was first elaborated in Opinion 1/76 on the establishment of a European laying-up fund for inland waterway vessels on the Rhine River. The negotiation with a third country (Switzerland) was inherent in the type of policy initiative, namely the regulation of transport on the Rhine and could only be meaningful if all countries involved participated in the initiative. Thus, an agreement not including Switzerland was seen unfit to pursue that objective. In this case, six Member States participated in the conclusion of the agreement and the Court mentioned that it was due to its particular structure, and to the fact that the Member States were already parties to an earlier agreement on the European river environment.[183] Subsequent case law has provided further clarity on the "necessity requirement" including the meaning of necessity, and whether it indicated an exclusive or shared competence. First, in Opinion 1/94, applying the criteria developed in Opinion 1/76 to ascertain the exclusivity of Union competence, the Court indirectly clarified that the necessity requirement of Opinion 1/76 concerned the establishment of an exclusive external competence, today codified in article 3(2) TFEU.[184] Adding to this, Opinion 1/03 further stated that "necessity" can be at the basis of both shared and exclusive external competences.[185] Only Opinion 2/15 gave a more complete indication on the meaning of the term: when an international action is indispensable the competence will be exclusive; when instead it only facilitates Union action, the implied competence will be "shared" within the meaning of article 216 TFEU.[186] Significant is also the specific wording introduced by the Lisbon Treaty. On the one hand, necessity as the basis for exclusivity is due to the exercise of an internal competence; on the other hand, necessity might not lead to exclusivity when it is for the achievement of an objective of the Treaties. In Opinion 1/76 it can also be observed that the agreement in question was not only a mean to exercise an internal competence (transport)

[182] See C-600/14 *Germany v Council (COTIF I)* ECLI:EU:C:2017:935, paras 50-51.
[183] Opinion 1/76 ECLI:EU:C:1977:63, para. 7.
[184] Opinion 1/94 ECLI:EU:C:1994:384, paras 82-86.
[185] Opinion 1/03 ECLI:EU:C:2006:81, paras 114-115.
[186] Opinion 1/94 ECLI:EU:C:1994:384 para. 85-86, Opinion 2/15 ECLI:EU:C:2017:376 paras 238-241.

externally, but aimed to develop the EU's internal transport networks which is an internal policy goal as opposed to solely an objective of its external action.[187]

3.2.2.2 Provided for in a legally binding EU act or in a legislative act

Both articles 3(2) TFEU and 216(1) TFEU provide that the Union may conclude international agreements when it is explicitly provided for in a binding Union act. Article 216(1) TFEU however establishes a broader condition than article 3(2) TFEU. According to Ott, in fact, article 216 TFEU combines treaty-making functions under the TEU and the TFEU,[188] and as such refers more generally to "legally binding acts" rather than "legislative acts" in this manner including a broader array of Union acts such as Council Decisions in the context of the CFSP not qualifying as legislative acts as the potential sources for granting the Union the power to conclude international agreements exercising its shared competence.

3.2.2.3 Affecting common rules or altering their scope

The same condition of "affectation" can be seen in both articles 216(1) and 3(2) TFEU constituting perhaps the most problematic aspect in order to separate the existence and exclusivity of EU competence.

In particular, "affectation" in article 3(2) TFEU is a codification of the well-known *ERTA* doctrine which entails that Member States are pre-empted from acting externally in a certain area as a result of a supervening exclusive implied external competence of the Union. In the *ERTA* case, the Court established that a shared competence may become an exclusive Union external competence as a result of the internal exercise of such competence. The Court held: *"[i]n particular, each time the Community, with the view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules*".[189] As put forward by Vedder, in *ERTA,* the Member States could not be allowed to conclude international agreements in fields regulated by common rules, and, as a consequence, the then Community

[187] Unlike the English and French versions of the TFEU, the Italian version might capture this when considering that the conclusion of an agreement is necessary for the exercise of a competence "at the internal level" as opposed to an internal competence.
[188] A Ott, 'EU External Competence' in J Larik and R A Wessel (eds), *EU External Relations Law Text, Cases and Materials* (2 ed, Hart Publishing 2020) p. 77-78.
[189] Case 22/70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32 para. 17.

was entitled to conclude agreements in the fields where internal common rules existed and might have been affected by the conclusion of an international agreement.[190]

It has been pointed out in the literature that, the legal foundation of ERTA pre-emption is shared with that of primacy.[191] In *Costa v ENEL,* the Court held that the executive force of Union law cannot vary from one Member State to another in deference to subsequent domestic laws without jeopardising the attainment of the objectives of the Treaty as set out in current article 4(3) TEU. Therefore, pursuant to the principle of primacy, national courts are required to disapply national law in conflict with Union law. Unlike primacy, ERTA pre-emption is not dependent on a specific overlap or conflict between a domestic and an EU measure, but seeks to preserve the operation of EU law and prevent potential conflicts which may occur because a field has been regulated by the Union. The Court developed a detailed method to determine when common rules may be affected by an international agreement. In essence, the Court will first determine whether there is an overlap between the scope of existing Union rules and the provisions of an international agreement. If so, the Member States will be prevented from acting. If an overlap is only partial, the Court will look into whether the field is largely covered by Union rules examining the scope, nature and content of common rules.[192] If the field is only partially or insufficiently covered, an agreement may be concluded by the Union exercising its shared competence. An example in which the Court held that the competence of the Union was shared with its Member States can be seen in the case *Antarctic MPAs*.[193]

It must be noted that the term "pre-emption" in the internal field and ERTA-type pre-emption to act externally are two different concepts fulfilling different functions. The pre-emption of Member States' internal action in an area of shared competence is regulated by article 2(2) TFEU and is specific in the sense that concerns exactly the areas touched upon by a Union measure. Externally, instead, ERTA pre-emption or "supervening exclusivity", is based on the criterion of affecting common rules which may include a much wider set of rules

[190] C Vedder, 'From *ERTA* to *Singapore*' in S Lorenzmeier, R Petrov, C Vedder (eds) *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood*, p. 60.
[191] See M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) pp. 71-75; B Van Vooren and R A Wessel, *EU External Relations Law. Text, Cases, and Materials* (CUP 2014), pp. 129-131.
[192] See a detailed explanation in B Van Vooren, R A Wessel, *EU External Relations Law. Text, Cases, and Materials* (CUP 2014), pp. 114-124.
[193] Joined Cases C-626/15 and C-659/16 *Commission v Council (Antarctic MPA)* ECLI:EU:C:2018:925, paras 100, 124.

because a field can be affected by an international agreement even if it has not been entirely regulated at Union level but if it was regulated to a large extent. This means that the possibility of limiting the independent action of Member States through the exercise of Union shared competences is greater externally then internally.[194] This is justified by the fact that pre-emption externally is not solely needed to ensure the attainment of Union objectives but also to preserve common rules, the common action of the Union, and ultimately the EU's decision-making process. While internally pre-emption is the consequence of Union action, ERTA pre-emption can express an already existing or partial internal pre-emption and operate as an enabler of future Union action. When a field has been largely regulated by Union law, individual international commitments of the Member States may jeopardise the attainment of Union objectives within the meaning of the future development of a Union policy. This is why externally ERTA pre-emption goes beyond the respect of primacy and finds its legal basis in the third segment of the principle of sincere cooperation.[195]

3.2.3 The consequences of the categorisation of Union competences as exclusive or shared for the Member States

The categorisation of Union competences as exclusive or shared has a direct impact on the exercise of Member States treaty-making powers. In matters falling within exclusive or supervening exclusive Union competences, the Member States are prevented from acting internally and externally, unless specifically authorised to do so by the Commission in accordance with article 2(1) TFEU. With regard to shared competences, different types of shared competences can be identified which may or may not allow Member States to act next to the Union. A shared competence might have a pre-emptive character as outlined in article 2(2) TFEU, including the competences listed in article 4(2) TFEU, but there are also areas that are under a shared complementary competence such as humanitarian aid and research, pursuant to which Member States can always act next to the Union. While not officially within the articles on competence, the CFSP can also be understood as having a shared and non-pre-

[194] M Kuisma, J Larik, 'The Continuing Contestation of *ERTA*: Conferral, Effectiveness and the Member States' Participation in Mixed Agreements' in N Levrat, Y Kaspiarovich, C Kaddous and R A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2022), pp. 51-52.
[195] See M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) pp. 71-75; B Van Vooren and R Wessel, *EU External Relations Law. Text, Cases, and Materials* (CUP 2014), pp. 129-131.

emptive character.[196] Lastly, there are supporting and coordinating competences such as human health, education, and culture outlined in article 6 TFEU which provide for a more limited role for the EU, excluding harmonisation at Union level and in which the Union may not supersede the Member States.

In the *COTIF I* case,[197] the Court clarified that the Union may exercise alone an external shared implied competence pursuant to article 216(1) TFEU, without the need of its prior internal exercise and for it to fall under article 3(2) TFEU. What is necessary is however that the required majority is reached within the Council. Shared external competence therefore does not necessarily entail mixity. In the case of complementary competences, the Union may act independently externally, but Member States are not prevented from taking further individual action. With regard to supporting competences, some scholars consider that the Union may, with the required majority in the Council, exercise such competences externally without the Member States like other non-exclusive competences.[198] This has not been conclusively answered, and it is doubtful whether it is possible under EU law. Supporting and coordinating competences prevent harmonisation at Union level and Member States remain primarily competent to adopt legislation in these areas. It is submitted that action by the Union could perhaps only be possible if both Union law and an international agreement set minimum standards but, at the same time, one may wonder whether coming within the realm of EU law the CJEU's interpretative jurisdiction might also lead to harmonisation of rules within these areas. This argument has been rejected by AG Hogan in his views on Opinion 1/19 on the EU's accession to Convention on Preventing and Combating Violence against Women and Domestic violence, also known as the Istanbul Convention, noting that Member States in their national laws may always go beyond the minimum standards established.[199] Moreover, in the same Opinion, while the AG considered that "it is possible to have doubts whether the Council was correct in considering that the Union will be obliged to exercise those competences in virtue

[196] Literature identifies the CFSP with various terms such as a "parallel" competence see, B Van Vooren, R Wessel, *EU External Relations Law. Text, Cases, and Materials* (CUP 2014), p. 105, and a "hybrid" competence see, A Ott, 'EU External Competence' in J Larik, R Wessel (eds), *EU External Relations Law Text, Cases and Materials* (1st ed, Bloomsbury Publishing 2020), p. 70.

[197] Case C-600/14 *Germany v Council (COTIF I)* ECLI:EU:C:2017:93.

[198] This is considered possible by I Bosse- Platière, M Cremona 'Facultative Mixity in the Light of the Principle of Subsidiarity' in M Chamon, I Govaere (eds) *EU External Relations Post- Lisbon. The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p. 50.

[199] AG Hogan Opinion 1/19 ECLI:EU:C:2021:198, para. 107.

of the third situation mentioned in article 3(2) TFEU"[200] (because he deems that *prima facie* the fact that both the Convention and EU directives provide for minimum standards questions the affectation of common rules according to art. 3(2) TFEU), he does not touch upon whether the Union could have equally exercised alone those competences. Ruling on Opinion 1/19, the Court did not question the Council's and Parliament's understanding that the selected provisions affected common rules within the meaning of the ERTA doctrine. It could be considered that either the Court sought to implicitly confirm this reading, or attempted as far as possible to remain within the realm of the question asked. One could consider this second option more likely because the Court recognises that it did not limit its inquiry to exclusive competences, as the Parliament's submission concerned the scope of the agreement and the legal basis regardless of the nature of the competence.[201] It remains thus unclarified by the Court whether the legal bases chosen indeed entail an exercise of only Union exclusive external competences through the partial conclusion of the Istanbul Convention.

With regard to agreements that contain both competences of the Union and competences which can be considered retained by the Member States, agreements must be concluded jointly. These instances constitute without doubt situations of obligatory mixity. Areas of retained competence include among others territorial boundaries and national defence matters but also recent case law has highlighted the competence of the Member States to ensure that domestic courts function as courts of the EU legal system.[202] Indeed, national judiciaries are competent to give effect to national and EU law at the domestic level and such power may not be assimilated and considered ancillary to other competences. As a result, future agreements that involve a transfer of jurisdiction from national courts to international bodies such as ISDS will have to be adopted jointly by the Union and the Member States.

[200] ibid, para. 102.

[201] Opinion 1/19 ECLI:EU:C:2021:832, para. 280. The approach followed by the Court in Opinion 1/19 can be viewed next to the one adopted with regard to Opinion 3/15 concerning the EU's conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled. In that case, the Court is asked to determine whether the Union has exclusive competence to conclude the agreement and its analysis is solely concerned with the applicability of article 3(1) TFEU and 3(2) TFEU. See Opinion 3/15 ECLI:EU:C:2017:114.

[202] See Opinion 2/15 ECLI:EU:C:2017:376, paras 285-304.

3.2.4 The exercise of Union competences *vis-à-vis* international law

Beyond the identification of a Union external competence and its nature, other external considerations may determine who will exercise such a competence. As already mentioned, some internal factors shape Union action, for instance, if a required majority is not reached within the Council, a shared competence might be exercised jointly with the Member States even though an agreement could have been concluded solely by the Union. Externally, the Union will have to comply with the rules of an international organisation which could preclude it from participating directly. In such a case, the Member States may be required to act as the EU's trustees, exercising a Union competence through their actions. Or in a reverse situation, an international organisation might require the membership of both the Union and the Member States as its voting powers depend on the presence of all its members as parties. These are aspects that might cause a discrepancy between the definition of external Union competences according to Union law and the composition or membership to international organisations and treaties. Therefore, the fact that an agreement has been concluded as an EU-only agreement, a mixed agreement, or has been concluded solely by the Member States is not representative of the substantive extent of the exercise of competence by the Union. An important element that can provide an indication of the exercise of Union competence, which influences the exercise of Union external competence from the start, is the determination of an agreement's legal basis which will be addressed in the following paragraph.

3.2.5 The choice of legal basis for the conclusion of an international agreement

Next to article 216(1) TFEU which provides that the EU may conclude international agreements, a "substantive legal basis" is required according to the principle of conferral in order to conclude an agreement.[203] Indeed, the Court has held that the choice of an appropriate legal basis is of constitutional significance.[204] Moreover, the legal basis determines the procedure to be followed for the adoption of an act which may affect the roles of the institutions within the Union. This can concern the vertical and horizontal allocation of competences between the Union and the Member States and among the Union institutions

[203] A Ott 'EU External Competence' in J Larik, R Wessel (eds) *EU External Relations Law Text, Cases and Materials* (1st ed, Bloomsbury Publishing 2020), p. 88.
[204] See for example, Opinion 2/00 (Catagena Protocol) ECLI:EU:C:2001:664, para. 5.

respectively. In order to determine the appropriate legal basis for concluding an international agreement, the Court has held that the choice *"may not simply depend on an institution's choice of the legal basis, for a measure may not depend simply on an institution's conviction as to the objective pursued, but must be based on objective factors amenable to judicial review"*.[205] To determine the correct legal basis, first, the Court will examine the scope of the external competence of the Union and then proceed to identify the main aim and content of the measure; and, second, operate the so-called "centre of gravity" test. This test aims at determining whether a single legal basis can be found as some aspects are considered ancillary, and can be subsumed to other areas of competence (for instance this is quite common with the CCP), or whether exceptionally two or more legal bases are needed if compatible in their respective procedures. Of course, whether or not there is a certain legal basis will determine (from an EU perspective) whether the agreement could be an EU-only or mixed agreement. It has been reported that there is a tendency of the Council to propose the addition of multiple legal bases to try and have the agreement concluded as mixed or opt for a legal basis that is not covered by EU exclusive competence such as article 114 TFEU instead of article 207 TFEU.[206] It is now clear however that the so-called "*pastis* theory", by which only one drop of shared competence could cause the agreement to be mixed is not applied. At the same time, another development is the division of Council decisions each with its own legal basis/es. For example, in Opinion 1/19 the Court indirectly stated that it was not possible to divide the decision to sign the Istanbul Convention into two merely because of the opt-outs of two Member States in certain policy areas.[207] Similarly in *Commission v Council (Armenia)*, the Court held that the Council could not have split a common position under article 218(9) TFEU into two, one of which was limited to the CFSP component of the agreement which, in the broader context of that agreement, was only an ancillary element.[208] The finding in *Armenia*, reaffirmed the Court's prior determination in *Commission v Council (Kazakhstan)* and *Parliament v Council* (*Tanzania)* that the centre of gravity test also applies with regard to CFSP

[205] See case 45/86 *Commission v Council* (generalised system of preferences) ECLI:EU:C:1987:163, para. 11.
[206] See for instance case C-137/12 *Commission v Council* ECLI:EU:C:2013:675 concerning the European Convention on the legal protection of services based on, or consisting of, conditional access.
[207] Opinion 1/19 ECLI:EU:C:2021:832, paras 327-328.
[208] Case C-180/20 *Commission v Council (Armenia)* ECLI:EU:C:2021:658, para. 56.

and non-CFSP areas, both when the CFSP elements are considered ancillary[209] and predominant.[210]

Whether or not elements are ancillary and may or may not justify the adoption of multiple legal bases (and in turn the possible participation of the Member States) is further complicated if the Union only partially accedes to an international agreement. This is the case of the Istanbul Convention which, according to the Council Decision on conclusion, has now been concluded explicitly only insofar as it concerns EU exclusive competences.[211] The Court has confirmed the reasoning of the AG which considers that the appropriate legal basis/es to conclude an international agreement are to be identified with regard to the "agreement envisaged"; thus, with regard to the parts or provisions that the Union decides to commit to. This seems to contrast with the position that the legal basis of an agreement may not be linked to the goals pursued by the institution but is based on objective factors.[212] Whether or not part of an international agreement falls under Union competence may be relevant in the context of judicial review and interpretation because of the link that the Court has constructed between the decision concluding an agreement and the agreement being an integral part of EU law.[213]

The choice of legal basis with regard to association agreements (AA) instead appears subject to different considerations. Article 217 TFEU can be seen as a "neutral" legal basis that allows the Union to establish a framework for action with a third country concluding an agreement that covers a wide range of policies. Unlike article 216(1) TFEU, AAs may have article 217 TFEU as their legal basis and do not require a substantive legal basis. For instance, this was the case of the Trade and Cooperation Agreement (TCA) with the UK.[214] In practice,

[209] Case C-244/17 *Commission v Council (Kazakhstan)* ECLI:EU:C:2018:662, para. 46. The Court had previously held that agreements predominantly concerned with the CFSP, even though also pursuing other goals, had been correctly concluded with a sole CFSP legal basis, see C-263/14 *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435 and C-658/11 *Parliament v Council (Mauritius)* ECLI:EU:C:2014:2025.
[210] Case C-263/14 *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435.
[211] Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement, recital 5.
[212] M Cremona, 'Mixed Agreements and Constitutional Gaps' in by M Claes, E Vos (eds) *Making Sense of European Union Law* (Hart Publishing 2022), pp. 22-23.
[213] ibid.
[214] Council Decision (EU) 2021/689 of 29 April 2021 on the conclusion, on behalf of the Union, of the 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information.

some additional legal bases have also been added to article 217 TFEU, such as article 37 TEU, article 207 and 209 TFEU to show that an agreement entails a CFSP, CCP or development aid component.[215] However, as the Court has clarified in *Commission v Council (Kazakhstan),* if matters pertaining to these substantive fields are only ancillary within the context of the agreement, the adoption of an additional legal basis is not necessary. Thus article 217 TFEU allows to set a legal basis which is not substantive, but which indicates a specific type of EU instrument. Procedurally, agreements adopted on this basis further differ from other agreements in that they are subject to a requirement of unanimity in the Council for their conclusion.[216]

It should be noted that the choice of legal basis is an EU law issue and not an international law one as it relates to an internal act of Union law. As such it does not have to be agreed definitively at the negotiating phase.[217] This may be due to the fact that the Council gives a negotiating mandate to the Commission rather than specific instructions, and then reflect the outcome of the negotiation. During the negotiation phase, the principle of sincere cooperation operates between the Member States and the Union towards reaching an agreement even if the legal basis, and in turn the competence divide, is not well defined beforehand. This is important to fulfil the Union's objective of becoming an international actor but also to advance an EU level strategy.

3.2.6 Article 218 TFEU and the procedure to conclude international agreements

The process for concluding international agreements is laid out in article 218 TFEU and applies to all policy areas including the CFSP, with the exception of article 207 TFEU for the negotiation and conclusion of agreements in the CCP, and article 219(1) and (3) TFEU laying out special rules for agreements on exchange rate system and monetary or foreign exchange regime matters.

The procedure for the conclusion of an agreement starts with the Commission (or possibly the High Representative in the case of the CFSP) making a recommendation to the

[215] For example, EU-Armenia CEPA. See on legal basis, F Naert, 'The Use of the CFSP Legal Basis for EU International Agreements in Combination with Other Legal Bases' in J Czuczai, F Naert (eds) *The EU as a Global Actor: Bridging Legal Theory and Practice* (Brill 2017), pp. 394-423.
[216] Art. 218(6)(a)(i) TFEU.
[217] The choice of legal basis could be further be modified between the Council decisions on signature and conclusion of the same international agreement as the Court held in Opinion 1/19 (Istanbul Convention) ECLI:EU:C:2021:832, para. 201.

Council. The Commission will then commonly be the actor designated to conduct the negotiations. It is worth noting however that the actors involved in the negotiations do not need to mirror whether or not an agreement might be concluded as an EU-only or mixed agreement.[218] The Council is the institution tasked with authorising the opening of negotiations, adopting negotiating directives and authorising the signature and conclusion of agreements. Council decisions are adopted by QMV in principle, but may be subject to unanimity for certain subject matters (article 218(8) TFEU). Article 218(6) TFEU calls for the consent of the European Parliament in some circumstances and in the other cases the Parliament should only be consulted and deliver its opinion within a time limit that the Council may set. An exception to the consultation of the Parliament is for CFSP agreements on which the Parliament must nonetheless remain informed according to article 218(10) TFEU.[219] Negotiations end with the Council approving a decision for signature, giving a green light to the adoption of the text which will then be subject to approval through ratification. Thus, the conclusion of an international agreement by the Union is composed by a decision for signature and one for conclusion (ratification). Lastly, article 218(9) TFEU provides for the possibility to suspend the application of an agreement but there is no provision laying out specific conditions for terminating international agreements. Article 218(9) TFEU also concerns the adoption of positions on the Union's behalf in a body set up by an agreement when this body adopts acts having legal effects.

While this goes beyond the scope of the present thesis, it is worth noting that next to the procedures outlined in article 218 TFEU, the Union may enter in international "soft" legal commitments such as declarations or joint statements. These may form the interpretative context for agreements or amount to unilateral declarations. For instance, in assessing CETA's ICS the Court considered that the presence of the joint statement and other reassurances as an important element leading to the compatibility of that system with the EU legal order.[220]

[218] P Craig and G de Búrca, *EU Law Text Cases and Materials* (7th ed, OUP 2020), p. 387 "The division of competence in a mixed agreement does not generally influence the participation in the negotiations. While this is decided on a case-by-case basis normally it is the commission who will act as the sole negotiator for the whole agreement according to the mandate given to it by the council."

[219] The obligation to keep the parliament informed under 218(10) TFEU is actionable in Court, see case C-658/11 *Parliament v Council (Mauritius)* ECLI:EU:C:2014:2025.

[220] Opinion 1/17 ECLI:EU:C:2019:341. See for example para. 141.

3.3 The external dimension of the principle of sincere cooperation

3.3.1 Competence creep or competence exercise?

Sincere cooperation has a role both in the existence and nature of the external Union competence as well as in the competence exercise. With regard to the existence and nature of external competences, sincere cooperation and primacy have been identified as the constitutional principles underlying the doctrines of implied powers and ERTA pre-emption. In particular, sincere cooperation has been absorbed in the two doctrines just mentioned which have subsequently developed their own characteristics.[221] Thus, when referring to the establishment and the nature of external competences, sincere cooperation does not result in specific commitments. Rather, article 4(3) TEU finds direct application in the field of EU external relations law to establish duties of action and abstention for the Member States which influence the exercise of Union competence. As the principle has limited the independent action of the Member States on the international plane in favour of Union action, scholars have raised the concern that sincere cooperation might operate a competence creep and influence the competence divide provided in the Treaties.[222] An illustrative example concerns the Union's participation in international organisations when comparing the cases *Commission v Greece (IMO)* and *Commission v Sweden (PFOS)*. In the first case, the Court held that Greece was prohibited from making an independent proposal because the subject matter fell within the exclusive competence of the Union and thus Greece's proposal violated the Union's competence. *Commission v Sweden* concerned another unilateral proposal, that of Sweden to the international conference of the Stockholm Convention on Persistent Organic Pollutants to add PFOS to the list of hazardous substances. In this case, the Court found a violation of the principle of sincere cooperation because, even though the matter fell within a competence shared between the Union and the Member States and Sweden could act, there was a concerted action at Union level not to include such a substance. Thus, Sweden was prevented from acting against that EU strategy according to the principle of sincere cooperation. In both

[221] Neframi draws an analogous conclusion with regard to the relationship between primacy and sincere cooperation in E Neframi 'The Duty of Loyalty: Re-thinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev, pp. 325-326.

[222] See among others, K Reuter, 'Competence Creep via the Duty of Loyalty? Article 4 (3) TEU and its Changing Role in EU External Relations' (unpublished PhD Thesis EUI 2013); G De Baere, '"O, where is faith? O, where is loyalty?" Some Thoughts on the Duty of Loyal Cooperation and the Union's External Environmental Competences in the Light of the PFOS Case' (2011) 36 ELR 405.

cases, Member States are prohibited from taking unilateral actions in an international setting, and this is why it has been argued that the principle of sincere cooperation is capable of turning a shared competence into an exclusive one and constitutes a form of competence creep. The principle of sincere cooperation is not however a competence conferring provision and operates to manage competences shared between the Union and the Member States rather than preventing their exercise from the start.[223] As noted by Chamon, "it is precisely because the Member States act alongside and jointly with the Union, rather than allowing the EU to act on its own, that they must cooperate with the EU, notably to ensure that EU commitments are fulfilled".[224] Sincere cooperation does not mean EU action, but rather aims at ensuring the effective exercise of EU competences which might be by the EU but also by the Member States.[225] Therefore, as the Court held in Opinion 1/94, EU-only action might not be chosen merely because it would simplify the exercise of EU competence in the absence of such an exclusive competence.[226] Similarly, the Court has upheld this principle in *COTIF I*, confirming that the Council has the choice to determine the extent of the of exercise of EU shared competences when concluding an international agreement giving in this way a green light to facultative mixed agreements, in which the Union does not exercise the full extent of its external shared competences.[227]

3.3.2 The internal and the external application of the principle of sincere cooperation

The claim of competence creep can also be contextualised when comparing the internal and the external application of the principle of sincere cooperation, which leads to different outcomes on the internal and external planes. It is commonly agreed in the literature that the principle of sincere cooperation applies more stringently in the external field than in the internal one.[228] Internally sincere cooperation is one dimensional as it is linked to the implementation and enforcement of EU law, to ensure its effectiveness and *effet utile*. This to

[223] C Hillion, M Chamon, 'Facultative Mixity and Sincere Cooperation' in M Chamon, I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p. 89.
[224] ibid.
[225] The link between effectiveness and sincere cooperation has been highlighted in academic writings. Among others see E Neframi 'The Duty of Loyalty: Re-thinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev 323; and A Theis 'The Search for Effectiveness and the Need for Loyalty in the EU External Action' in M Cremona (ed), *Structural principles in EU External Relations Law* (Hart Publishing 2018).
[226] Opinion 1/94 ECLI:EU:C:1994:384, para. 106.
[227] Case C-600/14 *Germany v Council (COTIF I)* ECLI:EU:C:2017:935 paras 49-50.
[228] See among others, C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (OUP 2019), pp.74-77.

some extent restricts the Member States' retained competences for instance with the necessity of complying with the requirements of effectiveness and equivalence. Internally, however, the principle of sincere cooperation does not lead to the disapplication of national law nor prevents the Member States from acting, rather it governs their mode of action to obtain a certain result. Indeed, internally it is the principle of primacy that requires the disapplication of national law in contrast with Union provisions. In the external field, the principle of sincere cooperation can be seen as bi-dimensional. Specifically, the second and third segments of article 4(3) TEU do not refer solely to obligations for the Member States to enable the accomplishment of Union obligations, tasks, and objectives in terms of the implementation and enforcement of EU law, but also with regard to the exercise of Union competences which internally follows in a more straightforward manner from the division of competence in the Treaties. In the external exercise of Union competences, the principle of sincere cooperation fulfils two functions: it enables the Union to exercise its external competences *vis-à-vis* third parties to carry out its external objectives, but also to exercise its competence in order to preserve common rules and the further development of policies at EU level safeguarding internal objectives which is ultimately the autonomy of the EU legal order. Individual actions of the Member States on the international plane such as the conclusion of international agreements conflicting with that of the Union may not only frustrate a common strategy, but existing and future developments of EU rules. In addition, subsequent amendments to an international commitment are more complex than those to norms adopted at the domestic level. The next section will explore more concretely the contribution of the principle of sincere cooperation in the exercise of Union competences identifying the circumstances in which the principle is applied, and both functions of the principle can be observed.

3.4 The application of the principle of sincere cooperation in the exercise of external Union competences

In the context of the exercise of the Union's external competences, the principle of sincere cooperation aims at allowing the Union to act on the global plane unhindered by the presence of the Member States as international actors pursuing their own interests and foreign policies.

The progressive increase of EU external competences and the ERTA pre-emption doctrine have already limited the Member States' independent action both within and outside the framework of joint action and, more specifically, the contribution of sincere cooperation can relevant where the Member States and the Union share the competence to act externally and the co-existence of their action could compromise EU action. Examples include among others, hindering the Union's negotiation of international agreements with third countries, preventing the Union from exercising its voting rights in an international organisation which precludes the exercise of a Union competence. The following paragraphs will delve into the contribution that sincere cooperation brings to Union action when the Union seeks to exercise its external competences allowing the Union to pursue a strategy leading to EU action (3.4.1), exercise competences jointly with the Member States concluding mixed agreements (3.4.2), and exercise its competence via the Member States acting as its trustees (3.4.3).

3.4.1 Allowing the Union to pursue an EU strategy or concerted action

Member States remain subjects of international law and exercise their treaty-making powers as part of their foreign policies. At the same time, in areas in which there is an exclusive EU competence, Member States will need to be authorised by the Commission prior to concluding an international agreement. In the context of competences which are shared between the Union and the Member States, several cases show that the Union has relied on the obligation of sincere cooperation in order to ensure that an EU strategy, common position, or concerted action can materialise without interference of individual actions of the Member States. Early case law of the CJEU on the role of sincere cooperation include *Kramer* and *Commission v UK (Sea Fisheries)*. In the first case, sincere cooperation was found to apply to limit the independent action of the Member States during a transitional period after which the competence to regulate measures restricting fishing was to become exclusive. The reasoning expressed in the case for limiting the Member States from exercising their competence in the area is worth recalling in full:

> "There is no doubt that member states cannot be required simply to abolish the measures which they have taken while waiting for rules and regulations to be drawn up by the community. But when they apply or possibly modify them they must take care not to impede the implementation of a set of community rules and endanger the interest which the community has in the conservation and rational use of the resources

> of the fishing industry. This applies *a fortiori* if they enter into agreements. Although the community is not legally bound by these agreements, they would hinder the fulfilment of its task since it would be difficult for it to disregard them in its relations with third countries. Furthermore, during the negotiations with those countries member states inevitably give priority to their own interests over those of the community. Only negotiations conducted by the Community or on a transitional basis by a member state acting under an authority given by the community and in accordance with the latter's general directions would ensure that all the interests involved are reconciled."[229]

The CJEU upheld this reasoning and ruled that Member States were not free to enter into international agreements during the transitional period. This is a rather specific situation characterised by a *quasi*-exclusivity of Union competence as the EU competence on matters concerning fisheries was set to become exclusive by a certain date. In the second case, *Commission v UK (Sea Fisheries)*, the abovementioned transition period expired and the Commission submitted some proposals to the Council. However, these proposals were not adopted, and the Council provided temporary measures instead. Due to the lack of renewal of these measures, the UK had given notice to the Commission that it would enact its own measures which then triggered the infringement action brought by the Commission. In the judgment, the Court stated that the inaction of the Council may not result in the competence going back to the Member States.[230] In particular, the Court acknowledged that even though the Council had not adopted the Commission's proposals, it issued guidelines which remained applicable at the time of the events which partially included the Commission's proposals.[231] The Court considered ultimately that the duty of sincere cooperation imposed duties of action and abstention even if, in this case, the proposals had not been adopted by the Council but *"represented a point of departure for concerted community action"*.[232] Given that the competence in that area was exclusive, Member States could only act on behalf of the Union and, in the absence of appropriate action on the part of the Council, could not *"bring into force*

[229] Joined Cases 3/76, 4/76 and 6/76 *Kramer et al.* ECLI:EU:C:1976:114 statements submitted to the Court, p. 1301.
[230] Case 804/79 *Commission v UK (Sea Fisheries)* ECLI:EU:C:1981:93, para. 22.
[231] These decisions which were essentially of an interim nature adopted the Commission's proposals as regards total allowable catchers. See J Temple Lang 'The Duty of Sincere Cooperation as a Lawyering Strategy. A Personal Account of Commission v. United Kingdom Case 804/79' in F Nicola, B Davies (eds), *EU Law Stories Contextual and Critical Histories of European Jurisprudence* (OUP 2017).
[232] Case 804/79 *Commission v UK (Sea Fisheries)* ECLI:EU:C:1981:93, para. 28.

any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission".[233] Here, the Court further notes the obligation to have detailed consultations with the Commission and to seek its approval, but also not to approve a measure in spite of objections or conditions formulated by the Commission.

The abovementioned cases concern two particular situations: a transitional period before which a competence will become exclusive, and the lack of exercise of a Union exclusive competence through the adoption of an EU act. In both instances, according to the principle of sincere cooperation, Member States are prevented from acting when it would jeopardise the future exercise of an EU exclusive competence.

The Lisbon Treaty provides a more punctual catalogue of competencies as well as the codification and expansion of some existing external competences such as the CCP. In particular, the current Treaties include foreign direct investment as an exclusive EU competence under article 207 TFEU. In this field, secondary legislation, the so-called "Grandfathering Regulation", has been adopted to coordinate the exercise of Member States' existing BITs.[234] The Regulation includes instructions for the Member States for continuing the implementation of their agreements following certain guidelines and conclude new agreements under the supervision of the Commission.

Subsequent cases have considered the principle of sincere cooperation in the context of competences which remain shared between the Union and the Member States. In *Commission v Luxembourg* and *Commission v Germany,* these Member States had concluded bilateral agreements with third states (some of which later became EU Members) despite of a Council Decision to negotiate a multilateral agreement. The Court dismissed the first argument brought by the Commission asserting that the conclusion of independent agreements violated the division of competence between the Union and the Member States which had become exclusive according to the ERTA doctrine. The second argument concerning a violation of the principle of sincere cooperation was instead upheld by the CJEU, ruling that:

> *"[t]he adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires for that purpose, if not a duty of abstention*

[233] ibid, para. 30.

[234] Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation."[235]

The case *Commission v Germany* in particular provides additional depth to the obligations arising from sincere cooperation. In this case, independent agreements were signed before the adoption of the Council Decision and Germany had consulted the Commission when the agreements were negotiated and signed. Nonetheless, the Court noted that the ratification and the implementation of the bilateral agreements still occurred after the decision of the Council was adopted, and took place without consulting the Commission.[236] Moreover, like what had been put forward in *Kramer*, the Court stated that the pledge to denounce the bilateral agreements as soon as a multilateral agreement had been concluded by the Union was not sufficient to comply with the principle of sincere cooperation. In fact, it concludes that *"such a denunciation would have had no practical effect since it would not have facilitated the multilateral negotiations conducted by the Commission"*.[237] It can be observed that sincere cooperation is not relied upon to address a potential conflict with EU law, but rather to enable the EU's standing as an autonomous actor and allow its effective action on the international plane. This confirms that the duties of action and abstention arising from sincere cooperation do not have the same aim as the obligation to refrain from acting derived from the attribution of competence. In *Commission v Germany*, the Member States' abstention is not to protect the existing internal legal *acquis* or other pre-existing Union actions,[238] but rather about the effectiveness in the exercise of Union competence which may be put into jeopardy by the interfering actions of the Member States. According to the judgment, to comply with the principle of sincere cooperation, Germany would have had to either refrain from enacting the agreement or implement it under the guidance of the Commission.

Against this backdrop, Heliskoski inquired how far Member States are required to foresee Union action, for instance whether the Union will exercise its competence in the

[235] Case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462, para. 66.
[236] ibid, para. 71.
[237] ibid, para. 72.
[238] As recalled by the facts of the case in para. 21 "To date, however, no multilateral agreement has been concluded by the European Community with the countries concerned." Moreover, the Court itself concluded that ERTA doctrine did not apply, thus the field was not largely covered by Union rules.

future and thus some policy space needs to be left for it.[239] This is not a matter of attribution of competence because, as witnessed in these latter cases, Member States are competent to act. He concludes that rather than foreseeing Union action, the existence of a common strategy seems to be the determining factor, possibly in addition to a situation of *quasi*-exclusivity as evidenced by the cases concerning fisheries.[240] Thus, there has to be some progress in the EU decision-making procedure which might be undermined by individual initiatives of the Member States. This is also the point put forward by Klamert, who argues that objectives alone would not suffice to create duties of action or abstention, but that some further concretisation is needed.[241]

After *Commission v Luxembourg* and *Commission v Germany*, the Court's jurisprudence has adopted an even more stringent view on the obligations arising from sincere cooperation constituting an obligation of result on the Member States, which has been termed by some scholars "a duty to remain silent".[242] It is not clear whether this is due to the context of mixed action and in turn might be justified by the need to ensure the unity of the external representation of the Union or rather shows an evolution of the principle.[243] Before discussing the specific situation of the principle of sincere cooperation enabling the Union to pursue its strategy in the framework of joint action, a final point with regard to pursuing a Union strategy concerns the fact that, so far, the case law of the Court has only considered the conclusion of international agreements but not the withdrawal from an international agreement. It is submitted that an obligation of sincere cooperation binding the Member States could also be envisaged in the context of a Union strategy to withdraw from an international agreement. In particular, after the failed attempt at modernising the Energy Charter Treaty (ECT), the EU's

[239] J Heliskoski, 'The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union' in A Arnull et al. (eds), *Constitutional Order of States? : Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011).
[240] ibid, pp. 562-563.
[241] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 115.
[242] A Delgado Casteleiro, J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 ELR 524.
[243] Most authors refer to a progressive strengthening of obligations deriving from sincere cooperation in the CJEU's interpretation of the principle. See for instance the analysis in B Van Vooren, R A Wessel, *EU External Relations Law: text cases and materials* (CUP 2014) pp. 194-205. On the contrary limiting the scope of the Court's interpretation to mixed agreements, J Heliskoski 'The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union' in A Arnull et al. (eds), *A Constitutional Order of States? : Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), p. 563 "the Court's emphasis on the consequences that actions of a Member States are bound to have for the Union strongly suggests that the *PFOS* case law is intended to apply in the specific context of mixed agreements."

and the Member States' withdrawal is the current course of action.[244] If a decision was adopted to mandate the EU's withdrawal, it can be envisaged that there would be some duties on the Member States which could encompass withdrawal, limiting the application of the treaty, or attempt to reform its provisions if they remained parties.[245]

The Union may also participate in bodies established by the agreements it concludes. It may also set up other organisations and, for example, it has been pushing for the creation of a Multilateral Investment Court (MIC) which might also be endowed with its own institutions. The principle of sincere cooperation has been pivotal to pursue a Union action in bodies of international organisations allowing the Union to enact a certain strategy or adopt a position in the decision-making process of an international organisation. In the above-mentioned *Commission v Sweden (PFOS)*, the Court concluded that Sweden breached its duty of sincere cooperation by making an individual proposal for the inclusion of the substance "PFOS" to the list of hazardous substances of the Stockholm Convention on Persistent Organic Pollutants. The Court considered that there was a Union strategy not to propose such a substance in the context of that Convention due, among others, to economic reasons. The Court recognised that not only formal acts adopted by the Union but also other acts such as meeting minutes may constitute the starting point for a concerted Union action. Thus Sweden should have abstained from acting unless such a common strategy was discarded.[246] In the later *COTIF II* judgment, the Court clarified that non-compliance with a Union position adopted according to article 218(9) TFEU is also a violation of the duty of sincere cooperation.[247] More specifically, this case concerned a shared competence exercised solely by the Union, as the Court ascertained in a prior judgment *Germany v Council (COTIF I)*[248]. A pending infringement

[244] On the 7th July 2023 the Commission published a proposal for a coordinated withdrawal from the ECT, Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty COM(2023) 447 final. See further, European Commission, *Coordinated EU withdrawal from the Energy Charter Treaty,* <https://energy.ec.europa.eu> (accessed 12 September 2023). Italy already withdrew from the treaty in 2016, International Energy Chater, *Italy,* <https://www.energycharter.org> (accessed 20 January 2024). France, Germany, and Poland have withdrawn from the treaty in December 2023, and Luxembourg's withdrawal will take effect in July 2024. International Energy Chater 'Written notifications of withdrawal from the Energy Charter Treaty' (22 March 2023) <https://www.energycharter.org> (accessed 20 January 2024); 'Written notification of withdrawal from the Energy Charter Treaty' (30 August 2023) <https://www.energycharter.org> (accessed 20 January 2024).

[245] See further on withdrawal from the ECT, L Ankersmit, 'Withdrawal from mixed agreements under EU law: the case of the Energy Charter Treaty' (2023) 7 Europe and the World: A law review 1.

[246] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 113.

[247] Case C-620/16 *Commission v Germany (COTIF II)* ECLI:EU:C:2019:256, para. 94.

[248] Case C-400/16 *Germany v Council (COTIF I)* ECLI:EU:C:2017:93.

action launched by the Commission in February 2023 might provide more insights on this issue. The case concerns a referral of Hungary to the CJEU for voting against the position of the Union on the World Health Organization (WHO) recommendations on scheduling cannabis and cannabis-related substances. According to the Commission's press release, the Commission argues that Hungary has failed to fulfil its obligations as included in the Council decision, breaching the EU's exclusive competence and the principle of sincere cooperation.[249]

3.4.2 Bridging the competence gap acting jointly with the Member States: mixed agreements

3.4.2.1 An introduction to mixity

Mixed agreements may be considered a form of Union external action which is expression of the principle of sincere cooperation. This is because the mixed formula allows the Union to act jointly with its Member States where it would not have full competence to do so, thus enabling the EU to exercise its external competence and become a party to international agreements and organisations. Furthermore, as the Court consistently held in its case law, the principle of sincere cooperation is also an inherent feature in these types of agreements. Sincere cooperation permeates the lifecycle of an agreement, from its negotiation to its implementation.[250] The practice of international agreements counting both the Union and its Member States as parties has been a constant feature of the external action of the Union and scholarly works have provided some typologies and categorisations of mixed agreements highlighting their distinctive features such as the competence division and the number of parties.[251] Starting with the parties to an agreement, mixed agreements may be bilateral or multilateral, which entails that the Union and the Member States will be either considered as constituting one party or separate parties. From a competence perspective, instead, it should first be noted that the mere fact that both the Union and Member States are parties to an agreement does not indicate a certain type of Union competence. Looking at the practice of the EU, mixity can in fact be found with respect to agreements covering any Union

[249]European Commission, February infringements package: key decisions (15 February 2023) https://ec.europa.eu/commission/presscorner/detail/en/inf_23_525

[250] See Opinion 1/94 (WTO) ECLI:EU:C:1994:384.

[251] See a recent typology by J Heliskoski, G Kübek 'A Typology of EU Mixed Agreements Revisited' in N Levrat, Y Kaspiarovich, C Kaddous and R A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2022).

competence. The literature accounts for three types of mixity: obligatory, facultative, and functional. The first two take an internal perspective linking mixity to the EU's own division of competences. Functional mixity, instead, takes an external perspective which considers the requirements flowing from international law which can affect the EU and Member States' participation on the international plane.

Obligatory mixity can occur when an agreement covers areas within retained Member States competence or arguably in the case of supporting competences.[252] Some examples include criminal sanctions and their enforcement, education and culture, and territorial demarcation. More recently, in Opinion 2/15, the CJEU held that the operation of national judiciaries also falls within the retained competence of the Member States. Thus, when an agreement has an ISDS system which can remove disputes from the jurisdiction of the national courts, this does not amount to an ancillary matter and Member States need to be parties to an agreement.[253]

Facultative mixed agreements are instead agreements which are concluded jointly as a result of a political choice of the Council (as such only partially reviewable by the CJEU) covering subject matters which fall within the external competence of the Union. Notably in *Germany v Council (COTIF I)*, the Court clarified that the Union does not only have an external competence when it is exclusive, but it may also independently exercise a shared competence. Therefore, if the required majority is reached within the Council, facultative mixed agreements could in principle be concluded by the Union alone through the exercise of exclusive and shared competences. When the Council decides otherwise or such a majority is not reached, the Member States will then exercise the treaty-making competences that they share with the Union and conclude an agreement next to it. To summarise, in the words of AG Ćapeta, "obligatory mixity is the result of conferral whereas facultative mixity is a question of the exercise of conferred competence".[254]

[252] Expressing a contrary position as to the possibility of the Union to exercise supporting and coordinating competences without the participation of the Member States see, I Bosse- Platière, M Cremona 'Facultative Mixity in the Light of the Principle of Subsidiarity' in M Chamon, I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p. 50.
[253] This is not the case for dispute settlement between the parties which may instead be considered ancillary. See the distinction between dispute settlement and ISDS in Opinion 2/15 ECLI:EU:C:2017:376, paras. 285-304.
[254] Opinion of AG Ćapeta, case C-500/20 *ÖBB-Infrastruktur Aktiengesellschaft v Lokomotion* ECLI:EU:C:2022:79, para. 28.

Functional mixity instead shifts the attention to the need to respect already existing rules of international law which might not mirror the vertical division of competence between the Union and the Member States.[255] An example could be if the EU's accession to an instrument or the availability of its voting rights entails as a prerequisite the membership of some of the EU's Member States. In the recent case *Commission v Council (Geneva Act)*, the Union joined some of its Member States as a party to the Geneva Act of the Lisbon Agreement on Appellations of Origin exercising its exclusive external competence in the CCP. In light of the prior participation of some of its Member States, the Union's accession has turned the agreement a mixed one. A first question emerging from the case is whether in light of the EU's exercise of exclusive competence, the Member States previously parties should remain parties to the agreement and/or whether other Member States could join the agreement at a later stage. A second point concerns instead voting rules, because according to that agreement, the Union may only have as many votes as members who are parties of the Act. Thus, without the participation of any Member State, the Union might find itself at a disadvantage compared to the other parties to the agreement.[256] A dispute between the Commission and the Council arose as the latter amended the Commission's proposal for accession enabling Member States to join voluntarily in the future. The Court ultimately ruled that the change operated by the Council was not just an amendment but rather it overstepped the Commission's right of initiative and its clear indication that no further Member States should accede to the Geneva Act.[257] In the judgment, the Court only addressed in passing the issue of voting rights ultimately stating that *"[a]ny difficulty which the European Union may encounter at international level in the exercise of its exclusive competence or the consequences of that exercise on the international commitments of the Member States would not, as such, authorise the Council to amend a Commission proposal to the point that it distorts its subject matter or objective, thereby infringing the institutional balance […]"*.[258] At the same time, the Court clarified that, pending a new Council decision, the seven Member States already parties to the Lisbon Agreement who have relied on the authorisation to accede to the Geneva Act will be

[255] On the concept of functional mixity see I Govaere, '"Facultative" and "Functional Mixity" in light of the Principle of Partial and Imperfect Conferral' (2019) College of Europe Research Paper.
[256] M Chamon, "Commission challenges authorisation granted to Member States to exercise EU exclusive competences" (10 march 2020) Analysis- EU Law Live https://eulawlive.com/analysiscommissionchallenges-authorisation-granted-to-member-states-to-exercise-eu-exclusive-competencesbymerijn-chamon/
[257] Case C-24/20 *Commission v Council (Geneva Act)* ECLI:EU:C:2022:911, para. 108.
[258] ibid, paras 111-112.

able to remain parties to the Geneva Act to protect acquired rights derived from their prior participation in the Lisbon system according to the principle of sincere cooperation.[259]

Agreements concluded on the basis of article 217 TFEU may also be mixed. Existing AAs show different approaches, for instance the Stabilisation and Association Agreement (SAA) with Kosovo and the TCA with the UK were concluded as EU-only agreements, but the majority of this type of agreements remains mixed such as the EEA and the CEPA with Armenia. As noted by Van Elsuwege and Chamon, normally Member States prefer the mixed solution, becoming parties in their own right, because of the political relevance of these agreements as well as to enhance their bargaining power.[260] Indeed, it can be noted that the two EU-only agreements mentioned above were adopted in singular circumstances. The TCA's conclusion was time-sensitive given the imminent deadline for a hard Brexit, and with regard to the SAA with Kosovo, considerations of a political character with regard to the recognition of Kosovo appear to have influenced the choice for an EU-only agreement.[261] Therefore, it seems that for agreements that are based on article 217 TFEU, which has an instrumental character rather than a substantive one, mixity may be subject to pragmatic or political considerations within the Union itself and not only functional to adapt to the requirements of international law.

3.4.2.2 Obligations deriving from the principle of sincere cooperation within mixed agreements

As evidenced in Chapter 2, in the context of mixed agreements, the Court has further specified a particular application of the principle of sincere cooperation resulting in a duty of close cooperation which is inherent in the life cycle of these agreements applying from their negotiation to their implementation. The next paragraphs will follow the stages of the exercise of Union competence through a mixed agreement showing that the principle of sincere cooperation within the framework of joint action creates a multiplicity of obligations which present varying levels of intensity. The most constraining obligations relate to the second segment of article 4(3) TEU which is concerned with the respect of obligations deriving from

[259] ibid, paras 128-129.
[260] P Van Elsuwege, M Chamon, 'The Meaning of 'Association' under EU Law- A Study on the Law and Practice of EU Association Agreements' Study for the AFCO Committee, European Parliament (EU 2019).
[261] M Gatti, 'La base giuridica dell'Accordo sugli scambi commerciali e la cooperazione tra Unione europea e Regno Unito (TCA)' (2021) 4 rivista.eurojus.it, pp. 97, 100.

the Treaties including the competence divide and Union procedures. Other duties relate instead to the third segment of the article which aims at facilitating the achievement of Union tasks which may be more or less concretely specified in further secondary legislation or common strategies; and requires the Member States to refrain from jeopardising Union objectives, a potentially even wider notion creating a bridge between competences and broader Treaty goals. It should be noted that there may be overlaps and grey areas as some situations could engage multiple obligations.

a. The principle of sincere cooperation in the process of conclusion of a mixed agreement

The Treaties do not explicitly mention mixed agreements nor provide a dedicated procedure for their conclusion, but article 218 TFEU lays out a procedure with regard to international agreements more generally. According to the subject-matter of an agreement, article 218(3) TFEU provides that the Commission or the High Representative for Foreign Affairs will negotiate an international agreement on behalf of the Union on the basis of the negotiating directives issued by the Council (article 218(2) TFEU). Notably, through its negotiating directives, the Council may not impose specific detailed requirements which would have the effect of precluding the exercise of the role of negotiator.[262] With regard to mixed agreements, Eeckhout reports that negotiations could be carried out by different negotiators for an EU and a Member States' part respectively, but that, in practice, most mixed agreements are negotiated "under the EU method albeit with a more preponderant role for Member States' representatives".[263] Ultimately however, it is at the moment of the adoption of a decision authorising the signature when the Council takes a position on the extent of the competence exercise by the Union including whether an agreement would be concluded as mixed.

As for the conclusion of the agreements, the Court confirmed the obligation to follow the procedures outlined in article 218 TFEU. In *Hybrid Acts,* the Court held that a mixed agreement may not be concluded through the adoption of two decisions one of which of an intergovernmental nature changing the procedures otherwise applicable in article 218

[262] See P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU law' (2019) 68 ICLQ, p. 9.
[263] P Eeckhout, *EU External Relations Law* (2nd ed, OUP 2011), pp. 216-217.

TFEU.[264] Nor may there be additional requirements to the adoption of a Council decision which *de facto* change the applicable voting such as prior *common accord* as the Court ruled in Opinion 1/19.[265] In both these cases, the intervening Member States and the Council invoked the principle of sincere cooperation to justify the practices based on the need to ensure close cooperation between the exercise of the Union and Member States' competences in concluding a mixed agreement. The Court has however reaffirmed that sincere cooperation *"may not justify the Council setting itself free from the compliance with the procedural rules and voting procedures laid down in article 218 TFEU"*.[266]

It has been argued that the principle of sincere cooperation may also not justify the automatic exercise of EU exclusive or shared competences leading to an agreement being concluded by the Union alone. In a nutshell, sincere cooperation might not give away the possibility of facultative mixity. Indeed, the Court clarified that it is for the Council to decide the extent of the EU's shared competence exercise. This makes sense because, as noted by Dashwood, the external action objectives of the Union may be achieved by the Union as well as the Member States,[267] and thus the Union has the power to decide how its competence will be exercised to reach its objectives. At the same time, mixity introduces a number of potential hurdles linked to the presence of the Member States next to the Union including the need to ensure that they respect the unity and coherence of Union action but also that they undergo national ratification procedures for mixed agreements to enter into force. By making the EU external action essentially more complex, it can be wondered whether the principle of sincere cooperation may result in a duty on the Member States to ensure that the Union exercises its competences to its maximum extent. This however rests on the premise that Union-only action best serves the achievement of Union objectives,[268] which in turn would limit the possibility of having facultative mixity. Hillion and Chamon argued that sincere cooperation may not prevent recourse to facultative mixity because, as emerged from the case law of the Court, the principle concerns the exercise of EU competences and the management of competences which are shared between the EU and the Member States. Sincere cooperation they rightly put forward can thus constrain the exercise of Member States competences when mixed

[264] See case C-28/12 *Commission v Council (Hybrid acts)* ECLI:EU:C:2015:282.
[265] See Opinion 1/19 ECLI:EU:C:2021:832, para. 274.
[266] Case C-28/12 *Commission v Council (Hybrid acts)* ECLI:EU:C:2015:282, para. 55.
[267] A Dashwood, 'The Limits of European Community Powers' (1996) 21 ELR, p.114.
[268] See Opinion of AG Kokott, case C-13/07 *Commission v Council (Vietnam)* ECLI:EU:C:2009:190, paras 83-84.

action is ongoing.[269] As such, the principle of sincere cooperation may not shape the choice of whether to act through a mixed or EU-only arrangement, and furthermore, an automatic recourse to EU only action would also not be compatible with the principle of subsidiarity. At the same time, when the participation of the Member States is not legally required, Hillion and Chamon suggest that the Member States' participation entails more constraining obligations for them.[270] They submit that this would be the case with regard to ensuring the entry into force of an agreement because otherwise the Union could be prevented from exercising a competence which it could have exercised alone.[271] This argument seems not fully convincing unless an agreement covers only EU exclusive competences and shared competences. This is because as the Council decides that the Union will not exercise part of its competence, the Member States will exercise part of that competence both in the case when mixity is mandatory and facultative. It would be important in both cases to ensure that ratification takes place for the exercise of the EU's exclusive competence, and in both cases an agreement might risk not entering into force because of missing ratifications. The argument of specific duties for facultative mixed agreements might be appropriate for situations of functional mixity, when in practice Member States participate because this is required by an international organisation or agreement and the implementing competence rests on the Union. While it is true that both the Union and the Member States remain competent for the implementation of the agreement to some extent, the substantive content of an agreement, whether it aims at the establishment of common rules and/or if its objectives may also be achieved through individual action by the Member States might give rise to additional duties.

Once the decisions for signature and conclusion have been adopted by the Council, the mixed nature of the agreement has also created particular issues with regard to the ratification of mixed agreements. This is so especially with reference to bilateral mixed agreements in which the Union and the Member States are jointly considered as one party, and in which the entry into force of an agreement depends on the ratification of all Member States. The problem of missing ratifications has concretely emerged when Dutch voters

[269] C Hillion, M Chamon, 'Facultative Mixity and Sincere Cooperation' in M Chamon, I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p. 89.
[270] ibid, pp. 95-99.
[271] ibid, p. 98.

rejected the ratification of the EU-Ukraine agreement in 2016 referendum,[272] Belgium opposed (on the initiative of the regional government of Wallonia) the ratification of CETA and, more recently, a negative vote was issued against CETA's ratification by the Cypriot parliament.[273] It has also been reported that Member States have threatened not to ratify mixed agreements in the context of the EU-Mercosur to spur the inclusion of more environmental safeguards,[274] as well as used the prospect of non-ratification to push for additional commercial concessions.[275] As put forward by Kübek "mixity […]showcases the vulnerability of the EU as a non-unitary external actor as the veto powers allocated to (sub-) national decision-makers may significantly compromise the effectiveness, efficiency and democratic legitimacy of EU external action".[276] As the lack of even one national ratification after the consent of the European Parliament may block the Union from exercising its competence through the conclusion of an international agreement, there is a question of whether the duty of sincere cooperation may impose some obligations on the Member States specifically with regard to the ratification of mixed agreements. As put forward by Eeckhout there are arguments for and against such a view: "once a Member State has signed the agreement it has already expressed its willingness to enter in an agreement with the EU and the other Member States, and therefore should not hold back on ratification. The reply to that argument […] would be that municipal procedures deserve to be taken seriously as they constitute the exercise of sovereign national powers not transferred to the EU."[277] Scholars share the opinion that according to international law, Member States may not be forced to

[272] P van Elsuwege, "Towards a Solution for the Ratification Conundrum of the EU-Ukraine Association Agreement?" December 16, 2016 <https://verfassungsblog.de/towards-a-solution-for-the-ratification-conundrum-of-the-eu-ukraine-association-agreement/ >; R A Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement' European Papers (European Forum Highlight of 22 December 2016) https://www.europeanpapers.eu/en/europeanforum/eu-solution-deal-dutch-referendum-result-on-the-eu-ukraine-association-agreement 1305.

[273] M Chamon, T Verellen, "Whittling Down the Collective Interest" (7 August 2020) Verfassungsblog https://verfassungsblog.de/whittling-down-the-collective-interest/

[274] See for instance threats not to sign and ratify the EU-Mercosur trade deal, Hanke Vela J., 'EU Countries Corner Macron on Mercosur Trade Deal' (10 December 2020) Politico https://www.politico.eu/article/eu-countries-corner-macron-on-mercosur-trade-deal/

[275] Allan Rosas reports that Italy initially refused to ratify on an EU agreement on trade, development, and cooperation with South Africa until its denomination "Grappa" received protection. See A Rosas, 'The Future of Mixity' in C Hillion, P Koutrakos (eds), *Mixed Agreements Revisited: The EU and the Member States in the World* (Hart Publishing 2010), pp. 368-369.

[276] G Kübek, 'The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States' (2018) 23 European Foreign Affairs Review, p. 22.

[277] P Eeckhout, *EU External Relations Law* (2nd ed, OUP 2011), p. 258.

ratify and thus to consent to an international agreement.[278] At the same time, some have put forward that some conditions deriving from the principle of sincere cooperation could be envisaged, such as the need to make a concrete effort to ratify, such as showing that the matter has been put for discussion at the national parliament,[279] or others have proposed that there be a deadline.[280] In order to avoid lengthy ratification procedures, including potential missing ratifications, the Union has adopted the technique of separating agreements into two, enabling the provisional application of the part concerning the CCP, which has now become a common practice.[281] Nonetheless, some issues remain unclarified also with regard to the provisional application of mixed agreements. First, similarly to the problem of missing ratifications, Van der Loo and Wessel highlight the problem of missing signatures in case an agreement would provide for provisional application but one or more Members would refuse to sign;[282] and second, it is yet unsettled whether an individual Member State could terminate the provisional application by notifying its impossibility to ratify the agreement in question which in turn would prevent the entry into force of an agreement (in the case of a bilateral agreement).

At the stage of conclusion of a mixed agreement, it can be observed that Member States are bound by more than one of the broad obligations enshrined in article 4(3) TEU. Obligations of sincere cooperation require the fulfilment of the procedures in article 218 TFEU and the compliance with the competence divide as provided for in the Treaties, including the respect for the exercise of the EU's exclusive competence. Furthermore, sincere cooperation duties to facilitate the action of the EU institutions may not justify the automatic exercise of all the Union's external competences.

[278] See among others G Van Der Loo, R A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 CMLRev, p. 744; and G Kübek, 'The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States' (2018) 23 European Foreign Affairs Review 21.
[279] G Van Der Loo, R A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 CMLRev, p.745; C Hillion, M Chamon 'Facultative Mixity and Sincere Cooperation' in M Chamon, I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020), p. 98.
[280] F Casolari, *Leale Cooperazione Tra Stati Membri e Unione Europea* (Editoriale Scientifica 2020), pp. 236-237.
[281] See "New approach on negotiating and concluding EU trade agreements adopted by Council" (22 May 2018) Council of the EU press release https://www.consilium.europa.eu/en/press/press-releases/2018/05/22/new-approach-on-negotiating-and-concluding-eu-trade-agreements-adopted-by-council/
[282] G Van Der Loo, R A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 CMLRev, p. 759.

b. The principle of sincere cooperation in the EU's exercise of external competence though mixed agreements

The main practical advantage of mixed agreements is that they do not require a precise definition of the division of competences at the beginning, avoiding in this way lengthy discussions on the competence divide at the moment of the conclusion of an agreement. From the point of view of the entry into force of an international agreement, the lack of a precise allocation of competence does not seem problematic. Moreover, Member States are bound by the agreements concluded by the Union and under a duty to ensure their implementation under EU law.[283] The extent of the Union's competence exercise might however affect whether or not an agreement constitutes an integral part of EU law as well as have consequences for the subsequent competence exercise both within the EU legal order and in an international body. Indeed, it is put forward that whether or not the Union has exercised its competence when concluding an agreement might trigger different duties of sincere cooperation that Member States must comply with. If there has been a competence exercise, then there will be an obligation of sincere cooperation in light of the second segment of article 4(3) TEU for the Member States to abide by the obligations of the international agreement. This would entail the implementation of Union measures and the respect of the competence divide. If instead the Union did not exercise some of its shared competences, the Member States would then be under a duty to facilitate Union tasks and refraining from jeopardising Union objectives according to the third segment of article 4(3) TEU, which could give rise to obligations of result of a procedural or substantive nature. Whilst the effects of an unclarified external exercise of competence through a mixed agreement will be examined in Chapter 4 with respect to the implementation of an agreement within the EU legal order, the next paragraphs will look in more detail at the issue of identifying the extent of the competence exercise and on its consequences on subsequent competence exercise on the international plane including in the bodies established by international agreements.

Some help to determine the extent of the Union's exercise of external competence in a mixed agreement can be sought by looking at the internal exercise of EU competence. Indeed, exclusive Union competences including those based on article 3(2) TFEU must be

[283] See art. 216(2) TFEU, and case 104/81 *Kupferberg* ECLI:EU:C:1982:362. These aspects will be further addressed by Chapter 4.

exercised by the Union. Another indication might be provided by a declaration of competence or sometimes an accession agreement, if there is one. The provisional application of part of an agreement may also suggest that that part of the agreement falls under Union competences, even though, as noted by Van der Loo and Wessel, some Council decisions explicitly state that "the provisional application of parts of the Agreement does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties".[284] More recently, in her opinion in case C-500/20 AG Ćapeta put forward that the presence of a disconnection clause might be the indication that the Union intends to adopt the provisions of a convention and apply them within its legal order between the Member States.[285] This finding was not subsequently elaborated upon by the CJEU, but it can be recalled that, on the contrary, in Opinion 1/03 the Court held that disconnection clauses did not relate to the division of competence, but rather to safeguarding existing rules or allowing the EU's future exercise of competence.[286] The issue of the extent of the EU's competence exercise was further addressed by the AG opinions in *Mox Plant* and in *Antarctic MPAs* respectively. According to the AG Poiares Maduro, the Union had exercised both its exclusive and non-exclusive competence by concluding the UNCLOS Convention.[287] Similarly, AG Kokott concluded that "there is no objective evidence amenable to review that the Council did not wish to exercise the Union's existing environmental competences nor that the Council exercised the Union's environmental competences in the contested 2015 and 2016 decisions only partially for political reasons".[288] It can be considered that, in principle, if the Union would have exercised all its exclusive and shared competence, an agreement would have been concluded as an EU-only agreement given that the Union may exercise alone its shared competence. When the Union however concludes the agreement as mixed it remains difficult to understand what part of the shared competence the Union has exercised, unless this is not explicitly pointed out (as it could be done for instance in the Council decision). Even more

[284] As argued by G Van Der Loo, R A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 CMLRev, p. 756 "Several Council decisions even explicitly state that "the provisional application of parts of the Agreement does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties".

[285] Opinion of AG Ćapeta, case C-500/20 *ÖBB-Infrastruktur Aktiengesellschaft v Lokomotion* ECLI:EU:C:2022:79, paras 94-97.

[286] Opinion 1/03 ECLI:EU:C:2006:81, para. 130.

[287] Opinion of AG Poiares Maduro, case C-459/03 *Commission v Ireland (Mox Plant)* ECLI:EU:C:2006:42, p. 36. See in particular the analogy with case C-239/03 *Commission v France (Étang de Berre)* in paras 33-34.

[288] Opinion of AG Kokott, joined cases C-626/15 and C-659/16 ECLI:EU:C:2018:925, paras 114-115, 117.

complex seems the situation of a subsequent accession of the Union to an international agreement to which Member States are already parties. In this case, the Union may have exercised all its external competences, but an agreement may remain mixed as the Member States which were parties prior to the Union's accession remain parties to the agreement.[289] The consequences of such an exercise of competence are also uncertain, because by exercising a potential shared competence via a mixed agreement, has the Union pre-empted the Member States from acting according to article 2(2) TFEU? What is the scope of this pre-emption? And may the EU then adopt proposals or vote on these matters in an international body established by the agreement? A differentiation could be made between pre-emption of internal and external shared competences, and it can be put forward that, unlike ERTA pre-emption which looks at protecting the common rules from being affected and results in exclusivity (the complete lack of external competence of the Member States), pre-emption provided for in article 2(2) TFEU is tailored to selected issues. The external exercise of the Union's shared potential competence (within the meaning of a shared competence not yet exercised -or fully exercised-and therefore still resting with the Member States) would not pre-empt the action of the Member States as if the Union had exercised a competence internally. As AG Wahl clarifies in Opinion 3/15 if a shared competence has been exercised internally with the adoption of legislation, notwithstanding it left some margins of discretion for the Member States, such exercise triggers the ERTA-pre-emption doctrine externally.[290] It could be thus argued that the exercise of a Union' shared competence externally, according to article 216(1) TFEU, could not produce the same effects as under 3(2) TEU and therefore automatically block any Member State's action with regard to third countries in that field or lead to a situation of reverse exclusivity preventing the action of the Member States internally. If a shared competence is first exercised externally, it is put forward that this is done under article 2(2) TFEU and is not giving rise to an exclusive competence of the Union, and the Member States may continue to act externally in matters not covered by the agreement. At the same time, the Member States would remain bound by the principle of sincere cooperation to facilitate Union action in an international forum, to inform and consult, but arguably also not take

[289] See for instance the case of the Union's accession to the Intergovernmental Organisation for International Carriage by Rail (OTIF).
[290] Opinion of AG Wahl, Opinion 3/15 ECLI:EU:C:2016:657, para. 150.

independent action on the international plane that may create conflicting obligations with the EU's exercise of competence.

With regard to the Union's subsequent accession to a Member States-only agreement, the Court has held that the subsequent accession of the Union through the exercise of an exclusive competence prevents other Member States from acceding next to the Union unless authorised to do so.[291] In the context of the exercise of a shared competence not yet exercised internally (thus as put forward earlier remaining shared) it can be put forward that Member States would not be obliged to leave the agreement. In any case, an obligation for Member States to leave an agreement as a result of the Union's accession seems difficult to imagine. Only in the context of bilateral agreements in Opinion 2/15, the Court considered that the EU-Singapore FTA was to substitute already existing agreements between the Member States and Singapore, which would have been automatically terminated. In light of the case on the *Geneva Act*, it could be foreseen that the Member States remaining parties to an agreement which has become a mixed agreement would be bound by the duty of sincere cooperation to adjust their position in light of the EU's participation; and on the part of the Union, it would have to coordinate with the Member States to safeguard any acquired rights under international law.

The next section will further elaborate on duties of sincere cooperation in the context of representation and voting rights in the framework of joint action in an international organisation or body.

c. The principle of sincere cooperation and the coordination between the Union and the Member States in mixed settings

Duties arising from the principle of sincere cooperation are pivotal for the management and coordination of shared competences in the context of mixed agreements. Whilst the Union has been a prolific treaty-maker its recognition as a full party in international organisations has not been equally as successful. On the one hand, some international organisations might still only accept States (e.g. the UN) or negotiations to include the Union have proved cumbersome. At the same time even the Member States are reluctant to voluntarily let the Union participate in international organisations in their place. On the other hand, it can occur

[291] Case C-24/20 *Commission v Council (Geneva Act)* ECLI:EU:C:2022:911, para. 100.

that membership of an IO within another IO or agreement is dependent on the membership of both the organisation and its members. As a result, the Union has become a party of organisations or bodies also through the mixed agreement formula. It should be noted at the outset that the participation of the Union and/or the Member States in an agreement and the representation of the Union do not necessarily coincide. Often representation, understood as the power to present the Union's position i.e. acting as the spokesperson, is exercised on an alternative basis depending on the distribution of competences within the EU. Even though "mixed representation is only possible when there is mixed participation, it does not follow automatically from the latter".[292] This is so even after the Union's subsequent accession to an agreement of which its Member States are already members as these issues will have to be agreed upon.

Often arrangements for representation and voting are organised on a case-by-case basis including through codes of conduct or *ad hoc* measures such as in the WTO, where the Commission normally speaks on behalf of the Member States. For the first time in *Commission v Council (FAO)*, the Court held that interinstitutional arrangements between the Commission and the Council detailing the form of the joint participation between the Union and the Member States in the context of a mixed agreement was a binding agreement that could be enforced.[293] The Court further noted that such an agreement is a manifestation of the duty of sincere cooperation. Codes of conduct have also been adopted with regard to the UN Convention on the Rights of Persons with Disabilities (CRPD) and the Istanbul Convention.[294] As noted by Teixeira and Wouters, the case of the interinstitutional agreement for FAO it did not only concern the EU institutions but also the cooperation between the institutions and the Member States, even though the latter had not formally agreed to it, if not within the Council.[295] As the competence divide in mixed agreements is not laid out in detail, there may be disagreements as to who is competent to present a Union position. In the *Antarctic MPAs*

[292] M Chamon, M Cremona, 'The Representation of the EU and its Member States in Multilateral Fora: The AMP Antarctique Effect' in N Levrat, Y Kaspiarovich, C Kaddous and R A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2022), p. 98.
[293] Case C-25/94 *Commission v Council (FAO)* ECLI:EU:C:1996:114.
[294] For example, see the recently adopted "Code of Conduct laying down the internal arrangements regarding the exercise of the rights, and the fulfilment of the obligations, of the European Union and Member States under the Council of Europe Convention on preventing and combating violence against women and domestic violence" 2023/C 194/03.
[295] R Guerreiro Teixeira, J Wouters, 'EU Membership in International Organisations and the Joint Exercise of Membership Rights: *Commission v Council (FAO)*' in G Butler, R A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022), p. 335.

case for instance, the Commission held that a position needed to be submitted on behalf of the Union as it concerned fisheries; and on the contrary, the Council (more specifically in this case COREPER) decided that the position had to be submitted on behalf of both the Union and the Member States because it concerned the protection of the environment and competences were shared.[296] Another case of a dispute which concerns the competence divide is *COTIF I*. Here, Germany considered that the Commission could not adopt a position according to article 218(9) TFEU if it had not previously exercised its shared competence internally.[297] Unlike in *PFOS*, these two cases do not concern a substantive contrast as to the content of the position but only a disagreement on the competent actor.[298]

i. Unity in the external representation of the Union

It is in the context of mixed agreements that the Court mentioned the concept of "unity in the external representation of the Union". There is a largely shared view that unity as such is not a distinct legal principle and that it is not the basis of concrete duties for the Member States.[299] In his Opinion on the *PFOS* case, AG Maduro also unequivocally stated that "the unity of international representation of the Community and its Member States does not have an independent value".[300] A requirement of unity in the EU's international representation may be relevant also in the broader context of the external action of the Union, but it seems paramount to strengthen the duties arising from the principle of sincere cooperation in the framework of joint action where the powers of treaty-making, decision-making, and representation might not rest on the same actor. Indeed, when operating in the context of a mixed agreement the multiplicity of interests between the Union and the Member States might lead to a fragmentation of Union action and in turn to the impossibility for the EU to exercise its external competence.

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[296] Joined cases C-626/15 and C-659/16 *Commission v Council (Antarctic MPA)* ECLI:EU:C:2018:925. For an account of the facts of the case see M Chamon, M Cremona 'The Representation of the EU and its Member States in Multilateral Fora: The AMP Antarctique Effect' in N Levrat, Y Kaspiarovich, C Kaddous and R A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2022), pp. 100-101.

[297] Case C-600/14 *Germany v Council (COTIF I)* ECLI:EU:C:2017:93, para. 38.

[298] M Chamon, M Cremona, 'The Representation of the EU and its Member States in Multilateral Fora: The AMP Antarctique Effect' in N Levrat, Y Kaspiarovich, C Kaddous and R A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2022), p. 106.

[299] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), pp. 190-191.

[300] Opinion of AG Poiares Maduro, case C-273/04 *Commission v Sweden (PFOS)* ECLI:EU:C:2007:361, para. 37 "The unity of international representation of the Community and its Member States does not have an independent value; it is merely an expression of the duty of loyal cooperation under Article 10 EC. The question whether such unity is required by the duty of loyal cooperation can be resolved only by analysing the obligations laid down in a specific agreement."

A first duty deriving from the principle of sincere cooperation is a best effort obligation to attempt reaching a common position,[301] which entails the consultation with the Union institutions. For instance, in *Mox Plant* before bringing a case against another Member State or in *PFOS* before making an individual proposal.[302] Duties of consultation between the institutions and the Member States do not however have equal strength. In *Commission v Greece (IMO)*, the Court held that even if the points raised by a Member State were not considered by the institutions, that Member State would be still prevented from relying on such inaction or refusal to discuss in order to unilaterally pursue its action. A mere duty to "endeavour to consider" was instead ascertained to rest on the Union institutions.[303] Another duty deriving from sincere cooperation is that of following the positions adopted by the Union according to article 218(9) TFEU. The Court has held in *COTIF II* that compliance with a Union position is *"a specific expression of the requirement of unity in the representation of the European Union, arising from the obligation of sincere cooperation"*[304] and thus, by opposing the position, Germany breached its obligations under that decision and article 4(3) TEU. Lasty, as previously mentioned with regard to the *PFOS* judgment, Member States are also under a duty to comply with an EU strategy or concerted action in the context of the decision-making of an international body.

d. A "duty of close cooperation" with varying strengths

As recognised by the Court already in its early jurisprudence, within mixed agreements the competences of the EU and the Member States are highly intertwined, and this is so already from the moment of their exercise to conclude an agreement. Member States may form a joint party with the Union in bilateral agreements or remain individual parties within multilateral agreements and, even in the latter circumstance, they are bound by obligations of sincere cooperation to coordinate the exercise of their competences with the Union. In the context of interlinked competences, the CJEU has identified a specific "duty of close cooperation" within the principle of sincere cooperation guided by the need to preserve the unity in the EU's external action to allow the Union to exercise its external competences but also to affirm itself

[301] E Neframi, 'The Duty of Loyalty: Re-thinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev, p. 355.
[302] Which was not met in the first case and complied with in the second.
[303] Case C-45/07 *Commission v Greece (IMO)* ECLI:EU:C:2009:81, para. 25.
[304] Case C-620/16 *Commission v Germany (COTIF II)* ECLI:EU:C:2019:256, para. 94.

as a global actor ensuring the well-functioning of the mixed membership to an international agreement. It is submitted that the principle of sincere cooperation can create a multiplicity of obligations on the Member States which are encompassed by the expression "duty of close cooperation".

Obligations to take a certain action or refrain from acting seem to be applicable when Member States are required to fulfil an obligation deriving from the Treaties according to the second segment of article 4(3) TEU. Indeed, when concluding mixed agreements, Member States are to respect both substantive as well as procedural obligations deriving from article 218 TFEU. From a substantive perspective the Member States are under an obligation to respect the division of competence including the supervening exclusive nature of the competences as a result of their (at least partial) internal exercise. Open questions remain with regard to the respect of the competence divide when it is unclear whether by concluding a mixed agreement the Union has exercised its competence, such as when a shared competence was not previously exercised internally. Similarly open questions concern the ratification of mixed agreements which might touch upon more than one obligation within article 4(3) TEU. According to the second segment of article 4(3) TEU, for aspects falling within the exclusive competence of the Union, it is put forward that Member States could be seen under a duty to ensure that the Union enacts that part of the agreement.[305] For the elements which instead pertain to the Member States' competences, a duty to facilitate Union action and not to jeopardise the obtainment of the Union objectives could possibly lead to an obligation of best efforts to ratify an agreement according to the third segment of article 4(3) TEU. As the Member States normally ratify mixed agreements as a whole, and public international law provides for the fundamental requirement to express consent to be bound, the application of a duty of close cooperation in terms of assisting each other under the first paragraph of article 4(3) TEU could furthermore entail finding a common ground, perhaps through procedural requirements. Last, with regard to the participation in the decision-making bodies of mixed agreements, the compliance with a position adopted by the Union fulfils an obligation of sincere cooperation to comply with the Treaties, but also an obligation to refrain from jeopardising the unity of the EU's external representation.

[305] See the argument made by Kübek on the need to respect EU exclusive competence, G Kübek, 'The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States' (2018) 23 European Foreign Affairs Review, pp.29-30.

Other obligations can be viewed instead as pertaining to the third segment of article 4(3) TEU with reference to the obligation to facilitate the achievement of the tasks of the EU. These may concern the coordination and representation of the Union and the Member States in an international body such as through voting arrangements, to uphold a Union strategy, or to resolve disagreements internally. An obligation of sincere cooperation to facilitate the Union's tasks cannot however be considered as precluding the use of facultative mixity.

Last but not least, the third segment of article 4(3) TEU entails an obligation for the Member States to refrain from jeopardising the objectives of the Union. Both obligations within the third segment "to facilitate" and "to refrain" seem closely connected and reinforcing one another, even though as was highlighted in Chapter 2, "objectives" seems a broader term than "tasks" and the obligation to refrain from measures which "could jeopardise" the objectives of the Union entails a hypothetical element. In *PFOS*, the Court made a specific reference to this obligation of the Member States because of the failure to ensure unity in the mixed context. It remains doubtful whether the obligation to refrain from jeopardising Union objectives might, as such, be the basis for duties of action or abstention, or whether a breach could be established only against a more concrete objective such as the compliance with a position, strategy, or arrangement for voting rights, partially engaging also one of the other broad duties of cooperation. A duty of best efforts to reach a common position could instead be understood as falling within this category.

3.4.3 Sincere cooperation and the exercise of competence through the Member States

As already mentioned, the Union might not become a party to all international agreements, but it may still exercise its external competences through the Member States. For instance, it may authorise them to conclude agreements in areas otherwise falling within the Union's competence.[306] In such cases, the cooperation between the Union and the Member States starts already at the negotiating phase. As noted by Saluzzo, even though an international agreement will be formally concluded and ratified by the Member States only, the process of negotiation will follow the requirements of article 218 TFEU.[307] First there is the adoption of a decision authorising the Member States to proceed with the negotiation which will occur on

[306] An example are agreements with legal basis art. 219 TFEU in the field of monetary policy which is under EU exclusive competence.
[307] S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Ledizioni 2018), p. 213.

the basis of an agreed Union position. At the same time, Saluzzo points out that following such position may be understood as a specific obligation of result, because if the Member States are not able to achieve the negotiating objectives laid down therein, they will have to renounce to conclude the agreement.[308]

Whilst not formally mixed, international agreements concluded by the Member States may still involve the joint exercise of external competences. For example, even though the Union is not a party to the ILO Conventions it exercises its exclusive competences through coordination with the Member States. The Union's exercise of competence may also involve the establishment of common positions, including when the Union is not a party to the Convention in question.[309] In the case *Germany v Council (OIV)*, Germany argued among others that the Council could not have adopted a Union position under article 218(9) TFEU on a resolution to be voted within the organisation because the Union is not a party to the International Organisation of Vine and Wine (OIV). The Court disagreed holding that the Union may adopt a position regardless of its formal membership in an international organisation (in this case the Union has an observer status). This conclusion was already partially apparent from the older *Commission v Greece (IMO)* judgment, in which even though the Union was not a party to the IMO, Greece was prevented from exercising an exclusive Union competence independently.

Another recent case *Commission v Council (IMO)* provides some further insights on the question of the Union's representation without formal membership.[310] In this case, notwithstanding the fact that the EU is not a member of the IMO, the Commission argued that it had the power of making a submission on behalf of the Union pursuant to its power of external representation in non-CFSP matters according to article 17 TEU.[311] First, the Court established that the Commission's power of external representation does not depend on the exclusive or shared nature of that external competence.[312] With regard to the case at hand, it however disagreed with the Commission's pleas, holding that the latter could not have submitted a position on behalf the Union without breaching the rules of the IMO, regardless of the nature of the external competence of the Union. The Court concluded that *"the Council*

[308] ibid, p. 214.
[309] Case C-399/12 *Germany v Council* (OIV) ECLI:EU:C:2014:2258, para. 55.
[310] Case C-161/20 *Commission v Council (IMO)* ECLI:EU:C:2022:260.
[311] ibid, para. 38.
[312] ibid, paras 50-52.

was […] fully entitled to consider that the submission at issue was required to be presented by the Member States in their own names, acting jointly in the interest of the European Union".[313] Therefore, it can be concluded that while the Union may adopt a common position to be presented by the Member States in a forum in which it is not a member, it may not formally table submissions on behalf of the EU (even though in an area covering exclusive competences) if this is not provided for according to the EU's status in the international agreement.

Kostantinides argues that when acting as trustees of the Union, Member States act as its "agents". As such they are under an obligation of sincere cooperation to give effect to the common positions adopted by the Union and at the same time not take individual actions which may jeopardise the fulfilment of those positions or be in conflict with EU law.[314] It appears therefore that in these cases, the adoption of a common position can be pivotal to coordinate the plurality of subjects included in the negotiations. At the same time, it may still be considered that the exercise of Union powers through the Member States constitutes a second-best option for the Union. Indeed, in the case *Kramer*, the Court explicitly identified a duty deriving from that article 4(3) TEU (then article 5 EC) to use *"all political and legal means to ensure the Community's participation in the convention"*.[315] Such a duty could entail among others: advocating for the accession of the Union, proposing the inclusion of REIO clauses, or not voting against the Union's accession in the relevant decision-making bodies. It could not however overstep the requirement of the adoption of a Council decision with the required majority for the Union's accession or conclusion of an international agreement.

3.5 Concluding remarks

Concluding international agreements is not only a way for the Union to enact its external objectives but also an instrument to accomplish internal policy goals. The Chapter analysed three types of exercise of Union competence and the resulting obligations of sincere cooperation binding the Member States. Duties deriving from sincere cooperation ensure that

[313] ibid, para. 71.
[314] T Konstadinides, 'Member States as Trustees of the Union in International Organisations: Germany v Council (OIV)' in G Butler, R A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022), p. 741.
[315] Joined cases 3/76, 4/76 and 6/76 *Kramer et al.*ECLI:EU:C:1976:114, paras 42/43-44/45.

the Union can exercise its external competence on its own by pursuing Union strategies at the international level when the Member States are also actors on the international plane. When the competence to act does not rest entirely on the Union, the principle of sincere cooperation enables it to act jointly with the Member States through the instrument of mixed agreements. Mixed action entails a variety of obligations deriving from sincere cooperation which are incumbent on the Member States, understood in terms of a "duty of close cooperation", to ensure that mixed agreements can be concluded, the competence of the Union exercised and that the Union can subsequently participate in the decision-making bodies established by the agreements. The paramount consideration when acting jointly is to ensure that the Union and the Member States act as one entity even if competences may lie between the both of them. In situations in which the Union has competence to act but it cannot do so directly, Member States may be under an obligation of sincere cooperation to act on its behalf. Here, sincere cooperation enables the Union to fit in the existing structures of the international legal order.

CHAPTER 4

The Principle of Sincere Cooperation in the Union's Compliance with International Agreements

As highlighted in the previous Chapter, the Union can act upon its objectives through the conclusion of international agreements and the participation in international organisations, which enable it to develop its external policies. For the Union's commitments to be meaningful, however, it is necessary that the Union is able to comply with them in its internal legal order. The present Chapter will analyse the operation of the principle of sincere cooperation in the Union's compliance with its international commitments, in particular by referring to the implementation of international agreements in the EU legal order (**Section A**) and their subsequent enforcement (**Section B**). Before doing so, as a basis for the following discussion, the Chapter will examine how the non-unitary actorness of the Union affects the implementation and enforcement of international agreements (4.1), and about how the principle of sincere cooperation draws the relationship between international and EU law within the EU legal order (4.2).

4.1 The non-unitary character of the EU's actorness on the international plane and the reception of international agreements in the EU legal order

The relationship between the EU and the Member States is a central element to the way in which international agreements are incorporated within the EU legal order. The following paragraphs will highlight the hierarchy of international law in the EU legal order, the shared obligation to comply with international agreements, and the concept of autonomy which may influence if and how far international agreements can be incorporated in the EU legal order.

4.1.1 The consequences of the hierarchy of international law within the EU legal order for the Member States

The EU founding Treaties show a distinct openness of the Union to international law. The TEU and TFEU are themselves international treaties and derive their binding force from international law. With the Treaty of Lisbon, the Union has been explicitly endowed with legal

personality to act on the international plane becoming bound by international law and operating within its constraints.[316] Article 3(5) TEU further states that the Union is committed to the strict observance and the development of international law, an objective later reaffirmed in article 21 TEU.[317] The Treaties, however, do not explicitly address the hierarchal status of international law within the EU legal order, nor provide how the Union should incorporate international law. This void has been progressively filled by the jurisprudence of the CJEU which assumed a prominent role in shaping the relationship between EU and international law through a number of highly significant cases. Among them is the case *Haegeman* in the Court's early jurisprudence.[318] Here, the Court was faced with the question of whether the provisions of the association agreement between the then Community and Greece could be the object of a reference for a preliminary ruling. The Court affirmed its jurisdiction to interpret the agreement famously stating that *"[t]he provisions of the Agreement, from the coming into force thereof, form an integral part of Community law"*.[319] Together with article 216(2) TFEU, which states that agreements concluded by the Union bind the Member States, *Haegeman* has contributed to a widespread understanding of the EU legal order as monist.[320] International law commitments undertaken by the Union are automatically valid in the EU's legal order from the time they are concluded as opposed to being dependent on further conditions, such as an agreement being subject to approval and translation in domestic law to exist in that legal order, which are typical of a dualist system.

At the same time, neither article 216(2) TFEU nor *Hageman* provide an indication that international law has a position of superiority in the Union legal order and whether it benefits from direct effect. Later case law clarified that international law, including both international

[316] Art. 47 TEU.

[317] Art. 21(1) TEU "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement[…]and respect for the principles of the United Nations Charter and international law…", para. 2(b) "The Union shall define and pursue common policies and actions […]in order to […] consolidate and support democracy, the rule of law, human rights and the principles of international law".

[318] Case 180/73 *R & V Haegeman v Belgian State* ECLI:EU:C:1974:41.

[319] ibid, para. 5.

[320] Whether the EU legal order can be described as monist or dualist remains debated. See, R A Wessel, 'Reconsidering the Relationship Between International and EU Law: Towards A Content-Based Approach?' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011), pp. 10-18; E Cannizzaro, 'The Neo-Monism of the European Legal Order' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011) pp. 36-39. On the theories of monism and dualism see M Mendez, *The Legal Effects of EU Agreements* (OUP 2013), pp. 37-47.

agreements and customary international law,[321] ranks between primary and secondary law.[322] The primacy of international treaties applies to both anterior and posterior legislation which may be in conflict with international commitments entered into by the institutions.[323] The latter are thus prevented from defeating internally what they agreed on the international plane,[324] enacting the Union's commitment to the strict observance of international law in article 3(5) TEU. Yet, international agreements and general international law do not have precedence over primary law which constitutes "an autonomous legal system which is not to be prejudiced" by international law.[325] As follows, "the Court has jurisdiction to determine whether an international commitment is compatible with the provisions of the Treaties, general principles of Union law, or the autonomy of the Union legal order, but also possibly with other rules of international law binding the Union".[326]

The positioning of international law in the EU legal order has a direct impact on how the domestic law of the Member States relates to international law. The fact that Member States can be bound by the international commitments of the Union and international law more broadly through their membership to the EU changes their relationship with the latter. Lavranos argues that it is no longer exclusively for the Member States' national legal systems to determine how international law is implemented and which rank it has in a domestic legal order, because the EU legal order partially supersedes this function.[327] It has further been stated that the relationship between the domestic law of the Member States and international law "is gradually becoming replaced by a new triangular relationship, international law/EU law/national law".[328] International agreements binding on the EU are an integral part of EU law and have primacy over the domestic law of the Member States, which are bound by an EU law obligation to secure their compliance like any other EU act binding upon them pursuant to

[321] Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* ECLI:EU:C:1998:293, para. 46.
[322] See joined cases C-402 and C-415/05 P *Kadi and Al Barakaat v Council* ECLI:EU:C:2008:461.
[323] J Etienne, 'Loyalty Towards International Law as a Constitutional Principle of EU Law?' Jean Monnet Working Paper 03/11, p.11.
[324] ibid, p.17.
[325] Joined cases C-402 and C-415/05 P *Kadi and Al Barakaat v Council* ECLI:EU:C:2008:461, para. 316.
[326] F Erlbacher, 'Article 216 TFEU' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (OUP 2019), pp.1648-1649.
[327] N. Lavranos, 'Decisions of International Organisations in the Domestic Legal Orders of Selected EU Member States' (Doctoral Thesis, Maastricht University 2004), p. 5.
[328] J Wouters, A Nollkaemper, E de Wet, 'Introduction: the Europeanisaiton of International Law' in J Wouters, A Nollkaemper, E de Wet (eds), *The Europeanisation of International Law* (T.M.C. Asser Press 2008), p.8.

article 4(3) TEU.[329] In turn, they are also bound by general international law, as it is the Union as an international actor. Therefore, on the one side, Union action is shaped by international law and, on the other, international law is implemented in the EU legal system through EU law and according to EU law.[330]

4.1.2 Compliance with international agreements: a task shared by the Union and the Member States

According to article 216(2) TFEU, agreements concluded by the Union bind both the Union and the Member States. These include both agreements concluded solely by the Union as well as mixed agreements in which Member States are also bound from the point of view of international law, and for which the Union is responsible both internally *vis-à-vis* its Member States and externally *vis-à-vis* other third parties.

The competence to implement an agreement concluded by the Union in the EU legal order can lie on the Union or the Member States depending on the policy area. This is the case even if an agreement is concluded solely by the EU because the legal basis of an agreement is applicable to its conclusion, but not the implementation of the agreement which may touch upon other areas and require a different legal basis.[331] For instance, Eeckhout recalls that notwithstanding the fact that many of the GATT provisions are targeted to the Member States in the EU context, the CJEU found that WTO agreements on trade of goods came within the exclusive competence of the Community in Opinion 1/94.[332] A concrete example is that of the prohibition of a discriminatory taxation regime on imported products under article II:2 GATT even though indirect taxation remains within the sphere of action of the Member States principally concerning tax laws and regulations at national level.[333] This means that the EU can commit to obligations towards a third state which in some respects it may not be able to implement directly.[334] By becoming bound by an agreement through Union law, Member

[329] More complex is the situation in case of the implementation mixed agreements in which the extent to which Member States also undertake international law commitments may remain unclear. See section 4A.1.2
[330] J Etienne, 'Loyalty Towards International Law as a Constitutional Principle of EU Law?' Jean Monnet Working Paper 03/11, p. 7.
[331] M Cremona, 'Internal Differentiation and External Unity' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019) p. 614.
[332] Opinion 1/94 ECLI:EU:C:1994:384, para. 34.
[333] P Eeckhout, *EU External Relations Law* (2nd edition, OUP 2011), p. 235.
[334] ibid.

States are first required to abide by the principle of conferral recognising the exercise of competence by the Union through international agreements. As follows, provisions covered by exclusive Union competence and exercised shared competence will have to be implemented by the Member States following the measures adopted at EU level. This is because of the principle of primacy as well as the second segment of the principle of sincere cooperation. Any implementing competence resting on the Member States, for instance in matters partially regulated by them or falling under their retained competence, needs nonetheless to be exercised in accordance with EU law as Member States are bound by an obligation of sincere cooperation not to affect existing EU obligations and not to impair the EU's implementation of an agreement. The Court has recognised that Member States are in fact under a broad duty of compliance *vis-à-vis* the Union stating that "*in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement"*.[335]

The hierarchical position of international law above secondary EU law means that, in principle, international law can invalidate contrary EU legislation. However, the jurisprudence of the CJEU has often drawn a distinction between the direct applicability (understood as incorporation) and its direct effect. Indeed, article 216(2) TFEU is not capable on its own to determine whether or not individuals can rely on an international agreement in order to enforce rights conferred on them by international law and possibly invalidate EU law. A determination of whether an international agreement concluded by the Union may be used to invalidate EU or national law may occur at EU or at Member State level. When the Union is competent to implement the provisions of an international agreement and has exercised its implementing competence, it is also competent to decide whether or not a provision of an international agreement may be invoked. If the Union did not exercise its implementing competence and it still rests on the Member States, the invocability of a provision will be determined at the national level. Similarly, for any issues to be implemented by the Member States, courts at the domestic level will decide whether or not an international agreement may

[335] Case 104/81 *Kupferberg* EU:C:1982:362, para. 13. See also case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, para. 11; case C-13/00 *Commission v Ireland* EU:C:2002:184, para. 15; case C-239/03 *Commission v France* ECLI:EU:C:2004:598, para. 26.

be relied upon. National courts are also under a duty to comply and enact the determinations made at EU level. This will be analysed more extensively with regard to the enforcement of international agreements in Section B.

While Member States are bound by agreements concluded by the Union, agreements concluded by the Member States are not normally binding on the Union according to EU law but for one main exception: if there has been a full transfer of competence to the Union which has succeeded to its Member States taking over their international commitments. Functional succession has allowed the Union to assume international obligations previously held by the Member States in the case of the GATT as the Court held in *International Fruit*.[336] There is, however, a very high threshold for succession to take place as could be seen with regard to the Chicago Convention in the *ATTA* judgment.[337] In this case, the American Air Transport Association brought an action for annulment arguing that Directive 2008/101/EC, which applied to all airlines operating in the EU, violated a number of international instruments because it sought to apply the greenhouse gas allowance trading scheme beyond the territorial jurisdiction of the EU. With regard to the claim that the Directive breached the Chicago Convention, the Court concluded that the Union, not being a party to the Convention, could only be bound by it if it had assumed all the powers previously exercised by the Member States that fall under that agreement. The fact that certain provisions of EU law incorporated parts of that Convention in the EU legal order was not deemed sufficient for that agreement to qualify as an integral part of EU law. What was required was instead the conferral of exclusive power to the EU in the subject matter of an agreement.

Two main reasons can be identified for agreements of the Member States not to be binding on the Union. First, allowing agreements to bind the Union when only the Member States are parties goes against the idea of the Union as a separate legal entity autonomous from its Member States. Second, if the Union were to be bound by international agreements of the Member States, by concluding inter-se agreements, the Member States could make substantive changes to EU law and to the institutional balance between the Union institutions. Agreements concluded by the Member States may nonetheless still have legal effects in the Union legal order as a matter of EU law. Relevant examples include the ECHR, pending the

[336] Joined cases 41 to 44-70 *NV International Fruit Company and others v Commission* ECLI:EU:C:1971:53.
[337] C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change (ATTA)* ECLI:EU:C:2011:864.

accession of the Union to the Convention which reflects general principles of EU law, as well as situations in which Union acts explicitly refer to an international agreement,[338] or when Member States enter into an agreement on the Union's behalf.[339] As a consequence, even though the Union is not bound by international law to implement an agreement, it may do so in the above mentioned situations exercising an exclusive or shared competence adopting internal legislation if an agreement is capable of influencing the content of EU law and the definition of common policies.

4.1.3 The impact of the EU's autonomy on the international agreements binding the Union

As noted by Etienne, international and European law find their meeting point on the principle according to which the EU is required to act according to international law.[340] Despite this, he concludes that it would be superficial to describe the relationship between EU law and international law as a monist one because, as a result of placing international law under primary law, the incorporation of international law has been progressively subject to considerations which seem to align with a dualistic approach.[341] As clearly argued by AG Poiares Maduro in his opinion on the *Kadi* case, the relationship between international and EU law "is governed by the Community legal order itself and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community".[342] In that case, the Court followed the AG's reasoning concentrating on the legal effects on individuals of the UN Security Council resolution at issue.[343] This allowed the CJEU not to

[338] For example, some EU Member States are members of the International Organisaiton for Wine and Vine (OIV) but the EU is not. In spite of this, EU secondary law refers to the oenological practices of the OIV, see Council Regulation (EC) 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (no longer in force) at stake in case C-399/12 *Germany v Council (OIV)* paras 63-64.

[339] F Erlbacher, 'Article 216 TFEU' in M Kellerbauer, M Klamert, J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (OUP 2019), p. 1648.

[340] J Etienne, 'Loyalty Towards International Law as a Constitutional Principle of EU Law?' Jean Monnet Working Paper 03/11, p. 2.

[341] On the *Kadi* case see G de Búrca, 'The European Court of Justice and the International Legal Order after Kadi' (Jean Monnet Working Paper 01 /09), pp. 45-46.

[342] Opinion of AG Maduro, joined cases C-402/05 P and C-415/05 P *Kadi et Al Barakaat v Council* ECLI:EU:C:2008:11, para. 24.

[343] The *Kadi* saga generated ample debate. The reading of the Court has been criticised by many as indirectly invalidating the Security Council resolution and putting into question the superiority of obligations deriving from the article 103 of the UN Charter. See among others G de Búrca, 'The European Court of Justice and the International Legal Order after Kadi' (Jean Monnet Working Paper 01 /09); A Cuyvers, '"Give Me One Good Reason": The Unified Standard of Review for Sanctions after Kadi II' (2014) CMLRev 1759; S Poli, M Tzanou, 'The Kadi Rulings: A Survey of the Literature' (2009) 28 Yearbook of European Law, pp. 533-558.

challenge directly the resolution of the Security Council but its implementation in the EU legal order, in this way showing that the acts through which the Union gives effect to the resolutions, like any other EU acts, can be subject to the Court's judicial review including for compliance with fundamental rights and the constitutional principles of the EU legal order. The *Kadi* case well exemplifies two elements and challenges related to the implementation of international law within the EU legal order: the respect for EU fundamental rights when international law affects individuals, and the preservation of the essential characteristics of the EU legal order, in a word its autonomy.

The concept of autonomy has played a major role in the recent jurisprudence to delineate the limits to the application and influence of international law in the EU legal order. As noted by Odermatt, autonomy broadly understood is not peculiar to the EU, but is discussed more widely in public international law with regard to the exercise of independent powers by international organisations (IOs).[344] IOs are composed "by states and constrained by their founding instruments, but have also been tasked with the powers and institutional structures to act with a certain level of independence from those states".[345] As stated by the International Court of Justice (ICJ) in *Legality of Nuclear Weapons* case, one of the goals of treaties establishing international organizations "*is to create new subjects of law endowed with a certain autonomy*".[346]

The autonomy of EU legal order is not referred to by the Treaties and does not have a clear definition but has been widely employed by the CJEU. For the first time in *van Gend and Loos*,[347] the Court affirmed that the EU constitutes a distinct and new legal order, and this notion has been applied ever since to both an internal and external setting. On the one hand, internal autonomy is proper of the relationship between the Member States and the EU and is based on the principles of primacy and direct effect. On the other hand, external autonomy is *vis-à-vis* the international legal order and strives to preserve the essential characteristics of the EU legal order. In order to do so, the Court has defined the relationship between international and EU law as determined by the rules in the EU legal order, establishing that the

[344] J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI, MWP 2016/07), p. 3.
[345] ibid.
[346] ibid, p. 3 citing ICJ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [8 July 1996].
[347] Case 26-62 *van Gend and Loos* ECLI:EU:C:1963:1.

essential characteristics of EU law, including its exclusive jurisdiction to interpret EU law, cannot be jeopardised by international law. As put forward by Lenaerts, in Opinion 2/13 (ECHR) the Court carries out a thorough analysis of the EU concept of autonomy counting among its vital features: "the constitutional structure of the EU, the nature of EU law, the principle of mutual trust between the Member States, the system of fundamental rights protection provided for by the Charter, the substantive law of the EU that directly contributes to the implementation of the process of European integration, the principle of sincere cooperation, and the EU system of judicial protection" including the preliminary reference procedure.[348] With regard to the external autonomy of the EU legal order, Court's role has been defined as that of the EU's gatekeeper from international law which might affect the essential characteristics of the EU legal order.

First, the Court used the lens of autonomy to decide whether an agreement concluded by the Union was compatible with EU law, to determine whether or not the Union should accede to or conclude said agreement. Two prominent examples are Opinion 2/13 on the Union's accession to the ECHR and Opinion 1/17 on CETA's Investor-State Dispute Settlement (ISDS). In the first case, the Court held the Union's accession to the ECHR incompatible with the autonomy of the Union citing its exclusive jurisdiction to interpret EU law, the co-respondent mechanism including the allocation of competences and responsibilities between the Union and the Member States, and the mutual trust between the Member States.[349] On the contrary, the provisions on ISDS under the CETA were held in compliance with the autonomy of EU law thanks to specific safeguards which were part of the agreement.[350]

Second, the concept of autonomy has affected the Court's interpretation of the Union's and the Member States' commitments under an international agreement. *Mox Plant* is a case on point. The Commission brought an infringement action against Ireland for starting proceedings under the UN Convention on the Law of the Sea (UNCLOS) facing the UK (another EU Member State at the time). Notwithstanding the fact that UNCLOS was concluded as a mixed agreement (and governs areas that are of national and EU competence), the CJEU held

[348] K Lenaerts, 'The Autonomy of European Union Law' (2019) Post AISDUE I, p.6.
[349] Opinion 2/13 (Accession to the ECHR) ECLI:EU:C:2014:2454, para. 258.
[350] Specific reassurances were deemed relevant by the Court: EU law must be considered as a fact rather than the applicable law, the right to regulate is explicitly mentioned, there is a commitment of the parties not to lower the existing standards in the CETA Joint Interpretative Statement, and substantive standards are narrowly defined. See Opinion 1/17 ECLI:EU:C:2019:341, paras 120-161.

that a Member State cannot resort to international arbitration against another Member State in which Union competences could be affected. Thus, the Court held that Members States were under an obligation deriving from the duty of sincere cooperation to bring disputes concerning the interpretation of EU law to the CJEU which has exclusive competence on the matter pursuant to articles 344 TFEU and 19 TEU. Another case in which the Court's interpretation of an international agreement is driven by the preservation of the autonomy of the EU legal order can be seen in *Moldova v Komstroy* with regard to the Energy Charter Treaty (ECT).[351] This case originated from a preliminary ruling from the Paris Court of Appeal which was faced with a request from the Republic of Moldova to annul an arbitral award in favour of Komstroy LLC, a Ukrainian company. The main substantive question posed to the Court was on the interpretation of the ECT and, more precisely, on whether a contract for the supply of electricity constituted an investment under that agreement. While it was not strictly required by the questions of the preliminary ruling request, the Court took the opportunity to clarify the scope of application of article 26 ECT as not including intra-EU disputes, namely all disputes concerning an EU investor and an EU Member State. Like in the case of *Achmea*, the Court found that intra-EU disputes would be incompatible with the autonomy of EU law.[352] Thus, in paragraph 66 the Court stated: *"it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State"*.[353] At the core of the Court's argument is the fact that the arbitral tribunals remove disputes that can concern the interpretation and application of EU law from the domestic courts of the Member States, which are under an obligation of sincere cooperation to give full effect to EU law, including the obligation of seeking the interpretation of the CJEU on points of law through the preliminary ruling procedure. In turn, the possible lack of uniformity in the interpretation of EU law risks to threaten the mutual trust between the Member States, which is a principle premised on the shared belief that all Member States comply with EU law including the values of article 2 TEU.[354]

In light of the above, it can observed that, while the letter of the Treaties seems generally open to international law, the judicial management of the relationship between EU

[351] Case C-741/19 *Republic of Moldova v Komstroy LCC* ECLI:EU:C:2021:655.
[352] ibid, paras 62-63.
[353] ibid, para. 66.
[354] See further on mutual trust in section 4A.2.

and international law, as argued by Cannizzaro, is more nuanced.[355] Some authors highlight that the Court has taken a negative approach to autonomy, shielding itself from the influence of international law which can impact the EU's legal order.[356] Autonomy, in fact, imposes the conditions through which the Union can engage on the international plane and integrate international law in its legal order to preserve its essential characteristics. As put forward by Neframi and Gatti, the autonomy of the EU legal order is not only reflected on whether the EU can act on the international plane but also on its ability to adopt its internal rules once international commitments have been undertaken.[357] The fact that EU law sets the conditions for the integration of international law in its legal order and interprets the commitments of international law binding upon it in light of its autonomy is not in principle contrary to a respectful outlook on international law, which leaves states the choice of means to perform their conventional obligations. However, in some cases, the mere possibility of a threat to the autonomy of the Union was deemed sufficient to prevent the Union from engaging on the international plane, as in Opinion 2/13. As opposed to relying on the principle of sincere cooperation for the Member States to act in conformity with Union law, facilitate tasks of the institutions, and refrain from posing an obstacle to Union objectives, the Court might impose that the Member States or the Union abstain from acting in order to prevent a (possible) incompatibility with EU law. Likewise, even if there might be options under international law that would allow the Member States to act in compliance with EU law, this has not been considered sufficient for the Court to ensure that a potential incompatibility is remedied.[358] There is then room to argue whether this is an appropriate balancing between effective international action and the safeguard of EU constitutional principles.

[355] E Cannizzaro, 'The Neo-Monism of the European Union Legal Order' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011), pp. 57-58.
[356] See among others, J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI, MWP 2016/07).
[357] E Neframi, M Gatti, 'Autonomy and EU competences in the context of free trade and investment agreements' in I Bosse-Platière, C Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements* (EE 2019), p. 74.
[358] This argument has been explicitly made in relation to prior agreements of the Member States. See for example case C-249/06 *Commission v Sweden* ECLI:EU:C:2009:119.

4.2 The principle of sincere cooperation: balancing autonomy and respect for international law

The principle of sincere cooperation regulates the relationship between the Union and the Member States creating reciprocal duties of respect and assistance but also positive and negative duties on the Member States and their national courts. In particular, the second segment of article 4(3) TEU addresses the implementation of EU law requiring the Member States to take all appropriate measures to comply with the obligations deriving from the Treaties and the acts of the institutions. These duties do not only apply with regard to the implementation of internal law but also to the international agreements binding on the Union. This is pivotal for the Union because, as a subject of international law, it has to observe the treaties it adheres to. By considering its international commitments an integral part of EU law, the latter are subject to a duty of sincere cooperation to be given effect by Member States and their courts including a procedural duty to refer questions for preliminary rulings if necessary, and a substantive duty to effectively implement an international agreement.[359]

With regard specifically to the external action, the following paragraphs will first address the role of the principle of sincere cooperation with regard to the bindingness of international agreements and highlight that the principle underpins two main considerations which characterise the Union's action on the international plane. On the one hand, the obligations deriving from sincere cooperation enact the EU's commitment to respect international law; and, on the other hand, the need to preserve the autonomy of the EU legal order from international law. The latter is fundamental as autonomy is the prerequisite for Union external but also internal action. The principle thus shapes the way in which international law is incorporated and complied with in the EU legal order by creating duties on the Member States and on the EU institutions.

[359] E Neframi, 'The Duty of Loyalty: Re-thinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev 323.

4.2.1 Sincere cooperation and the bindingness of international agreements on the Union and the Member States

The principle of sincere cooperation has been viewed as a manifestation of the international law principle of *pacta sunt servanda*,[360] mandating the Union and the Member States to comply with obligations deriving from the EU Treaties, but also obligations of international law binding on the Union pursuant to article 216(2) TFEU and article 3(5) TEU with regard to general international law. It is submitted that the principle of sincere cooperation is conducive to the respect of international commitments in the EU legal order as they form an integral part of it, but it should not be seen as a mere repetition of article 216(2) TFEU. Whilst the two provisions overlap from the point of view of requiring the Union's compliance with international agreements binding on the Union, the principle of sincere cooperation addresses the manner in which EU law, but also national measures falling within the scope of EU law, should be executed. If article 216(2) TFEU is concerned with the legal effects deriving from the Union's engagement on the international plane, article 4(3) TEU has a broader relevance. When Member States implement an international agreement, they must do so facilitating Union action and without jeopardising the obtainment of the Union's objectives. Therefore, in line with its second segment, the principle of sincere cooperation aims to ensure compliance with international law binding on the Union and, according to its third segment, simultaneously with existing and prospective EU law, to maintain the essential features of the EU legal order as well as ensure that the Union can act effectively achieving both its internal and external objectives.

Looking inwards, it has been stated that sincere cooperation "to an extent is the main basic principle that holds EU law together".[361] Arguably, this is not just because it underpins many other EU law fundamental principles such as primacy or the Member States' liability for breaches of EU law.[362] At a fundamental level, the EU Treaties not only establish a specialised regime of international law but rather a separate and autonomous legal order, as the Court has consistently repeated.[363] As follows, Member States are not just parties to the EU Treaties

[360] D Davison-Vecchione, 'Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty' (2015) 16 German Law Journal 1163.
[361] A Delgado Casteleiro, 'Loyalty in External Relations Law: The Fabric of Competence, Autonomy and Institutional Balance' in E Neframi, M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018), p. 385.
[362] See M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), pp.71-82.
[363] Case 6-64 *Costa v ENEL* ECLI:EU:C:1964:66.

as any other multilateral treaty, but they become Members of the EU, an organisation with an institutional and constitutional structure whose powers are defined in the Treaties. The relationships between the Member States are therefore not built on reciprocal commitments in bilateral treaties but by the rules of the international organisation which has a certain autonomy from its members and by mutual trust among them. Furthermore, there is an "organic" link between the Member States and an international organisation such as the EU. Not only the Member States are the authors of the EU Treaties but participate in the decision-making of the Union through their representatives in EU institutions. In light of these characteristics of the EU and its legal order, the principle of sincere cooperation necessarily goes beyond the principles of *pacta sunt servanda* and good faith under international law. As put forward by De Baere and Roes, sincere cooperation is an incarnation of these principles, but it goes substantively further matching the increasing level of integration at EU level.[364] Following the Lisbon Treaty such level of integration can be considered high, encompassing many policy areas. By creating a bridge between EU competences and objectives, the principle asks more of the Member States than what strictly prescribed by conferral, because it requires them to ensure the effectiveness of EU action.

4.2.2 Sincere cooperation and autonomy

The relation between autonomy and the principle of sincere cooperation has found limited analysis in the literature.[365] In Opinion 1/09 the Court considered the observance of the principle of sincere cooperation an element of the autonomy of the EU legal order.[366] Sincere cooperation nurtures two fundamental relationships based on duties to fulfil the obligations deriving from the Treaties: between the Member States' national courts and the CJEU through

[364] G De Baere, T Roes, 'EU Loyalty as Good Faith' (2015) 64 ICLQ, p. 866.

[365] See however, A Delgado Casteleiro, 'Loyalty in External Relations Law: The Fabric of Competence, Autonomy and Institutional Balance' in E Neframi, M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018), pp. 385–408.

[366] Opinion 1/09 ECLI:EU:C:2011:123, paras 67-69 "It is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties […] It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (…). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law... The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (…)"

the preliminary ruling procedure, and between the Member States and the CJEU (as the judicial institution of the EU) which has the exclusive jurisdiction on the interpretation and validity of EU law. At the centre of both is the CJEU as the ultimate authoritative interpreter of EU law. International commitments which remove elements of the national courts' jurisdiction or allow another international court to provide a binding interpretation of EU law are thus threatening the national courts' and the Member States' compliance with the principle of sincere cooperation to give effect to EU law. The uniform interpretation of EU law by national courts following the case law of the Court is further paramount in the EU legal order as it is the foundation of the mutual trust between the Member States. Equally, the Court held in *Mox Plant* that a Member State submitting a dispute involving the interpretation of EU law to another court breaches its exclusive jurisdiction under article 344 TFEU, and in turn the principle of sincere cooperation of which that article is a specific expression.[367] It can thus be observed that duties of sincere cooperation protect the interpretative autonomy of the CJEU, and its ability to determine the meaning of EU law and of international agreements falling within its scope.

It is worth highlighting the circular relationship between the principle of sincere cooperation and autonomy. On the one hand, if there were no sincere cooperation between the Union and the Member States, for instance no compliance by the national courts with the duty to give full effect to Union law, the EU legal order could not be autonomous from the domestic legal system. On the other hand, if Member States' relationships were governed by international law or an international court could interpret and apply EU law, the EU legal order would not be autonomous or independent nor would there be sincere cooperation between the Union and the Member States. Thus, it can be observed that sincere cooperation and autonomy proceed in parallel by forging and maintaining the special relationship between the EU and the Member States on which rests the whole EU legal order.

[367] Case C-459/03 *Commission v Ireland (Mox Plant)* (2006) ECLI:EU:C:2006:345, para. 169 "The obligation devolving on Member States, set out in Article 292 EC [current 344 TFEU], to have recourse to the Community judicial system and to respect the Court's exclusive jurisdiction, which is a fundamental feature of that system, must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 10 EC [current 4(3) TFEU]".

4.2.3 Sincere cooperation and EU's commitment to respect international law

The principle of sincere cooperation allows the Union to enact its commitment to the strict observance of international law. It ensures compliance with the commitments undertaken in the Union's legal order through the Member States' implementation of matters falling within their implementing competence and by imposing duties of cooperation not to jeopardise the attainment of the Unions' objectives. This is vital from the point of view of international law, because the latter does not recognise the division of competences between the Union and the Member States. In fact, according to international law, the internal competence divide is in principle irrelevant for third states to determine whether an agreement has been breached.[368]

Pursuant to the principle of sincere cooperation, Member States may be called to take additional steps within their sphere of competence in order to give full effect to international agreements that are an integral part of EU law or that can affect the implementation of EU objectives. In this way, the principle enables the Union to enter into international commitments, even if not entirely within its external or implementing competence, knowing that it will be able to comply with its outward commitment to respect international law prescribed by article 3(5) TEU. For instance, Member States need to comply with provisions of international agreements within the scope of EU law safeguarding the overall compliance of an agreement within their domestic law, or national courts might have to follow the interpretation of the CJEU for obligations falling both in the scope of national and EU law. [369]

4.3 Concluding remarks

When considering the spectrum between monism and dualism, it can be observed that the EU Treaties show a generally monist approach, whereas the Courts' jurisprudence reads the Union's general openness towards international law through the lens of the EU constitutional legal order and the preservation of its autonomy providing, thus, a more nuanced picture. Considering the interplay between EU law and international law within the EU legal order, the CJEU located international law below EU primary law and above EU secondary law. This does

[368] ILC Draft Articles on the Responsibility of International Organisations with commentaries (2011), comment to art. 10 para. 9.

[369] Case C-53/96 *Hermes International v FHT Marketing Choice BV* ECLI:EU:C:1998:292, paras 26-32. The Court held unequivocally that it could still interpret provisions concerning a field in which the Union had not yet legislated if they referred to situations falling both within the scope of national and EU law.

not however answer the question of direct effect of an international agreement, in other words, whether an international agreement can be invoked in a court or automatically supersedes relevant EU legislation, which is instead determined by specific requirements established in the CJEU's case law. The concept of autonomy has also emerged as a defining feature of the CJEU's jurisprudence in order to assess whether the Union could become bound by an international agreement, ensuring the compatibility of that instrument with the essential characteristics of the EU legal order. One of such characteristics is the compliance with the principle of sincere cooperation. In the above paragraphs, it has been put forward that this principle not only acts as an element of its autonomy (both internal and external) but has a significance of its own as it is a precondition for the existence of the autonomous nature of the EU legal order. The principle of sincere cooperation and the duties deriving from it play a central role in terms of enabling the Union as a non-unitary actor to respect its international law commitments and at the same time ensure the EU legal order remains independent from international law.

Section A: Implementation

The present section will consider how the principle of sincere cooperation affects the implementation of international agreements in the EU legal order. In particular, it will address: the implementation of different types of agreements (4A.1), the intra-EU effects of international agreements (4A.2), and the CJEU's jurisdiction to interpret international agreements (4A.3).

4A.1 Sincere cooperation and the implementation of international agreements

It is vital to note that the external competence exercise by the Union does not equate with the competence to implement an international agreement within the EU legal order. With regard to the internal exercise of Union competence, Member States are normally responsible for implementing EU law. For instance, as put forward by De Baere, a general framework may be provided at EU level while Member States provide "local knowledge necessary for proper implementation enhancing the chances for effective action".[370] Unlike for internal Union policies, in the EU external action the Commission might be involved to a higher degree in the implementation of an agreement or agreed action. A concrete example is in the context of development cooperation when the Commission actively oversees the implementation of programmes together with the EEAS.[371] Another circumstance are subsequent actions within the framework of a treaty regime or law-making within an international organisation which contribute to an agreement's implementation or to the achievement of the goals of an organisation. Some of the problematic aspects deriving from the management of the competence divide that have been evidenced in Chapter 3 with regard to the conclusion of international agreements can also be transposed to the moment of implementation. As follows, the next sections will address the implementation in the EU legal order of EU-only and mixed agreements as well as agreements binding the Member States.

[370] G De Baere, 'Subsidiarity as a Structural Principle Governing the Use of EU External Competences' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018), p.111.
[371] ibid, pp. 111-112.

4A.1.1 EU-only agreements

According to the centre of gravity test, an agreement is concluded based on a predominant legal basis which determines the nature of the competence to conclude an agreement. Even if an agreement is concluded solely by the EU- as it can be observed in the vast majority of cases when looking at the agreements that the Union concluded from 2010- this does not mean that the competence of the Member States is engulfed by that of the Union and is overtaken, because it will remain relevant for the implementation of an agreement. In fact, the Member States' implementing competence, rather than being reflected in whether or not they are parties to an international instrument, can be observed at the moment of implementation. When the Union concludes an agreement alone it does not necessarily have the competence to implement all the commitments contained therein. An agreement might, in fact, include areas where enforcement measures must be established at the national level for instance in the context of environmental law.

An important caveat should be made to differentiate between the implementing competences and retained competences of the Member States. In the first case, whilst the implementation might be at national level (with more or less discretion given by EU law), there has been a transfer of decision-making competence to the Union which is entitled to undertake action at EU level. In this case, an agreement can be concluded as an EU-only agreement such as the case presented in Opinion 3/15.[372] In that case, the fact that an international commitment curtailed the derogations available under EU law did not affect the exclusive nature of the external competence of the Union to conclude that agreement and the fact that Member States had to follow the Union's implementing measures.[373] When considering retained competences, it is instead necessary that the Member States participate to the conclusion of an agreement because the decision-making competence in those areas rests on them. The Union could not conclude alone agreements which exceed its conferred competence or that go beyond the scope of EU law (e.g. territorial boundaries between EU Members). Therefore, for all matters concerning retained Member States competence, they must exercise that competence concluding an agreement alongside the Union in order for EU

[372] In the Opinion, the Court was asked to determine the correct legal basis for the conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled administered by WIPO.
[373] Opinion 3/15 ECLI:EU:C:2017:114, paras 120-128.

to conclude an agreement. For example, an agreement concerning the protection of workers in Opinion 2/91 was ruled to be partly within the exclusive competence of the Union and partly within that of the Member States. Could the Union become a contracting party to that Convention, it would have been a case of a mandatory mixed agreement.[374]

With regard to the implementation of EU-only agreements, Member States must follow the principle of sincere cooperation under article 4(3) TEU as when implementing EU law. Article 216(2) TFEU has the function of reasserting the principle of conferral and the preservation of the competence divide. As the Union has exclusive competence over the conclusion of the agreement, the Member States will be obliged to enact the Union's implementing measures and will be bound to implement commitments in their domestic legal orders to the extent that they are given discretion to do so under EU law. Therefore, it can be observed that by implementing an agreement binding on the Union, the Member States are fulfilling their obligation of sincere cooperation to give full effect to EU law. This scenario would be representative of policy areas in which the EU has external exclusive competence such as the CCP in which there are common rules or full harmonisation, but the implementation of an EU-only agreement might be more complex if an agreement contains ancillary matters falling under areas of minimum harmonisation or areas in which there is internal differentiation at EU level. Some of these complexities will be analysed in Section 4A.1.3.

4A.1.2 Mixed and incomplete mixed agreements

a. Full mixity

When compared to the situation of EU-only agreements described above, mixed agreements are characterised by the presence of both the Union and the Member States as contracting parties to an international agreement. As follows, Member States and the Union are both directly bound from the point of view of international law to abide by an agreement they have concluded. In this case, Member States are under two obligations: one originating from their status of contracting parties given by the international law principle *pacta sunt servanda* and another deriving from article 216(2) TFEU as they are bound by agreements binding the Union. From an EU law point of view, article 216(2) TFEU does not specify what types of agreements

[374] Opinion 2/91 ECLI:EU:C:1993:106. According to the rules of the ILO, ratification of ILO Conventions is open to states only.

it refers to and the Court has not hesitated to assert that a mixed agreement as a whole constitutes an integral part of EU law.[375] As such, the Union's participation does not bring an agreement falling partially under EU competence and partially in the competence of the Member States under EU competence, but rather within the broader scope of EU law.

Like EU-only agreements, when implementing mixed agreements Member States must follow the principle of sincere cooperation under article 4(3) TEU. Under the second indent of this article, the Member States are required to give full effect to EU law which, with regard to mixed agreements, entails following the competence divide and the EU's implementing measures for areas under EU competence. At the same time, a mixed agreement may cover aspects falling under the Member States' competence and if so, they are entrusted with the implementation of those provisions in their national legal orders. Member States will not, however, enjoy complete freedom as to the manner in which they give effect to those commitments but need to consider possible negative effects to the completion of Union tasks and to the achievement of Union objectives linked to the conclusion of that international agreement according to the third indent of article 4(3) TEU. So, whilst Member States determine the contents and form of implementation of matters falling within their retained competence at national level, the principle of sincere cooperation creates a broad duty of compliance for the Member States for the part of the agreement not under EU competence.[376]

It is put forward that, from an EU law perspective, Member States have a duty to implement and comply with a mixed agreement in its entirety deriving from article 216(2) TFEU and article 4(3) TEU. The existence of these duties has a two-fold reasoning. First, the implementation by the Member States of certain parts of an agreement might affect existing EU law or the Union's standards of implementation of the parts of an agreement falling within its competence. Second, a breach of an international agreement might render the Union liable at the international level. In the context of mixed agreements, the division of competence between the Union and the Member States is normally not externalised and the Union and the Member States are equal contracting parties, bound by the entire agreement, and may be jointly liable for violations.[377] Therefore, it is essential that Member States cooperate loyally

[375] Case 181-73 *Haegeman v Belgian State* ECLI:EU:C:1974:41, case 12-86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400, case C-53/96 *Hermes International v FHT Marketing Choice BV* ECLI:EU:C:1998:292.

[376] This duty of compliance deriving from sincere cooperation can be enforced by the CJEU, see Section 4B.

[377] When and to what extent the Union may be held liable jointly with the Member States remains subject to debate, see among others P T Stegman *Responsibility of the EU and the Member States under EU International*

with the Union in the implementation of an agreement to avoid the Union's liability for breaching an agreement. This conclusion is arguably not affected by the possibility of externalising the competence divide with a declaration of competences in order to have more clarity over competences and responsibilities for different subject matters within an agreement. Declarations of competence are often drafted at the request of third parties and may be annexed to an agreement but have limited concrete value. It has been consistently pointed out that in practice these declarations constitute more of a general indication rather than a definitive answer to the question of competence divide and responsibility between the Union and the Member States.[378] This is because a declaration does not refer to the specific provisions of an agreement, and the competence divide between the Union and the Member States is likely to change following internal developments.

b. Incomplete mixity

The lack of participation of some Member States in an international agreement concluded by the Union and other Member States known as incomplete mixity raises another set of legal questions. Incomplete mixed agreements might be the result of, among others, the missing ratification of an agreement by one or more Member States,[379] the limited scope of an agreement which is only of interest to some Member States,[380] the withdrawal from a mixed agreement by one or more Member States.[381] Incomplete mixity may also be temporary such as pending the ratification process of an international agreement.[382]

As previously stated, when it comes to complete mixed agreements, all the Member States are bound by the entire agreement, irrespective of the allocation of competence which

Investment Protection Agreements- Between Traditional Rules, Proceduralisation and Federalisation (Springer 2019), pp. 106-112.

[378] See among others, A Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 European Foreign Affairs Review, p. 492. J Odermatt, *International law and the European Union* (CUP 2021), pp.75-82.

[379] E.g. in the case of the Istanbul Convention, see Opinion 1/19 ECLI: EU:C:2021:832.

[380] For example, agreements that are linked to the management of natural resources such as a river or mountain chain e.g. Opinion 1/76 ECLI:EU:C:1977:63.

[381] For instance Italy's withdrawal from the Energy Charter Treaty recently followed by other Member States.

[382] E.g. the Paris Agreement on Climate Change was first concluded by the Union pending ratification by some Member States. See, art. 3 of Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change. See further on the EU's ratification J Heliskoski, G Kübek, 'A Typology of EU Mixed Agreements Revisited' in N Levrat, Y Kaspiarovich, C Kaddous and R A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2022) p. 37.

is often not further defined at the moment of conclusion of the agreement. Indeed, one of the advantages of mixity is that it allows to proceed with the conclusion of an international agreement without being hold back by long discussions as to the competence divide. In such a situation, the Union and the Member States would later implement the agreement to the extent of their competences.

When a mixed agreement is incomplete, only some Member States will be bound by an international law obligation with regard to the compliance of provisions that fall within their retained competence. From an international point of view, states cannot be bound by an agreement unless they are parties to it according to the maxim *pacta tertiis nec nocent nec prosunt.* As follows, EU Member States could not be bound internationally by an agreement unless they exercised their retained competence and became parties to that agreement. From an EU law perspective, the fact that Member States are seen as separate third parties is somewhat artificial. They are involved in the decision-making within the EU's bodies, and they might have played an active role in the negotiation and in other diplomatic activities leading to an international convention. Therefore, a first question concerns whether non-participating Member States can be bound by an EU law obligation to implement an agreement due to the Union's participation in said agreement.

At the heart of this matter lies the tension between the principle of conferral and article 216(2) TFEU which states that agreements concluded by the Union bind the Member States. According to the principle of conferral, an agreement becomes binding on non-participating Member States as a result of the internal division of powers and the transfer of competence to the Union. If a mixed agreement is incomplete, the non-participating Member States could not be bound to perform substantive obligations falling within their retained competence but, nonetheless, would be bound by obligations deriving from the principle of sincere cooperation to give full effect to EU law and to the part of the agreement under EU competence, and to refrain from jeopardising the objectives of the Union. More specifically, EU law obligations to ensure uniformity of interpretation and the effective application of EU law, which *de facto* can limit a retained Member State competence. As rightfully concluded by Gravnik, for a Member State not participating in a mixed agreement the "bindingness" of article 216 TFEU would equate to an obligation to cooperate with the Union facilitating its tasks and refraining from

jeopardising its objectives within the meaning of article 4(3) TEU, which can be enforced by the CJEU.[383]

Drawing a comparison between the situation of full mixity and that of incomplete mixity, it can be observed that the principle of sincere cooperation will apply to the Member States in both circumstances. The main difference concerns the non-participating Member States in the context of incomplete mixity, because duties of sincere cooperation will not entail the full implementation of an agreement in their national systems. Rather, duties will concern enabling the Union's compliance with the agreement and thus can take the shape of a duty of not acting against the object and purpose of the agreement to avoid international liability of the Union, and refraining from jeopardising the effective implementation of the agreement including preventing the exercise of EU exclusive competences. These duties of cooperation would enable the Union to implement the agreement, limiting potential obstacles from the Member States, and facilitate Union action. Therefore, on the one hand, in full mixed agreements, the exercise of Member States' retained competences in the adoption of their implementing measures must be in compliance with the principle of sincere cooperation with a view to ensure overall compliance with a treaty; and, on the other hand, in incomplete mixed agreements non-participating Member States must consider the principle of sincere cooperation their law-making (possibly also including treaty-making), which must not constitute an obstacle to Union action or impede the implementation of the part of the agreement falling under Union competence.

c. Mixity without the joint exercise of competence of the Union and the Member States

Two specific types of Union action can result in multilateral mixed agreements even though they are not characterised by the joint exercise of competence but by what could be termed a "parallel" exercise of competence between the Union and the Member States.

i. Partial conclusion of an agreement

A first situation concerns agreements concluded only partially by the Union, when it enters into a reservation or limits the scope of its commitments to selected provisions of an agreement falling within its exclusive competence. For instance, in Opinion 1/19, the Court

[383] L Granvik, 'Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness' in M Koskenniemi (ed), *International Law Aspects of the European Union* (Nijhoff Brill 1998), pp. 255-272.

was asked to provide its views on the envisaged Council Decision concluding the Istanbul Convention to which the Union ultimately recently acceded only with regard to its exclusive competences.[384] In this case, the Court affirmed that the Member States and the Union are only bound to the extent of their competence, each acting exclusively in their sphere of competence when concluding an agreement.[385] Therefore, in that case, the Court explains that the Union is bound only for matters falling within Union competence, and matters falling within retained Member States' competence bind the Member States only if they are formally parties.[386] For the Member States this means that they are not under an EU obligation to exercise their retained competence to sign, ratify, or implement provisions of a treaty falling within their competence.[387] They are, however under an EU obligation to implement the part of the agreement falling within Union competence in order to enable the Union to accomplish its obligations. Thus, any exclusive EU competence and shared competence that the Council has elected to exercise, including when these might limit the exercise of their retained competence. Unlike regular mixed agreements, these agreements cannot be considered an integral part of EU law in their entirety because the Union intended to commit itself only to certain provisions and it is not bound by the agreement as a whole.

ii. Subsequent accession of the Union

Another circumstance – which might coexist with the first- is that of the subsequent accession of the Union to an agreement or treaty protocol to which the Member States are already parties.[388] Here there is no joint exercise of competence for the conclusion of the agreement, but the Union's subsequent exercise of a newly acquired exclusive or shared competence, a supervening exclusive external competence, or possibly a treaty change allowing for the Union's participation in an international organisation.[389] As the Member States are already

[384] Opinion 1/19 ECLI: EU:C:2021:832. Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement, recital 5.
[385] Opinion 1/19 ECLI: EU:C:2021:832, paras 259-260.
[386] ibid, para. 257.
[387] ibid, para. 259.
[388] The Union can also accede to agreements to which only some of its member states are parties. See section on incomplete mixity.
[389] An example is the Geneva Act of the Lisbon Agreement which, unlike the main agreement, allows the Union to be a member. See, WIPO, Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (2015).

parties, they have been implementing an agreement in their domestic legal orders and there might be some consequences deriving from the Union's participation. The way in which the Union's subsequent engagement might affect the existing implementation of an agreement depends on the policy area at stake. If it concerns a field that was fully or partly covered by EU law, Member States had to still comply with EU law when implementing the agreement or might have had to follow EU law provisions in substitution of international law provisions prior to the Union's accession. In the case of a previously non-existing competence at EU level such as in foreign investment, or a shared competence not yet exercised internally, the participation of the Union can possibly have more far-reaching effects on the Member States. The latter might need to amend their implementing measures in order to follow those of the Union and comply with its standards. A point of contention between the Union and the Member States might concern the extent of the Union's competence exercise in case a competence was not previously exercised internally, leading to the question of whether the Member States can still act on the international plane in that area. From an international point of view however, there might be limited changes as the Union becomes a party in its autonomous right unless there are specific rules related to the participation of IOs. An example might be with regard to voting rules, speaking rights and participation in dispute settlement mechanisms (if present) which need to be arranged to take into consideration the presence of both the Union and the Member States.

A particular circumstance concerns the Union's subsequent accession to treaties to which only some of the Member States are parties. The non-participation of some Member States in an agreement that *de facto* becomes mixed with the Union's accession is not an unlikely circumstance. Examples include the COTIF Convention and the Geneva Act of the Lisbon Agreement. In this case, the accession of the Union creates a series of legal issues with regard to the implementation of an agreement starting from understanding the scope of the Union's exercise of competence to determine the extent to which Member States that are not parties in their own right will be bound by an agreement following the Union's accession. Such accession might be regulated by a separate "Accession Agreement" including specific indications on the EU's participation in the convention/international organisation such as in the case of the COTIF, but this is not a constant practice.

As the Court clarified in the case *Germany v Council (COTIF I)*, the Union may exercise its shared competence on the external plane even if it was not yet exercised internally through

the conclusion of international agreements. As was stated in Chapter 3, this would not lead to exclusivity of Union action on the external plane on the subject matter in question as it would be the case of a competence exercised internally which had become exclusive under article 3(2) TFEU. Member States could still further act on the international plane to the extent that the Union had not acted, in accordance with the obligations of sincere cooperation to facilitate the fulfilment of the EU's tasks under the agreement concluded by the Union and not to jeopardise the achievement of the objective pursued by Union action. With regard to the implementation of an agreement, even if a shared competence can be exercised externally solely by the Union, it can remain a shared competence internally in compliance with the provisions of an international agreement. This would be so until the adoption of EU rules in that area, which arguably could be legislation enacted in order to align the Union's framework with the international agreements concluded or subsequent legislation on the matter.

4A.1.3 The effect of internal differentiation on the implementation of agreements concluded by the Union

The theory of implied external powers of the Union is founded on a parallelism between the internal and the external legal order. A varied degree and scope of participation in internal EU policies can thus impact the Union's engagement on the international plane, and in turn the implementation of resulting commitments in its legal order. The diversification of objectives and interests of the Member States following the Union's enlargement led to the introduction of mechanisms for differentiation in the Treaty of Amsterdam with the view of preventing permanent setbacks in the integration process. Since then, new forms of differentiation have emerged such as in the area of economic governance and, more recently, the 2016 Brexit referendum has again created a momentum for the debate on differentiated integration.[390] For the purpose of this section, the term differentiated integration will be used to express the circumstance in which not all Member States participate in an EU policy to the same extent and at the same time. It should be noted however that other expressions have also been used which entail other substantive nuances.[391] Two-core manifestations of differentiated

[390] A Miglio, 'Differentiated Integration and the Principle of Loyalty' (2018) 14 EuConst, p. 475.

[391] The latter is often linked to expressions such as multi-speed Europe, variable geometry, and integration *à la carte*. Even though these terms intuitively share a common idea, they are not to be understood as synonyms because they portray different roles of differentiation and, with that, divergent visions of what the EU is and ought to be. See, S Blockmans 'Introduction' in S Blockmans (ed), *Differentiated Integration in the EU. From the Inside Looking Out* (CEPS 2014), p.5.

integration are internal to the EU legal order, namely enhanced cooperation and opt-out mechanisms.

As it concerns the effect of the application of opt-outs to the implementation of agreements concluded by the Union, for instance on the AFSJ, in some cases it can be straightforward. The Member States concerned will not participate in the Council decisions signing and concluding an international agreement in this field and will not be bound by them.[392] Often agreements relating to the AFSJ contain a special provision limiting the scope of the agreement such as "shall not apply to the territory of". Odermatt notes that in the case of readmission agreements there is often a clause inviting Denmark to conclude a bilateral agreement mirroring the one concluded by the EU.[393] The application of the Protocols, however, depends on the choice of legal basis, which can be simpler in case of single-issue agreements but increasingly complex for agreements encompassing a broader variety of subject matters. As the Court stated in Opinion 1/19, the fact that part of an agreement touches upon the ASFJ, does not entitle the Council to split its decision for signature in order to include a separate legal basis to ensure the rights of the Member States benefitting from a Protocol.[394] Similarly, in prior case law, the Court affirmed that the existence of a Protocol on the same subject matter covered by an agreement does not pre-determine the agreement's legal basis, nor the agreement should have *a priori* a dual legal basis.[395] As follows, an agreement touching upon a variety of issues (e.g. association agreements), and concluded with a single a non-AFSJ legal basis, will bind the Member States subject to a protocol too. As argued by Cremona, unless a Member State chooses to opt in to implementing measures, the opted-out Member State will be under a duty of sincere cooperation based on article 4(3) TEU to take any necessary steps to implement the obligation within a protocol's scope via its own domestic legislation.[396]

Enhanced cooperation could also be liable to affect the Union's conclusion of and participation within international agreements due to the internal separation between

[392] The preamble of the relevant council decision might read as follows: Ireland or Denmark 'does not take part in the adoption of this Decision and is not bound by it or subject to its application', or Ireland 'has notified its wish to take part in the adoption and application of this Decision'.
[393] J Odermatt, *International law and the European Union* (CUP 2021), p. 95.
[394] Opinion 1/19 ECLI:EU:C:2021:832, paras 328-328.
[395] C-656/11 *United Kingdom v Council* ECLI:EU:C:2014:97, paras 47-50.
[396] M Cremona, 'Internal Differentiation and External Unity' in F Amtenbrink, G Davies, D Kochenov, J Lindeboom (eds), *The Internal Market and the Future of European Integration Essays in Honour of Laurence W. Gormley* (CUP 2019), pp. 415-416.

participating Member States, a "restricted Union", and non-participating Member States. On the one hand, if an agreement is limited to issues subject to enhanced cooperation, a restricted Union would have the competence to conclude it and non-participating Member States could become parties in their own right, exercising their retained competences. This would constitute a mixed agreement, even though Union and Member State competences would not be exercised jointly but rather in parallel. Voting rights in such a case will need to be adjusted accordingly as the Union would be acting within the framework of enhanced cooperation with a restricted membership. It is worth noting that enhanced cooperation entails the exercise of EU competence only for a limited number of Member States, and it would not give rise to the ERTA-effect for non-participating Member States. Therefore, such an agreement could not fall under "full" Union exclusive competence and bind non-participating Member States, who remain free to act on the international plane. The situation could be different, however, if an agreement would require the participation of all Member States in order for the Union to be a member or exercise the rights connected to membership to an organisation and the Council took a decision that the Member States have to exercise their shared competence calling for mixity. The primary difference between this situation and the situation of mixity created by the restricted union concluding the agreement is that non-participating Member States would here be clearly acting in the framework of the Treaties. The Union as opposed to the "restricted Union" would conclude the agreement and non-exclusive competences not yet exercised by the Member States will have to be exercised jointly with the Union.

On the other hand, if an agreement were to include a multitude of topics, including matters subject to enhanced cooperation, who will be entitled to conclude the agreement will be determined according to the chosen legal basis. Like the case of the Protocols examined earlier, the implementation of the agreement would then reflect the internal differentiation competences involved. If there were multiple legal bases of which one referring to an area subject to enhanced cooperation, an agreement would be mixed. Such situation creates increasing complexity because a restricted Union would become an additional actor to either the full Union, the Member States, or both Union and Member States. As put forward by Neframi, agreements that entail the participation of the restricted and full Union will be subject to two Council decisions one in a restricted formation and one in plenary formation and would have to be represented externally by the Union or the Union and the Member

States depending on the matter in question.[397] She concludes that the management of diversity on the international plane would require reaching a common position with the Member States outside the enhanced cooperation in order to ensure the unity of the representation of the Union and a clearer legibility of the Union's position by third states.[398] No obligation would however arise for Member States not participating in the enhanced cooperation to join the restricted Union.[399] This is another manifestation of the principle of sincere cooperation, because the EU could not be a party of an agreement twice and it will be necessary for all Member States to facilitate the exercise of EU competence by the Union.

The lack of participation of all Member States at the internal level can result in a complex scenario when the Union acts externally. As Union competences have not been exercised with respect to all Member States, non-participating Member States can choose whether to exercise their retained competence in parallel to that of the Union. This is in turn a potential source of incomplete mixed agreements on the external level as non-participating Member States are not bound to join a "restricted union" nor to participate in Union action. This does not seem to be the case when agreements are concluded according to a legal basis which does not give rise to differentiation, which will then be relevant only internally at the moment of implementation. In principle, internal differentiation is the reverse image of the situation created by incomplete mixity. In the first, not all Member States are internally bound by an agreement concluded by the Union, whereas in the second not all Member States are bound externally but are all bound via EU exclusive (or exercised shared) competences at the internal level.

4A.1.4 Agreements of the Member States

In limited circumstances, the Union might be bound by agreements of the Member States and will implement them in its legal order. Notwithstanding the development of the Union's international treaty-making power, the Member States continue to be actors on the international plane, pursue their own foreign policies, and conclude international agreements. Agreements concluded by them are part of their domestic law and are in principle extraneous

[397] E Neframi, 'L'élargissement et les coopérations renforcées: de nouvelles complications dans l'action internationale des Communautés et de l'Union européennes?' in J Andriantsimbazovina, C Geslot (eds), *Les Communautés et l'Union européennes face aux défis de l'élargissement* (La Documentation française 2005), p. 349.
[398] ibid, p. 350.
[399] ibid, p. 351.

to the EU legal system.[400] However, in spite of the lack of a formal link between the Union and an agreement concluded by the Member States, these agreements can in some circumstances still be relevant from the perspective of EU law.[401] Member States' agreements "are not formally 'Union agreements' within the scope of articles 216 and 218 TFEU, and thus the matters regulated by those provisions, including the binding nature of the agreement as far as the Union is concerned as well as its place in the Union legal order are not expressly resolved".[402]

As follows, this subsection will look at some specific instances which show different levels of influence that an agreement might have on the Union through the typology provided by Allan Rosas.[403] On one extreme, an agreement concluded by the Member States may become binding on the Union as an integral part of EU law; and on the other, it can entail a requirement to consider the agreement in the implementation of Union legislation. In turn, this will also be a factor to determine the extent of the CJEU's interpretative jurisdiction and of the Union's compliance with the agreement, and whether such international agreement may invalidate secondary EU law.

a. Functional succession

As recalled by Schütze, article 31 of the Vienna Convention on Succession of States in respect of Treaties of 1978 "ignores -even for federal states- that the Member States may survive as (independent) subjects of international law with (limited) treaty powers".[404] To regulate this matter, the EU has developed its own theory and practice of functional succession. The Union considers itself materially bound by those international agreements that were concluded by all its Member States and fall within its exclusive competence.[405] *International Fruit* is the only case where the theory of functional succession was deemed applicable by the Court with regard to the GATT. In that case, the Court held that as a result of the transfer of competence

[400] A Rosas, 'The Status in EU law of International Agreements concluded by the Member States' (2011) 34 FordhamIntlLJ, p. 1310.
[401] ibid.
[402] M Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union' in A Arnull, C Banard, M Dougan, E Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), p. 439.
[403] For an in-depth analysis on agreements concluded by the Member States see A Rosas, 'The Status in EU law of International Agreements concluded by the Member States' (2011) 34 FordhamIntlLJ 1304.
[404] R Schütze, 'The 'Succession Doctrine' and the European Union', in A Arnull et al. (eds), *A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), p. 483.
[405] See earlier section 4.1.2 on functional succession.

to the Community, the latter was bound by the agreement even though it was not formally a party. The Court did not specify the consequences for the Member States once an agreement has functionally succeeded to the Union and Cremona affirms that, relying on later case law, the compliance with GATT became a matter of Union law as opposed to for the domestic courts of the Member States.[406] In this case it can be seen that an agreement of the Member States could be in a comparable situation to agreements concluded by the Union under article 216(2) TFEU and make up an integral part of EU law.

b. Renvoi and other legal effects

The provisions of an international agreement could be applicable in the EU legal order due to a *renvoi* in EU legislation which might integrate an agreement or part of it in the EU legal order, even though the Union is not a contracting party. The mere existence of a *renvoi* to an international agreement does not mean however that the agreement in question is an integral part of EU law nor that it has direct effect, but that it should be observed or taken into account with regard to the application of Union acts.[407] A *renvoi* signals that a certain text is applicable rather than providing legal effects which are rather determined by the EU legal act referring to the agreement. An example concerns the International Organisation of Vine and Wine (OIV). In the case *Germany v Council,* the Court held that the recommendations of OIV can constitute acts having legal effects because of their direct impact on the European Union's acquis in that area.[408] Union legislation provides that the Commission will have to "base itself" on such recommendations when authorising oenological practices which means that the recommendations *"are capable of decisively influencing the content of the legislation adopted by the EU legislature in the area of the common organisation of the wine markets"*.[409] Therefore, the CJEU concluded that even though the Union is not a party of the OIV Agreement it can establish a position to be adopted on its behalf.[410]

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[406] M Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union' in A Arnull, C Banard, M Dougan, E Spaventa (eds) *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), p. 438.

[407] A Rosas, 'The Status in EU law of International Agreements concluded by the Member States' (2011) 34 FordhamIntlLJ, p. 1330.

[408] Case C-399/12 *Germany v Council (OIV)* ECLI:EU:C:2014:2258, para. 64.

[409] ibid, paras 62-63. See for example article 120f of Regulation 1234/2007 at stake in the judgment "When authorising oenological practices in accordance with the procedure referred to in Article 195(4), the Commission shall: (a) base itself on the oenological practices recommended and published by the [OIV] as well as on the results of experimental use of as yet unauthorised oenological practices...]"

[410] ibid, para. 64.

c. Conclusion/continued participation in the interest of the Union

When the Union cannot engage directly on the international plane because an international agreement or the membership of an international organisation is only open to states, it can exercise its external competence through the Member States, acting as its trustees. When the Member States conclude an agreement "on behalf of the Union" they are under a double obligation of compliance deriving from both international and EU law. The Member States' participation can be regulated in a Union instrument (such as an authorization to act in the context of an exclusive competence) but even in the absence of express incorporation in EU law, Member States are bound by a duty of sincere cooperation to take all appropriate measures to respect the exclusive competence of the Union. When acting as trustees of the Union, compliance with the agreements is a Union obligation, which may be enforced by the Court. At the same time, in this type of agreements, the Member States might not have the power to implement an agreement (if a matter is within exclusive internal Union competence) but will be bound by that agreement and can be held liable for its compliance at the international level. For example, in the case of the ILO "Member States alone can be held liable for failure to comply with those undertakings, even if the breach of the provisions of such a convention is attributable to a Community measure adopted by majority decision".[411] In these cases, it is put forward that duties of mutual assistance deriving from article 4(3) TEU (first segment) would be incumbent on the EU institutions to ensure that the agreement is implemented, and that Member States are not found liable on the international plane.

Other agreements include instruments that were concluded by the Member States in which it is decided that, notwithstanding an exclusive Union competence, the Member States will continue to participate without a formal change to the parties to an agreement.[412] In this context, Cremona mentions the example of the ERTA Convention. In the *ERTA* case the Court ruled that, considering the final stage of the negotiation of that convention, the Member

[411] A Rosas, 'The Status in EU law of International Agreements concluded by the Member States' (2011) 34 FordhamIntlLJ, p. 1330.

[412] M Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union' in A Arnull, C Banard, M Dougan, E Spaventa (eds) *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), p. 436.

States ought to have remained parties to it, even though the convention fell under exclusive union competence.[413]

d. Agreements with a specific relevance in the EU legal order

Despite not being formally binding on the Union, some instruments concluded by the Member States have a recognised significant importance within the EU legal order. A first example is the European Convention on Human Rights (ECHR). Article 6 TEU provides an obligation for the Union to accede to the Convention, a task which it has not yet been able to accomplish. The Convention has shaped both the EU Charter of Fundamental Rights (CFR) and the general principles of EU law. Another example is the UN Charter, to which the Union commits to comply in its primary law. In the *Kadi* Saga both the Court of First Instance (now General Court) and the CJEU considered that the EU was not bound by the UN Charter but was required to give effect to the Charter by virtue of the EU Treaties. As it is well known however, the courts presented two different interpretations as to the extent of their jurisdiction to review the lawfulness of a Security Council resolution.[414]

Other agreements relevant to application of EU law are instruments that codify general international law, including customary international law, which bind the Union as a subject of international law such as the VCLT. In particular, as affirmed by Rosas, the Union is not truly bound by the written text of an agreement but by the unwritten norms it reflects.[415] These agreements can thus "serve as an important source of reference for the determination of an international customary norm binding on the Union."[416]

e. Agreements that should be "taken account of" in the interpretation of EU law

This category encompasses agreements to which all Member States are parties and that are partially implemented at Union level, for example the Marpol Convention as the Court held in *Intertanko*.[417] In such cases, the Union is not bound by these agreements and the CJEU would

[413] Case 22-70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32, para. 86 "At that stage of the negotiations, to have suggested to the third countries concerned that there was now a new distribution of powers within the community might well have jeopardized the successful outcome of the negotiations, as was indeed recognized by the commission' s representative in the course of the council' s deliberations."
[414] Case T-85/09 *Kadi v Commission* ECLI:EU:T:2010:418; joined cases C-402 and C-415/05 P *Kadi and Al Barakaat v. Council* ECLI:EU:C:2008:461.
[415] A Rosas, 'The Status in EU law of International Agreements concluded by the Member States' (2011) 34 FordhamIntlLJ, pp.1324-1326.
[416] ibid, pp. 1325-1326.
[417] Case C-308/06 *Intertanko and others v Secretary of State for Transport* ECLI:EU:C:2008:312.

rely on the duty of consistent interpretation and the principle of sincere cooperation trying to avoid possible clashes between commitments deriving from international law and EU law.[418]

4A.1.5 Conclusion

When the Union concludes an agreement, the legal basis/es chosen and whether or not an agreement is concluded as EU-only or mixed are not descriptive of a certain implementing competence which may rest on the Union and the Member States to varying degrees. The legal basis is chosen according to the centre of gravity test and does not reflect all subject matters addressed by an agreement, which will then be implemented internally according to the competence divide. The legal basis/es might also not reflect the existence of internal differentiation mechanisms such as opt-outs and enhanced cooperation. Furthermore, the presence of the Union and the Member States in a mixed agreement, might also not be indicative of the extent of the competence exercise by the Union.

The principle of sincere cooperation bridges the gaps resulting from the competence divide binding the Member States to implement an agreement to the extent of their implementing competence, in a manner that achieves Union tasks and objectives, going beyond article 216(2) TFEU. Sincere cooperation further binds Member States both when they do not participate in a mixed agreement and when they do not participate in the internal implementation of an agreement to ensure that an agreement concluded by the Union may be complied with. For EU-only agreements and in areas falling within the EU exclusive competence or exercised shared competence in mixed agreements, the Member States will be obliged to enact the Union's implementing measures. At the same time, they will also be bound to implement commitments in their domestic legal orders to the extent that they are given discretion to do so under EU law. This entails fulfilling the obligation according to the second segment of article 4(3) TEU of complying the obligations deriving from the Treaties. In areas within the Member States' competences (such as shared competences not exercised by the Union, retained competences, and opt-outs), Member States will be bound by obligations linked to the third segment of the principle of sincere cooperation to ensure that the Union's tasks and objectives pursued through the conclusion of an agreement can be accomplished when they take implementing measures or in their domestic law and treaty making.

[418] This point is further developed in Section B.2.2(c)(i).

Agreements concluded by the Member States may also still be relevant for EU law in some limited circumstances. The principle of sincere cooperation can create obligations for the Member States to comply with the competence divide when acting as Union trustees, or to sustain a Union position, but also obligations of mutual assistance for the Union of seeking to limit possible conflicts of obligations.

4A.2 Sincere cooperation and the intra-EU implementation of an agreement

Another facet of the presence of both the Union and the Member States as separate actors on the international plane is that international agreements can have an intra-EU dimension. This can concern agreements concluded by the Member States among each other as well as multilateral agreements to which both the Union and the Member States are contracting parties. For instance, bilateral investment treaties concluded prior to the accession of some EU Member States to the Union such as the Dutch-Slovak BIT at stake in the *Achmea* judgment or the Energy Charter Treaty (ECT) in *Komstroy*, respectively. Even though the intra-EU dimension of international treaties has gained widespread attention in recent years, the applicability of international law in the relationships between the Member States has been an issue identified much earlier. Already the EC included disconnection clauses in some of the agreements it entered into, preventing the applicability of international law in the relationships between the Member States, and allowing them to be governed by EU law.[419] This might be due to the fact that, at the time, the Union did not have the extent of today's competence and was acting less on the international plane by way of exclusive external competences. Furthermore, there might have been the need for the Union to assert its autonomy from international law and to safeguard the principle of primacy established through its case law in *Costa v ENEL*, ensuring that the Member States did not rely on international law commitments *in lieu* of EU law. When approaching the topic of disconnection clauses today, the practice assumes additional meaning in light of the development of the concept of the autonomy and its extensive use by the CJEU. Indeed, avoiding the intra-EU

[419] In particular such practice can be observed with regard to Council of Europe conventions. Among others examples include the Council of Europe (CoE)/Organisation for Economic Cooperation and Development in Europe (OECD) Convention on Mutual Administrative Assistance in Tax Matters (1988, prior amendment in 2010), Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) (2005).

application of an agreement might be the key to ensuring its compatibility with the autonomy of the EU legal order.

The following sections will consider whether there may be an obligation of sincere cooperation to limit the intra-EU application of international agreements, highlighting the link between the intra-EU effects of international agreements and the autonomy of EU law (4A.2.1) and later examine disconnection clauses as a possible tool to enact such obligation (4A.2.2).

4A.2.1 An obligation of sincere cooperation to limit the intra-EU effects of international agreements?

An international treaty which regulates the relationship between two or more EU Member States might be problematic from the point of view of EU law. A first consideration concerns possible conflicts and ensuring that that they are decided in favour of EU law upholding its primacy. Another aspect reaches at a more fundamental level the operation of the EU legal order, which is based on giving full effect to EU law at national level and on its uniform interpretation which could be put in jeopardy. If some Member States could apply a conventional regime or a treaty instead of the applicable EU law provisions, they would not only disrupt the system of supranational law created by EU law -which has primacy above national law and international agreements concluded by the Member States- but also the principle of mutual trust.

This is a concept identified by the CJEU which entails the presumption of full application of EU law according to the fundamental values enshrined in article 2 TEU in all EU Member States, which is a paramount component of the horizontal relationships between the Member States. Mutual trust first emerged in the context of the internal market, where the Court held that Member States should trust each other and refrain from monitoring compliance of another Member State with EU law. For example, in relation to conducting systemic inspections at Member States' borders when goods had already been subject to inspection by the exporting state.[420] The principle also assumed a specific meaning in certain areas, among others in the ASFJ, for instance in relation to the European Arrest Warrant and in European civil procedure where mutual trust is at the basis of the recognition of the administration of justice within other EU Member States including the recognition of judgments. Only later, in

[420] Case C-46/76 *Bauhuis* ECLI:EU:C:1977:6, paras 21–22.

Opinion 2/13, the CJEU identified the principle of mutual trust as an overarching constitutional principle of the Union characterising it as a feature of its autonomous legal order. As argued by Canor, this "judicial upgrade matched the legal emergence of the values on which the EU is founded, and which are common to the Member States, as expressed in article 2 TEU, as well as the emergence of the Charter of Fundamental Rights".[421] In Opinion 2/13 the Court stated that there is a "*premiss [which] implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected"*.[422] In turn, this justifies that each Member State may be required to give other Member States' norms and judicial decisions a special treatment in their legal orders, which allows the maintenance of an area without internal borders.

Like the principle of sincere cooperation, mutual trust concerns the implementation of EU law, and both are tied to its uniform interpretation and full application by the Member States.[423] On the one hand, mutual trust is focused on the horizontal relationships between the Member States as members of the European Union and, on the other hand, sincere cooperation is concerned with the vertical relationship between the Member States and the Union institutions based on the obtainment of Union objectives. Arguably both are essential for the functioning of the EU legal system, and they define what it means to be a Member State of the European Union *vis-à-vis* other Member States and *vis-à-vis* the Union. International commitments binding the Member States can affect the way in which they interpret and implement EU law, but also develop and apply their national law. In principle, this matters both from the perspective of mutual trust and from the perspective of sincere cooperation. With regard to the former, the fact that a Member State is bound by specific provisions of international law may cast doubt on the presumption of compliance with EU law or its fundamental values; and with regard to the latter, it might result in a violation of sincere cooperation if it does not give effect to EU law or if such an action can jeopardise the obtainment of the Union's objectives. From this perspective, it can be understood why the uniform interpretation of an international agreement which is an integral part of EU law or which- by virtue of its subject matter- can affect the scope of EU law has been emphasised in

[421] I Canor, 'Suspending Horizontal Solange: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law' in A von Bogdandy, P Bogdanowicz, I Canor and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021), p. 188.
[422] Opinion 2/13 EU:C:2014:2454, para. 168.
[423] See C-284/16 *Slovak Republic v Achmea* ECLI:EU:C:2018:158, para. 34.

the jurisprudence of the CJEU. Furthermore, it is not a coincidence that intra-EU dispute settlement mechanisms have emerged among the most problematic aspects of international agreements for the EU. According to article 19 TEU, it is for the CJEU and domestic courts of the Member States to ensure the consistent interpretation and application of EU law, which "inevitably bears consequences on the role of other international courts and tribunals interpreting and applying EU law".[424] More on the topic of the CJEU's jurisdiction on the interpretation of international agreements will follow in Section 4A.3, whereas the next paragraphs will explore disconnection clauses as an instrument to enact a possible obligation of sincere cooperation for the Member States to avoid the intra-EU application of an international agreement.

4A.2.2 Disconnection clauses as a tool of sincere cooperation

There are multiple ways to limit the applicability of some provisions of an international instrument for example, but not limited to: regional integration clauses, unilateral declarations, interpretative declarations, reservations, restrictions on jurisdiction, substitution (in secondary EU law). This section will focus on the so-called disconnection clauses. This is not a term of art of public international law but rather one which developed to describe a specific type of clauses that the EU has been using in its treaty practice aiming to avoid the intra-EU application of an international agreement.

The use of these clauses has been brought to the fore by Opinion 1/20 in which Belgium asked the CJEU whether the Energy Charter Treaty (ECT) contains an implicit disconnection clause.[425] The subject of disconnection clauses also arose in *Moldova v Komstroy*, where the CJEU ruled that article 26 ECT is not applicable between the Member States which could be seen as a *de facto* disconnection clause preventing intra-EU dispute settlement between an EU investor and a Member State. The inclusion of disconnection clauses was also recently considered with regard to the Second Protocol to the Council of Europe Convention on Cybercrime (Budapest Convention).[426] According to the Commission, a disconnection clause would enable the Member States to regulate the relations among themselves on the basis of

[424] C Contartese, 'EU Law as Applicable Law in International Disputes and its Procedural Implications' in M Adenas, M Happold, L Pantaleo (eds), *The European Union as an Actor in International Economic Law: Recent Trends and Developments* (TMC Asser Press 2020), p. 174.
[425] Opinion 1/20 (Draft modernised Energy Charter Treaty) ECLI:EU:C:2022:485.
[426] Second Protocol to the Council of Europe Convention on Cybercrime (ETS No. 185).

EU law as well as prevent possible conflicts with ongoing legislative initiatives at EU level concerning cross-border access to electronic evidence.[427]

The next paragraphs will first introduce disconnection clauses and their function (a) and then focus on selected aspects, namely their relation to the concept of autonomy (b), the observance of international law (c), the incorporation of agreements in the EU legal order (d), mixed agreements (e), and to agreements of the Member States (f).

a. Zoom-in on disconnection clauses

A disconnection clause is a provision included in agreements of the Union and/or of the EU Member States which is meant to reconcile an agreement with the Member States' obligations arising from the EU legal order. The purpose of disconnection clauses is to prevent the creation of the conventional links established by an international instrument between the Member States and to substitute them with EU law regulating that subject matter. As a result, these clauses prioritise the application of EU law in intra-EU relations independently from whether there is a conflict with an international commitment. It follows that they cannot be assimilated to conflict clauses (such as "without prejudice" clauses) but can be understood as applicable law clauses.[428]

An example of disconnection clause reads: "[n]otwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community."[429] This is an example of the first type of disconnection clauses used by the Union, which was then followed by a longer provision specifying that EU law should "apply without prejudice to the object and purpose of the agreement in question and its full application towards other parties".[430] Such an addition ensures that, at least at an overall level, there is an explicit commitment that the

[427] European Commission, Recommendation for a Council Decision authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185) COM/2019/71 final. It should be noted that a disconnection clause does not feature in the Council Decision authorising the conclusion of the Protocol but reservations, declarations and notifications and communications are present. See Council Decision (EU) 2022/722 of 5 April 2022 authorising Member States to sign, in the interest of the European Union, the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence.

[428] Odermatt notes how these clauses could be viewed as a form of inter-se agreement within the meaning of article 41 VCLT. See, J Odermatt, *International law and the European Union* (CUP 2021), p. 86.

[429] Art. 27(2) of Council of Europe (CoE)/Organisation for Economic Cooperation and Development in Europe (OECD) Convention on Mutual Administrative Assistance in Tax Matters (1988) prior amendment in 2010.

[430] See for instance, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

EU Member States will adhere to a convention among each other, and that, in turn, EU law is not used as a way to either circumvent the fundamental objectives of an international instrument or act as a reservation.

In one of the earliest works covering the topic of disconnection clauses, Economides and Kolliopoulos provide a definition of a disconnection clause highlighting three main characteristics.[431] First, these clauses are of a general nature. They do not specify which provisions of Union law are singled out and which will apply instead of an international agreement. Moreover, often, these clauses do not require further declarations or notifications from the other contracting parties, but are automatically applicable with the signature of the contracting parties. Lastly, they are unconditional, meaning that their validity is not dependent on the condition that Union law can be reconciled with the text of a convention, except with regard to what could be considered an overall level of compliance in clauses including the phrase "without prejudice to the object and purpose".

Scholars and public international law bodies have questioned the validity and suitability of these clauses.[432] In the context of the Council of Europe, the Committee of Legal Advisers on International Law was called to evaluate this practice with regard to the CoE Conventions where these clauses are frequently present. According to its report, the question of validity is uncontroversial: disconnection clauses are approved by all contracting parties and thus valid under international law.[433] Contrasting positions have however emerged on the appropriateness of these clauses. Some argued that from an international point of view, disconnection clauses increase fragmentation,[434] and the literature has found especially problematic their general and unconditional nature. Disconnection clauses do not refer to what law will apply instead of the provisions of an agreement in intra-EU relations, whether such standards are in compliance with it, and even clauses providing the phrase "without prejudice to the object and purpose of the convention", do not evaluate compliance from a

[431] C Economides, A Kolliopoulos, 'La clause de deconnexion en faveur du droit communautaire: une pratique critiquable' (2006) 110 Revue Générale de Droit International Public 273.
[432] Report of the Study Group of the International Law Commission finalized by M Koskenniemi 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc. A/CN.4/L.682 13, para. 293.
[433] CAHDI, 'Report on the consequences of the so-called "Disconnection Clause" in International Law in General and for Council of Europe Conventions, containing such a clause, in particular', paras 22-23.
[434] ibid; Report of the International Law Commission 2005, UN Doc A/60/10, paras. 463-465; M Ličková, 'European Exceptionalism in International Law' EJIL 19 (2008), p. 486; Report of the Study Group of the International Law Commission finalized by M Koskenniemi 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc. A/CN.4/L.682 13.

substantive perspective. It has further been argued that, in particular where the EU is not a party to the agreement and there is already existing legislation at EU level, EU rules might not be as specialised, up-to date, or equipped with a specialised monitoring system.[435] At the same time, however, disconnection clauses do not interfere with the obligations of the Union and/or the Member States with regard to third countries.

From the perspective of EU law, the inclusion of a disconnection clause has a number of functions which enable the Member States to secure the fulfilment of the principle of sincere cooperation. To begin with, disconnection clauses and sincere cooperation both have a function of conflict prevention and of compliance with EU law. According to the principle of sincere cooperation, Member States have to comply with the obligations deriving from the Treaties and, by precluding possible overlaps with EU law, disconnection clauses prevent *ab origine* the infringement of the Member States' loyalty obligation, aside from a violation of the principle of primacy. Furthermore, disconnection clauses can be seen as fulfilling the duty of sincere cooperation incumbent on the Union and the Member States to assist each other in the completion of their tasks. Through the use of disconnection clauses, the Union would not require the Member States to abandon or refrain from engaging on the international level as a whole, but to remove the applicability of an international law instrument intra-EU, thus supporting the continuation of the commitments that the Member States' have taken on the international level. By favouring EU law over other (possibly) conflicting provisions of an international instrument, or provisions (possibly) affecting EU law, disconnection clauses remove potential incompatibilities and ensure that the Member States' compliance with EU law in intra-EU relations is in line with the commitments undertaken under international law.[436] In this way, disconnection clauses may enhance compliance with an agreement also

[435] J Klabbers, 'Safeguarding the Organizational Acquis: The EU's External Practice' (2007) 4 IntlOrgRev, p. 81; M Smrkolj, 'The Use of the "Disconnection Clause" in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?' (14 May 2008) available at http://ssrn.com/abstract=1133002, p. 10.

[436] See for example the reasons put forward by the Commission in the Proposal for a Council Decision on the conclusion by the European Community of the Agreement on the Accession of the European Community to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980. At para. 5 "[t]here was a growing realisation that Article 3(2) of COTIF which purported to ensure compliance between the respective Community and OTIF legal regimes, in fact did not do this adequately. A legal review of the COTIF and its Appendices confirmed that a number of divergences existed between Community acquis and COTIF, relating both to the rules on jurisdiction in the COTIF (articles 12 and 28) and to the rules in some of the Appendices (E, F and G)." And at para. 7 "In order to protect the European Community legal regime, the Community proposed that a suitable provision (a so-called disconnection clause) should be added into the agreement to avoid any legal incompatibilities between COTIF and the existing and developing Community acquis."

from an international perspective. The Member States are no longer in the position of having to violate an international commitment to comply with EU law or *vice versa* to be sanctioned under EU law for keeping an international law commitment.

Another function of disconnection clauses can be witnessed when Member States and the Union jointly exercise an EU external competence (be it partially exclusive or shared), or when Member States might not be acting just as states but (also) as the trustees of a Union competence. In both cases, a disconnection clause signals that Member States are not acting solely in their capacity and that they will follow the implementing measures given by the Union for those parts of the Convention which fall within its competence. As it is the Union's competence that is being exercised, Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves. At the same time, disconnection clauses indicate that Member States will respect the competence division and not implement international commitments falling under EU competence through their own measures. This is fully in line with their duty of sincere cooperation to fulfil the obligations arising from the Treaties and facilitate the tasks of the Union. Therefore, with regard to the joint exercise of competence, disconnection clauses avoid an overlap in the vertical exercise of competences between the Union and the Member States. [437]

Lastly, disconnection clauses maintain existing relationships based on sincere cooperation. Under the second segment of article 4(3) TEU, Member States are under a duty of loyalty to give effect to obligations of EU law. A disconnection clause, which prioritises the application of EU law in intra-EU relationships, enables the Member States- but especially their judiciary- to ensure the application of EU law in article 4(3) TEU. Otherwise, Member States might be obliged by virtue of international law to apply different or even contrasting rules, and national courts or the CJEU might not have jurisdiction, even if EU law is relevant in the dispute (e.g. in the context of arbitration for national courts, or for the CJEU in a Member State-to-Member State case, or via the preliminary ruling procedure). With regard to the CJEU, this is

[437] See for example the Declaration by the Union and the Member States annexed to Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) which states that "the inclusion of a 'disconnection clause' is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the member states to the Community." Moreover, a "disconnection clause is necessary for those parts of the Convention which fall within the competence of the Community/Union, in order to indicate that European Union member states cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union)."

further emphasised by the fact that the Court has exclusive jurisdiction to rule on the validity and interpretation of EU law pursuant to article 344 TFEU. In the *Mox Plant* case, the Court found that article 344 TFEU embodies the principle of loyalty and it is its specific application. In turn, it held unnecessary to determine a breach of sincere cooperation when it already established a breach of the Court's exclusive jurisdiction for not submitting to it a Member State-to-Member State case where EU law was applicable.[438] Indeed, in the absence of a disconnection clause such as in *Mox Plant*, Member States must still uphold the Court's exclusive jurisdiction pursuant to the principle of sincere cooperation.

Focusing on the role of national courts, a lack of jurisdiction on EU law matters would damage the uniformity of the interpretation of EU law because a court external to the EU legal system could interpret EU law and not refer questions concerning interpretation and validity to the CJEU under the preliminary ruling procedure. This was one of the points raised by the Court in Opinion 1/09 on the establishment of the European Patent Court, ruling that such a court that would have unduly restricted the national courts' jurisdiction to decide on patent law matters. A limitation of jurisdiction such as the one envisaged, would have prevented national courts from guaranteeing effective legal protection in the fields covered by EU law as required by article 19(1) TEU. Furthermore, a lack of jurisdiction on EU law matters could also jeopardise the relationship of mutual trust between the Member States as the Court stated in *Achmea*. If the national courts did not have substantive jurisdiction on some areas of EU law, there would be no guarantee of a full application of EU law and effective judicial protection, which is reinforced by the preliminary ruling procedure. Safeguarding the full application and enforcement of EU law is a task entrusted to the judiciary both at national and EU level and without such guarantee the operation of EU law, e.g. cooperation in criminal matters, cooperation in civil matters, internal market rules, could be threatened.

b. Disconnection clauses and autonomy

Taking autonomy as the starting point from which to look at disconnection clauses, it can be observed that disconnection clauses may be a tool to remedy an agreement's incompatibility with the autonomy of EU law. A clear link between the uniform interpretation of EU law and autonomy has been established in the Court's case law and is at the core of the three-step test

[438] C-459/03 *Commission v Ireland (Mox Plant)* ECLI:EU:C:2006:345, para. 171.

employed by the CJEU in *Achmea*. The Court writes: *"[i]n order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law".*[439] To determine whether the intra-EU arbitration in the Dutch-Slovak BIT is compatible with EU law, the Court translates this sentence in three concrete steps: first, it checks whether EU law can be the applicable law to the dispute,[440] second whether the tribunal is within the EU legal system,[441] and third whether the uniformity of EU law can still be guaranteed by the review of a Member State's court.[442]

Disconnection clauses can influence the first two of these three aspects. To begin with, disconnection clauses clarify that EU law will be the law applicable in the relationships between the Member States to the exclusion of international law. As such, the Member States' commitment to apply EU standards is recognised in an international agreement, and any dispute on such measures will then be brought to the CJEU or national courts, who are under a duty to fulfil obligations deriving from the Treaties pursuant to article 4(3) TEU. When a convention also entails matters falling within non-exclusive EU competence it may be more complicated because, according to a disconnection clause, Member States apply EU law standards in light of the competence of the Union on a subject matter. If there is a question as to whether a certain matter falls or not within the disconnection clause, this would ultimately be a question over the internal division of competence between the Union and the Member States and as such should be addressed to the CJEU. The link with the second-step of the autonomy test in *Achmea* is readily apparent, namely that the courts of the EU legal system will be the courts competent to interpret and apply EU law. Disconnection clauses carve out the jurisdiction of an international tribunal established by an international agreement in regards to an intra-EU dispute. As evidenced by Opinion 2/13, *Mox Plant*, *Achmea*, and *Komstroy* among others, the interpretation of EU law by an international tribunal has been a recurrent factor that the CJEU deems incompatible with the autonomy of EU law.

According to the principle of sincere cooperation, Member States are under a duty to fulfil the obligations deriving from EU law and, after a determination of incompatibility with the principle of autonomy, one way of complying with the CJEU's judgment could be to add a

[439] Case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158, para. 35.
[440] ibid, para. 39.
[441] ibid, para. 43.
[442] ibid, para. 50.

disconnection clause. In the context of the ECT, this solution seemed unlikely given that the addition of the clause in a modernised version of the treaty required the approval by all the other state parties. Nonetheless a clause limiting the application of specific articles between members of a REIO was added to the agreement in principle, now ultimately abandoned.[443]

In relation to the autonomy of the EU legal order, it is worth mentioning that in Opinion 1/17 the Court seems to have expanded this notion including what could be called "substantive autonomy", or in other words the regulatory autonomy of the Union.[444] As previously stated, international agreements which apply intra-EU might have an effect on the operation of EU law as Member States are bound by both. This is not only in terms of a clearly identified conflict, where the obligation of primacy would set in for the Member States which could require breaching international law, but rather in the "occupation" of the policy space, or the affectation of other internal legislation. Disconnection clauses could also be relevant to preserve the regulatory autonomy of the EU legal order as they limit the effect of an international agreement intra-EU, thus allowing the Union to adopt its internal measures whilst maintaining the commitments with third countries.

c. Disconnection clauses and the Union's observance of international law

Disconnection clauses can also be an instrument for the Union to seek compliance with an international agreement in line with its commitment to its strict observance in article 3(5) TEU. Disconnection clauses, in fact, transpose an EU law obligation of the Member States (namely to comply with EU law) from the European to the international level. They entail an international law commitment to apply EU law which is applicable to the Member States on top of the already existing internal obligation of fulfilling obligations arising from EU law under the second segment of article 4(3) TEU. Such double-layered commitment might improve the compliance and enforceability of an international agreement concluded jointly by the Union

[443] See article 24(3) of the Agreement in Principle titled "REIO": "[f]or greater certainty, Articles 7, 26, 27, and 29 shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations". The ECT will continue to apply between EU member states to intra-EU investments and its substantive investment standards might still be enforceable before domestic courts. See the text of the Agreement in Principle and further on the topic, L Schaugg, S Brewin 'Uncertain Climate Impact and Several Open Questions. An analysis of the Proposed Reform of the Energy Charter Treaty' International Institute for Sustainable Development (IISD) Report (October 2022). On the 7th of July 2023 the Commission published a proposal for a coordinated withdrawal from the ECT, see European Commission, "Coordinated EU withdrawal from the Energy Charter Treaty" <https://energy.ec.europa.eu/publications/coordinated-eu-withdrawal-energy-charter-treaty_en> (accessed 12 September 2023).

[444] See Opinion 1/17 ECLI:EU:C:2019:341, paras 150-151.

and the Member States because, in a case of non-compliance, Member States would be sanctioned for breaching the agreement through EU law. At the same time, it could be said that disconnection clauses have the effect of "unionising" an international law obligation undertaken by the Member States, as they clarify that the Union will implement the agreement as far as competent, and Member States will follow those standards.

By removing potential incompatibilities beforehand, disconnection clauses avoid the breach of international commitments in which the Member States or the Union might incur because of the application of EU law between the Member States. This could be relevant when new legislation is enacted internally (e.g. in addition to minimum standards) or the allocation of competence changes internally (e.g. more areas become exclusive). Disconnection clauses reaffirm the *pacta sunt servanda* principle binding the Member States and/or the Union in their relationship with third countries.

d. Disconnection clauses and the incorporation of international agreements

Disconnection clauses preclude the effects of an international treaty in the EU legal order and as such seem *prima facie* to operate contrary to the established positioning of international law in the hierarchy of sources within the Union legal order. International law, which is normally situated below primary law and above secondary EU law, is disapplied in favour of EU secondary law in regards to the intra-EU application of an international convention. More specifically, without disconnection clauses, mixed agreements concluded by the Union and the Member States are an integral part of EU law and have priority over secondary Union law. International agreements concluded by the Member States, instead (even when on behalf of the Union), are part of the domestic law of the Member State and thus fully subject to the principle of primacy if secondary EU law were to be in conflict with them.

When disconnection clauses are included in first type of agreements, this does not really influence the positioning of that international commitment in the EU legal order. Member States are always bound by both international and EU law to comply with the agreement, and, as a party to the agreement, the Union will in any case adopt its standards to execute the part of the agreement under its competence or apply conventional standards according to the meaning and effect attributed to them by the CJEU. By adding a disconnection

clause, it is only clarified that Member States will follow Union standards rather than executing the agreement themselves for the part in which the Union is competent.[445]

However, if disconnection clauses are included in the second type of agreements, this has the effect of creating a link between an agreement and the EU legal order which would not otherwise exist. The international commitment of the Member States is then matched by their EU law commitment to comply with EU law standards on the subject matter of a convention. Arguably, in case of conflict, Member States would have nonetheless to favour the application of EU law due to the principle of primacy, but, if there is a disconnection clause, this would not result in a breach of the commitments undertaken. Much like in the case of mixed agreements, Member States become bound to implement EU standards of an international agreement falling within the competence of the Union both from an international and EU law perspective.

e. Disconnection clauses and mixity

Mixity, like disconnection clauses, shows the Member States' unique status as members of the EU. In the case of mixity, this concretely means that neither the Member States nor the Union always have or exercise the competence to act externally and thus might need to conclude an agreement jointly. Disconnection clauses signal that an agreement or part of it falls within the competence of the Union and therefore that the Member States participating will follow Union measures rather than their own to implement it. As already stated, these clauses however do not show which part of an agreement falls within Union competence but rather that there is a complementary commitment of the Union and the Member States to execute the obligations of an agreement according to the competence divide.

Displaying who will be doing what and who will be responsible is instead precisely the aim of declarations of competence. Third parties may request these declarations in mixed agreements, but, as previously mentioned, their actual value is disputed as they are not truly representative of the competence divide which is dynamic. Even without a declaration of competence, it has been argued that the fact that an agreement has been concluded by both the EU and the Member States is a sufficient indication to third parties that the competence and responsibility between the Union and the Member States is shared. In Opinion 1/03, the

[445] E Neframi, 'La répartition intra-communautaire des compétences et les Etats tiers sous le prisme de la clause de déconnexion' (2009) 61 Revue hellénique de droit international, p. 478.

Court concluded that disconnection clauses are unrelated to the question of competence in terms of who should conclude an agreement. In the proceedings, the Commission and the Council presented the Court with opposing arguments. The former submitted that because there was a disconnection clause, it meant that the common rules were "affected" within the meaning of the ERTA doctrine and thus that the competence to conclude the agreement was exclusive. The latter instead argued that exactly because there was a disconnection clause, it prevented the intra-EU application of the agreement and in turn the affectation of common rules, and, as a consequence, the competence to conclude the agreement was shared. The Court did not agree with either account, concluding that a disconnection clause shows a degree of overlap of EU and international standards but that this is not a decisive factor for the determination of competence which is performed through a different set of requirements. Disconnection clauses do not concern the establishment of competence but the execution phase of an agreement. Therefore, a disconnection clause inserted in a mixed agreement expresses the partial divestiture of competence of the Member States resulting from the joint conclusion of an agreement. The EU is also a party in its own right and will remain bound by an agreement both internally and externally towards third parties. Thus, the EU cannot use disconnection clauses to become party of an agreement in violation of its own standards,[446] and they also do not resolve an overall conflict between EU law and international law. If there was such a conflict, that would not be for the disconnection clause to address, but other measures such as reservations could be more appropriate.

Disconnection clauses allow to keep more flexibility for the EU if the competences change and are a way to re-balance the competences between the EU and the Member States without impacting the relationship with third countries. As already stated, disconnection clauses entail a double expression of loyalty: internally of the principle of sincere cooperation to implement EU law, and externally the respect of international law enshrined in article 3(5) TEU. For example, if Member States had exercised a shared competence in an area not covered by common rules, the subsequent exercise of that competence by the Union may entail the appropriation of that conventional commitment of the Member States, which will now be

[446] ibid, p. 482.

implemented by the Union. In such a case the disconnection clause takes effect without the commitment of the Member States and/or the Union with third states being affected. [447]

Another point concerns the issue of liability.[448] A disconnection clause could allow the attribution of an unlawful act to the Union in the event of non-performance of a mixed agreement as opposed to a default joint responsibility.[449] Disconnection clauses affirm that a matter is at least partially regulated by EU law, and this is a point that could be raised by the Member States to designate the Union as the subject responsible in the context of litigation. At the same time, the Union could also be responsible where it is not possible to separate the action of the Union and that of the Member States such as the implementation of EU law instruments requiring a degree of discretion.[450] Contributing to the identification of responsibilities between the Union and the Member States is also a function of declaration of competences, even though disconnection clauses -by having a general nature- would allow to take into consideration the possibility of a change in the allocation of competence.

Lastly, disconnection clauses could play a significant role in the context of mixed agreements to which only some Member States are parties or for commitments undertaken on the international plane by certain Member States only. In both instances an international commitment will be binding on some but not all Member States which can result in a multiplicity of standards at the intra-EU level. If such agreements contained a disconnection clause, Member States would be obliged to apply EU law standards internally, which would contribute to the uniform application of EU law. From this perspective a disconnection clause is a mechanism to reduce legal differentiation.[451]

f. Disconnection clauses and Member States' agreements

Member States can still act on the international plane for example in areas of shared competences (e.g. environment), where there is minimum harmonisation at Union level, or in

[447] E Neframi, 'La répartition intra-communautaire des compétences et les Etats tiers sous le prisme de la clause de déconnexion' (2009) 61 Revue hellénique de droit international, p. 489.
[448] The exclusion the of intra-EU effects of international agreement through a disconnection clause could serve to signal that the Union and the Member States are a single contracting party. See, P T Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements- Between Traditional Rules, Proceduralisation and Federalisation* (Springer 2019), p. 47.
[449] E Neframi, 'La répartition intra-communautaire des compétences et les Etats tiers sous le prisme de la clause de déconnexion' (2009) 61 Revue hellénique de droit international, pp. 491-492.
[450] ibid.
[451] M Cremona, 'Disconnection Clauses in EU Law and Practice' in C Hillion, P Koutrakos (eds), *Mixed Agreements Revisited: The EU and the Member States in the World* (Hart Publishing 2010), p. 161.

case of a parallel competence (e.g. development aid). If the EU later exercises a competence or supplements existing law, the Member States are under a duty to give effect to EU law and not to jeopardise the Union objectives but, from an international perspective, in doing so they might violate an international commitment. There is no provision in the Treaties that addresses the obligations of the Member States concluding international agreements after accession, nonetheless the obligations deriving from primacy and sincere cooperation are applicable. If the competence divide changes, the Member States are under a duty to ensure that the agreements are consistent with the new division of competence and with whatever action the Union takes in the exercise of its new competence.[452] If obligations arising from EU law and commitments with third states cannot be reconciled, the obligation to remove incompatibilities could entail the renegotiation of an agreement. As the Union is not bound by the obligations of the Member States, a disconnection clause could be helpful to preserve the future exercise of Union competence as well as a conflict with the rules of an international agreement.

When considering agreements between an EU Member State and a third state, a clause that ensures a Member State's compliance with EU law might be a necessity. For example, the Commission brought three infringement cases alleging the incompatibility of extra-EU BITs with the provisions on free movement of capital in cases *Commission v Austria, Commission v Sweden*, and *Commission v Finland*.[453] In the latter case, the Court explains that international law mechanisms such as suspension or denunciation of an agreement would be too uncertain order to ensure the fulfilment of Sweden's obligations arising from EU law. A provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a Member of the Union might be the solution "to eliminate the risk of conflict".[454] In this specific context, however, this would not be a disconnection clause but a clause justifying a detriment to the rights of third parties in light of obligations deriving from EU law.

4A.2.3 Conclusion

When considering the CJEU's external relations case law on article 4(3) TEU, it is worth recalling that the possibility of undermining the external action of the Union, including future EU

[452] Opinion of AG Sharpston, Opinion 2/15 ECLI:EU:C:2016:992, para. 389
[453] Case C-205/06 *Commission v Austria* ECLI:EU:C:2009:118, case C-249/06 *Commission v Sweden* ECLI:EU:C:2009:119, and case C-118/07 *Commission v Finland* ECLI:EU:C:2009:715.
[454] Case C-118/07 *Commission v Finland* ECLI:EU:C:2009:715, paras 31-33.

agreements, is sufficient to trigger duties of sincere cooperation limiting the freedom of Member States to conclude other international treaties or take a position in an international organisation.[455] Sincere cooperation, more specifically with regard to its second segment, further creates duties to take any appropriate measure, including on the external sphere, to abide by EU law including ensuring its uniform interpretation by the CJEU.[456] A question is then whether the Member States' exercise of their competence to conclude an agreement next to the Union or on its behalf in conformity with EU law includes an obligation based on the principle of sincere cooperation to foresee possible implementing obstacles and/or threats to the autonomy of EU law and thus entail a duty to limit the intra-EU applicability of an international agreement. If rather than a mere substantive conflict of norms, which could technically be addressed with primacy internally (possibly in breach of an international commitment), the intra-EU applicability of an international treaty jeopardises the uniform interpretation and application of EU law (e.g. that an international tribunal would interpret and apply EU law) disconnection clauses can be considered a tool to ensure that Member States are in the position to give effect to EU law and remain in compliance with an international agreement. From the perspective of the functioning of the EU legal order, disconnection clauses carve out intra-EU elements from the scope of application of an international agreement and reconcile the fact that the Union is a non-unitary actor with the observance of international law. These clauses allow the Union to regulate its own internal laws applicable between the Member States and reduce internal differentiation, whilst at the same time the Union remains bound to implement an international agreement at EU level for which it can be held liable by third parties.

4A.3 Sincere cooperation and the CJEU's interpretative jurisdiction with regard to international agreements

A final issue that Section A aims to examine is the role played by the principle of sincere cooperation with regard to the CJEU's jurisdiction to interpret international agreements. The

[455] See the *Inland waterway* cases C-433/03 *Commission v Germany* ECLI:EU:C:2005:462 and C-266/03 *Commission v Luxembourg* ECLI:EU:C:2005:341; and case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203.

[456] For example, refraining from bringing a dispute against another Member State in *Mox Plant*.

CJEU may be required to examine an international agreement as a result of a referral by a national court in the preliminary ruling procedure, an action of annulment in which an EU institution or an individual questions the validity of an EU act, or in the context of an infringement action against a Member State. A further avenue through which the Court may be required to pronounce itself on international agreements includes the Opinion procedure laid down in article 218(11) TFEU which enables a Union institution or a Member State to seek the Court's views on the compatibility of an international agreement with EU law.

As was already noted in the previous subsections, the Court's jurisdiction on international agreements is linked to their status as an integral part of Union law. However, unlike internal EU law, the status of international agreements alone is not capable of drawing the contours of the Court's jurisdiction. Important distinctions should be made concerning the extent of the Court's power of interpretation based on the competence divide and the implementing competence involved in each agreement and its specific provisions. This subsection will consider how the principle of sincere cooperation binding the Member States and their courts to fulfil obligations deriving from EU law influences the scope and extent of the CJEU's jurisdiction with reference to different types of international agreements.

It should be noted that this subsection will not be concerned with the Court's jurisdiction that can arise if specifically provided for in an international agreement. Indeed, other than the functions intrinsic to its role as the main judicial organ of the EU legal system, the CJEU may operate among others as a forum to settle disputes,[457] or as the ultimate interpreter of EU law following a procedure delineated in a specific agreement.[458]

4A.3.1 The CJEU's exclusive jurisdiction: autonomy and sincere cooperation

According to article 344 TFEU, the CJEU has exclusive jurisdiction to provide an authoritative interpretation of EU law and to determine its validity, which is a specific expression of the principle of sincere cooperation as the Court held in *Mox Plant*. This complements article 19 TEU, pursuant to which the Court is responsible for the observance of the law in the interpretation and application of the Treaties. In performing this role, the CJEU may be faced with the need to interpret or apply international agreements binding the Union, the Union and the Member States, or just the Member States. More specifically the Court may be called to

[457] Art. 272 TFEU.
[458] Art. 273 TFEU.

examine the compatibility of an international agreement with EU law *ex ante*, meaning at the phase of conclusion of an agreement such as according to article 218(11) TFEU, or *ex post* during the implementation of an agreement. It may also be called to provide its interpretation of the terms within a provision of an international agreement which would be in particular in the case of preliminary rulings.

The incorporation of an international agreement in the EU legal order or the existence of an act of the EU institutions often coincides with the Court's jurisdiction. As well evidenced by the area of the CFSP, however, these concepts may not necessarily overlap. Article 275 TFEU explicitly excludes the CFSP from adjudication by the Court. It is worth noting the connection between the exceptions to the Court's lack of jurisdiction provided in the second paragraph of article 275 TFEU and the principle of autonomy. The exceptions ensure that the essential characteristics of the EU legal order are preserved, among others, the decision-making procedures and institutional balance within the Union, and the effectiveness of EU law with regard to the establishment of a comprehensive system of remedies. A first example can be seen with regard to the compliance with article 218 TFEU in the conclusion of international agreements assessed by the Court in the *Mauritius* and *Tanzania* cases.[459] When looking more broadly at international acts of the EU institutions and its agencies, other examples in which the Court has upheld its jurisdiction in the context of the CFSP include *Rosneft* on targeted sanctions in a preliminary ruling procedure,[460] and case *H v Council*, a staff case in the framework of EU Missions in third countries.[461] In addition, in a currently pending case *KS and*

[459] Case C-658/11 *European Parliament v Council of the European Union (Mauritius)* ECLI:EU:C:2014:2025; case C-263/14 *Parliament v Council* ECLI:EU:C:2016:435.

[460] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury* ECLI:EU:C:2017:236. In *Rosneft*, the Court held that it had jurisdiction to rule on the validity of a CFSP decision on restrictive measures. In case C-351/22 *Neves 77 Solutions* (currently pending) the CJEU has been asked to interpret a CFSP decision within a preliminary ruling request and in turn, whether the exception in *Rosneft* also applies to the interpretation of a CFSP decision on restrictive measures. See further C Breitler, 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (13 October 2022) Blogpost 45/2022 European Law Blog <https://europeanlawblog.eu/2022/10/13/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/ > accessed 18 October 2023. AG Ćapeta recently provided her views on the case holding that the Court does not have jurisdiction to interpret general provisions of a CFSP decision to clarify their meaning. The Court could, however, provide an interpretation of general principles of EU law and fundamental rights which is relevant for the assessment of the lawfulness of national measures implementing a CFSP decision. Opinion of AG Ćapeta, case C-351/22 *Neves 77 Solutions* ECLI:EU:C:2023:907.

[461] Case C-455/14 P *H v Council* ECLI:EU:C:2016:569.

KD, AG Ćapeta concluded that the Court should uphold is jurisdiction to hear an action alleging a breach of fundamental rights by a CFSP measure.[462]

Leaving the CFSP, the Court's jurisprudence has consistently reaffirmed that the Court has an inherent power to rule on the division of competence between the Union and the Member States including the apportionment of responsibility among them. This applies notwithstanding the fact that part of an agreement may have been concluded by the Member States in their own right.[463] This is another piece of the autonomy of the EU legal order, as the Court secures its right to adjudge the internal system of governance of the Union according to the division of competences established by the Treaties. In addition, the Court may also seek to preserve the autonomy of EU law from the domestic legal order of the Member States in situations that fall both within and outside of the scope of EU law. This can be seen in the case *Moldova v Komstroy* in which the Court gave an interpretation of the ECT in a dispute concerning two parties extraneous to the EU and its Member States through a preliminary ruling. The dispute was brought to the Paris Court of Appeal which submitted the questions for interpretation to the Court relying on the fact that the ECT is an agreement also binding on the Union (as well as on a majority of its Member States). Taking into account that the EU now has an exclusive competence with regard to direct investments and a shared competence with regard to non-direct investments, the Court held that it had jurisdiction to rule on the interpretation of the provisions at issue (articles 1(6) and 26(1) ECT on the definition of "investment") because, as they concerned situations that fell both under EU and national law, there was an interest of the Union that those provisions are interpreted in a uniform manner.[464] These examples showcase that the Court's jurisdiction may be understood as a mean to preserve the essential aspects of the EU legal order that render it autonomous both from international and domestic law, in particular: safeguarding the internal structure of decision-making through the division of competences between the Union and the Member States and the principle of institutional balance, the respect of the decision-making procedures at Union level, a comprehensive system of remedies for violations of EU law as well as the

[462] Opinion of AG Ćapeta, joined cases C-29/22 P and C-44/22 P *KS and KD v Council and others* ECLI:EU:C:2023:901.

[463] The impossibility of the Court to allocate responsibilities between the Member States and the Union was one of the principal arguments of the Court against the compatibility of the accession of the EU to the ECHR in Opinion 2/13 ECLI:EU:C:2014:2454.

[464] Case C-741/19 *Moldova v Komstroy* ECLI:EU:C:2021:655.

uniform interpretation of EU law. It can therefore be concluded that the area of EU action, the joint participation of the Union and the Member States, and the fact that a dispute might concern parties extraneous to the EU legal order, are not elements that preclude the Court from upholding its jurisdiction when its role of ultimate interpreter of EU law enables it to secure the maintenance of the essential characteristics of the EU legal order.

The principle of sincere cooperation is one of the essential characteristics of the EU legal order and of its autonomy but at the same time is a pre-requisite for the very existence of such legal order. In the context of the implementation of international agreements, duties deriving from the principle of sincere cooperation not only bind the Member States to fulfil the commitments undertaken, but also pursuant to its third segment to facilitate the tasks of the Union and to ensure that Union objectives can be achieved. When approaching the CJEU's jurisdiction from the point of view of this principle, it can be noticed that through the interpretation and determination of the contents of international commitments binding the Union, the CJEU contributes to shape the exercise of Union competence. This is both with regard to the determination of the proper implementation of an agreement in the EU legal order in light of the Union's broader commitment to the respect of international law in article 3(5) TEU, but also to ensure that the Member States refrain from taking any measure that could jeopardise the obtainment of the EU's objectives. As follows the next paragraphs will consider the CJEU's jurisdiction with regard to different types of international agreements and reflect on the role of sincere cooperation in shaping the scope and intensity of the Court's review.

4A.3.2 Sincere cooperation and the CJEU's jurisdiction with regard to international agreements concluded by the Union

While establishing the CJEU's jurisdiction in the case of EU-only agreements is often straightforward, the Court has developed an intricate jurisprudence on the question of jurisdiction over mixed agreements. EU-only agreements are concluded solely by the Union pursuant to its exclusive competence and are the epitome of agreements which are an integral part of EU law. They are acts of the institutions, concluded through a Council Decision, signed and ratified by the Union. Like any other sources of EU law, the CJEU has exclusive jurisdiction to interpret and assess the validity of EU law according to articles 344 TFEU and 19 TEU. The power of implementation falls to the EU and concerns the Member States indirectly.

Therefore, similarly to EU legislative acts, the Court has jurisdiction to interpret all provisions of these agreements including whether or not a clause can be accorded direct effect. EU-only agreements can thus be assimilated to other sources of EU law and in turn the principle of sincere cooperation mandating that the Member States are to ensure the fulfilment of the obligations deriving from the EU Treaties is applicable.[465]

Mixed agreements may cover areas of shared competence between the Union and the Member States as well as areas falling within Union competence and within the Member States' retained competence. Initially the Court avoided addressing the question of the scope of its jurisdiction with regard to mixed agreements in a number of cases including *Haegeman,* which concerned an Association Agreement with Greece.[466] The first time the Court's jurisdiction to interpret mixed agreements was challenged was in the case *Demirel*.[467] Relying on the mixed nature of the agreement, the German and British governments argued that the Court lacked jurisdiction over provisions of the Association Agreement with Turkey concerning the free movement of workers, a matter which, they put forward, fell within the exclusive competence of the Member States.[468] Whilst the Court addressed the issue of competence raised by the two governments, it left open the question of determining the scope of its jurisdiction. Moreover, recalling its *Kupferberg* judgment, it asserted that *"in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community which has assumed responsibility for the due performance of the agreement"*.[469] In so doing, the Court used the same reasoning it developed with regard to an EU-only agreement, the Free Trade Agreement with Portugal in *Kupferberg,* to conclude that Member States have a duty towards the Union to ensure the compliance of the commitments assumed by the latter. As a result, when international agreements are an integral part of EU law Member States are under a duty to ensure their implementation and while performing this function, the Court should be allowed to provide an interpretation of an international agreement. This logic, based on the international commitment entered into by the Union, underpins a broad conception of

[465] Second segment of art. 4(3) TEU.
[466] Case 181-73 *Haegeman v Belgian State* ECLI:EU:C:1974:41.
[467] Case 12-*86 Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400.
[468] P Koutrakos, 'Interpretation of Mixed Agreements' in C Hillion, P Koutrakos (eds), *Mixed Agreements Revisited: The EU and the Member States in the World* (Hart Publishing 2010), p. 117.
[469] Case 104/81 *Kupferberg* EU:C:1982:362.

the Court's jurisdiction premised on an interest in the uniformity of interpretation of EU law also when enacting commitments from international agreements. The scope of the Court's jurisdiction was further raised in several rulings including three cases in the context of the interpretation of the TRIPS Agreement namely *Hermès*, *Dior*, and *Merck*.[470] In the first case, the Court was called to interpret the term "provisional measure" with reference to article 50 of the TRIPS. Again, some Member States opposed the Court's jurisdiction arguing that, in light of the Court's Opinion 1/94, the competence to conclude the agreement was not exclusive to the Union insofar no common rules were adopted that allowed for ERTA pre-emption to occur.[471] The Court rejected the argument put forward by the Member States, stating that the Union and the Member States concluded the WTO Agreement without specifying the allocation of obligations between them. According to the Court, it was immaterial that the dispute at national level did not concern Community trademarks ruling that:

> *"where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply".*[472]

In *Dior*, the Court was also concerned with another request for a preliminary ruling on the TRIPS Agreement on trademarks as well as design rights. This was an area in which the Union had not taken legislative action at the time, and thus the question became whether the Court could interpret article 50 with reference to a subject matter in which there was no legislation at Community level. To begin with, the Court upheld its jurisdiction to examine this question. In regards to the substantive requirements of that provision, it held that with reference to an area outside the scope of Community law, it is for the legal order of the Member States to accord the right to rely on article 50(6) TRIPS.[473] Similarly in *Merck*, the Court upheld its jurisdiction to address the question from the national court but subsequently concluded that *"when the field is one in which the community has not yet legislated and which consequently falls within the competence of the member states,[…] Community law neither requires nor*

[470] Case C-53/96 *Hermès International v FHT Marketing Choice BV* ECLI:EU:C:1998:292; joined cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH* ECLI:EU:C:2000:688; case C-431/05 *Merck Genéricos v Merck & Co. Inc*. ECLI:EU:C:2007:496.
[471] Case C-53/96 *Hermès* ECLI:EU:C:1998:292*,* para. 23.
[472] ibid, para. 32.
[473] Joined cases C-300/98 and C-392/98 *Parfums Christian Dior SA* ECLI:EU:C:2000:688*,* para. 48.

forbids the legal order of that member state to accord individuals the right to rely directly on that rule laid down in the TRIPS Agreement".[474]

It is submitted that focusing on the competence to implement an international agreement can provide a useful reading of the case law on the Court's jurisdiction on mixed agreements. More specifically that it is the operation of the principle of sincere cooperation linked to the implementation of EU law at national level that can determine the extent of the Court's jurisdiction on international agreements concluded by the Union. In the next paragraphs, I will follow the distinction drawn by the Court between interpretation and direct effect. While the division may seem somewhat artificial as the determination of direct effect may also entail interpretation, I will consider the two phases separately because they allow to identify and rationalise the extent of the Court's jurisdiction, and because interpretation and direct effect may fulfil two different functions, one *vis-à-vis* the EU legal order and one *vis-à-vis* Union citizens.

a. Sincere cooperation and the CJEU's jurisdiction to interpret international agreements

Next to the Court's jurisdiction to rule on the division of competences which aims at preserving the autonomy of the EU legal order, the Court may be called to provide its interpretation to give meaning to substantive or procedural provisions within an international agreement. As recalled in *Kupferberg* the Court held that, in ensuring the respect for international agreements concluded by the Union, Member States fulfil a duty towards the Union who has assumed responsibility for the performance of the agreement. According to the principle of sincere cooperation, the Member States are called to fulfil the treaty obligations deriving from EU law and in doing so they may (or must) turn to the CJEU for a determination of the validity and interpretation of EU law. As a result, when international agreements are an integral part of EU law, Member States are under a duty to ensure their implementation and in performing this function, the Court has to be allowed to provide an interpretation of an international agreement. However, under mixed agreements, the division of competences is purposefully not well defined and, from an EU perspective, the extent of the exercise of EU and Member States competences in the conclusion of the agreement remains unclear and can possibly

[474] Case C-431/05 *Merck Genéricos* ECLI:EU:C:2007:496, para. 34.

change following the internal exercise of competence. When implementing an international agreement concluded jointly by the Union and the Member States, the latter fulfil a duty of sincere cooperation to comply with the obligations deriving from EU law which entail implementing the parts falling under EU exclusive competence and commitments falling within their sphere of competence without jeopardising the obtainment of the Union's objectives and facilitating the Union's completion of its tasks, namely the due performance of the international agreement. Irrespective of the competence exercise to conclude an agreement, if a provision of an international agreement will have to be implemented both under EU law and according to national law, the Court has upheld its jurisdiction in order to forestall differences in interpretation of the same provision. By exercising their competence jointly with the Union, and concluding a mixed agreement which is an integral part of EU law Member States are under a duty of close cooperation to ensure the uniformity of interpretation of EU law including in situations which would have otherwise been regulated by national law.

Therefore, the principle of sincere cooperation narrows the differences between the CJEU's jurisdiction to interpret EU-only and mixed agreements to facilitate the uniform interpretation of EU law. In both cases, pursuant to article 216(2) TFEU, agreements bind the Union and the Member States who are under a duty of sincere cooperation to implement the agreement which includes being subject to the CJEU's jurisdiction. For situations falling within the exclusive external competence of the Union, it is the Union that will have the decision-making power for the implementation and the Member States fulfil a duty to implement EU law. For shared competences, the Member States might exercise them jointly with the Union, and here a subject matter might fall within the scope of the EU's implementing competence, the national implementing competence or both.

b. Sincere cooperation and the Court's jurisdiction to determine the direct effect of international agreements

Before delving in the question of the CJEU's jurisdiction to determine direct effect, it is worth highlighting that such determination is relevant with regard to preliminary rulings, actions for annulment, and actions for non-contractual liability as opposed to infringement actions initiated by the Commission. While scholars have highlighted that the requirements for

establishing the Court's jurisdiction are the same for the various procedures,[475] it should be noted that the CJEU is trying to assess different elements in procedures such as preliminary rulings compared to infringement procedures. In preliminary rulings, the interpretation of an agreement may include not only the interpretation of its meaning but also whether or not it has direct effect. With regard to direct effect, this determines the legal effects of an international agreement in the EU legal order including whether individuals may derive rights from it. Therefore, when determining whether or not it has jurisdiction to rule the effects of an agreement in the EU legal order, the CJEU will consider whether such provision falls under an area of EU competence or is a commitment of the Member States according to international law. In the latter case, it would be for the Member States' courts to decide the effects of an agreement at the domestic level. Direct effect is thus concerned with a particular aspect of the implementation of an international agreement in the EU legal order, namely the effects of an agreement on individuals. If instead we consider infringement procedures, the Court is assessing whether or not there is an alleged violation of EU law and, in order to do so, it will examine if a Member State is violating the international agreement by not implementing it or whether its implementation is incompatible with other rights guaranteed by EU law. In the context of the infringement procedure, the attention is on the effects of the lack of compliance with an international agreement or an incorrect compliance with the international agreement for the rest of the EU legal system and concerns the obligations between the Union and the Member State to the effective application of EU law. Therefore, in infringement actions it might be important to assess whether a commitment is within the scope of EU law. On the contrary, if the Court examines whether or not a provision has direct effect it would look at the scope of EU competence strictly speaking, thus whether there are specific provisions covering a certain subject matter.

With regard to the CJEU's jurisdiction to determine the direct effect of international agreements, a clearer distinction between EU-only and mixed agreements is visible in the intensity of the Court's jurisdiction on direct effect compared to the jurisdiction to interpret international agreements. Concerning EU-only agreements, the competence to implement rests on a large extent on the Union, who defines the framework that Member States must

[475] P Koutrakos, 'The Interpretation of Mixed Agreements' in C Hillion, P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010), p. 137; B Hoops, 'The Interpretation of Mixed Agreements in the EU after Lesoochranárske zoskupenie' (2014) 10 Hanse Law Review, pp.18-19.

comply with at national level. In such a case, the Court has jurisdiction over the entirety of an agreement, including direct effect if commitments have been transposed in EU secondary law.[476] Agreements concluded by the Union and the Member States may be implemented by both actors to different extents also considering the type of mixed agreement such as facultative or mandatory. If a mixed agreement is concluded pursuant to a shared competence such as the protection of the environment, the Court will consider the extent to which the Union has exercised its competence when concluding the international agreement to determine whether a specific obligation falls within the implementing competence of the Member States or the Union. As noted by Neframi, this follows from the fact that the conclusion of international agreements by the Union in an area of shared competence does not pre-empt the internal action of the Member States, who remain competent for implementing those provisions of an agreement.[477] Indeed, in *COTIF I* the Court has ruled that the Union may exercise a shared competence for the first time externally which still enables the Member States to act internally. To understand to what extent the Union has exercised its competence through the conclusion of an international agreement, the fact that the Union has internal legislation on a certain subject matter goes to show that those topics have been covered by EU law and in turn the implementation concerning those provisions will fall under EU law. Therefore, it will be the Union that will decide whether an agreement has direct effect. If instead EU law does not sufficiently cover an area of shared competence internally, the Court has concluded that a specific obligation of implementing that provision rests on the Member States and as such they will have to determine whether or not a provision has direct effect (an example of this circumstance is the case *Merck*).

Recent case law such as with regard to the COTIF Convention, the Istanbul Convention and the Geneva Act shows that the Union may also subsequently accede to an international agreement and turn it into a mixed agreement.[478] These cases should be differentiated from the conclusion of an international agreement as here no competence is exercised jointly with

[476] The findings of the Court in Opinion 3/15 (Marrakesh Treaty) concerning international agreements in areas providing only for partial harmonisation can here be applied by analogy. Even if the Union might enable Member States to derogate or leave them a margin of manoeuvre, it is the Union that decides the scope of this margin and that determines whether or not it shall be narrowed.

[477] E Neframi, 'Mixed Agreements as a Source of EU Law' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011), p. 341.

[478] Case C-500/20 *ÖBB-Infrastruktur Aktiengesellschaft v Lokomotion Gesellschaft* ECLI:EU:C:2022:563, Opinion 1/19 (Istanbul Convention) ECLI:EU:C:2021:198, and case C-24/20 *Commission v Council (Accession to the Geneva Act)* ECLI:EU:C:2022:911.

the Member States but there is the subsequent exercise of a shared potential competence or, in the case of the Geneva Act, an external competence which has become exclusive under the CCP with the Lisbon Treaty and the possibility for the Union to accede to the agreement. In some cases, such as the COTIF Convention, there is an accession agreement laying out the extent of the EU's exercise of competence but, in its absence, it might be difficult to determine the extent of the Union's exercise of external competence if this is not matched by any prior internal exercise. The Istanbul Convention does not envisage the Union's accession through a specific agreement, but it is a peculiar case because the Council Decision evidences that the Union will exercise only its exclusive external competences acceding solely to part of the agreement.[479] In such a case, the Court would have jurisdiction to interpret only the part that has been concluded by the Union as either the Union has not exercised the shared competences, or there are competences of the Member States. Only those Member States that are parties in their own right will be further bound to implement the provisions of the Convention falling within their competence. As observed in the paragraphs above, in prior case law, the Court has not considered conferral and the exercise of competence as the dividing line to determine whether an obligation within a mixed agreement was a source of EU law. For instance, in *Hermès*, the Court held unequivocally that it could still interpret provisions concerning a field in which the Union had not yet legislated if they referred to situations falling both within the scope of national and EU law. In *Étang de Berre*, the Court noted that notwithstanding the fact that a specific subject matter (discharges of fresh water and alluvia) had not yet been the subject of community law, this did not alter the fact that the field had been covered in large measure by community law and thus came within its scope. In these cases, the Member States are bound to give full effect to a mixed agreement, implementing it to the extent of their competence, which is the essence of article 216 TFEU. In doing so, they might not act contrary to the Union interest and jeopardise the unity in the external representation of the Union. This is the result, on the one hand, of the principle of primacy because agreements that are an integral part of EU law rank above agreements concluded by the Member States, and on the other hand, of the principle of sincere cooperation to facilitate Union action. Unlike prior cases, for the Istanbul Convention the Court has explicitly stated

[479] Council Decision 2023/1075 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union, recital 2.

that there has been a partial accession and -leaving aside whether this is possible under international law- one could put forward that the narrow accession with multiple legal bases allows to ensure a high degree of coincidence between what are considered EU exclusive competences and substantive provisions of the agreement. Thus, a partial accession might re-define the meaning of integral part of EU law for both, the obligations resting on the Member States, but potentially also for the Court's jurisdiction to interpret provisions not under EU exclusive competence. Considering lastly the case of the Geneva Act, the Court ruled on the consequences of the Union's subsequent exercise of its external exclusive competence in the CCP to accede to the agreement.[480] Ultimately the agreement will stay mixed pending a new Council Decision, due to the acquired rights of the seven Member States already parties to the agreement. The other Member States will instead not be granted the authorisation to accede. From the point of view of EU law, this arrangement will turn the Geneva Act at least temporarily in an incomplete mixed agreement, but as the competence exercised is that of the CCP, the Court will have jurisdiction to interpret the entirety of the agreement including its direct effect.

In conclusion, looking at the international agreements concluded by the Union, the effective and uniform implementation of an international agreement through the principle of sincere cooperation plays a significant role in shaping the CJEU's jurisdiction. When the Union and the Member States conclude a mixed agreement, they exercise a reciprocal duty of cooperation which extends to the phase of implementation of an agreement. It is thus acknowledged that the implementation of a mixed agreement and its interpretation are not only relevant for the achievement of the objectives covered by that agreement, but for the integration of those commitments in the EU legal order in a manner that is compatible with existing EU legislation and with the Union's commitment to the observance of international law. As such a mixed agreement has been understood as an "instrument of EU law" which enables to pursue EU objectives on the international plane.[481] In turn the Court's jurisdiction over such an instrument may support the fulfilment of the Member States' obligation to facilitate Union action and refrain from jeopardising its objectives.

[480] Case C-24/20 *Commission v Council (Accession to the Geneva Act)* ECLI:EU:C:2022:911. The fact that the agreement fell within the Union's CCP was already determined by the Court in case C-389/15 *Commission v Council* ECLI:EU:C:2017:798.

[481] E Neframi, 'Mixed Agreements as a Source of EU Law' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011), p. 347.

4A.3.3 Sincere cooperation and the CJEU's jurisdiction for other international agreements

a. Member States' agreements

The Court may also be required to examine agreements concluded solely by the Member States to which the Union is not a party. In spite of this, some Member States' agreements can entail the joint exercise of Union and Member States competences when the Member States act as trustees of the Union. The Court has also been called to examine Member States-only agreements when they were deemed allegedly incompatible with EU law such as with regard to prior agreements in article 351 TFEU.[482]

Considering incompatibilities with EU law is in particular the role of the Opinion procedure, which has been held to grant the Court the jurisdiction to assess also the compatibility of Member States' agreements when concluded on behalf of the Union.[483] As argued by Cremona, a finding of incompatibility in this circumstance would have the effect of prohibiting the Council from adopting a decision concluding an incompatible agreement but would not invalidate an act of the Member States concluding the agreement in question.[484] However, such an act could be considered a breach of the Member States' obligation of sincere cooperation. When Member States become trustees of the EU, from an EU law perspective, there is an exercise of EU competence through the medium of the Member States, who are authorised to act on behalf of the Union. Even though the Union has not formally assumed responsibility for an agreement at the international level, the Member States' must act accordance with the competence divide internally and the principle of sincere cooperation at the international level. At the same time, the first segment of the principle of sincere cooperation could be understood to bind the institutions to ensure that Member States are not found liable internationally for violations deriving from measures taken at EU level.[485]

[482] For a detailed analysis on art. 351 TFEU see S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Ledizioni 2018), ch.2.
[483] This was the case of the ILO Convention in Opinion 2/91 ECLI:EU:C:1993:106.
[484] M Cremona, 'Member States Agreements as Union Law' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011), p. 302.
[485] As affirmed by the CJEU in *Commission v Greece (IMO)* sincere cooperation entails reciprocal obligations between the Union institutions and the Member States.

b. Informal agreements of the Union, its institutions, and the Member States

With reference in particular to the recent jurisprudence of the CJEU, the Court has not addressed the question of the status of informal agreements which have been entered into by the Union or its institutions with regard to its jurisdiction.[486] These agreements or arrangements are not concluded in accordance with article 218 TFEU and are characterised as soft law instruments including joint communications, joint letters, strategies or Memoranda of Understanding (MoUs). As noted by Wessel, the fact that an agreement may not create binding obligations does not *per se* mean that it falls completely outside the scope of EU law.[487] Andrade also notes that whilst an agreement might not be meant to be binding under international law it might still have legal effects under EU law.[488] The Court has examined some soft law instruments in its jurisprudence, for instance the MoU with Switzerland annulling the Commission Decision on signature for failing to respect the powers between institutions.[489] Notably, the CJEU has instead refrained from examining the EU-Turkey Statement as it held that it was an intergovernmental act attributable to the Member States outside of the scope of the Treaties.[490]

A4.3.4 Conclusion

The Court's case law distinguishes between the Court's jurisdiction to interpret an international agreement and to determine whether its provisions have direct effect. As the Court stated with regard to *Hermès,* but also more recently in the context of *Moldova v Komstroy*, the presumption of relevance of the questions from national courts as well as the need to interpret and apply EU law uniformly are at the basis of the Court's competence to address questions concerning international agreements binding the Union. This is in particular

[486] AG Sharpston considered this question in her Opinion on the Swiss MoU case highlighting the concept of "acts producing legal effects vis-à-vis third parties" as put forward in art. 263 TFEU, see Opinion of AG Sharpston, case C-660/13 *Council v. Commission* ECLI:EU:C:2015:787.
[487] R A Wessel, 'International Agreements as an Integral Part of EU Law: Haegeman' in G Butler, R A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022), p. 41.
[488] P García Andrade, 'The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments' European Papers (European Forum Insight of 16 April 2016) https://www.europeanpapers.eu/en/europeanforum/distribution-powers-between-eu-institutions-conducting-external-affairs, pp. 118-119.
[489] Case C-660/13 *Council v Commission (Swiss MoU)* ECLI:EU:C:2016:616.
[490] See for example, T-192/16 *NF v Council* ECLI:EU:T:2017:128.

where the provisions of an international agreement regulate situations that fall both within and outside the competence of the Union. With regard to the extent of the Court's jurisdiction including the determination of the direct effect of the provisions of an international agreement, the external competence of the Union as well as the internal exercise of that competence via legislation at EU level are important aspects determining the extent of the Court's jurisdiction. This concerns in particular the jurisdiction to interpret an agreement leading to a determination of the direct effect of a provision in the EU legal order as opposed to the jurisdiction of the Court to examine an international agreement to begin with. For agreements concluded by the Union, the Member States are under an obligation deriving from the principle of sincere cooperation to ensure the fulfilment of the obligations arising from the Treaties, which includes the respect of an international agreement. When outside or partially outside the scope of EU competence, the principle of sincere cooperation will impose duties to fulfil the obligations deriving from EU law and to enact implementing measures in a manner which does not jeopardise the achievement of Union objectives.

Section B: Enforcement

This subchapter aims at highlighting the contribution of the principle of sincere cooperation to the enforcement of the Union's international commitments. The following paragraphs will concern commitments enshrined directly in international agreements as opposed to EU legislation implementing or embodying obligations binding at the international level. Whilst the transposition in the EU legal order can undoubtedly be important to strengthen the effectiveness of the commitments undertaken, when the EU enacts secondary legislation aiming to implement international agreements, it is no different than other legislation and can be enforced as such, benefitting from primacy and direct effect. Considering the enforcement of international agreements as such (i.e. in the absence of an EU act of implementation), instead, allows observing the direct impact that they may have in the EU legal order, thus qualifying as an integral part of EU law. The term "enforcement" will here be used to refer to a process that enables the review of the observance of international obligations of the EU and the Member States and compels compliance.[491]

4B.1 Sincere cooperation and the enforcement of international agreements

A starting point when looking at the enforcement of international agreements in the EU legal system, which refers to international law more broadly, is article 3(5) TEU which states: "[the Union] shall contribute to peace, security, […] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". Being itself a creature of international law, the Union's commitment to ensure the respect of international law is coherent with its positioning as a supranational actor. It is submitted however that article 3(5) TEU does not envisage an obligation of result *per se*, nor an affirmation of the subordination of EU law to international law. Rather it puts forward the observance of international law as one of the Union's objectives.[492] Article 3(5) TEU is pivotal

[491] The term "enforcement" has also been used in a narrower sense to refer specifically to the action of the Commission according to article 258 and 260 TFEU, for example see S Andersen, *The Enforcement of EU Law* (OUP 2012), p. 39.

[492] Many authors have discussed the nature of the Union's commitment to international law in article 3(5) TEU. Among others see E Kassoti, R A Wessel 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' Draft – to be published in P García Andrade (ed), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022); E Cannizzaro, 'The Value of the EU International Values' in W Th Douma et al. (eds), *The Evolving Nature of EU External Relations*

because it informs that compliance with international law is not an "outwardly imposed obligation" but stems from EU law itself.[493] Article 3(5) TEU does not however provide a complete picture enabling one to understand more concretely how the process of compliance with international agreements takes place in the EU legal order and according to what considerations. And it is here that the principle of sincere cooperation can supply some answers. This is because, as already examined in the section on the implementation, also the enforcement of international agreements can take place both at the national and EU level and the principle of sincere cooperation shapes this interaction.

While article 3(5) TEU refers to an objective of the Union with regard to international law broadly understood, article 216(2) TFEU refers specifically to the implementation of international agreements within the EU legal order establishing that agreements concluded by the Union are also binding on the Member States. At the same time, according to article 4(3) TEU, Member States are under an obligation of sincere cooperation to implement international agreements which are an integral part of EU law.

Considering the enforcement of international agreements in the EU legal order, the principle of sincere cooperation can be seen as operating in light of the overarching objective of the Union to the respect of international law in its internal and external action and through its external action enshrined in article 3(5) TEU. Even though the implementation of international commitments has an internal focus, their enforcement also constitutes an external manifestation of the Union's compliance and can occur within the EU legal order but also outside via other international bodies. Dispute settlement bodies in particular have attracted ample discussion as to whether or not they are compatible with the EU legal order and potentially jeopardise its autonomy.[494]

Law (TMC Asser Press 2021); J Etienne 'Loyalty Towards International Law as a Constitutional Principle of EU Law?' Jean Monnet Working Paper 03/11; E Neframi, 'Customary International Law and the European Union from the Perspective of Article 3(5) TEU' in P Eeckhout, M Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2016).

[493] E Kassoti, R A Wessel 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' Draft – to be published in P García Andrade (ed), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022), p. 13.

[494] Most notably, the Court considered the compatibility of international dispute settlement with the autonomy of EU law in Opinion 1/09 (European Patent Court), Opinion 2/13 (European Court of Human Rights) and Opinion 1/17 (CETA Investment Court System). Highlighting the conditions for compatibility with the autonomy of the EU legal order set by the CJEU see C Hillion, R A Wessel 'The European Union and International Dispute Settlement: Mapping Principles and Conditions' in M Cremona et al (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017); L Pantaleo, *The Participation of the EU in International Dispute Settlement* (TMC Asser Press 2019) pp. 43-65.

The next sections will address two facets of the enforcement of the international commitments of the Union, from within the EU legal order through its procedures (4B.2), and from the outside in the context of the decisions of international bodies established by international agreements (4B.3).

4B.2 Enforcement of international commitments within the EU legal order

According to article 216(2) TFEU, agreements concluded by the Union bind both the Union and the Member States under EU law. The implementation of an international agreement may occur with varying degrees both at EU and national level and the CJEU and national courts are entrusted with the task of enforcing compliance of the obligations undertaken. The EU legal system provides for a multiplicity of avenues for ensuring compliance of the Union and the Member States. A review of secondary EU law in light of an international agreement may occur through direct actions for annulment, actions for damages, preliminary rulings or indirectly through a finding of illegality under article 277 TFEU. Also, Member States may be held accountable for their implementation of an international agreement through infringement procedures initiated by the Commission as well as via preliminary rulings.

As already mentioned, according to article 344 TFEU, the CJEU has exclusive jurisdiction for the interpretation of EU law and is its primary enforcer according to article 19 TEU. This is a fundamental attribute of the autonomy of EU law, namely, that the CJEU is able to define the law that is applicable within the EU legal order. As international agreements concluded by the EU are a source of EU law and constitute an integral part of it, the Court may be called to interpret them and assess the EU's and the Member States' compliance. At the same time, however, the CJEU is not an enforcer of international agreements nor of decisions of international courts and bodies, but rather only in so far as these provisions are relevant within the EU legal order. When the CJEU is called to examine an alleged violation of an international agreement by a Member State, this can include both the substantive obligations contained in an international agreement and/or the obligations deriving from article 4(3) TEU. Compliance with the second segment of article 4(3) TEU partially overlaps with the respect of the substantive obligations of an agreement, but the Court may also examine the compliance with the obligations deriving from the first and third segments of article 4(3) TEU.

It is submitted that when assessing the conduct of the Member States with respect to an international agreement which is an integral part of EU law, the Court is giving effect primarily to the principle of sincere cooperation and its specific expression in article 216(2) TFEU rather than the Union's commitment to respect international law in article 3(5) TEU. Article 3 TEU, similarly to article 21 TEU, entails a variety of objectives which are binding on the Union among which the strict observance of international law. As put forward by Wessel and Kassoti, the bindingness of the objectives not only refers to the action of the Union but must also encompass that of the Member States with regard to their implementation of secondary law or when they act in the EU framework because, otherwise, they might prevent the Union from achieving those objectives.[495] This seems a direct consequence of the non-unitary nature of the Union as an international actor, which follows from the multilevel division of powers within the Union, and finds confirmation in the principle of sincere cooperation in article 4(3) TEU and its application in the field of EU external relations. Unlike article 4(3) TEU, however, article 3(5) TEU does not create self-standing obligations for the Member States but takes the shape of normative guidance.[496] Specifically when comparing article 3(5) TEU and article 216(2) TFEU it can be seen that the first entails an objective to respect international law whereas the second an obligation to implement agreements concluded by the Union, which also encompasses an obligation to respect them.[497] And when looking at article 4(3) TEU, there is a further dimension to the obligation to implement than under article 216(2) TFEU which affects the scope of that obligation. The implementation of an international agreement in article 4(3) TEU is contextualised within the broader picture of EU law and of its respect, including its fundamental characteristics such as the division of competences and fundamental rights. Therefore, it appears that when evaluating the conduct of a Member State with regard to the implementation of an international agreement the Court would turn to articles 216(2) TFEU and 4(3) TEU which are concerned with the implementation of international agreements as a source of EU law obligations. By assessing a Member State's compliance with article 4(3)

[495] E Kassoti, R A Wessel 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' Draft – to be published in P García Andrade (ed), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022), p. 6.

[496] ibid, p. 12. Kassoti and Wessel refer to the functioning of art. 3(5) TEU as that of a "normative penumbra, informing the judicial review process; guiding the interpretation of other legally binding norms; as well as guaranteeing that the autonomous EU legal order is still open to international law".

[497] E Neframi, 'Customary International Law and the European Union from the Perspective of Article 3(5) TEU' in P Eeckhout, M Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2016), p. 210.

TEU including that the objectives of the Union are not jeopardised, this would also include refraining from undermining the EU's commitment to the strict observance of international law under article 3(5) TEU.

It must be noted that, internally, article 4(3) TEU is at the basis of the enforcement of EU law[498] and that Member States are primarily responsible for giving effect to EU law within the EU legal order.[499] By assimilating international agreements to EU law as such, the obligation of sincere cooperation to give full effect to EU law at national level also includes the obligations arising from international agreements and rests on all branches, including the judiciary. In addition, national courts are bound more specifically by article 19 TEU which is concerned with the obligation to provide for effective legal protection in the fields covered by Union law, including international agreements that qualify as an integral part thereof. Moreover, the Court affirmed that, by being an integral part of EU law, international agreements concluded by the Union fall within the scope of application of EU law and thus of the Charter of Fundamental Rights (CFR).[500] It follows that article 47 CFR providing an individual right to an effective remedy must also be guaranteed by national courts with regard to international agreements. While EU secondary law might provide for more specific remedies, this is less likely to occur with regard to international agreements, which in principle leave the means of implementation to state parties. In the absence of EU rules (and it is put forward equally so for rules within international agreements) governing the subject of remedies and enforcement of rights, the CJEU has consistently held that it is for the national legal system in each Member State to designate courts and procedural rules to safeguard the rights provided in EU law. According to the principle of national procedural autonomy, Member States can shape how a person adversely affected by an infringement of EU law can find redress. Two principles emerged from the Court's case law aiming to balance national procedural autonomy and the effective enforcement of EU law, namely equivalence and effectiveness.[501] The former entails that rights deriving from EU law must be subject to similar procedures as rights deriving from national law; whereas the latter provides that national procedural rules should not render the

[498] F Casolari, *Leale Cooperazione Tra Stati Membri e Unione Europea* (Editoriale Scientifica 2020) p. 150; See also P Craig and G de Burca, *EU Law: Text, Cases and Materials* (7th ed, OUP 2020), pp. 262-300.
[499] S Andersen, *The Enforcement of EU Law* (OUP 2012), p. 13.
[500] Opinion 1/17 (CETA) ECLI:EU:C:2019:341, para. 171.
[501] On equivalence and effectiveness see P Craig and G de Burca, *EU Law: Text, Cases and Materials* (7th ed. 2020 OUP), pp. 262-300.

exercise of EU rights impossible or excessively difficult in practice. Whilst the Court considers that there is no requirement for the introduction of new remedies at national level,[502] in some cases it required to make available a specific type of remedy such as interim relief even when this was not available under national law.[503] The codification of article 19 TEU in the Lisbon Treaty, requiring national courts to ensure effective legal protection, adds a further element to the enforcement of EU law at national level. The relationship between effective legal protection and effectiveness as defined in *Rewe* has not been clarified.[504] Some scholars have drawn a distinction noting that "*Rewe"* effectiveness is concerned with the effective application of EU law, whereas effective legal protection in article 19 TEU is read in light of article 47 CFR and focuses on protecting individuals, allowing them to enforce their rights.[505] These considerations will need to be taken into account also for what concerns international agreements that are an integral part of EU law to ensure their application at national level.

4B.2.1 An obligation of sincere cooperation to avoid that the Union is found liable for a breach of an international agreement

International agreements concluded by the Union are binding on the Member States pursuant to article 216(2) TFEU and, because they are an integral part of EU law, Member States are under a duty to give them effect in their domestic legal orders according to the principle of sincere cooperation. It can further be considered that the bindingness of international agreements on the Member States stems from their bindingness on the institutions, because otherwise the Union could not fulfil its commitments in that it is precluded from implementing all parts of an agreement. Therefore, the Member States are under an obligation of sincere cooperation which entails facilitating Union tasks and refraining from jeopardising its objectives, among which the implementation of an international agreement and the strict observance of international law. As put forward by Neframi, a conceptual distinction can be made between the implementation of an international agreement and its compliance within

[502] Case C-432/05 *Unibet* ECLI:EU:C:2007:163, paras 40-41.
[503] Case C-213/89 *Factortame and others* ECLI:EU:C:1990:257, para. 21.
[504] E Neframi, 'Judicial Implementation of EU Law' (2016 Paper EPLO Academy), p. 2.
[505] J Krommendijk, 'Is There Light on the Horizon? The Distinction between Rewe Effectiveness and the Principle of Effective Judicial Protection in Article 47 of the Charter after Orizzonte' (2016) 53 CMLRev, pp. 1405-1406.

the EU legal order.[506] On the one hand, she notes that "implementation" can be considered linked to the exercise of EU competence. On the other hand, "compliance" refers more broadly to the shared commitment of the Union and the Member States to respect an international agreement, which is the source of an obligation for the Member States *vis-à-vis* the Union as established in *Kupferberg*.[507] In this judgement, the Court went further than its prior *Haegeman* ruling in its construction of the consequences of the bindingness of international agreements under article 216(2) TFEU, by holding that the Member States' are under an obligation to abide by an international agreement connecting it to the need of avoiding the Union's international responsibility.[508]

Both obligations to implement and comply can be enforced by the Union institutions through the initiation of an infringement procedure under article 258 TFEU. When the Commission refers a case to the CJEU,[509] the Court has consistently reiterated that an alleged violation can only be assessed with reference to obligations arising from EU law.[510] This is so also in the context of a possible failure to comply with the commitments enshrined in an international agreement and, in particular, before making a determination, the Court will assess whether the obligation which is the subject-matter of the action falls within the scope of EU law. The Court has considered both Member States' infringements of EU-only as well as of mixed agreements. For example, the GATS Agreement at stake in the case *Commission v Hungary* is a mixed agreement (currently) falling within the exclusive competence of the Union in the CCP,[511] the Convention for the protection of the Mediterranean Sea against pollution in

[506] E Neframi, 'Status and Enforceability of EU International Agreements within the Domestic Legal Systems of the Member States: Kupferberg' in G Butler, R A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022), pp. 160-161.

[507] ibid, p. 159.

[508] Case 104/81 *Kupferberg* ECLI:EU:C:1982:362, *para. 13* "[i]*n ensuring respect for commitments arising from an agreement concluded by the community institutions the member states fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the community which has assumed responsibility for the due performance of the agreement". This understanding has been* consistently repeated in the Court's jurisprudence with regard to mixed agreements among others in case 12/86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400 para. 11; case C-459/03 *Mox Plant* ECLI:EU:C:2006:345, para. 85; case C-239/03 *Étang de Berre* ECLI:EU:C:2004:598, para. 26.

[509] An infringement procedure is initiated by the Commission who sends a letter of formal notice requesting information to the Member State concerned. In case of an unsatisfactory response, it can further send a reasoned opinion which entails a request to comply with EU law. If both measures fail to bring a Member State in compliance, the Commission may then decide to bring the matter to the CJEU. The majority of cases is resolved without a referral to the Court. See on the infringement procedure S Andersen, *The Enforcement of EU Law* (OUP 2012), p. 18.

[510] See for example, C-239/03 *Commission v France (Étang de Berre)* ECLI:EU:C:2004:598, para. 23.

[511] Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792. In Opinion 2/15 the Court affirmed that GATS falls within the CCP see Opinion 2/15 (FTA Singapore) ECLI:EU:C:2017:376 para. 54.

Commission v France (Étang the Berre) is a mixed agreement where competence is shared between the Union and the Member States,[512] and the International Dairy Arrangement (IDA) at stake in *Commission v Germany* is a multilateral treaty concluded solely by the then European Economic Community under the CCP.[513] Therefore, if the provisions of an international agreement are within the scope of EU competence, a Member State can be subject to a finding of non-compliance with its duty to give full effect to the international agreement, facilitate Union tasks and refrain from jeopardising Union objectives. In the infringement procedure the competence divide plays an important role, but equally relevant is the scope of EU law, a broader notion which represents a threshold that can arguably be easily met by agreements concluded by the Union, including mixed agreements. This is because when Member States and the Union conclude a mixed agreement, they are jointly tasked with the implementation of commitments in the EU legal order according to the competence divide as well as the Union's overall compliance for an agreement to which it is a party. As such, the Member States act within the broader scope of EU law, which can be affected by the actions they take at the national level. In the context of an infringement procedure, next to the substantive obligations of an agreement which may rest on the Member States or that Member States need to implement, the CJEU also enforces the obligations deriving from the principle of sincere cooperation which can reach beyond the sphere of EU competence. This is made explicit in AG Kokott's reasoning with regard to the GATS agreement in *Commission v Hungary*:

> "According to the Court's case-law, in the internal implementation of an international agreement the Member States fulfil an obligation in relation to the European Union, which has assumed responsibility, externally, for the due performance of the agreement. This obligation is an expression of the duty of sincere cooperation under Article 4(3) TEU, which acts as a limit on the exercise of competence. Hungary thus remains free to exercise its internal competence to regulate higher education, but only in so far as the relevant rules do not infringe obligations under the WTO agreements. This would not only render the European Union liable in international law, but also expose the other Member States to the risk of countermeasures. This risk is clearly illustrated by recent developments […]. Compliance with this duty of sincere cooperation can also be enforced in infringement proceedings."[514]

[512] Case C-239/03 *Commission v France (Étang de Berre)* ECLI:EU:C:2004:598.
[513] Case C-61/94 *Commission v Germany (IDA)* ECLI:EU:C:1996:313.
[514] Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792, paras 53-55.

Infringement proceedings may also concern a specific endeavour that the Member States have undertaken at the international level. An example is the case *Commission v Ireland* in which the Commission sought to ensure the respect of the European Economic Area (EEA) agreement which included a commitment of the Member States to sign the Berne Convention on the Protection of Literary and Artistic Works within a certain deadline.[515] The CJEU held that Ireland breached both article 228(7) EC (precursor of article 216(2) TFEU) as well as the specific provision of the Protocol of the EEA agreement outlining the obligation to accede to the Convention. This is notwithstanding the fact that Ireland declared to be in the process of adopting the Convention which was pending parliamentary approval. The Court recalled its findings in *Demirel,* where it held that mixed agreements have the same status in the EU legal order as EU-only agreements and that in *"ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement".*[516] Next, it noted that the protection of literary and artistic works was an area of shared competence which had been largely regulated internally by the Treaties and in turn the agreement came within the scope of EU competence.[517] The Court further added that there was an interest in ensuring that all Contracting Parties of the EEA agreement adhered to the Berne Convention as this Convention created rights and obligations covered by EU law. In turn, the Member States' compliance or lack thereof would also have affected the regulation of trade-related aspects of IP not yet covered by EU law for which they had committed to enact the provisions of the Convention.

With reference to infringement procedures, it is worth dwelling on the relationship between a breach of international law and one of EU law. Taking the case against Ireland, the Court could not have mandated that Ireland acceded to the Berne Convention, as this would have been contingent on the consent of that Member State. But rather, the Court sanctioned Ireland for a commitment that it had taken in the EEA Agreement *vis-à-vis* the EU and other Member States to adhere to that Convention and implement it in its domestic legal order for the parts not yet regulated under EU law. So, the Court is not sanctioning the breach of an international obligation that Ireland has according to the EEA agreement but rather an EU

[515] Case C-13/00 *Commission v Ireland (Berne)* ECLI:EU:C:2002:184.
[516] ibid, para. 15.
[517] Art. 207(1) TFEU. Trade-related aspects of IP law are today part of the exclusive external competence of the EU as part of the CCP.

obligation, which coincides with the former in terms of its substantive content. A confirmation of this can be found in the fact that the availability of the infringement procedure is not influenced by the existence of a designated dispute settlement mechanism. This has been clarified in the case *Commission v Hungary* in which the Court was faced for the first time with an argument on the consequences of the interplay between enforcement at EU level through the infringement procedure and enforcement at the international level via the WTO.[518] The Court clarified that the existence of the WTO dispute settlement system does not influence the Court's jurisdiction on the infringement action.[519] Moreover, a finding of a breach of GATS via the infringement procedure is not a characterisation of an international wrongful act, which is governed exclusively by international law.[520] Thus an infringement procedure has formally no bearing on a possible finding of non-compliance of the WTO DSB.[521]

At the same time, the Member States can also be held accountable for an obligation of sincere cooperation to implement and comply with an international agreement via the preliminary ruling procedure initiated at the national level.[522] In order for individuals to rely on a provision of an international agreement, it must have direct effect within the EU legal order, an aspect which will be discussed in the following paragraphs.

4B.2.2 An obligation of sincere cooperation to review the legality of the EU's and the Member States' action in light of binding international agreements

When the CJEU is called to examine the compliance of the Union and Member States with international agreements on the initiative of private parties and Member States, an assessment of direct effect has emerged as a necessary prerequisite for the Court to enforce the provisions of such international agreements in the EU legal order.

As regards to preliminary rulings in particular, the CJEU may acquire jurisdiction not only with regard to questions of interpretation to challenge an act of a Union institution but also to challenge national measures. Indeed, through the involvement of the national courts the CJEU has effectively been able to ensure compliance with EU agreements by the Member

[518] Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792, paras 77-93.
[519] ibid, para. 86.
[520] ibid, para. 88.
[521] ibid, para. 89.
[522] Art. 267 TFEU.

States.[523] The argument put forward is that the obligations of the second and third segment of the principle of sincere cooperation concern not only the relationship between Member States and the EU, and national courts and the CJEU, but also that between the EU Member States and EU citizens. This is because by allowing the enforcement of EU law to be decentralised and brought about by individuals, the obligation of giving effect to the Treaties can be challenged at the national level making the individual part of the enforcement of the Member States' obligations deriving from EU law, including international agreements which are an integral part of it.[524] The obligation deriving from sincere cooperation to ensure the fulfilment of the obligations of the Treaties and acts of the institutions for national courts translates in two duties in this respect: giving effect to EU law setting aside any national law in conflict (upholding the principle of primacy), and applying procedural rules according to the principles of effectiveness and equivalence. Moreover, according to article 19 TEU, national courts have an obligation to guarantee effective legal protection in the fields covered by EU law. The latter obligation includes both the duties deriving from sincere cooperation just mentioned as well as other obligations of a structural nature that enable individuals to obtain redress through a functioning and decentralised enforcement system.

Therefore, the question arises whether the obligations of the three segments of article 4(3) TEU, assisting each other in the completion of the Treaties' tasks, ensuring the fulfilment of obligations deriving from EU law, facilitating Union tasks and refraining from jeopardising the Union's objectives, play a role in the decision on whether or not the CJEU will enable an agreement to be enforced in the EU legal order, reviewing the Union and the Member States' compliance. To begin with, it can be affirmed that neither the obligation to implement under article 216(2) TFEU nor article 4(3) TEU by themselves encompass an obligation to grant direct effect to international agreements which are an integral part of EU law. This is also the case for internal EU law in which not all EU instruments, most notably directives, can in principle be directly invoked in court.

[523] The AG in *Haegeman* drew a distinction and suggested a more restrictive interpretation limited to when the interpretation required in a preliminary ruling was instrumental to the validity or interpretation of an act of the EU institutions. See M Mendez, *The Legal Effects of EU Agreements* (OUP 2013), p. 65.
[524] M Klamert, B Schima, 'Article 19' in M Kellerbauer and M Klamert (eds), *The EU Treaties and the Charter of Fundamental Rights* (OUP 2019), p. 177.

a. An obligation of sincere cooperation incumbent on national courts to respect a determination of direct effect by the CJEU

It must be recalled that within the EU legal order direct effect is a necessary prerequisite for an individual to rely on the EU Treaties, EU secondary law and international agreements. In the seminal case *Van Gend & Loos,* the Court declared the direct effect of EU Treaties by identifying the individual as the holder of rights and obligations under EU law which must be protected through the EU legal system. Indeed, unlike other treaties whose domestic effects are normally determined by the constitutional law of each State Party, the CJEU (then ECJ) ruled that the EEC Treaty was different because it established a new legal order which was designed to include individuals as its subjects.[525] The reasoning for finding direct effect was primarily based on the role of individuals next to that of States in the Community that the EEC Treaty sought to create.[526] In turn, the Court's argumentation shows a certain circularity as direct effect is both reason and the consequence of the *sui generis nature* of the EU legal order.[527] A consideration that emerges clearly from the judgement is however that direct effect is conducive to an enhanced protection of the rights granted by EU law at the national level, and thus underlines the importance of ensuring the effective implementation of EU norms which affect individuals at the domestic level. The doctrine of direct effect applies in principle to all binding EU law including the Treaties, the Charter, general principles, secondary legislation and international agreements which can be used to challenge national law. There are notable differences concerning the direct effect of EU directives, but also distinct issues concerning the direct effect of international agreements concluded by the Union.

While the hierarchical position of international law above secondary EU law means that, in principle, international law can invalidate contrary EU legislation in annulment procedures as well as preliminary rulings, the jurisprudence of the CJEU has drawn a distinction between the incorporation of international law and its direct effect which is the

[525] Notably see P Pescatore 'The Doctrine of Direct Effect: An Infant Disease of Community Law' (1983) 8 ELR, p. 158.

[526] Case 26/62 *Van Gend and Loos* ECLI:EU:C:1963:1, page 12. "[…] implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects member states and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this community […]".

[527] See B de Witte 'Direct Effect, Primacy and the Nature of the Legal Order' in P Craig, G de Burca (eds), *The Evolution of EU Law* (3rd ed, OUP 2021), p. 226.

basis for individuals to rely on rights provided in international agreements.[528] This is consistent with the practice at international level where the legal effects of international law are contingent on national law. Indeed, as a matter of principle, international law leaves a certain leeway to States with regard the identification of the means to comply with its norms, including whether or not to allow their courts to give direct effect to treaty provisions.[529] Thus the primacy of international law in the EU legal order does not result in an automatic annulment of secondary EU law, but the provisions of an international agreement need to meet the procedural conditions of invocability before EU courts following the *ad hoc* assessment of the CJEU. Indeed, article 216(2) TFEU is not capable on its own to determine whether or not individuals can rely on an international agreement in order to enforce rights conferred on them by international law and possibly invalidate EU law. An agreement may itself determine its effects,[530] or direct effect might be explicitly excluded by the Council Decision concluding the agreement.[531] If the existence of direct effect is not clarified, however, then the CJEU will make such a determination as a matter of interpretation of the agreement on a case-by-case basis. In *Kupferberg,* the Court laid down a two-step test to determine whether a provision of an international agreement had direct effect which has become a point of reference for subsequent case law. The first step of the test focuses on the nature and structure of the agreement, whereas the second step pertains to the purpose and object of an agreement in order to determine the unconditional and precise character of the invoked

[528] On the CJEU's jurisdiction see Section 4A.3. It is worth noting that direct effect is a prerequisite for invoking an international agreement in preliminary rulings and actions for annulment, but this is not the case in infringement procedures. In the context of WTO treaties, to which CJEU has consistently denied direct effect, the Court assessed that even Member States cannot challenge the validity of EU law in case C-280/93 *Germany v Council* ECLI:EU:C:1994:367 in light of WTO law nor bring claims for damages against the EU (joined Cases C-120/06 P and C-121/06 *FIAMM* ECLI:EU:C:2008:476). The reverse situation is however possible, namely the Commission can sue Member States for alleged infringements of the WTO agreements through the infringement procedure.

[529] See for example ICJ *Avena and Other Mexican Nationals (Mexico v United States of America),* Judgment [31 March 2004] as cited by A Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 The European Journal of International Law, p. 122.

[530] Eeckhout notes that states rarely agree on the precise legal effects of agreements in their municipal legal order because they may have different attitudes towards international law. P Eeckhout, *EU External Relations Law* (2nd ed, OUP 2011), p. 335.

[531] This practice has not yet been considered by the Court. See for example Council Decision 2014/ 295/ EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their MS, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II, and VII thereof [2014] OJ L161/ 1.

provisions.[532] An example of agreements which did not meet the first prong of the test notably include the GATT and the WTO agreements. Here, the Court reasoned that the very nature of the agreement and the need to leave enough room for negotiation does not allow individuals to invoke its provisions because it would curtail the scope of action of the Union. An example of an international agreement whose provisions did not meet the second prong of the test includes article 9(3) of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[533] The Court further developed and narrowly interpreted two exceptions to the test for direct effect in the cases *Nakajima* and *Fediol*, both concerning agreements concluded in the context of the WTO.[534] In these two cases, the Court considered that it could review the legality of an EU act in light of the agreements at issue because the EU intended to implement a precise commitment or an obligation deriving from an international agreement had been explicitly referred to in an EU act, respectively.[535] More on these two exceptions will be discussed in the coming paragraphs. For now, it should be noted that the exceptions have since been interpreted restrictively, as well as the conditions of direct effect have proven difficult to meet, giving rise to a widespread criticism of the Court's approach which renders international agreements unenforceable in the EU legal order.

Concretely, the interpretation and determination of direct effect for EU-only agreements falls in principle within the jurisdiction of the CJEU. In the context of mixed agreements, instead, the internal exercise of a Union competence is essential to conclude whether or not the Union has the power to decide if a specific provision of an international agreement has direct effect. For commitments falling under shared competence and which have not been regulated at EU level, it will be for the Member States to define whether or not obligations within an international agreement have direct effect at the domestic level.[536]

On the one hand, direct effect can pierce the national legal order to give effect to specific rights, but on the other hand, as put forward by Nollkaemper, it can act as a shield

[532] See E Neframi, 'Status and Enforceability of EU International Agreements within the Domestic Legal Systems of the Member States: Kupferberg' in G Butler, R A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022), pp. 155-165.
[533] Case C-240/09 *Lesoochranárske zoskupenie (Brown Bears I)* ECLI:EU:C:2011:125, paras 44-45.
[534] The Anti-dumping Code and the General Agreement on Tariffs and Trade (GATT).
[535] Case C-69/89 *Nakajima v Council* ECLI:EU:C:1991:186, case 70-87 *Fediol v Commission* ECLI:EU:C:1989:254.
[536] Case C-431/05 *Merck Genéricos* ECLI:EU:C:2007:496, para. 34.

protecting from a review based on international law.[537] In principle, the lack of direct effect is not in breach of international law, whose subjects are given a broad margin of flexibility as to the means by which they perform their international obligations and to how the domestic legal order will relate to the international one, nor it is in violation of article 3(5) TEU. The impossibility to ascertain a violation in the implementation of an international agreement does not by itself prove a breach of the agreement, but arguably, as stated by Nollkaemper, takes into account the different starting points between EU law and international law.[538] On the internal plane, the Court has been readily willing to find the direct effect of EU law for instance through construing a broad notion of State,[539] finding incidental direct effect,[540] and allowing the direct effect of general principles when secondary EU law does not have direct effect.[541] With international agreements, we can witness instead a more careful approach. Initially the Court found that more international agreements met the requirements of direct effect, then progressively fewer and fewer.[542] In the internal legal order, the objectives pursued by direct effect are those of the effective enforcement of EU law, deriving from the decision-making process at EU level balanced with the margin of discretion given to the Member States to implement EU law in their domestic legal orders. Similarly, the direct effect of agreements binding on the Union enables to enforce the commitments of the Union and the Member States taken at the international level which are also an integral part of EU law. At the same time, as the negotiation and the conclusion of an agreement happens at the international level, direct effect may influence the role of the Union as a global actor and the acts of a general nature it can adopt internally, thus potentially posing a limit to its future external and internal exercise of competence.[543] In determining the direct effect of an agreement, the Union must then also ensure that its other objectives are not jeopardised. Indeed, before the concept of autonomy acquired prominence, the doctrine of direct effect already made the

[537] A Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 The European Journal of International Law, p. 108.
[538] ibid, p.117.
[539] Case 152/84 *Marshall* ECLI:EU:C:1986:84.
[540] Case C-194/94 *CIA Security International SA* ECLI:EU:C:1996:172.
[541] Case C-144/04 *Mangold* ECLI:EU:C:2005:709.
[542] See for example cases such as Case 104/81 *Kupferberg* ECLI:EU:C:1982:362, and case 87-75 *Bresciani* ECLI:EU:C:1976:18 compared to more recent cases such as case C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change (ATTA)* ECLI:EU:C:2011:864, case C-240/09 *Lesoochranárske zoskupenie (Brown Bears I)* ECLI:EU:C:2011:125, case C-308/06 *Intertanko* ECLI:EU:C:2008:312.
[543] These are among the grounds for refusing to recognise direct effect to the WTO agreements.

CJEU a gatekeeper of the role of the EU as an international actor well as of internal EU law rules and the decision-making process that led to them.

In conclusion, whether or not an international agreement concluded by the Union has direct effect is in principle determined by EU law and not by national law, so as to ensure that internally enacted EU law has the same effect throughout the EU legal order, [544] and that the Union may comply with its objective of strict observance of international law. Direct effect is significant because it can give effect to an international agreement even when the political branch fails to do so and in this way, it secures compliance with international obligations. If the competence to make a determination of direct effect falls within the jurisdiction of the CJEU, national courts will be obliged to follow it. If instead direct effect is to be determined at the domestic level, national courts will need to make sure that they comply with the obligations arising from sincere cooperation. On the one side, upholding the primacy of EU law and refraining from jeopardising the objectives of the Union including that of effective judicial protection; and on the other, fulfilling the obligations deriving from an act of an EU institution, the international agreement. Like in the implementation of international agreements, the principle of sincere cooperation balances autonomy and the respect of international law also in the enforcement of the commitments of the Union.

b. The reciprocal character of the principle of sincere cooperation as the possible basis for an obligation on the CJEU to review EU acts implementing international agreements in light of said agreements

i. Limited exceptions to direct effect to review EU acts on the basis of an international agreement

In the *Nakajima* and *Fediol* jurisprudence the Court has identified two circumstances which justify the judicial review of EU acts on the basis of an international agreement, notwithstanding the lack of direct effect of the agreements in question. Recent case law has brought to the fore these exceptions in order to assess whether a provision of an international agreement could be used as a reference to invalidate or interpret secondary EU law.[545] Both

[544] See A Nollkaemper, 'The Role of National Court in Including Compliance with International and European Law-A comparison' in M Cremona (ed), *Compliance and Enforcement of EU law* (OUP 2012), p.169.
[545] For instance, in the case *Changmao* with regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European

Nakajima and *Fediol* were established in connection with the WTO agreements but, as put forward by de Búrca and others, they could also be applicable to other international agreements.[546] The case *Stichting Natuur* provides some insights in this regard.[547] At the first instance, the General Court (GC) considered the *Nakajima* exception applicable with regard to the Aarhus Regulation[548] as it held that it implemented the provisions of the Aarhus Convention.[549] On appeal, the CJEU reversed this finding but did not put forward the principle according to which the exception would be restricted only to the WTO context.[550] *Stichting Natuur* also shows a clear difference in the approach of the two courts to the use of the exceptions. On the one hand, the GC referred to the objectives of the Aarhus Regulation as a whole to affirm the applicability of the *Nakajima* exception,[551] whereas the CJEU considered the relevance of both the *Nakajima* and *Fediol* exceptions with specific reference to article 10(1) of the Aarhus Regulation.[552]

Other cases focus instead on the substantive alignment between a commitment enshrined in an international agreement and a provision within an EU instrument as an indication of the implementation of an international commitment as opposed to an EU-specific approach. In *Rusal Armenal,* the applicant sought to annul Regulation 384/96 (referred to as EU Basic Regulation) in light of the Anti-dumping Agreement (ADA)[553] and the Court came to

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Union, and in *EUIPO v KaiKai* with regard to Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

[546] G de Búrca, C Kilpatrick, J Scott, 'Questioning the EU's 'Principled Openness' to International Law: An Examination of the Court's Reception of the Aarhus Convention and the Convention on the Rights of Persons with Disabilities' in M Claes, E Vos (eds) *Making Sense of European Union Law* (Hart Publishing 2022), pp. 15-16.

[547] Joined cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and others* ECLI:EU:C:2015:5. An analogous reasoning can be found also in Joined cases C-401/12 P to C-403/12 P *Council and Commission v Vereniging Milieudefensie* ECLI:EU:C:2015:4.

[548] Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[549] Case T-338/08 *Stichting Natuur en Milieu and others* ECLI:EU:T:2012:300, paras 57-59.

[550] Joined cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and others* ECLI:EU:C:2015:5, paras 49-51. As opposed to dismissing the applicability of the two exceptions outside of the WTO context, the Court first stated that the exceptions in *Nakajima* and *Fediol* "were justified solely on the basis of the particularities of the agreements that led to their application" and then proceeded to indicate that such particularities were not met in regard to the Aarhus Convention. A different approach can be seen in the Opinion of AG Jääskinen, who considered the two exceptions inapplicable outside the WTO context, see Opinion of AG Jääskinen, joined cases C-401/12 P to C-403/12 P *Council and Commission v Vereniging Milieudefensie* ECLI:EU:C:2014:310, para. 29.

[551] Case T-338/08 *Stichting Natuur en Milieu and others* ECLI:EU:T:2012:300, para. 57.

[552] Joined cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and others* ECLI:EU:C:2015:5, paras 50-51.

[553] Case C-21/14 P *Commission v Rusal Armenal* ECLI:EU:C:2015:494. Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade (1994 Anti-Dumping Agreement- ADA)

the conclusion that it was not possible to determine whether the EU's legislator intended to implement the agreement. The formula used in the recital of the Regulation "should be brought into Community legislation as far as possible" was considered not conclusive to prove an intention to implement the ADA in the EU legal order through the Basic Regulation. Moreover, the Court considered that article 2(7) of the Regulation introduced a specific system targeting non-market economy countries which was not present in the ADA, in turn concluding that the applicant could not rely on the provisions of the ADA to assess the legality of the EU Basic Regulation. More recently, in *Changmao*, the applicant challenged the Commission's decision to maintain anti-dumping duties on its imports of tartaric acid from China based on Regulation 2016/1036 (current EU Basic Regulation) which the applicant considered no longer compatible after the expiry of China's Accession Protocol to the WTO.[554] Similarly to the regulation applicable in *Rusal Armenal*, the recital of the new EU Basic Regulation states that the ADA should be reflected "to the best extent possible". As noted by the AG Opinion in this case, unlike the ADA, China's Accession Protocol to the WTO contains rules for non-market economy countries. In spite of this, she highlights that the new Basic Regulation does not mention the Accession Protocol, and recalls that the treatment of China in the Regulation has not changed before and after its entrance in the WTO. Ultimately, this leads her to conclude that the Basic Regulation did not mean to consider China's Accession Protocol,[555] and that the expiry of the Protocol does not affect the fact that article 2(7) of the Basic Regulation is an expression of a specific EU approach and not an implementation of an international commitment.[556] AG Ćapeta has also provided her views on this matter in another recent case, *EUIPO v KaiKai*, which concerns the Paris Convention for the Protection of Industrial Property, also part of the WTO bundle of agreements and binding on the Union through the TRIPS agreement.[557] Notably, this is the first case brought to the CJEU after the introduction of the

[554] Opinion of AG Ćapeta, case C-123/21 P *Changmao* ECLI:EU:C:2022:890. China's Accession Protocol envisaged a regime for the calculation of the normal value in anti-dumping investigations that differs from the rules contained in the WTO ADA. By section 15(d) of the Protocol this regime was set to expire with the termination of the protocol 15 years after China's accession on the 11 December 2016. In 2017, the Commission initiated an expiry review of the anti-dumping measures on tartaric acid imported from China and relying on article 2(7)(a) of the Basic Regulation it employed the 'analogue country' methodology as under that Regulation China is classified as a non-market economy country member of the WTO. After an unsuccessful action at the General Court, the applicant brought an appeal contesting the application of article 2(7)(a) and the analogue country methodology to calculate the nominal value of its imports of tartaric acid in light of the expiry of the WTO Accession Protocol.
[555] ibid, para. 86.
[556] ibid, para. 92. The Court has confirmed this position in its recent judgment dismissing the appeal, case C-123/21 P *Changmao Biochemical Engineering v Commission* ECLI:EU:C:2023:708, paras. 76-84.
[557] Opinion AG Ćapeta, case C-382/21 P *EUIPO v KaiKai*, ECLI:EU:C:2023:576.

appeal filtering mechanism.[558] Unlike in *Changmao*, in *KaiKai* the AG concludes that the GC judgment should be reversed, and that the EU Regulation on designs at the heart of the dispute aims to implement the Paris Convention, and is be reviewed in light of the latter according to *Nakajima*.[559] The Court has recently confirmed the AG's views in *Changmao*,[560] but at the moment of writing still needs to rule on the *KaiKai* case and it will be interesting to see whether it will follow the AG's conclusions. In any case, both the *Nakajima* and *Fediol* exceptions seem of paramount importance when considering the effects of international agreements in the EU legal order, especially the first which could potentially apply to a broader array of circumstances. Indeed, according to *Nakajima* when the Union intended to implement an international agreement through its secondary law, its legislation can be reviewed in light of that international agreement, notwithstanding the nature and structure of said agreement. As noted by Gáspár-Szilágyi, affirming the applicability of the exceptions with regard to an agreement containing procedural rights such as the Aarhus Convention it might have caused a lot more challenges as it could be linked to a multiplicity of EU instruments.[561] In addition, differently from the WTO agreements, the Aarhus Convention does meet the first prong of the direct effect test, it is rather its provisions which are not precise and unconditional. Arguably it could be understood that *Nakajima* and *Fediol* aim to "remedy" the nature and structure of the agreement in light of precise commitments implemented or referred to in EU law as opposed to establishing a more general exception for testing the legality of EU law in the absence of direct effect. Following this understanding only the agreements under the auspices of the WTO or few others might qualify for these exceptions. At the same time, international agreements are normally broadly worded and in a case such as the Aarhus Regulation, which clarifies its link with the Convention already from its name, such an approach may lead to somewhat paradoxical results. Another illustrative example concerns the UN Convention on the Rights with Persons with Disabilities in which the Court narrowly interpreted a provision

[558] The filtering mechanism concerns appeals from the General Court to the Court of Justice and applies to the decisions of the independent boards of appeal of four EU offices and agencies (EUIPO, the Community Plant Variety Office, the European Chemicals Agency and the European Union Aviation Safety Agency), along to the decisions of all independent boards of appeal set up after 1 May 2019 within any other EU office or agency. The CJEU will allow an appeal to proceed in whole or in part only 'where it raises an issue that is significant with respect to the unity, consistency or development of Union law'.

[559] Opinion of AG Ćapeta, case C-382/21 P *EUIPO v KaiKai*, ECLI:EU:C:2023:576, para. 68.

[560] Case C-123/21 P *Changmao Biochemical Engineering v Commission* ECLI:EU:C:2023:708.

[561] S Gáspár-Szilágyi, 'The Relationship between EU law and International Agreements. Restricting the Fediol and Nakajima Exceptions in Vereniging Milieudefensie' (2015) 52 CMLRev, p. 1072.

of an EU Directive considering that it was not an implementation of the Convention, even though the EU instrument in question was included in the list of implementing measures annexed to the Convention.[562]

ii. The reciprocal obligation of sincere cooperation: a basis to broaden the requirements of direct effect for the Member States?

When considering mixed agreements other than the WTO, it is important to note that, in principle, not only the Union but also the Member States could be held accountable at the international level. The possibility for the Member States to challenge the validity of EU secondary law in light of an international agreement is however significantly limited as no exception is made from the prerequisite of direct effect for Member States as privileged applicants under article 263 TFEU.[563] Therefore, lacking direct effect, a review of compatibility of EU legislation cannot in principle take place through the annulment procedure, whereas it is possible for the Union to start infringement proceedings reviewing national laws' compliance with international agreements and possibly also decisions of international agreements in the context of a mixed agreement. As noted by Tancredi, "the limitation of Member States' direct action against EU measures deprives the system of an important element of checks and balances within the EU".[564] On the one side, Member States are entrusted with the implementation of EU law as well as with the granting of effective legal protection; on the other, however, they are prevented from holding the Union accountable for its possible failure to implement international commitments. Thus, Member States are mandated to follow secondary law even in case they believe it (or an international tribunal has found it) not in compliance with an international agreement. It is doubtful whether such a lack of involvement of the Member States in challenging the legality of EU law in light of an international agreement binding on them under article 216(2) TFEU is in compliance with the reciprocal commitment of assistance in the implementation of an integral part of EU law

[562] See case C-356/12 *Glatzel v Freistaat Bayern* ECLI:EU:C:2014:350. See a critique to the Court's approach in G de Búrca, C Kilpatrick, J Scott, 'Questioning the EU's 'Principled Openness' to International Law: An Examination of the Court's Reception of the Aarhus Convention and the Convention on the Rights of Persons with Disabilities' in M Claes, E Vos (eds), *Making Sense of European Union Law* (Hart Publishing 2022), pp. 8-9.
[563] Case C-280/93 *Germany v Council* ECLI:EU:C:1994:367, paras 106-112.
[564] A Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order' in E Cannizzaro and others (eds), *International Law As Law of the European Union* (Brill Nijhoff 2011), p. 268.

according to article 4(3) TEU. Of course, it cannot be forgotten that Member States are also involved in the law and policy making at Union level within the Council and that other means of addressing a possible incompatibility might be available to them.

Notably the *Nakajima* and *Fediol* exceptions involved an indirect plea of illegality of general EU legislation according to article 277 TFEU rather than seeking to invoke an international norm in order to rely on a right granted by that norm. Thus, it is put forward that a conceptual distinction could be drawn between direct effect and the plea of illegality which seeks primarily to challenge the margin of appreciation of the EU's institutions in their implementation of international commitments. From this perspective, the restrictive stance of the Court with regard to the application of the above-mentioned exceptions can be better understood. *Nakajima* and *Fediol* indeed allow an international agreement to affect the validity of an EU norm even if the nature and structure of an agreement prevent this, and after the expiry of the two-month deadline allowed by the annulment procedure for the underlying EU act. At the same time, such distinction between direct effect for invoking rights of private parties and reviewing the validity of an EU act implementing an international commitment appears rather theoretical because when assessing the direct effect of a norm the margin of discretion of the EU institutions for the implementation of an agreement is called into question in any case. An isolated case in the Court's jurisprudence is nonetheless illustrative of such a distinction and rather than using it to differentiate between actions for annulment and pleas of illegality seems to use it to distinguish between private parties and Member States. In *Netherlands v Parliament and Council (Biotech*)[565], the Court held that the *Rio de Janeiro Convention on Biological Diversity* (CBD) met the first prong of the direct effect test and stated that even if that Convention did not contain provisions that are directly effective, this would *"not preclude the review by the courts of compliance with the obligations incumbent on the community as a party to the agreement"*.[566] Importantly at para. 55 the Court writes: *"[…] in any event, this plea should be understood as being directed, not so much at a direct breach by the Community of its international obligations, as at an obligation imposed on the Member States by the Directive to breach their own obligations under international law, while the Directive itself claims not to affect those obligations"*. In this case therefore, even though the Court ultimately rejected the applicant's argument, it deemed that the Netherlands' plea for

[565] Case C-377/98 *Netherlands v Parliament and Council (Biotech)* ECLI:EU:C:2001:523.
[566] ibid, para. 54.

a review of legality in light of the CBD was admissible even though the provisions of said agreement were not capable of producing direct effect understood in terms of rights to private parties.[567] While possibly linked to the particularities of the EU instrument at hand, a directive which included a provision stating that it applied without prejudice to the obligations of the Member States pursuant to international agreements, this approach avoids a situation in which a Member State party to a mixed agreement is prevented from challenging the validity of EU law provisions. [568]

By way of concluding remarks, some reflections can be drawn from the case law referred to above. The restrictive way in which the *Nakajima* and *Fediol* exceptions are framed by the CJEU in its case law shows a general unwillingness of the Court to call into question the policy choices of EU institutions which could also be understood as portraying a presumption that the Union abides by its commitment to international law under article 3(5) TEU in the adoption of its secondary law. A stringent approach to establishing direct effect may significantly limit the possibility not only for private parties but also for the Member States to challenge the validity of secondary EU law, which seems contrary to the first segment of article 4(3) TEU according to which "the Union and the Member States have a reciprocal commitment of assistance in carrying out the tasks which flow from the Treaties". Even though Member States qualify as privileged applicants under article 263 TFEU, direct effect remains necessary to rely on international agreements concluded by the Union. With the exception of *Biotech*, the case law has not drawn a distinction between a review of legality brought by a Member State or a private party.

c. An obligation of sincere cooperation for the CJEU and national courts to interpret EU and national law consistently with an international agreement

According to the Court, the lack of direct effect at EU or national level does not completely exclude considering international rules.[569] More precisely, EU secondary law is to be interpreted in light of the wording and purpose of the EU's international obligations, guaranteeing indirect effect to such rules and helping to solve potential conflicts between EU

[567] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.
[568] See further on the case in P Eeckhout, *EU External Relations Law* (2nd ed, OUP 2011) pp. 297-298.
[569] See among others, F Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law As Law of the European Union* (Brill Nijhoff 2011).

law and international commitments. The duty to interpret an agreement in consistently with international law is most clearly a consequence of the status of the agreements concluded by the Union as an integral part of EU law which is hierarchically superior to secondary EU law.[570] The Court stated in *Commission v Germany (IDA)* that "*[w]hen the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty […] Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements*".[571] Moreover, the commitment to the strict observance of international law in article 3(5) TEU can be seen as the source of the binding nature of the principle of consistent interpretation within the EU legal order.[572]

It is worth noting a different point of view on the relationship between direct effect and consistent interpretation within the EU legal order put forward by AG Ćapeta in her recent opinions. The AG argues that if an agreement does not fulfil the first prong of the direct effect test, nor the *Nakajima* and *Fediol* exceptions are applicable, then an agreement should not give rise to a requirement of consistent interpretation because it would defeat the purpose of the lack of direct effect.[573] This argument appears controversial because it casts doubt on the premise that international agreements concluded by the Union are an integral part of EU law and that, as such, they benefit from the primacy of EU law in the EU legal order making an obligation of consistent interpretation compulsory. Moreover, even though direct effect and consistent interpretation may lead *de facto* to the same results in certain circumstances, this is not the case in principle. Only direct effect, in fact, can enable an interpretation *contra legem* that can result in the disapplication of relevant national or EU law. Consistent interpretation, rather than performing a review of uniformity in light of an international instrument, aims at

[570] F Casolari 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law As Law of the European Union* (Brill Nijhoff 2011), p. 404.
[571] Case C-61/94 *Commission v Germany (IDA)* ECLI:EU:C:1996:313, para. 52.
[572] See E Kassoti, R A Wessel 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' Draft – to be published in P García Andrade (ed), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022); and F Casolari 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law As Law of the European Union* (Brill Nijhoff 2011).
[573] Opinion of AG Ćapeta, case C-382/21 P *EUIPO v KaiKai*, ECLI:EU:C:2023:576, paras 72-77; Opinion of AG Ćapeta, case C-123/21 P *Changmao* ECLI:EU:C:2022:890, paras 100-101.

maintaining coherence with international law instruments in accordance with the commitment of the Union in article 3(5) TEU to the extent allowed by the wording of a provision. As put forward by AG Mengozzi in *Diakité*, in principle an obligation of consistent interpretation can arise in relation to commitments that bind the Union and an "alignment can be imposed only where hermeneutic consistency between the different acts is justified".[574] In that case, this was subsequently indirectly confirmed by the Court which held that international humanitarian law (binding on the Union through customary international law) and the directive for subsidiary protection had different objectives and aims, and that, as a result, could be interpreted differently.[575]

The duty of consistent interpretation takes different shapes in the EU legal order and may rest on the CJEU as well as on national courts. It is submitted that the principle of sincere cooperation imposes reciprocal obligations of consistent interpretation on the CJEU and national courts as a result of the interplay between EU commitments and national law but also of that between Member States' international commitments and EU law.

i. An obligation of sincere cooperation to "take account" of Member States' international commitments to interpret EU law

It can be considered that only agreements that are binding on the Union may result in an obligation of conform interpretation. However, in light of the first segment of article 4(3) TEU, the CJEU has also framed a "weaker" duty of consistent interpretation for the Union to "take account" of the international obligations undertaken by the Member States. More precisely, this form of consistent interpretation has emerged for agreements not binding on the Union but binding on all its Member States. In the case *Intertanko,* the Court was asked to rule on the validity of the provisions of an EU directive in light of the UNCLOS and the International Convention for the Prevention of Pollution from Ships known as the Marpol Convention. Even though the Court found that the latter did not bind the Union but solely the Member States, it considered that by virtue of the customary principle of good faith, which forms part of general international law, and of Article 10 EC (former article 4(3) TEU), it was incumbent upon

[574] Opinion of AG Mengozzi, case C-285/12 *Diakité* ECLI:EU:C:2013:500, paras 26-27.

[575] The opposite conclusion is reached in *Walz*. Here the Court interprets the term "damage" under the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) concluded by the Union in accordance with the term "damage" as understood in general international law. See case C-63/09 *Walz* ECLI:EU:C:2010:251, paras 27-28.

it to "take account" of that Convention when interpreting EU law.[576] In that particular case, all Member States were parties to the Marpol Convention and the Court considered that, as such, that convention could affect the interpretation of UNCLOS as well as of an EU directive. In another case, *Defrenne*, the Court considered that an international agreement binding on the Member States could also influence the interpretation of the EU Treaties.[577] In that case, the Court considered article 119 TEC (now article 157 TFEU) in light of ILO Convention n. 100 which was binding on the EU Member States but not implemented by the Union in the EU legal order. Nonetheless, the interpretation of EU Treaties in light of international agreements remains a rare occurrence even for agreements binding on the Union because the obligation of consistent interpretation applies with reference to secondary EU law rather than the founding Treaties which rank higher than international law in the EU legal order.[578]

By establishing a duty to take account, the CJEU fosters consistency between EU law and international commitments binding on the Member States that might have implications for EU law. At the same time, an effort to address overlaps and possible inconsistencies by the Court can be seen as a logical consequence of the fact that Member States are not free to give priority to their international commitments if that would entail a breach of EU law. For instance, in the case of *Commune de Mesquer*, the Court clarified that national courts are under an obligation to interpret Member States' international commitments consistently with EU law. In particular in that case, the CJEU held that the national court was under an obligation to interpret France's commitments among others under the International Convention on Civil Liability for Oil Pollution Damage in line with an EU directive.[579]

[576] Case C-308/06 *Intertanko* ECLI:EU:C:2008:312, para. 52. See C Eckes, 'International law as Law of the EU: The Role of the European Court' in E Cannizzaro, P Palchetti, R A Wessel (eds) *International Law as Law of the European Union* (Brill Nijhoff 2011), p. 365; F Casolari, *Leale Cooperazione Tra Stati Membri e Unione Europea* (Editoriale Scientifica 2020), p. 10 and pp. 247-246.

[577] Case 43-75 *Defrenne* ECLI:EU:C:1976:56, paras 18-20. F Casolari, 'Giving Indirect Effect to International Law within The EU Legal Order: The Doctrine of Consistent Interpretation' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law As Law of the European Union* (Brill Nijhoff 2011), p. 412.

[578] See for instance case T-201/04 *Microsoft Corp. v. Commission* ECLI:EU:T:2007:289, para. 798 "[t]he Court holds that the principle of consistent interpretation thus invoked by the Court of Justice applies only where the international agreement at issue prevails over the provision of Community law concerned. Since an international agreement, such as the TRIPS Agreement, does not prevail over primary Community law, that principle does not apply where, as here, the provision which falls to be interpreted is Article 82 EC."

[579] Case C-188/07 *Commune de Mesquer* ECLI:EU:C:2008:359, paras 81-85.

ii. An obligation of sincere cooperation to interpret EU and national law in conformity with agreements concluded by the Union and the Union and the Member States

Agreements binding on the Union are subject to a duty of consistent interpretation both by the CJEU and national courts depending on who retains the implementing competence for specific provisions. Like for direct effect, an obligation of consistent interpretation of agreements binding on the Union is regulated by EU law not national law.[580] Thus first, the CJEU will consider whether the provision of an international agreement have been implemented by the Union. If that is not the case, it will be for the domestic courts to decide whether or not those provisions will enjoy direct effect, and in any case, the CJEU has been vocal in asserting an obligation for national courts to interpret domestic law in conformity with an international agreement to ensure the effectiveness of international provisions.[581] By imposing a duty of consistent interpretation on national courts, the CJEU is enforcing the compliance of an international agreement of which the EU is a party, obliging domestic courts to ensure its effectiveness similarly to what occurs with internal legislation. Internally, as noted by Bobek, consistent interpretation may be used by Member States' courts to support an existing conclusion, to choose one interpretation instead of another, or to interpret national law in light of EU law.[582] In her Opinion in *KaiKai,* AG Ćapeta draws a distinction between the situation of the CJEU and that of national courts *vis-à-vis* international agreements and EU norms respectively. She writes that internally Member States' courts are bound by article 4(3) TEU, thus by a special loyalty to implement EU law which is not paralleled externally for the CJEU in the relationship with international law.[583] In turn, she concludes that the obligation of consistent interpretation of the CJEU might be less far reaching for international agreements compared to that of national courts towards EU law. National courts are in fact subject to extensive obligations, including for example changing their established case law, and the AG doubts that the same could be asked to the CJEU. This seems confirmed by the jurisprudence

[580] A Nollkaemper, 'The Role of National Court in Including Compliance with International and European Law-A comparison' in M Cremona (ed), *Compliance and Enforcement of EU law* (OUP 2012), p. 182.
[581] See for example with regard to multilateral agreements case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Brown Bears I)* ECLI:EU:C:2011:125, para. 51; and with regard to bilateral agreements (EEC-Turkey Association Agreement) case C-329/97 *Sezgin Ergat v Stadt Ulm* ECLI:EU:C:2000:133 para. 41.
[582] M Bobek, 'The Effects of EU Law in the National Legal Systems' in C Banard, S Peers (eds), *European Union Law* (2nd ed, OUP 2017), pp. 157-158.
[583] Opinion of AG Ćapeta, case C-382/21 P *EUIPO v KaiKai*, ECLI:EU:C:2023:576, paras 88-91.

of the Court, for example, when it was faced with the interpretation of article 263(4) TFEU in light of the Aarhus Convention. Notably, the CJEU considered a broader interpretation in conformity with the Convention as a derogation from the TFEU and therefore *contra legem.* Also with regard to the UN Convention for the Rights of Persons with Disabilities (CRPD) the CJEU has adopted a limited margin of review through the use of consistent interpretation.[584] Indeed it appears that the CJEU relies on consistent interpretation with regard to international agreements in the two less powerful functions: supporting an existing conclusion and choosing one interpretation instead of another. As international agreements are an integral part of the EU legal order however, the literature has pointed out that this approach leads to a double standard.[585] Indeed, for the implementation of the same international agreement the CJEU tends to ask more from national courts than it is ready to do when it is called to interpret international agreements. The Aarhus Convention provides an illustrative example of the fact that the Court has taken a more proactive approach to broadening the criteria for access to justice at Member State level.[586]

iii. An obligation of sincere cooperation to interpret EU law in conformity with agreements concluded by the Member States on behalf of the Union

When Member States act on the EU's behalf, it is submitted that the principle of sincere cooperation entails an obligation for the EU and national courts to interpret EU and national law consistently with an international agreement. Such cases should be distinguished from agreements concluded by Member States on their own will, because, in this circumstance, the implementing competence rests (at least partially) on the Union. As the Court held in *Libor Cipra,* an international agreement to which the Union is not a party may constitute an integral part of EU law if it is concluded on behalf and in the interest of the Union.[587] For example, in that case, the Member States concluded the ERTA Agreement due to purely practical reasons

[584] G de Búrca, C Kilpatrick, J Scott, 'Questioning the EU's 'Principled Openness' to International Law: An Examination of the Court's Reception of the Aarhus Convention and the Convention on the Rights of Persons with Disabilities' in M Claes, E Vos (eds) *Making Sense of European Union Law* (Hart Publishing 2022), pp. 15-16.
[585] See among others G de Búrca, C Kilpatrick, J Scott, 'Questioning the EU's 'Principled Openness' to International Law: An Examination of the Court's Reception of the Aarhus Convention and the Convention on the Rights of Persons with Disabilities' in M Claes, E Vos (eds) *Making Sense of European Union Law* (Hart Publishing 2022).
[586] For example see cases C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Brown Bears I)* ECLI:EU:C:2011:125 and C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* (*Trianel)* ECLI:EU:C:2011:289.
[587] Case C-439/01 *Libor Cipra* ECLI:EU:C:2003:31, paras 5, 23-24.

even though the Court recognised the Union's exclusive competence.[588] In such a case, the Member States could be held accountable at the international level for EU measures breaching an international agreement and, to uphold its obligation of mutual assistance under the first segment of article 4(3) TEU, the CJEU ought to interpret EU secondary law in conformity with the agreements that the Member States concluded as Union trustees.

In conclusion, the rationale for the doctrine of consistent interpretation as applied in the EU legal order seems to be not only to prevent a clash between EU law and international commitments, but also to reinforce the respect for international law binding on the Union and/or the Member States.[589] Unlike direct effect, there are no exceptions such as with regard to the nature and structure of a legal source that influence the requirement of consistent interpretation.[590] Whilst the principle of primacy of EU law would have the effect of setting aside national law or international agreements conflicting with EU primary law, the principle of sincere cooperation underpins the logic of consistent interpretation which aims at enforcing the hierarchical status of international treaties and ensuring the effectiveness of an international obligation, by additionally upholding compliance with EU law as a whole. In particular, consistent interpretation in the form of a duty to "take account" by the CJEU seems to be based primarily on article 4(3) TEU. By enabling the Member States to comply with their international commitments and address inconsistences, the CJEU is safeguarding the uniform application of EU law and of international agreements within the EU legal order. In turn, this supports the development of international law removing possible fragmentation in line with article 3(5) TEU.

[588] Case 22/70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32 paras 30-31, 83-86. Prior to the EU's accession to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 2015, this constituted another example in which only the Member States were full members of a Convention implemented via Union measures.

[589] C Eckes, 'International Law as Law of the EU: The Role of the European Court' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011), pp. 371-372.

[590] M Bobek writes "[t]he scope of indirect effect in the vision of the court is very ambitious: all national law must be interpreted in accordance with all EU law by all national authorities. In contrast to direct effect there are no source-based exceptions to this requirement at least from the point of view of the court. Even national law adopted prior to the EU legislation in question must be interpreted in conformity with the latter." See M Bobek, 'The Effects of EU Law in the National Legal Systems' in C Banard, S Peers (eds), *European Union Law* (2nd ed, OUP 2017), p. 157.

d. Beyond consistent interpretation: a procedural obligation of sincere cooperation resting on the Member States to grant effective legal protection?

As observed by Casolari, consistent interpretation can be differentiated from indirect effect in the relationship between national and EU law in so far as the Court's jurisprudence links consistent interpretation primarily to the hierarchical status of international agreements as opposed to considerations of effectiveness, which instead appear pivotal in the Court's reasoning with regard to national law.[591] This section will argue that the enforcement of an international commitment may include considerations of effectiveness in particular when adopting a combined reading of article 4(3) TEU and article 19 TEU as currently interpreted by the CJEU as creating an obligation on national courts to ensure effective legal protection of rights deriving from EU law. Article 19 TEU was introduced by the Lisbon Treaty and affirms that ensuring compliance with EU law is a task shared between the CJEU and the national courts, even though the Member States, rather than the Union, are responsible for affording effective legal protection. The added value of article 19 TEU remains contested.[592] It must be noted that it has been recently interpreted by the Court's jurisprudence beyond the original tenets of effectiveness in *Rewe*. Indeed, the Court has considered article 19 TEU as establishing an obligation on national courts to provide for effective legal protection as a fundamental right (connected to article 47 CFR) but also as an autonomous obligation of the Member States to maintain a functioning legal system which is to apply EU law.[593] Therefore, both an obligation *vis-à-vis* EU citizens and a structural one *vis-à-vis* the Union. It is this latter interpretation in particular that has been considered ground-breaking. Article 19 TEU was framed as an autonomous obligation to guarantee a functioning legal system which is concrete expression of the value of the rule of law enshrined in article 2 TEU understood within the meaning of recognising the right of individuals to safeguard their rights in a court of law. This is true for when individuals act at EU level through actions for annulment and when judicial protection takes place at the national level.[594] In the case *Associação Sindical dos Juízes Portugueses*

[591] F Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E Cannizzaro, P Palchetti, R A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011), p. 404.

[592] See the literature review by M Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law, p. 39.

[593] ibid, p. 37.

[594] See F Casolari, *Leale Cooperazione Tra Stati Membri e Unione Europea* (Editoriale Scientifica 2020), pp.122-124.

(Potuguese Judges), the Court relied on article 19 TEU to rule on the independence and appointment of judges, thus limiting the autonomy of the Member States in the organisation of their judiciaries in order to ensure that their courts are independent, can submit questions for preliminary rulings, and can provide remedies that are sufficient to ensure effective legal protection in the fields covered by EU law.[595] Here, article 19 TEU applies beyond the scope of EU law and the focus is on the role of national judges as judges of the EU (note the similarity of the reasoning with regard to the jurisdiction of the CJEU for mixed agreements, for situations falling within the scope of national and EU law). In *Rosneft* and *H v Council* the CJEU uses article 19 TEU on effective legal protection to expand its jurisdiction over cases in the CFSP, addressing a gap in the EU's "complete system of remedies".[596] Another structural interpretation of the principle is developed in *Achmea* which departs from the rule of law argument and concentrates on effective legal protection through EU courts as an element of the autonomy of the EU legal order. The Court reasoned that Member States cannot *"remove from the jurisdiction of their own courts and hence from the system of judicial remedies which the second subparagraph of article 19(1) TEU requires them to establish in the fields covered by EU law disputes which may concern the application or interpretation of EU law"*.[597] This would prevent "*those disputes from being resolved in a manner that ensures the full effectiveness of EU law*".[598] If an international tribunal not fulfilling the conditions of article 267 TFEU could be called to interpret and apply Union law, it would be unable to engage with the CJEU through the preliminary ruling procedure. Furthermore, the Court held that the possibility to challenge the arbitral award before an ordinary court could not be considered an adequate alternative, because it only envisaged a limited form of judicial review based purely on national law.

A careful reading of *Brown Bears I* provides an insight into the link between article 4(3) TEU and article 19 TEU with regard to international agreements. The case at hand concerns the implementation of the Aarhus Convention in the EU legal order and the interpretation of article 9(3) providing for access to justice. Here the Court does not simply leave the

[595] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117.
[596] The Court refers to the fact that the Treaties established a "complete system of legal remedies", see case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury* ECLI:EU:C:2017:236, paras 66-67 and case law cited.
[597] Case C-284/16 *Slovak Republic v Achmea* ECLI:EU:C:2018:158, para. 55.
[598] ibid, para. 56.

determination of whether or not the Convention may have direct effect at national level but specifies that:

> *"[i]t is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that Convention and the objective of effective judicial protection of the rights conferred by EU law".* [599]

As noted by Klamert, in *Brown Bears I* the Court established that the protection of said animal species was within the scope of the Habitats Directive which means within the scope of EU law.[600] Therefore, by limiting the *locus standi* of the NGO at national level, national law was undermining the enforcement of EU law as well as the objectives of the Aarhus Convention which aided the enforcement of EU law obligations concerning the environment.[601] It seems therefore that the rights conferred by EU law which must be guaranteed are ultimately those enshrined in secondary EU law rather than the autonomous procedural right to a broad access to justice provided in the Aarhus Convention. According to the abovementioned passage, the obligation of sincere cooperation imposed on the national court is then to interpret its national law consistently with the Convention and providing for effective legal protection in order to give effect to rights enshrined in secondary EU law. The case *Brown Bears II* adds a further element to the Court's analysis considering the obligation of effective judicial protection as enshrined in article 47 CFR next to the provisions of the Directive 92/43 and those on access to justice for specific activities in article 9(2) of the Aarhus Convention. Whilst the reference to the Charter further strengthens the Court's argument and enables to provide an interpretation that reaches far in the realm of national procedural law, the Court makes a clear connection to rights deriving from secondary EU law which overlap with rights granted by the Aarhus Convention similarly to *Brown Bears I*.[602]

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[599] Case C-240/09 *Lesoochranárske zoskupenie (Brown Bears I)* ECLI:EU:C:2011:125, para. 52.
[600] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 136.
[601] ibid.
[602] In *Brown Bears II* the CJEU held that EU law precludes an interpretation of national law that would hinder (if not preclude) the participation of an NGO to an administrative procedure for the authorisation of a project. In a nutshell, Slovakian law allowed for considering an appeal to a decision refusing the status of party to the procedure separately from the procedure for authorising the project. In that case, the procedure for the project's authorisation was definitively concluded prior to the final decision as to whether or not the NGO possessed the status of "party". In this situation the NGO would have been ultimately required to initiate another procedure to review the obligation of national authorities to ensure public participation according to article 6(3) of Directive 92/43. Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (Brown Bears II)* ECLI:EU:C:2016:838.

Would there be an obligation of sincere cooperation for the Member States to guarantee effective legal protection to rights which are not enshrined in secondary EU law but solely in an international agreement which is an integral part of EU law? Klamert puts forward that it could be possible to conceive an autonomous obligation of ensuring legal protection on the basis of article 4(3) TEU if effective legal protection "embodies a qualified constitutional interest of the Union".[603] Drawing a parallel with the case law concerning the requirement of unity in the external action of the Union, one can suggest this could be a possible development. Like the unity in the external representation of the Union, effective judicial protection can be understood as an objective of the Treaties, later codified in articles 19 TEU and 47 CFR. As such it could be read in a broad notion of "objectives" in the third segment of article 4(3) TEU. While in the case law concerning the external exercise of EU competence, a Union strategy or concerted action was an essential element to trigger the application of sincere cooperation limiting the action of the Member States, in the enforcement of a mixed agreement it could be argued that that such "concerted action" can be found in the ratification of the international agreement. An obligation of sincere cooperation to ensure effective legal protection could take the shape of an obligation of consistent interpretation or a procedural duty to grant legal standing to an applicant to allow a referral of a question to the CJEU concerning the interpretation and validity of an international agreement binding on the Union.

4B.3 Enforcement of international commitments taking place outside the EU legal order

This section will focus on the effects of the enforcement of international agreements which occurs outside the EU legal order through decisions of international dispute settlement mechanisms (IDS), investor-to-state dispute settlement (ISDS) and interpretative or complaint bodies established by international agreements concluded by the Union.

The Court has consistently held that in principle the Union may conclude agreements which entail binding dispute settlement, but the preservation of the autonomous nature of the EU legal order poses a limit on the types of bodies in which the Union can engage.[604] In

[603] M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), p. 138.
[604] Opinion 2/13 ECLI:EU:C:2014:2454, paras 182-183 state: "an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the

particular, aspects such as the exclusive jurisdiction of the CJEU to interpret EU law, the preservation of the division of competences and responsibilities between the EU and the Member States as well as their relationship of mutual trust have been found to be essential to the autonomy of the EU legal system.[605] The Treaties do not address the Union's participation in dispute settlement bodies nor the effects of the decisions of these bodies within its legal order, but they entail a prominent commitment of the Union to engage on the international plane and find multilateral solutions to common problems. Article 21 TEU lays down ambitious objectives including advancing democracy, the rule of law, and the respect for human dignity among others. The EU's involvement in international dispute settlement not only would contribute to fulfilling substantive external policy objectives but would also be a mean to enact the commitment of strict observance of international law laid down in article 3(5) TEU. Indeed, the Union's participation in IDS can be considered "an effective means for the EU to be an active player on the international scene in line with its own objectives, not only in terms of its role as rule-promoter but also as rule-complier and rule-enforcer".[606] At the same time, the Court's stringent application of the concept of autonomy needs to be seen in light of the fact that the external action of the Union has expanded in a variety of policy fields and it has been faced with the need to address the consequences of the Union's participation in international bodies for the EU legal system.

In Opinion 1/91, the CJEU clarified that the incorporation and effects of decisions of an IDS in the EU legal order are connected to those of the international agreement establishing that body. The Court held that:

> *"[w]here, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court*

institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions." "Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order."

[605] See among others Opinion 2/13, Opinion 1/09, and Opinion 1/17.

[606] C Hillion, R A Wessel, 'The European Union and International Dispute Settlement: Mapping Principles and Conditions' in M Cremona et al. (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017), p. 24.

will be binding on the [Union] institutions, including the Court of Justice. Those decisions will also be binding in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the [Union] legal order".[607]

Therefore, if an agreement is capable of having direct effect the decision of its dispute settlement body will also have direct effect. In a case such as the WTO, in which the Court has consistently held that the provisions of the WTO agreements lack direct effect, the decisions of the WTO DSB will not be considered as directly effective in the EU legal order and it will not be possible to review secondary EU law in light of WTO decisions.[608] An analogous case concerns the decisions of the International Tribunal for the Law of the Sea applying the UNCLOS as the Court held in *Intertanko.*[609]

As follows, this section will address two ways in which decisions of external bodies can become relevant in the EU legal order, namely when they amount to (i) *res interpretata* and (ii) *res iudicata.* Next, it will examine the role of sincere cooperation in the enforcement of decisions of bodies established by international agreements concluded by the Union.

4B.3.1 *Res interpretata*

Notwithstanding dispute settlement and other bodies provide authoritative interpretations of an international agreement in the performance of their function, the CJEU rarely expressly refers to the jurisprudence of another international body for interpretative guidance.[610] This is true both for when it is called to interpret an international agreement which is part of EU

[607] Opinion 1/91 *European Economic Area Agreement* ECLI:EU:C:1991:490, para. 39.

[608] See A Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order' in E Cannizzaro et al (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011) p. 283, citing the case *FIAMM* para. 120 in which the CJEU stated "A DSB decision, which has no object other than to rule on whether a WTO member's conduct is consistent with the obligations entered into by it within the context of the WTO, cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations and by reference to which such a review is carried out, at least when it is a question of determining whether or not an infringement of those rules or that decision can be relied upon before the Community courts for the purpose of reviewing the legality of the conduct of the Community institutions." (joined cases C-120/06 P and C-121/06 *FIAMM* ECLI:EU:C:2008:476).

[609] Case C-308/06 *Intertanko* ECLI:EU:C:2008:312, para. 65. According to art. 287 UNCLOS, the International Tribunal for the Law of the Sea is only one of the tribunals to which the parties of the Convention may bring their disputes, next to the ICJ and ad hoc arbitration.

[610] The CJEU has engaged with ICJ's interpretation of the VCLT and customary international law. See, for example, case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* ECLI:EU:C:1998:293, para. 24; case C-286/90 *Poulsen and Diva Navigation Corp*. ECLI:EU:C:1992:453, para. 10; and case C-104/16 P *Council of the European Union v. Front populaire* (Front Polisario) ECLI:EU:C:2016:973, para. 88.

law or when it is called to assess the validity or interpretation of EU secondary law in light of an agreement. It would be misleading however to conclude that such decisions are ignored.

In the context of the WTO, some authors have referred to a form of interaction consisting of a "muted dialogue" between the CJEU and the WTO DBS.[611] Even when the CJEU does not formally acknowledge the case law of the WTO DSB in the text of its judgments, it has been observed that the Court tries to ensure compliance with WTO rulings and recommendations.[612] For example in *FTS International* the Court ultimately declared invalid a Commission regulation concerning the classification of boneless chicken cuts because the Commission had exceeded the powers granted to it.[613] The Court's interpretation was consistent with a prior interpretation of the WTO Appellate Body condemning said Regulation.[614] Examples in which instead the Court has expressly referred to the case law of the WTO bodies include *Digitalnet*, where the Court followed the WTO panel's interpretation of the term "modem" in the Combined Nomenclature.[615] The CJEU may also decide not to follow or only partially follow the decisions and interpretative methods used by the WTO DSB. As noted by Vranes with reference to the case *Commission v Hungary*,[616] the Court referred to WTO case law on the functioning of GATS schedules, but did not mention other WTO rulings dealing with relevant substantive issues such as the question of the "likeness" of domestic and foreign services and providers of services which was not addressed in the CJEU's judgment.[617]

A different approach can be observed with regard to the European Convention on Human Rights (ECHR). This is a special case, as it is well known that the EU did not accede to the Convention and individuals may not bring actions against the EU. However, the ECtHR has introduced a system to indirectly review EU action. Famously in *Bosphorus,* the ECtHR

[611] See among others M Q Zang, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement' (2017) 28 The European Journal of International Law, p. 284.
[612] J Wouters, F Hoffmeister, G De Baere, T Ramopoulos, *The Law of EU External Relations* (OUP 2021), p. 461. Wouters and others note that in the context of the WTO "the Court does seem to attempt to achieve results that diverge as little as possible from WTO law obligations through 'WTO conform' interpretations."
[613] Case C-310/06 *FTS International* EU:C:2007:456, para. 25.
[614] See the case as reported by M Q Zang, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement' (2017) 28 The European Journal of International Law, p. 284; J Wouters, F Hoffmeister, G De Baere, T Ramopoulos, *The Law of EU External Relations* (OUP 2021), p. 461.
[615] ibid, p. 461. Joined cases C- 320/ 11, C- 330/ 11, C- 382/ 11, and C- 383/ 11 *Digitalnet* EU:C:2012:745, paras 32-33.
[616] Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792
[617] E Vranes, 'Enforcing WTO/GATS Law and Fundamental Rights in EU Infringement Proceedings: An Analysis of the ECJ's Ruling in Case C-66/18 Central European University' (2021) 28 Maastricht Journal of European and Comparative Law, p. 712.

established a presumption of "equivalent protection" in EU law showing a high degree of deference towards the CJEU and the EU legal order.[618] The uniqueness of the ECHR can also be seen from the perspective of the effects of the Strasbourg Court's judgments in the EU legal order. According to article 52(3) of the CFR, the meaning of its rights are to be the same as laid down by the ECHR and therefore, unlike the WTO DSB, the CJEU cites ECtHR rulings as it needs to ensure consistency between the two legal instruments.[619] Moreover, fundamental rights recognised in the ECHR are also considered general principles of EU law according to article 6(3) TEU and may come to play a role even when the CFR is not applicable.[620] Therefore, even though the ECHR remains not formally incorporated in the EU legal order, there are clear linkages between the judicial determinations of the two courts. This is unlike the situation of other agreements that the Union has concluded such as the WTO Agreements but also other agreements such as the European Economic Area (EEA). Here, the Court explicitly held that the mere fact that the wording of an international agreement is identical to EU law does not justify an analogous interpretation. Indeed, the Court considers that the context and objectives of the agreements must be taken into consideration.[621]

In the context of interpreting agreements giving rise to arbitration such as the Energy Charter Treaty (ECT), the Court has not referred to the interpretation of arbitral tribunals in either of the two preliminary rulings concerning the interpretation of said agreement.[622]

Lastly, the findings of quasi-judicial bodies connected to international agreements to which the EU is a party such as the Aarhus Convention Compliance Committee (ACCC) have

[618] ECtHR *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland* App n. 45036/98 [30 June 2005].

[619] Art. 52(3) EU Charter of Fundamental Rights (CFR) "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[620] Art. 6(3) TEU "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[621] See Opinion 1/91 ECLI:EU:C:1991:490, para. 14.

[622] Joined cases C-798/18 and C-799/18 *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others* ECLI:EU:C:2021:280 and case C-741/19 *Moldova v Komstroy* ECLI:EU:C:2021:655. In *Komstroy* a question was posed as to the definition of investment for the purpose of the ECT, a crucial and widely debated notion in international investment law.

found limited acknowledgment by the CJEU.[623] On the contrary, Advocate Generals have sometimes considered decisions and recommendations in their opinions.[624]

In conclusion, the CJEU displays a cautious approach in acknowledging other bodies' decisions as a source of reference or authority. By doing so, it avoids subjecting its capacity to determine the content of international agreements as an integral part of EU law to the decisions of an external judicial or interpretative body. Therefore, it seems that considerations based on the autonomy of EU law are paramount in determining the Court's approach to considering the decisions of other bodies. Either through an informal process of interaction, a "muted dialogue" or a best effort to comply, the Court is thus keeping full control of the outcome of its adjudication process including whether to confirm or oppose the findings of other tribunals or bodies.

4B.3.2 *Res iudicata*

Decisions of other bodies might also have an effect on the EU legal order when the Union or its Member States are found in violation of the provisions of an international agreement. A first distinction is here to be made between bodies that issue binding decisions and those of an advisory or non-binding nature. For decisions that are binding on the Union and/or the Member States, a determination of direct effect will be the fundamental prerequisite for deciding whether or not a decision can be enforced in the EU legal order.

The question of enforceability of decisions against the Union arose prominently following a series of the decisions of the WTO DSB against the Union. In the so called "banana saga", the Union's compliance with the GATT was challenged multiple times resulting in yet again unfavourable rulings.[625] As a result, some of the affected companies turned to the CJEU for redress. In *Van Parys,* the applicant submitted that two decisions of the national authority refusing to issue it with import licences should have been annulled because of the unlawfulness of the underlying EU legislation that had been ascertained by the WTO DSB.[626] Here the Court noted that *"even where there is a decision of the DSB holding that the measures*

[623] See A Delgado Casteleiro, 'The Effects of International Dispute Settlement Decisions in EU Law' in M Cremona, et al. (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017), p. 210.
[624] Opinion AG Jääskinen, joined cases C-402/12 P, C-403/12 P *Council v Vereniging Milieudefensie and others* ECLI:EU:C:2014:310, paras 113-115.
[625] See WTO, European Communities — Regime for the Importation, Sale and Distribution of Bananas https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm
[626] Case C-377/02 *Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)* ECLI:EU:C:2005:121, para. 35.

adopted by a member are incompatible with the WTO rules, […] the WTO dispute settlement system nevertheless accords considerable importance to negotiation between the parties"[627] which may take place also beyond a decision of the WTO DSB. It further added that recognising a responsibility for the CJEU to review compliance with the WTO would create an anomaly in the WTO system as this commitment would not be reciprocal among WTO members.[628]

In another case, *Chiquita,* the Court was faced with the action for damages by an importer against the Union for failing to bring its legislation in compliance with WTO law.[629] In a nutshell, the Court was asked to consider whether legislation enacted following a first unfavourable ruling was to be considered the implementation of a WTO obligation.[630] Indeed, the applicant argued that one of the exceptions for finding direct effect was applicable, namely that the EU intended to implement WTO obligations as the Court considered in *Nakajima*.[631] If this exception was applicable, the WTO decision would have had direct effect and would be capable of being relied upon to fulfil the requirement of illegal conduct for finding the Union liable.[632] The Court decided on the matter by answering negatively, highlighting the particular character of the Anti-Dumping Codes of the GATT at stake in *Nakajima* which required the contracting parties to take "all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Party in question".[633] It concluded that this was substantively different from compliance with the GATT[634] or the decision of a WTO body which remains in a system that accords considerable importance to negotiation between the parties, and which cannot be compared to the binding effects of decisions of a court in the internal legal system of the Member States.[635]

The CJEU has also explicitly excluded the possibility of invoking DSB rulings to support an action for damages on grounds of the extra-contractual liability of the EU in *FIAMM*. Starting

[627] ibid, para. 42.
[628] ibid, para. 53.
[629] Case T-19/01 *Chiquita and others v Commission* ECLI:EU:T:2005:31.
[630] ibid, paras 83-91.
[631] Case C-69/89 *Najakima v Council* ECLI:EU:C:1991:186. See section 4.B.2.2 point (b).
[632] According to art. 340 TFEU, three elements are necessary to find the union liable under EU law: the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question.
[633] Case T-19/01 *Chiquita and others v Commission* ECLI:EU:T:2005:31, para. 121.
[634] ibid, paras 159-160.
[635] ibid, para. 162.

by recalling that the effects of the decisions of international bodies are on par with those of the agreement creating them, the Court held that a decision of an international body does not "*accord individuals a right that they do not have by virtue of those agreements in the absence of such a ruling*".[636] The Court held that "*any determination by the Community courts that a measure is unlawful, even when made in an action for compensation, has the force of res judicata and accordingly compels the institution concerned to take the necessary measures to remedy that illegality*". Moreover, reversing the hypothesis of the General Court that there might be non-contractual liability for lawful acts, the CJEU confirmed that this is not possible as it would affect the legislative autonomy of the Union.[637] Which as noted by Tancredi, would be the reason behind refusing direct effect of WTO law in the first place.[638]

More recently, the issue of enforcement of decisions of international bodies has come to the forefront of legal debates from the perspective of the autonomy of the EU legal order in the context of new FTAs concluded by the Union and the Union and the Member States' participation in Investor-State-Dispute-Settlement (ISDS). In Opinion 1/17, the Court ruled that in order to be compatible with EU law its decisions cannot provide a binding interpretation of EU law, must only concern the award of damages and not a requirement of legislative action, and lastly, that they must not assess the level of public interest provided in Union law.[639] In addition, decisions of such bodies are also unlikely to be granted direct effect in the EU legal order.[640] This is because many new FTAs contain explicit provisions removing direct effect, which fulfil the premise that the Court set in *Kupferberg*, namely that the agreement itself provides for whether or not its provisions have direct effect. Moreover, for a body such as the ICS in the CETA which is limited to the award of pecuniary damages, only the investor would have the right to claim a remedy as it will be the only person/entity entitled to liability. An award would thus not confer rights on other individuals who, in line with the case law regarding *FIAMM*, cannot derive rights from a decision of an international body that were not already granted by the international agreement. As a result, decisions of a body such as ICS would not be capable of affecting the validity of an EU act directly.

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[636] Joined cases C-120/06 P and C-121/06 P *FIAMM and others* ECLI:EU:C:2008:476, para.131.
[637] ibid, para. 176.
[638] A Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order' in E Cannizzaro et al (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011) p. 252.
[639] Opinion 1/17 ECLI:EU:C:2019:341.
[640] See A Delgado Casteleiro, 'The Effects of International Dispute Settlement Decisions in EU Law' in M Cremona, et al. (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017), p. 200.

With regard to the ECHR, as previously stated, currently there are no cases against the EU but there is an indirect review of EU law through the cases brought by individuals against EU Member States. The equivalent protection doctrine shows a largely deferential approach which limits a finding of non-compliance by the Union. In principle, the Court has shown the willingness to rebut the presumption of equivalence for instance with reference to the EU asylum system's compliance with the Convention.[641] At the same time however as the Union participates alongside the Member States, if the action allegedly violating the Convention is found not to be regulated by EU law and at the discretion of a Member State, EU law would not be at stake, and the presumption of equivalence would not apply altogether. The ECtHR's deferential approach to EU action will probably change after the EU's accession as the Strasbourg Court will decide conclusively over the Union's compliance with rights of the Convention. Also one of the issues leading to the incompatibility of the accession agreement in Opinion 2/13 was the scope of the ECtHR's jurisdiction which covered the CFSP. Following the EU's accession, there would have been a situation in which only a judicial body external to the EU had jurisdiction over an area in which the CJEU does not have jurisdiction itself.[642]

In the context of the Aarhus Convention, the Aarhus Convention Compliance Committee (ACCC) is a quasi-judicial body which issues recommendations following complaints brought by individuals. In 2017, it found the Union in violation of its commitments specifically with regard to the access to justice provisions of the Convention.[643] When addressing the interpretation of the Convention, the CJEU has made no specific mention to the findings of the ACCC and, to the contrary, has consistently upheld the *Plaumann* doctrine for actions of annulment for unprivileged applicants.[644] It should be noted that in 2021 the EU legislator amended the EU secondary legislation implementing the Convention broadening the actors and the types of acts that can be challenged.[645]

[641] See for example ECtHR *MSS v Belgium and Greece* App. No 30696/09 [21 January 2011].
[642] Art. 275 TFEU.
[643] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, 17 March 2017 https://unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7.e.pdf
[644] See for example Case C-565/19 P *Carvalho and others* ECLI:EU:C:2021:252.
[645] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

Another example concerns the accession of the Union to the Istanbul Convention which establishes the GREVIO, a body tasked with assessing the compliance with the Convention. The compatibility of this body with the autonomy of EU law was recently questioned by the intervening Member States in Opinion 1/19, but this point was not further developed by the Court. The latter considered that first, the body could not be compared to decisions of international courts which are final and binding on the EU and the Member States, and that, second, a full examination of the compatibility of such system could not be addressed in the context of that Opinion.[646]

The impossibility to obtain redress for a violation of an international agreement concluded by the EU, even though ascertained outside the EU legal system clashes with the narrative of a "complete system of legal remedies" established by the Treaties. This is especially so considering that agreements concluded by the Union are an integral part of EU law. According to Gáspár-Szilágyi, the system devised by the Court by which the decisions of an international body set up by a non-directly effective agreement cannot be enforced can hamper the compliance with international decisions in politically sensitive areas.[647] On the contrary, exactly because of politically sensitive matters, Tancredi notes that the Court's approach is not without merit when viewing the safeguard of the rule of law through the lens of institutional balance. The possibility of having individuals challenge the action of the Union would hinder its exercise of legislative authority as the Courts would automatically apply the assessment of an external body to the EU legal order. He specifically mentions that WTO norms affect a variety of policy areas which are unrelated to trade which could become dependent on the action of specific individuals as opposed to a broader range of interests in the political and legislative decision-making process.[648] Such a development can be observed for instance with regard to addressing the non-compliance with the Aarhus Convention through an amendment of the Aarhus Regulation. As noted by Delgado Casteleiro, while limiting direct

[646] Opinion 1/19 ECLI:EU:C:2021:198, para. 269.

[647] S Gáspár-Szilágyi, 'The CJEU: An Overzealous Architect of the Relationship Between the European Union Legal Order and the International one?' Forthcoming in Revista de Drept Constitutional/Constitutional Law Review (2016), p. 22.

[648] A Tancredi, 'On the Absence of Direct Effect of The WTO Dispute Settlement Body's Decisions in the EU Legal Order' in E Cannizzaro et al. (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011), pp.263-264. An analogous discussion was central in the debate with regard to the Union's continued participation in the Energy Charter Treaty (ECT). On the 7th July 2023 the Commission published a proposal for a coordinated withdrawal from the ECT, see European Commission, "Coordinated EU withdrawal from the Energy Charter Treaty" <https://energy.ec.europa.eu/publications/coordinated-eu-withdrawal-energy-charter-treaty_en> (accessed 12 September 2023).

effect prioritises the respect for the institutional balance and democratic legitimacy, it also removes a question from being addressed judicially. Therefore, rather than the Court acting as a gatekeeper and interpreter of the rights deriving from an international agreement, he concludes that IDS decisions will become "'the law of the EU land' […] only in as much as the EU institutions agree to implement" them.[649]

4B.3.3 Sincere cooperation and the enforcement of decisions of international dispute settlement bodies

As it has been previously mentioned, international agreements concluded by the Union or the Union and the Member States are implemented both at EU and Member States' level. As a result, the decisions of international bodies can refer both to situations falling within the scope of EU and national law and could in principle be enforced at both levels. Enforcement at the domestic level can constitute a challenge to the uniformity of interpretation of EU law because whether or not a national authority enforces a decision of an international body can influence the application of EU law in that Member State. An example is the "*Micula* saga" in which the decision of the Romanian authorities to grant an ICSID award in favour of the investor was considered to constitute unlawful state aid.[650] Through the lens of autonomy, the binding nature and the enforcement (or lack thereof) of decisions of international bodies may pose a problem in terms of their effects on the uniformity of interpretation and application of EU law, the division of competences between the Member States, but potentially also create substantive conflicts. By governing the relationship between the Union and the Member States establishing duties of mutual cooperation, the next paragraphs will highlight how the principle of sincere cooperation supports the Union in the enforcement of decisions of an international body according to EU law.

[649] A Delgado Casteleiro, 'The Effects of International Dispute Settlement Decisions in EU Law' in M Cremona, et al. (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017), p.203.
[650] Case C-638/19 P *Commission v European Food SA* ECLI:EU:C:2022:50. See among others, G Biagioni, 'The Curious Incident of the 'State Aid' Granted by an International Arbitral Tribunal' European Papers (European Forum Insight of 28 July 2022) https://www.europeanpapers.eu/it/europeanforum/curious-incident-state-aid-granted-international-arbitral-tribunal 533.

a. An obligation of sincere cooperation to follow a determination by the CJEU on the direct effect of decisions of international bodies established by agreements concluded by the Union

Whether or not decisions of international bodies are directly effective in the EU legal order will depend on whether they are binding and have direct effect. As already stated, the direct effect of decisions of international bodies mirrors the effects of the agreements establishing them. In turn, the task of determining direct effect may fall on the CJEU if the EU has regulated a certain area or on each Member State. Such a situation is replicated with regard to decisions of international bodies. If direct effect (or its absence) is decided by the CJEU, national courts will become bound by this determination as well as by the interpretation that the Court gives of an international agreement or decision. As noted by Delgado Casteleiro, it can also be envisaged that the CJEU not only would have jurisdiction to interpret and set the effects of IDS decisions under a mixed agreement in which the EU was a party to the dispute, but also with regard to IDS decisions involving only an EU Member State.[651] This would follow from the fact that a mixed agreement is an integral part of EU law and that the Union has assumed responsibility to enact its provisions jointly with the Member States.

The determination of the effects of international agreements at EU level might be a double-edged sword for national courts. On the one hand, it might force them to give direct effect and to harden the effects of an international decision, but it can also entail a limitation of their power if an agreement is held not to have direct effect. When national courts are seized with the determination of direct effect, they are under a duty to refrain from adopting measures that "appear to be contrary to EU law". Therefore, if they decide to grant direct effect this must be in compliance with EU law.[652]

b. A procedural obligation of sincere cooperation to ensure effective legal protection for rights deriving from EU law

At the national level, with or without direct effect, courts remain bound by the principle of sincere cooperation to fulfil the obligations from the EU Treaties. Read in conjunction with

[651] A Delgado Casteleiro, 'The Effects of International Dispute Settlement Decisions in EU Law' in M Cremona, et al. (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017), p. 197.
[652] Case C-124/95 *CentroCom* ECLI:EU:C:1997:8, para. 60 "It should, in any event, be remembered that, when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure".

article 19 TEU, this encompasses the protection of rights deriving from EU law as a result of EU internal law-making but also of agreements concluded by the Union which are an integral part of EU law. According to the principle of primacy, national courts must ensure compliance with EU law which includes disapplying national law if necessary, and must refrain from asserting the invalidity of EU law.[653] Therefore, to guarantee effective legal protection of rights deriving from EU law, from inside or outside the EU legal order, they will have to ensure that there is an avenue for upholding Union rights which is provided by the preliminary ruling procedure.[654] As occurred with the "banana saga", as the CJEU ultimately found that the applicants could not invoke the WTO DSB decisions, this does not necessarily constitute a concrete redress for the applicant.

At the same time, the possibility that national courts may refer questions of interpretation and validity to the CJEU might clash with an obligation to enforce a decision. In particular, this can be the case with international investment treaties that rely on the ICSID Convention. Pursuant to ICSID, awards must be considered as a final judgment of a court in that state and are to be executed automatically. Therefore, if a domestic court is faced with a question of EU law related to the enforcement of the ICSID award it would be obliged according to EU law to halt the enforcement proceedings and request a preliminary ruling. Aside from the ICSID system, a referral for a preliminary ruling might also be problematic for awards from the Investment Court System (ICS) in new EU FTAs which entails an appeal system which is built to be the final layer of legal review.[655]

c. An obligation of sincere cooperation to prioritise EU law in case of conflicting decisions

The "*Micula* saga" is illustrative of the fact that Member States can find themselves in a difficult position which entails either violating an international law obligation or an EU law one. This might be increasingly so following *Achmea*, in which the CJEU held that intra-EU agreements are incompatible with the EU legal order and prohibits the Member States from engaging in intra-EU investment disputes. International tribunals have consistently rejected the intra-EU

[653] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.
[654] According to art. 267(b) TFEU "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."
[655] L Butz, 'Beyond the Pledge: The Imperfect Legal Framework for Enforcing Awards of the CETA Investment Court against the European Union' (2020-2021) 7 McGill Journal of Dispute Resolution, p. 116.

objection raised by EU Member States generating an outright situation of conflict between international investment law and EU law.[656] Indeed, in *Achmea,* the CJEU has shaped autonomy as an all or nothing proposition, which seems to confirm that the Court views autonomy as absolute.[657] No attention seems to have been given to mitigate the consequences deriving from the incompatibility of intra-EU BITs such as limiting the effects of the judgment to awards not yet issued. If the enforcement of awards takes place at national level, the national court will have to decide what to comply with. Taking for example the situation of intra-EU BITs, domestic courts are bound by the principle of primacy and the principle of sincere cooperation which might require them first to withhold enforcing a decision if there is a judgment currently pending at the CJEU, and later, to rectify the incompatibility with the EU legal system which, in this case, would prevent the enforcement of an intra-EU award.

An example of the first situation can be seen in the context of the already mentioned "*Micula* saga". Here, the claimants sought to enforce their ICSID award in the UK, where English law provides for a two-tier system requiring first, the registration of an arbitral award and second, its enforcement. Following the award's registration, Romania supported by the Commission brought an appeal to the High Court. The appeal was ultimately rejected but the High Court decided nonetheless to stay the enforcement of the award. Indeed, in the meantime, the investors had brought an action to annul the Commission's finding that the enforcement of the ICSID award in question constituted unlawful state aid.[658] As cited by Koutrakos, by registering the award under English law, it was understood as comparable to a final domestic court judgment.[659] As such the High Court held that according to its duty of cooperation it could not proceed with the enforcement of the award whilst the decision of the General Court was pending.[660] By enforcing the award, the national court would have infringed its obligation of sincere cooperation to refrain from jeopardising the objectives of the Union,

[656] An exception is *Green Power Partners K/S & SCE Solar Don Benito APS v. Spain*, SCC 2016/135, Award of 16 June 2022. J Odermatt, 'The Court of Justice of the European Union and International Dispute Settlement: Conflict, Cooperation and Coexistence' (2022) 24 CYELS, pp. 97-103.

[657] Scholars have questioned the nature of the concept of autonomy expressing divergent views. For example, Eckes argues that autonomy is absolute, others such as Moreno Lax and Ziegler highlight that it must be conceived in relation to something. See C Eckes, 'The Autonomy of the EU Legal Order' (2020) 4 Europe and the World: A law review 1; V Moreno-Lax, K S Ziegler, 'Autonomy of the EU Legal Order a General Principle? on the Risks of Normative Functionalism and Selective Constitutionalisation' in K S Ziegler, P J Neuvonen, V Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022).

[658] Cases T-624/15, T-694/15 and T-704/15 *European Foods SA v Commission* ECLI:EU:T:2019:423.

[659] P Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' forthcoming in (2019) 18 Nordic Journal of International Law, City Research Online, p. 10.

[660] ibid.

because it would have acted in contrast with a Commission decision prohibiting Romania from making any payment.

A second duty to comply with the judgments of the CJEU and to rectify the unlawful consequences of a breach of EU law can be observed in *PL Holdings*.[661] After the Stockholm Chamber of Commerce decided in favour of the investor, Poland instituted proceedings at the national courts in Sweden to annul the award on EU law grounds. As the matter proceeded to the Swedish Supreme Court, it referred a question for a preliminary ruling concerning the compatibility of an *ad hoc* agreement (instead of an intra-EU BIT) with the autonomy of EU law. The CJEU ruled that the *ad hoc* agreement at issue, reproducing the same arbitration clause of the intra-EU BIT, was equally breaching Union law.[662] As follows, the Supreme Court later proceeded to annul the award issued in favour of the investor.[663] Even though the ruling of the Swedish Supreme Court is in compliance with the principle of primacy, the retroactive annulment of awards already issued, as opposed to the invalidation of the arbitration clause, could breach other rights guaranteed by both EU primary law and by the ECHR.[664] This might be a true conundrum for national courts because while giving effect to an obligation of sincere cooperation to remove the unlawful consequences deriving from a breach of EU law, they are also under an obligation to provide for effective remedies for rights deriving from EU law which seem undermined here.

d. An obligation of sincere cooperation to allow ex-post review of compatibility with the EU Treaties by the CJEU

In *Achmea*, the fact that national courts have some margin to review the decision of an international body was not considered sufficient for the Union to guarantee an effective system of judicial protection of rights deriving from EU law.[665] This is because the conditions for review are determined by national law and because the review may often have a limited scope, such as in the case of an investment award. As argued by Koutrakos, *Achmea* might be

[661] Case C-109/20 *PL Holdings* ECLI:EU:C:2021:875.
[662] ibid, para. 65.
[663] See R Maurel 'PL Holdings case: The Investor Ordered to Pay the Expropriating State's Costs, a New Consequence of Achmea' European Papers (European Forum Insight of 10 February 2023) https://www.europeanpapers.eu/en/europeanforum/pl-holdings-case-investor-ordered-pay-expropriating-state-costs-new-consequence-achmea , pp. 1132-1133.
[664] ibid, p. 1134.
[665] Case C-284/16 *Slovak Republic v Achmea* ECLI:EU:C:2018:158, para. 51-55.

a missed occasion for the CJEU to involve national courts in the safeguard of the autonomy of the EU legal system.[666] Already in Opinion 1/09 the role of national courts has been strongly emphasised as intrinsic to the autonomy of the EU legal order, and, in particular, the fact that the national courts' jurisdiction to apply EU law must not be limited through intra-EU agreements. Arguably, a duty "to take all measures necessary to ensure the fulfilment of the obligations from the Treaties" could have been framed by the Court to encompass the possibility to enable an *ex-post* constitutionality review. This would not be the first time that the requirements deriving from EU law would have restricted the Member States' procedural autonomy and would be in line with ensuring the effectiveness of EU law. At the same time, whilst domestic courts may facilitate such a process of review, it is the CJEU and not the Member States' courts that are tasked with ensuring the compatibility of EU Treaties. It can then be asked whether the possibility of referring a question for a preliminary ruling would enable an *ex-post* review for the compatibility of a decision from an international body with law. This might also depend on the international agreement at stake as a review might not be compatible with certain types of decisions, such as for instance the ICSID awards or the awards of the ICS which entails an appeal that constitutes the final stage of proceedings. On the contrary, the *Kadi* case has shown that a review of the decision of an international body might also occur indirectly through implementing secondary EU law. A further involvement of national courts outside a procedural obligation seems however unlikely to be envisaged given the Court's attention to the uniformity of interpretation of EU law which could be threatened by a multiplicity of decisions at national level. As put forward by Fanou, a question of compatibility of an arbitral award from a system such as the ICS in CETA, which was held in compliance with EU law, could still be raised through an objection to the jurisdiction and/or operation of arbitral tribunal which may have overstepped its powers.[667] Indeed, in Opinion 1/17 the Court has made compatibility subject to two caveats: that an external body does not interpret EU law and that it does not call into question the level of public interest established by Union institutions.[668]

[666] P Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' forthcoming in (2019) 18 Nordic Journal of International Law, City Research Online, p. 10.
[667] M Fanou, 'The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future' (2020) 22 CYELS, pp. 127-128.
[668] Opinion 1/17 ECLI:EU:C:2019:341, paras 131, 150, 160.

e. An obligation of sincere cooperation to coordinate responsibility for violations

Unlike an international agreement, a decision of an international body has an addressee and refers to a specific conduct. In the case of the EU, these two elements might not coincide as it is evident in the Union's participation in the WTO. The EU, and in particular the Commission, always represents the Member States even though the alleged violation may refer to a conduct of the Union which has been carried out by the Union, by a Member State on the basis of EU law, or an autonomous conduct of a Member State. In the WTO, Member States and the Union operate through *ad hoc* arrangements whereas more structured systems have been envisaged for example in the context of the ECHR with regard to the establishment of the party representing the Union and/or the Member States,[669] and with regard to the EU's participation to ISDS concerning the internal allocation of financial responsibility. Investment chapters of new FTAs in particular rely on Regulation 912/2014 (FRR).[670] The latter provides that the determination of the respondent is a matter of EU law which shall bind a tribunal, which prevents an external body from ruling on the division of competences between the Union and the Member States. Moreover, crucially, the FRR distinguishes international responsibility from the internal attribution of the unlawful conduct which is determined internally and enacted through a system of allocation of financial responsibility. From the perspective of EU law, the stipulation of rules for the internalisation of responsibility between the Union and the Member States embodies a mutual obligation of cooperation to fulfil the obligations deriving from an international treaty, rendering them effective and to ensure that the autonomy of EU law is preserved, including the vertical division of competences. For example, a system in which the Union or a Member State could bring forward a claim that it is not the correct respondent would be prejudicial to the functioning of the arbitration and later at the phase of enforcement risks causing the annulment of an award.

[669] The co-respondent mechanism envisaged in the Draft Accession Agreement to the ECHR was found incompatible with the autonomy of EU law in Opinion 2/13. See on the co-respondent mechanism C Contartese, L Pantaleo, 'Division of Competences, EU Autonomy and the Determination of the Respondent Party: Proceduralisation as a Possible Way-Out?' in E Neframi, M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018), pp. 425-434.

[670] Regulation No 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party. For a detailed analysis see P T Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements- Between Traditional Rules, Proceduralisation and Federalisation* (Springer 2019), pp. 250-300.

4B.4 Concluding remarks

The analysis carried out in this subchapter identifies the contribution of the principle of sincere cooperation to the enforcement of international agreements within the EU legal order, both with regard to the enforcement by the CJEU and international bodies. When an international agreement becomes an integral part of EU law, it becomes binding on the Member States according to EU law and can be enforced within the EU legal order via its procedures. Pursuant to article 216(2) TFEU, Member States are bound by agreements concluded by the Union and are under an obligation of sincere cooperation to ensure their full application according to the second segment of article 4(3) TEU. Moreover, according to the third segment of that article they are also to ensure that when implementing part of the agreement at the domestic level they do not jeopardise the Union's objectives or impair the accomplishment of Union's tasks. Therefore, in fulfilling the obligations of an international agreement, Member States are also bound by a tight net of obligations deriving from the principle of sincere cooperation. It is by enforcing these obligations of implementation and compliance (understood as ensuring the respect with an international agreement as a whole) that the Union safeguards the respect of an international agreement within its legal order. First, an obligation resting on the Member States to comply with an agreement in order for the Union not to be found liable at the international level can be identified in the Court's case law. Second, other obligations deriving from sincere cooperation can be observed in connection to the judicial review of the Union's and the Member States' compliance with an international agreement. On the one hand, these may be linked to ensuring the uniformity of application of Union law at national level and to preserving the EU's autonomy *vis-à-vis* international law, for instance with regard to the determination of direct effect. On the other hand, obligations deriving from sincere cooperation uphold the effectiveness of EU law through obligations of consistent interpretation of secondary EU law, procedural duty to refer questions for preliminary rulings to the CJEU, and in turn, the Union's commitment to the strict observance of international law under article 3(5) TEU. Similarly, the interplay between autonomy and respect for international law emerges with regard to the enforcement of decisions of international bodies. In particular, when decisions need to be enforced by the Member States, domestic courts can become directly tasked with addressing international and EU law obligations. The principle of sincere cooperation acts in favour of prioritising EU law commitments, even

though the possibility of conflicting obligations as evidenced in the case of *PL Holdings* poses additional complexity for national courts. Furthermore, the analysis highlighted that the reciprocal character of the principle of sincere cooperation emerges only partially. An example is the obligation established by the CJEU to "take account" of international commitments binding all Member States when interpreting secondary EU law. At the same time, it has also been put forward that national courts are under more stringent obligations to give effect to an international agreement as they are fulfilling an obligation of sincere cooperation towards the Union, and that the limitations with regard to Member States' direct actions to challenge the legality of EU secondary law appear in contrast with the in the first segment of article 4(3) TEU in which the Union and the Member States are under an obligation of mutual assistance in fulfilling the tasks arising from the Treaties.

CHAPTER 5

Conclusion: The Contribution of the Principle of Sincere Cooperation to EU External Relations Law?

The thesis focused on delineating the application of the principle of sincere cooperation in EU external relations law to investigate its contribution to Union action this field. In particular, it examined how the principle applies in specific situations when the EU enters in an international commitment exercising its external competence and later complies with it in its legal order. On the basis of the findings of the previous chapters, this Chapter draws some final conclusions on the contribution of the principle of sincere cooperation. To begin with, it is submitted that the principle contributes and could contribute to address four main tensions that characterise the field of EU external relations law. Moreover, it is put forward that sincere cooperation contributes to the field of EU external relations law in a three-fold manner, supporting the well-functioning of the Union, the development of EU external relations law and the relationship between EU law and international law, and the EU's actorness on the international plane.

5.1 Tension between conferred competences and Union tasks and objectives: A gap-filling function

The Union has been endowed with broad tasks and ambitious internal and external objectives and, in spite of having many competences, its competences are finite. A first contribution of the principle of sincere cooperation in EU external relations law is that of filling that gap, bridging between substantive conferred competences and Union tasks and objectives.

In the conclusion of international agreements, the principle allows the Union to exercise its competences to act upon those broad objectives. For example, the principle enables the Union to accomplish its action in areas where it does not have full competence to do so, or in which it shares its competence with the Member States participating in the international scene with them through the conclusion of mixed agreements.

In the context of the implementation of international agreements in the EU legal order, the principle of sincere cooperation fills another gap which is that between the EU's

competence that has been exercised externally for the conclusion of an agreement and its implementing competence. Indeed, even when the Union may have the external competence to conclude an agreement alone or to conclude it partially with the Member States, it may not have an implementing competence on each subject matter. The reasons behind this can entail: the competence on a certain subject rest on the Member States e.g. in a mixed agreement; there are ancillary matters not captured by the legal basis through the use of the centre of gravity test which are for the Member States to implement internally (entirely or partially) e.g. opt-outs, supporting competences, CFSP-matters; the Union has not yet exercised a shared competence internally; the extent of its internal competence exercise does not cover the entirety of an agreement as there might be aspects which will be implemented at national level according to the principle of subsidiarity. Therefore, when implementing an international agreement, the Union needs to rely on the Member States to fulfil the common external action undertaken through an international commitment and to ensure that the Union can comply with its objective of strict observance of international law under article 3(5) TEU. Indeed, article 216(2) TFEU explicitly provides that international agreements concluded by the Union are binding on it and on the Member States. In addition, when implementing international agreements, article 4(3) TEU creates a broad duty of compliance for the Member States for the implementation of the part of the agreement falling within their retained competence as well as to refrain from impairing Union action and respecting existing EU law.

With specific reference to mixed agreements, the principle of sincere cooperation also underpins the closing of the jurisdictional and enforcement gap between international obligations binding the Member States by virtue of international law or by EU law. The mixed agreement formula is an essential instrument to allow the Union to exercise its competence externally but, as Member States undertake international law obligations next to obligations binding them via the exercised EU competence, a part of the agreement seems *prima facie* to fall outside the scope of the CJEU's jurisdiction constituting international commitments within the Member States legal orders and not obligations of EU law. However, when implementing an international agreement concluded jointly by the Union and the Member States, the latter fulfil an obligation of sincere cooperation to comply with the obligations deriving from EU law which entail implementing the parts falling under EU exclusive competence, and are bound by an obligation to refrain from jeopardising the obtainment of the Union's objectives and facilitate the completion of the Union's tasks, i.e. the performance of the international

agreement as an instrument of Union action, for the commitments falling within their sphere of competence. It is on the basis of this duty of sincere cooperation that the Court has upheld its jurisdiction with regard to mixed agreements which apply both within the scope of EU law and national law fulfilling a three-fold goal: ensuring the uniform interpretation of provisions which may affect the application of EU, overseeing that the Union objectives can be attained through the implementation of the agreement, and upholding the EU's commitment to the strict observance of international law under article 3(5) TEU. In turn, the principle of sincere cooperation also affects the enforcement of mixed agreements within the EU legal order. As the Court stated in *Demirel*, the implementation of mixed agreements entails a duty of sincere cooperation for the Member States to ensure broad compliance with an agreement to avoid that the Union is found liable for violations at the international level. This duty of sincere cooperation *vis-à-vis* the Union may be enforced with regard to commitments which fall within the scope of EU law, as opposed to only those under EU competence, as these may be capable of affecting the Union's internal implementation of the agreement and its overall compliance with third parties.

In its gap-filling function, two aspects of the principle of sincere cooperation linked to the structure of the EU action and the effectiveness of EU law appear paramount. Sincere cooperation structures the way in which the Union may engage on the international plane as a non-unitary actor through the instrument of mixed agreements, regulates its compliance with international agreements within its multilevel system through duties to implement resting on the Member States, and widens the CJEU's jurisdiction to ensure the uniform interpretation and compliance with agreements concluded by the Union and the Member States. Obligations of sincere cooperation also enable to safeguard the effectiveness of Union action. With regard to the competence exercise, the principle allows the Union to act on the international plane overcoming the competence divide and the limits of EU external competences. At the moment of implementation, the principle further aims at the effectiveness of international agreements that have become an integral part of EU law, in terms of ensuring compliance with aspects within international agreements that are not in the EU's implementing competence, and the effectiveness of the application of EU law through a broad jurisdiction of the Court to interpret international agreements and hold Member States accountable when the implementation of an agreement may affect the scope of EU law and trigger the EU's international liability.

5.2 Tension between Union's actorness and that of its Member States on the international plane: prioritising the development of common action at EU level

The Union and the Member States are both actors on the international plane and contend their role and presence on the international stage. The principle of sincere cooperation contributes to addressing this continuing underlying tension within the Union's external action prioritising EU decision-making in order to facilitate the EU's tasks and exercise of competences to conclude international agreements but also when these are implemented jointly by the Union and the Member States within the EU legal order.

5.2.1 Shared international presence

Obligations of sincere cooperation can limit the prerogatives that Member States may have under international law to ensure that the Union can exercise its competence without being impaired by the fact that the Member States are also actors on the international plane pursuing their own policies and interests. The Court has clarified already in Opinion 1/94 that the fact that Member States may be precluded from acting is not based on convenience or effectiveness on the basis that EU-only action is *a priori* easier to manage. This was later repeated in *Germany v Council (COTIF I)* when the Court upheld the possibility for the Council not to exercise certain shared competences, enabling the Union to conclude facultative mixed agreements which have much longer entry into force procedures.

Two instances may be identified in which the Member States have to give precedence to their status as EU Member States according to the principle of sincere cooperation with duties of result: in areas under the exclusive competence of the Union, and when the policy/decision-making of the Union has started. With regard to the exclusivity of the Union external competence, Member States are bound by a duty of sincere cooperation to respect the Union's external competence when they act externally, with and without the Union being a party to an international agreement. If the Union has exclusive external competence or the ERTA-pre-emption doctrine applies, the Member States will be precluded from acting (for instance, concluding an international agreement in an area of EU exclusive competence without authorisation or making proposal in a body on a matter that is under EU exclusive competence). The application of sincere cooperation also prioritises Union action when the EU decision-making/policy/strategy making machine has started with regard to shared

competences such as the *Inland waterway* cases or the *PFOS* case. In particular, the principle of sincere cooperation may entail procedural duties such as to inform and consult but also substantive duties of abstention.[671] A limitation of the Member States' action in terms of competence exclusivity could be seen as pertaining primarily to the second segment of the principle of sincere cooperation to fulfil Union obligations, whereas the limitation on Member State action in terms of policy-making, decision-making at EU level seems connected to the third segment with regard to the "facilitation of Union tasks".

The last obligation on the Member States pursuant to article 4(3) TEU "to refrain from jeopardising Union objectives" may also play a role in restricting the action of the Member States. For example, in *PFOS* the Court found that there was both a violation to facilitate Union tasks as well as of the obligation not to jeopardise Union objectives, in that case the unity in the representation of the Union.[672] It is put forward that this may be due to the decision-making process of the Stockholm Convention, but also because the unity of the external representation of the Union is an intrinsic feature of the joint action of the Union and the Member States through mixed agreements. By submitting an individual proposal, Sweden not only went against an established Union strategy but affected the Union's participation under the Convention. First, according to the system of the Convention, as an IO, the Union could not exercise its right to vote if any of its Member States exercised theirs, making impossible the concurrent exercise of voting rights.[673] Second, the Union had not made use of a reservation allowing it to opt-out to amendments and it was uncertain whether the Union could have made a declaration of non-acceptance of an amendment proposed and voted for by some of the Member States.[674] In any case, the Court concluded that the objective of Sweden's proposal was to adopt a rule binding on the parties to the Convention, including the Union who had not previously notified a declaration of non-acceptance.[675] This situation should be distinguished from that of the *Inland water*way cases. In the latter, the fact that

[671] Even though also the duties to inform and consult as framed by the Court in the case against *Germany* seem to hide a duty to abstain, see case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462.
[672] Case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203, para 103- 104.
[673] Thus, the Court explains that, "either the Union voted against that proposal, depriving the Member State making the proposal of the possibility of defending its own proposal […], or that Member State exercised its right to vote in favour of its own proposal, thus depriving the Union of the possibility of exercising its right to vote with a number of votes equal to the number of its Member States and leaving the other Member States free to vote for or against the proposal" C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203, paras 93-94.
[674] ibid, para 98.
[675] ibid, para. 100.

there were independent bilateral actions of the Member States complicated the negotiations of the Union, which had to take into account the existing agreements between the third country and the Member States when negotiating with that country. In *PFOS,* instead, Sweden proposed rules that could bind the Union internationally in contrast with a common strategy. Even if the Union took action to distance itself from the proposed amendment, it would further break the unity of the representation of the Union and the Member States and in turn jeopardise the joint commitment to participate in the Stockholm Convention.

In particular, with reference to mixed settings (or if the Member States act on behalf of the Union), Member States are also bound by duties of action and inaction with respect to a Union position adopted under article 218(9) TFEU. Voting against a Union position would not only breach an obligation of the Treaties but also violate the obligation to refrain from jeopardising Union objectives, i.e. the unity of the EU's external representation.[676]

5.2.2 Shared implementation within the EU legal order

After the conclusion of an agreement, the principle of sincere cooperation also contributes to address competing claims to implement and interpret international agreements to ensure the uniform interpretation of EU law and in turn its effectiveness and *effet utile* in the EU legal order.

First, the principle of sincere cooperation limits the national courts in their interpretation and application of an international agreement which is an integral part of EU law as already occurs in the context of the implementation of other EU instruments. Domestic courts are bound by a determination of the CJEU with regard to direct effect and consistent interpretation or might be called to make such determination mindful of not acting against Union tasks and objectives. As mixed agreements are an integral part of EU law, as put forward by Delgado Casteleiro, it can also be envisaged that the CJEU could have jurisdiction to interpret and set the effects of IDS decisions under a mixed agreement involving only an EU Member State.[677] The principle of sincere cooperation further results in the creation of a procedural duty of sincere cooperation to refer questions of interpretation to the CJEU and a

[676] Case C-620/16 *Commission and Council v Germany (COTIF II*) ECLI:EU:C:2019:256, paras 92-94. In this case, Germany expressed a separate point of view from the position adopted by the European Union, voted against that position and expressed its disagreement with the EU's exercise of a right to vote (paras 75-76).
[677] A Delgado Casteleiro, 'The Effects of International Dispute Settlement Decisions in EU Law' in M Cremona, et al. (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017), p. 197.

substantive duty to ensure the effectiveness of an international agreement. Moreover, according to article 19 TEU national courts are to ensure the effective legal protection for rights deriving from EU law. When an international agreement supports the enforcement of rights granted by EU law, such as in the Aarhus Convention, the obligation of sincere cooperation to take any measure to ensure the fulfilment of the Treaties could be seen as enhancing an obligation to ensure effective judicial protection at the national level.

Second, the principle of sincere cooperation restricts the implementing competence of the Member States for areas falling within their retained competence. The shared presence of the Union and the Member States as parties of an international agreement may create uncertainty as to the extent of the EU's competence exercise and in turn generate competing claims between the Union and the Member States as to whom is to take measures to implement an agreement and whether in doing so a Member State's conduct can be subject to an infringement action by the Commission.

As concerns full-mixed agreements, these constitute an integral part of EU law, and there is a joint commitment of the Union and the Member States which entails that the latter can be held accountable also for measures falling within the scope of EU law that they take pursuant to their retained competences. However, when mixed agreements are incomplete, some Member States have not exercised their retained competences to conclude an agreement and thus are not bound by international law but only by EU law through the competences exercised by the Union. It was put forward that the incomplete character of a mixed agreement does not change the "bindingness" of an international agreement concluded by the Union under article 216(2) TFEU and the non-participating Member States would need to comply with obligations deriving from the principle of sincere cooperation give effect to the competence exercised by the Union and to refrain from jeopardising the uniformity of interpretation and the effective application of EU law, which can be enforced by the CJEU.[678] The partial conclusion of an international agreement by the Union poses yet another set of challenges. When the Union accedes only to selected provisions of an agreement and the Member States may exercise their retained competences to accede to the rest of the agreement there is not a joint action of the Union and the Member States but rather a co-existent or parallel action which results in a mixed agreement. Unlike regular mixed

[678] L Granvik, 'Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness' in M Koskenniemi (ed), *International Law Aspects of the European Union* (Nijhoff Brill 1998), pp. 255-272.

agreements, the extent of the EU's competence is more clearly drawn, and the Union does not enter into a joint commitment with the Member States to conclude and implement an agreement, but rather in a parallel one. The Member States remain under an obligation to respect the competence divide and implement the part of the agreement falling within Union competence, thus any exclusive EU competence and shared competence that the Council has elected to exercise, including when these might limit the exercise of their retained competence. Mixed agreements lacking a joint commitment cannot, however, be considered an integral part of EU law in their entirety, because the Union intended to commit itself only to certain provisions and is not bound by the agreement as a whole. In turn, Member States could not be held accountable by the CJEU for their implementation of the part of the agreement under their retained competence, but for an obligation of sincere cooperation not to impair the action of the Union if measures taken at the national level affect implementation of the agreement by the Union.

5.3 The EU's global actorness *vis-à-vis* its autonomy: balancing engagement and protecting the essential characteristics of the EU legal order

The more the Union has exercised its external competences to enter into international agreements aspiring to become a fully-fledged actor on the international plane, the more the need for preserving its autonomy has emerged. This has led the Court to delineate some of the constitutional limits of the Union's external action for the EU legal order not to be intrinsically altered by the EU's participation in international agreements and international organisations. Can the principle of sincere cooperation change those limits? In short, it is put forward that sincere cooperation may not change the limits but, by creating duties of action and abstention on the Member States, it may safeguard the autonomy of the EU legal order in a way to remain within those limits and, in turn, enable the Union to undertake international commitments.

Examples include an obligation for the Member States to refer to the CJEU any controversies with regard to EU law, even though an international agreement may put forward other dispute settlement mechanisms such as in *Mox Plant*.[679] Compliance with the CJEU's exclusive jurisdiction, as codified by article 344 TFEU, ensures that disputes which

[679] Case C-459/03 *Commission v Ireland* (*Mox Plant*) ECLI:EU:C:2006:345. UNCLOS Convention art. 287 "Choice of procedure".

concern the application of EU law are brought to the CJEU, maintaining the Court's jurisdiction and autonomy to interpret international agreements applying within the EU legal order. National courts are also under an obligation to turn to the CJEU for questions of interpretation on international agreements that are an integral part of the EU legal order. In this way, the CJEU is able to provide the uniform meaning to international agreements that apply in the EU legal order through the preliminary ruling procedure, such as for example in the case of *Komstroy* on the interpretation of the ECT or *Hermès* on the TRIPS agreement.

Another way in which the application of sincere cooperation may safeguard the autonomy of the EU legal order and enable Union action is an obligation of sincere cooperation to avoid the intra-EU application of international treaties such as in multilateral mixed agreements in which the Member States participate as independent actors. The intra-EU application of international agreements undermines the EU's autonomy as it may change the way in which EU law is applied within the EU legal order and sever the mutual trust between the Member States.

Obligations deriving from sincere cooperation also bind the Member States when the EU's autonomy is threatened by the external influence on the competence divide by the assessment of external bodies. Issues of responsibility may be a challenge for a non-unitary actor as the Union and the attribution of acts and omissions may affect the division of powers between the Union and the Member States and in turn jeopardise the autonomy of the EU legal order.[680] To ensure that the Union may engage in international dispute settlement, there is then a need to arrange that disputes are brought in accordance with the EU competence divide against the right actor. It is put forward that the creation of a system separating international responsibility from the internal allocation of financial responsibility such as that adopted in the FRR can be considered the expression of a mutual obligation of cooperation to fulfil the obligations deriving from an international treaty, rendering them effective and ensuring that the autonomy of EU law is preserved.

It can be concluded that the mutual obligation of assistance to ensure that the Union and the Member States jointly achieve tasks flowing from the Treaties, entails an obligation to cooperate for the preservation of the autonomy of the EU legal order, without which the EU's ability to adopt internal rules after committing to international agreements to achieve those

[680] Opinion 2/13 (Accession to the ECHR) ECLI:EU:C:2014:2454, paras 230-231.

tasks is threatened. The obligation to uphold the exclusive jurisdiction of the CJEU to interpret EU law is concretised in Treaty articles, 344 TFEU and 267 TFEU, which entail obligations of sincere cooperation. Avoiding the intra-EU application of international agreements and framing the allocation of responsibility for the enforcement of international agreements could be seen instead as obligations of sincere cooperation not only with respect to its first segment, but also to its second and third segments to preserve the competence divide, the exclusive jurisdiction of the CJEU, and the objective of uniform interpretation of EU law.

5.4 Tension between EU law and the obligations contained in international agreements: addressing contrasting requirements and obligations

It is put forward that the application of the principle of sincere cooperation contributes to overcome the requirements imposed by international law in the external exercise of EU competence and influences the EU's compliance with international agreements. On the one side, advancing the respect of international agreements but, on the other side, prioritising EU law in case of conflicts.

5.4.1 Overcoming requirements to enter in international agreements and participate in international bodies

The analysis has shown that the Union relies on the Member States to adapt its multilevel structure to the requirements and constructs of international agreements and bodies it seeks membership to. The Union may call on the Member States to act as its trustees when it cannot participate in an international agreement or body because membership is limited to states, or it concludes an agreement together with the Member States when this is required by an international agreement (e.g. that the membership of an IO must encompass at least that of some of its members). This entails that Member States may be authorised to act on the Union's behalf and following the Union's indications even in areas of exclusive Union competence. Moreover, the CJEU has referred to an obligation of best-efforts on the Member States deriving from sincere cooperation to attempt to make the Union a party to the international agreements which it cannot yet formally join. Furthermore, the principle of sincere cooperation aids the respect and management of the competence division between the Union and the Member States within the framework of international agreements such as

coordinating the shared presence in international bodies in order to abide by the rules of international organisations e.g. as to whom should act or vote if, for instance, concurrent rights are not possible.

5.4.2 Influencing the enforcement of international law commitments in the EU legal order

According to article 216(2) TFEU, agreements concluded by the Union bind the Member States and, as held in *Haegeman,* become an integral part of EU law. As such, they are hierarchically superior to secondary EU law and benefit from the primacy of EU law *vis-à-vis* the domestic law of the Member States. The incorporation of international agreements occurs both at EU and national level and domestic courts are bound by duties of sincere cooperation as for the implementation other EU instruments including to effectively implement EU law and to refer questions for preliminary rulings.[681] When the CJEU interprets and enforces international agreements it makes determinations about the substantive law applicable within the Union, which affect the way in which international agreements are incorporated at EU and at national level. In this way as noted by Etienne, international law becomes the law of the land, according to the law of the land.[682] However, there may be situations in which the obligations of an agreement concluded by the Union contrast with those of EU law. In these cases, the analysis evidenced that principle of sincere cooperation could be used to address some of the conflicting obligations.

A first situation can be considered with regard conflicting obligations between EU law and an international agreement or decision of an external body referring to areas of Union exercised competences. The mutual obligation of sincere cooperation in the first segment of article 4(3) TEU has not been seen as an obligation for the Union to ensure that Member States are not found liable on the international plane, as a basis on which to hold the Union accountable for violations identified by external bodies, nor on which to request a legality review by the CJEU. A proposed development of the reciprocal character of sincere cooperation could be a duty to enable Member States to challenge the legality of EU law against an international agreement to which they are also bound internationally. This would entail broadening the direct effect requirement in the situation in which a Member State is

[681] E Neframi, 'The Duty of Loyalty: Re-thinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev 323.
[682] J Etienne, 'Loyalty Towards International Law as a Constitutional Principle of EU Law?' Jean Monnet Working Paper 03/11, p. 7.

required to implement contrasting obligations deriving from EU law and an international agreement concluded by the Union.

Another aspect concerns conflicting obligations between EU law and a decision of an international body addressed to a Member State. Even if the case law has so far mainly concerned intra-EU BITs, therefore agreements between the Member States rather than agreements concluded by the Union, similar concerns can be transposed to the future action of the Union as it has been involved in the creation of new dispute settlement mechanisms in FTAs and the establishment of a MIC which may rely on the same or similar enforcement systems. Obligations of sincere cooperation binding national courts could provide a safeguard to ensure that the decisions of international bodies are compatible with the autonomy of EU law through a duty to ensure effective legal protection within the EU legal system and possibly a duty to allow for an *ex post* constitutionality review, which are both linked to the preliminary ruling procedure.

Agreements that provide for the immediate enforcement of awards might pose yet unsolved challenges because the preliminary ruling procedure may itself be incompatible with an agreement. In particular, this can be the case with international investment treaties that rely on the ICSID Convention but also on the new Investment Court System (ICS) which entails an appeal system which is built to be the final layer of legal review. Domestic courts could further be required to withhold enforcing a decision if there is a judgment currently pending at the CJEU and later to rectify the incompatibility with the EU legal system which, as in the case of *PL Holdings*, could prevent the enforcement of an award or decision.[683]

5.5 The three-fold contribution of sincere cooperation to EU external relations law

Making an overall assessment about the contribution of sincere cooperation to the external relations law of the Union, this could be understood as three-fold.

5.5.1 Contribution to the well-functioning of the Union

First, sincere cooperation is a principle that allows the Union to function properly internally and externally fulfilling its ultimate objective of integration through law. In an internal context, the principle has primarily been used to secure the application and enforcement of EU law at

[683] Case C-109/20 *PL Holdings* ECLI:EU:C:2021:875.

the national level. In turn, the preliminary ruling procedure is the core procedure to ensure the uniform interpretation of EU law across the Member States enabling both the *effet utile* and effectiveness of EU law. These aspects of the internal application of sincere cooperation are also relevant to the external action of the Union and to the implementation of international agreements within the EU legal order. The direct applicability (incorporation) of international agreements concluded by the Union in the EU legal order as constituting an integral part of it has as a result that complying with EU law entails complying with an international agreement and, *viceversa,* complying with an international agreement equates to complying with EU law. This monist approach to the incorporation of international agreements as an integral part of EU law is shaped by the principle of sincere cooperation binding both the Member States and their national courts. This in turn changes the relationship of the Member States' legal orders with international law as the direct applicability of international agreements concluded by the Union in their national legal orders can be enforced through the prism of EU law including the obligations deriving from sincere cooperation.

5.5.2 Contribution to the development of the external action of the Union and the relationship between international and EU law

Second, the principle of sincere cooperation allows the Union to develop its external action and its relationship with international law. A dual function emerges in this context, on the one hand, to allow the Union to engage on the international plane and, on the other hand, to uphold the autonomy of the EU legal order. Externally the principle is conducive to the exercise of the EU's competence without which the Union could not engage on the international plane accomplishing its external objectives and become a global actor, limiting the development of the EU's external policies. Non-exhaustive examples include the possibility of concluding mixed agreements, exercising an exclusive competence or pursuing a Union strategy limiting the individual action of the Member States, relying on the Member States to act as the Union's trustees where it cannot engage directly, coordinating the exercise of coexistent rights in international bodies. Moreover, the principle creates obligations on the Member States which shape the implementing phase of international agreements which address some threats to the autonomy of the EU legal order and in turn enable further external action by the Union which would otherwise be incompatible with the autonomy of

the EU legal order. Here reference can be made to a duty to uphold the exclusive jurisdiction of the CJEU, avoid the intra-EU application of international agreements, and coordinate the attribution of responsibility between the EU and the Member States. Obligations of sincere cooperation allowing the Union to remain an autonomous actor also bind national courts. They are required to comply with the determinations of the CJEU on direct effect and consistent interpretation and, when the implementing competence for part of an agreement rests on the Member States, are called to refer questions for preliminary rulings supporting the uniformity of interpretation of EU law and enabling effective judicial protection, which are elements of the autonomy of the EU legal order.

5.5.3 Contribution to the EU's actorness within the international legal order

Lastly, the principle of sincere cooperation may also contribute to the EU as an actor within international law more broadly. This thesis has shown that the principle of sincere cooperation is paramount for the EU's participation in the international legal order in the way it exercises its external competence concluding international agreements, but also in its implementation and enforcement of international agreements, which in turn affect its actorness on the international plane.

From the perspective of improving compliance with international agreements, the principle of sincere cooperation creates a tight knit relationship between the Union and the Member States for ensuring that Member States abide by the international agreements which are an integral part of EU law. The Member States are bound by international agreements concluded by the Union pursuant to article 216(2) TFEU which is expression of the principle of sincere cooperation as it enables the Union to enact its commitments within the EU legal order which would otherwise not bind the Member States through international law (e.g. in EU-only agreements, or to a more limited extent in mixed agreements). Moreover, Member States are also bound by an obligation of sincere cooperation to ensure the overall compliance with a mixed agreement, including for the part falling within their implementing and retained competences. Those obligations of the Member States *vis-à-vis* the Union deriving from the principle of sincere cooperation can then be enforced within the EU legal order for the Union not to be found liable internationally. In this way, the principle of sincere cooperation contributes to overseeing compliance with the international agreements concluded by the Union in line with the EU's objective of strict observance to international law under article 3(5)

TEU. Furthermore, the Member States' courts need to comply with the determination of direct effect taken at the EU level which may result in further compliance for decisions by external bodies if these are granted direct effect. Other obligations deriving from sincere cooperation such as ways to avoid direct clashes between EU and international law requirements including the internalisation of the allocation of responsibility not only limit potential threats to the autonomy of the EU legal order but might also enhance compliance with international law commitments.

While sincere cooperation can strengthen the compliance of the Member States with international agreements concluded by the Union, this is not necessarily the case for the Union itself. While article 4(3) TEU entails a reciprocal obligation of assistance, the principle of sincere cooperation does not establish duties binding on the Union which are comparable to those on the Member States. For example, Member States submitting an action for annulment questioning the legality of EU secondary law in light of an international agreement are still subject to the compliance with the conditions for direct effect, whereas the Commission may hold them accountable for their implementing measures (or lack thereof) through infringement actions also on the basis of their obligation of sincere cooperation. Moreover, considering the cases concerning the Aarhus Convention it appears that the Union has been more timid in upholding the standards that it has asked the national courts to comply with at national level. This is in part due to the obligations of sincere cooperation according to which the national courts are bound to implement international agreements as an integral part of EU law, in that case ensuring effective legal protection which is entrusted to national courts under article 19 TEU, whereas the CJEU is bound by the objective of ensuring the strict observance of international law in article 3(5) TEU which does not have the same normative content. While the execution of obligations between the Union (and the Member States in case of a mixed agreement) and a third party remains subject to the international law principle of good faith, obligations deriving from an international agreement which is an integral part of EU law are to be executed by the Member States in accordance with the principle of sincere cooperation. In selected circumstances, the Union has also sought to foster compliance with international agreements binding only the Member States. This occurred for instance when all Member States are parties to an international agreement through an obligation of consistent interpretation framed as "taking account". This is functional to the EU legal order

as obligations binding all Member States may affect the way in which EU law is applied within the EU.

From a broader perspective, sincere cooperation could further be seen as contributing to development of international law. The principle is an illustrative example of the participation of an international organisation within the structures of the international legal order. By shaping the exercise of external competence by the Union, the principle of sincere cooperation enables the Union to adapt its internal structure to the framework given by international agreements and their bodies. It enables the Union to act and to bring forward its initiatives involving also third states for example the MIC, other models for FTAs, or the modernisation of the ECT. Moreover, it is also an example of the transformation of the more general principles of *pacta sunt servanda* and good faith in the incorporation and enforcement of international agreements within a non-state multilevel system.[684]

5.6 Final remarks

With the expansion of the internal and external competences of the EU, more international agreements once within the domain of action of the Member States will progressively fall within the scope of EU competence or, more broadly, that of EU law. This will strengthen the Union as an international actor and enhance the influence of EU law for the international action of the Member States. Re-drawing the scope of EU law will, at the same time, test the EU legal order's resilience to cope with its own growth and to "accommodate international law".[685] By balancing the respect for international agreements and the autonomy of the EU legal order, the principle of sincere cooperation may be one of the principal ways to endeavour to create internal and external coherence in the action of the Union, incorporating international agreements in the EU legal order and finding solutions to address conflicts. The principle may in fact contribute to addressing some of core tensions characterising the external relations law of the Union as was highlighted above. Not all conflictual developments evidenced by the recent litigation seem however to find a solution (or at least a straightforward one) in the current application of the principle of sincere cooperation. These

[684] This is evidenced by G De Baere and T Roes 'EU Loyalty as Good Faith' (2015) 64 ICLQ 829; and D Davison-Vecchione, 'Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty' (2015) 16 German Law Journal 1163.
[685] I Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic' in I Govaere, S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019), p. 30.

include disagreements on the expediency of the procedures or substantive contents of international agreements, for example in the case of missing ratifications to mixed agreements. Sincere cooperation, in fact, ensures that the external action of the Union remains effective rather aiming at advancing a specific policy or procedural choice if alternatives are deemed compatible with the Treaties (e.g. facultative mixity). Without changing in this underlying understanding of the principle, it is put forward that addressing such issues would require further codification of obligations arising from sincere cooperation which would structure the otherwise orientational EU objectives of the EU external action.

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