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## 9.1 Introduction

Over the past decades, most issues concerning the interface between EU law and national law have been resolved, and Member States' authorities have grown to accept the basic tenets of supremacy and direct effect. However, once the rules of international law enter into the picture as well, the relationship between norms from the European and the national legal order becomes less clear-cut.

The Member States continue to play an independent role on the global scene, enjoy their own rights there and have taken up individual obligations vis-à-vis a plethora of third countries and international organisations. As we have seen, the EU has also concluded a great number of treaties and conventions, and it too is an active participant in international bodies and forums. Nonetheless, as we will observe in this chapter, while both the EU and the Member States are bound by international law, they occupy different positions within the international legal order. Moreover, they do not respond in the same way to rules that are external to their legal system. Thus, the interaction between norms of international, European and domestic pedigree is fraught with complications. Mixed agreements, the products of the

fact that the EU and the Member States share external competences in certain domains, present a typical litmus test. The EU Treaties contain several tools and mechanisms to smoothen the interplay between international, European and national law, but these do not succeed in eradicating the tensions altogether. In the sections that follow, we will investigate some of the (potential) fracture lines, and analyse the legal provisions that seek to iron them out.

The present chapter is divided into two parts. First, attention will be devoted to the place of the EU in the international legal order and the way it has generally positioned itself (Sect. 9.2). Thereby, we shall also discuss the internal rank and effect of norms of international provenance, as well as the meandering views of the EU Courts on that subject. In the second part of the chapter, we will take a closer look at the position of the Member States, which are sandwiched between, and bound to comply with, their European as well as their international commitments (Sect. 9.3). Thereby, a special focus is placed on the intricacies surrounding the management of mixed agreements, as well as on the (waning) possibilities for seeking enforcement at international courts and tribunals.

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## 9.2 The EU and the International Legal Order

### 9.2.1 The Applicability of International Law on the EU Legal System

As illustrated in the previous chapters, the EU deploys countless activities on the global scene. It has concluded a great many agreements that now number well over a thousand.<sup>1</sup> It takes part in the work of numerous international organisations such as the WHO and UNESCO.<sup>2</sup> The participation can take the form of either full membership or observer status. The Union is, for instance, a full member of the WTO and the FAO, but it holds an observer status in the ILO.<sup>3</sup>

The eager and diligent approach of the Union chimes with the freedom to contract, which is traditionally just as much a cornerstone of international law as it is of civil law. All the same, it should be added that Article 220 TFEU contains the legal imperative to establish appropriate forms of cooperation with the UN, specialised UN agencies, the Council of Europe, the OSCE and the OECD. A similar obligation was already around in the days of the Communities, and duly followed up on.<sup>4</sup>

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<sup>1</sup>See the Treaties Office database at <http://ec.europa.eu/world/agreements/default.home.do>.

<sup>2</sup>The ability of the Community to join (other) international organisations was confirmed by the ECJ in Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*.

<sup>3</sup>If an international organisation only admits states (e.g. the IMF and the World Bank), the Union may authorise its Member States to act there on its behalf and in its interest.

<sup>4</sup>See e.g. Serrano de Haro (2012), p. 12.

**Box 9.1 The EU and the UN General Assembly**

After a failed attempt in 2010, the EU finally acquired an enhanced observer status in the UN General Assembly one year later. Resolution A/RES/65/276 of 3 May 2011 has inter alia enabled it to be inscribed on the list of speakers, and have its communications circulated as UNGA documents. So far though, in light of the diplomatic humiliation that came with the earlier rejection of the status, and despite the high hopes that were initially pinned on it, the upgrade has turned out to be of relatively limited value, and mainly a symbolic instead of a substantial advance. As a possible consequence, the voting pattern of EU Member States in the UNGA did in the past years become a bit more coherent.

The EU makes itself out to be distinct from the organisations with which it has entered into relations, by claiming to constitute an ‘autonomous legal order’.<sup>5</sup> The ECJ has thereby taken up a central filtering role, deciding by which external norms the Union may be considered bound, and which it can duck out off.

The autonomy claim first manifested itself through *Costa v ENEL*, when the EEC Treaty (and the norms stemming from it) was characterised as an independent source of law.<sup>6</sup> This laid the basis for a structural priority of European law over norms of domestic law. Owing to that premise, the supranational system was to function in a top-down manner, and the highest rules could not be undermined or obscured by national laws and provisions.

The external dimension of this systemic autonomy only emerged some time later. In Opinion 1/76, the original design for a laying-up fund for inland waterway vessels turned out to be unacceptable, due to the conflict between the jurisdiction of the proposed judicial body and the ECJ.<sup>7</sup> The same guarded view was taken in e.g. Opinion 1/91, when the initial framework for collaboration with the EFTA countries was rejected: it would introduce a large body of new rules juxtaposed with a corpus of identically worded provisions of EC law, causing an abundance of interpretation and consistency problems, eroding the very foundations of the European legal order.<sup>8</sup>

<sup>5</sup>Some partners have been more receptive to this claim than others, as demonstrated in e.g. de Waele and Kuipers (2013).

<sup>6</sup>Case 6/64, *Costa v ENEL*. But cf. already the ‘new legal order’ postulate in Case 26/62, *NV Internationale Transportonderneming Van Gend & Loos v Nederlandse Administratie der Belastingen*.

<sup>7</sup>Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*.

<sup>8</sup>Opinion 1/91, *Draft agreement on the creation of the European Economic Area (I)*. Following renegotiations, a novel agreement was drawn up, which received the blessing of the ECJ in Opinion 1/92, *Draft agreement on the creation of the European Economic Area (II)*.

In Opinion 1/00, the Court was even more explicit, stating that the preservation of the autonomy of the EU legal order requires, first of all, that the essential character of the powers of the Union and its institutions as conceived in the Treaties stays unaltered.<sup>9</sup> Additionally, said autonomy was taken to mean that any procedure for resolving disputes and ensuring uniform interpretation foreseen in bodies and structures that are external to the EU, may not have the effect of binding the Union and its institutions in the exercise of their internal powers, nor in the interpretation of their own legal rules. This means that the EU can ultimately not be considered bound by norms originating in international law, unless and to the extent that it has accepted these, and that they do not clash with the internal legal system. This has led the ECJ to reject the overriding authority of the UN in its seminal judgment in the *Kadi* case.<sup>10</sup> Here also, the Court decided to refuse an unreserved application of external international obligations in order to preserve fundamental norms of the internal legal order. It will be recalled that, in this case, the central dispute concerned the legality of a Regulation implementing a resolution of the UN Security Council. This venerable origin did not render the instrument immune from judicial review, as ‘the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system, which is not to be prejudiced by an international agreement’.<sup>11</sup>

The Court’s attachment to the idea of autonomy reached an apex with Opinion 2/13.<sup>12</sup> In one bold swoop, accession to the European Convention on Human Rights was declared to be impossible on the basis of the terms that were negotiated in the preceding years. Several problems were identified that allegedly put in danger the foundations of the EU legal order, inter alia the dilution of the ECJ’s monopoly on dispute settlement, the envisaged ‘co-respondent mechanism’, and the jurisdiction over CFSP acts conceded to the ECtHR. This unexpectedly stern verdict left politicians dumbfounded and forced the responsible diplomats to go back to the drawing board—an exercise from which they have yet to return.

In all then, one could say that the unique quality and quasi-independent position of the European system in the international arena has been vigorously stressed on different occasions. Admittedly, the EU Courts have also repeated several times that the Union must respect international law in the exercise of its powers.<sup>13</sup> Still, it takes considerable effort to square the outcomes of sundry cases with that creed. At the end of the line, in the face of an irreconcilable conflict, decisive weight will be

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<sup>9</sup>Opinion 1/00, *Envisaged agreement on the establishment of a European Common Aviation Area*.

<sup>10</sup>Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al-Barakaat International Foundation v Council*.

<sup>11</sup>*Ibid.*, paragraph 316.

<sup>12</sup>Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*.

<sup>13</sup>See e.g. Case C-286/90, *Anklagemyndigheden v Poulsen and Diva Navigation Corp*, and Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*.

attributed to the spirit and stipulations permeating the founding Treaties, which are regarded as unassailable constitutional documents.<sup>14</sup> On the other hand, the treasured autonomy has not prevented the Courts from considering the Union to be fulsomely bound by the GATT, pushing aside the prerogatives of the Member States in the process.<sup>15</sup> Also, it has welcomed the thought that some international rules do in fact form an integral part of the European legal order, among others, the UN Convention on the Law of the Sea and rules of customary international law.<sup>16</sup>

### 9.2.2 The Rank and Effect of International Law in the EU Legal Order

The corollaries of the restricted applicability of general international law and the autonomous position of the EU may be observed when looking inside the European legal order. In principle, the Union considers itself bound by the treaties it has concluded and the rules of the organisations it has joined. At the same time, the EU Courts once again act as gatekeepers, exercising control over the influx of external norms, remaining wary that the system is 'contaminated' by rules and concepts that are not native to it.

Unsurprisingly then, in the hierarchy of norms within the European legal order, the general principles of EU law have been placed at the top of the normative pyramid, with rules of international law standing on a lower plane (with the exception of *ius cogens* norms).<sup>17</sup> Simultaneously, international agreements concluded by the EU will, in case of conflict, trump any divergent secondary legislation (e.g. Regulations or Directives).<sup>18</sup> This primacy of international agreements over provisions of secondary law also means that the latter must, as far as possible, be interpreted in a manner that is consistent with those agreements.<sup>19</sup>

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<sup>14</sup>Cf. Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, paragraph 23.

<sup>15</sup>Joined Cases 41-44/70, *NV International Fruit Company and others v Commission*.

<sup>16</sup>See respectively Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*; Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*.

<sup>17</sup>Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al-Barakaat International Foundation v Council*. Some commentators read a primordial confirmation of this position in Case 41/74, *Van Duyn v Home Office*.

<sup>18</sup>See e.g. Case T-115/94, *Opel Austria GmbH v Council*; Case C-344/04, *The Queen on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*.

<sup>19</sup>See e.g. Case C-61/94, *Commission v Germany*; Case C-341/95, *Gianni Bettati v Safety Hi-Tech Srl*.

In the classic dichotomy between states that are dualist or monist as regards the effect of norms of international law in their legal order, the EU would appear to adhere to the latter position. International agreements concluded by the EU automatically become part of EU law, and the rules contained therein may be relied upon in front of the EU Courts and the courts of the Member States.<sup>20</sup> This e.g. holds for provisions in various association and cooperation agreements.<sup>21</sup>

### Box 9.2 Monism v Dualism: A Dichotomy in Need of Nuance

The monism–dualism dichotomy served as a popular explanatory matrix throughout the twentieth century. Dualism posits the existence of a barrier between the international and the domestic legal order, in that an act of incorporation or transformation is required before a treaty norm can become judicially invocable. No such act is necessary in a monist approach. Although intellectually useful, the distinction has nowadays been criticised, sometimes even abandoned—the modern realisation being that there lies a whole spectrum between two extremes. Most countries find themselves somewhere in the middle, and few adhere to a purely monist or dualist position. Besides, a monist approach does not rule out incidental blockades, nor does dualism impede a fluid reception of international norms through other means (e.g. conform interpretation).

Provisions contained in an agreement concluded by the EU will however not be awarded direct effect before an examination has been made of the spirit, general scheme and terms of that agreement.<sup>22</sup> Moreover, when the invalidity of EU legislation is pleaded in front of a national court, the ECJ only reviews the validity of the measure concerned in the light of all the rules of international law subject to two conditions: first, the EU must be bound by those rules; second, the validity of the legislation can merely be assessed in the light of an international treaty where the nature and the broad logic of the latter do not preclude this, and when the provisions of that treaty are unconditional and sufficiently precise.<sup>23</sup>

Contrary to what one might presume, the latter does not constitute an entirely straightforward matter, and quirky outcomes may well be reached. Earlier, we

<sup>20</sup>See e.g. Case 181/73, *Haegeman v Belgium*; Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

<sup>21</sup>See e.g. Case 87/75, *Bresciani v Amministrazione Italiana delle Finanze*; Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*; Case C-18/90, *Office national de l'emploi v Kziber*; Case C-416/96, *El-Yassini v Secretary of State for Home Department*; Case C-438/00, *Deutscher Handballbund eV v Kolpak*.

<sup>22</sup>See e.g. Case C-469/93, *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA*, and Case C-160/09, *Ioannis Katsivardas – Nikolaos Tsitsikas OE v Ipourgos Ikonomikon*.

<sup>23</sup>See e.g. Case C-344/04, *The Queen on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*.

already encountered the strange case of the (non-)effect of GATT and WTO norms. These rules are recognised as forming an integral part of the European legal order, but sadly this is to little avail for those individuals who actually wish to rely on them.<sup>24</sup> In *Intertanko*, taking a rather dubious view of the UNCLOS, the ECJ also rejected the direct effect of its provisions, in light of their nature and broad logic.<sup>25</sup> The same went for the Aarhus Convention in *Stichting Natuur en Milieu*, impeding private citizens' access to justice in environmental matters.<sup>26</sup> The number of agreements that is denied direct effect now seems to be growing steadily.

Diverse explanations have been offered to explain the variations in the Court's jurisprudence, whereby it fails to apply the steps in its test with the exactly same rigour. Some emphasise the growing negotiation power and political interests of the EU; others stress the importance of regarding whether the rules have a bilateral or a multilateral dimension.<sup>27</sup> Although no solution has yet been proffered that decisively resolves all puzzles, there is good cause to believe in the existence of a 'twin-track approach', whereby EU measures are structurally shielded from challenges based on external norms, with the Court adopting instead a rather merciless position in cases where the legality of Member State action is challenged.<sup>28</sup> We should add that, after a string of erratic pronouncements, the Court now seems to display a greater consistency towards (the invocability of) international customary law as well.<sup>29</sup>

A salient trend on the political front may eventually divert attention from the (supposed) preferences of the ECJ. With ever greater frequency, the EU institutions and the Member States elect to insert clauses in international agreements that aim themselves to exclude their direct effect before domestic courts.<sup>30</sup> Disconcertingly, this exclusion extends to sections on investment protection, social rights and environmental standards—a hardly coincidental situation, given the sensitive character of those topics. As a redeeming feature, by explicitly denying the immediate invocability of the relevant provisions, their indirect effect has (accidentally or intentionally) not been ruled out.

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<sup>24</sup>See Chap. 4, Sect. 4.4.

<sup>25</sup>Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

<sup>26</sup>Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*; see also Case C-612/13 P *ClientEarth v Commission*.

<sup>27</sup>An excellent overview offers Bronckers (2008).

<sup>28</sup>As argued by Mendez (2013); see also Wouters et al. (2013).

<sup>29</sup>See Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*. Contrast e.g. Case C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz*.

<sup>30</sup>Further illustrated in Semertzi (2014).

## 9.3 The Member States Between EU and International Law

### 9.3.1 Individual Treaty Commitments

In all fields where the EU enjoys no competence, or merely a supporting one, the Member States are principally entitled to take up legal commitments with third states or international organisations.<sup>31</sup> Also, as stipulated in the first sentence of Article 351 TFEU, no provision of EU law may affect rights or obligations of Member States that arise from agreements they concluded with third countries or international organisations prior to becoming members of the Union.<sup>32</sup> It should be realised that this rule not only functions to the benefit of Member States, but shields the rights of the third countries or organisations in equal measure. For the latter, the EU Treaties denote a *res inter alios acta*, and as a result, the maxim of *pacta tertiis nec nocent nec prosunt* applies. Thus, the EU and its institutions should not stand in the way of a faithful performance of the obligations of the Member States that stem from a prior agreement with external partners.<sup>33</sup>

#### Box 9.3 The Remarkable Tolerance for *Inter Se* Agreements

Despite the ever-expanding reach of EU law, the ECJ has exhibited a remarkable tolerance for *inter se* agreements, i.e. treaties concluded between the individual Member States. Of late, these are gaining in popularity in order to tackle contentious issues located on the outskirts of Union competence, especially when not all members of the (European) Council prove willing to adopt a ‘proper’ EU instrument. A prominent example from 2012 forms the Treaty on Stability, Coordination and Governance in the EMU. The main condition attached to the approach is that it may in no way impinge on the Union’s (exclusive or shared) powers. Occasionally however, the principle of sincere cooperation may require that Member States abstain from the practice in certain areas, even when there are no common rules yet in the field.

<sup>31</sup>E.g. education, culture, some aspects of public health. One might add topics that touch on military and defence issues, as the Treaties do not pronounce themselves unequivocally on the nature of the CSDP (nor, for that matter, on that of the CFSP).

<sup>32</sup>For the founding members of the EU, the reference is to agreements concluded prior to 1 January 1958; for states that have acceded later, the date of their accession presents the relevant yardstick.

<sup>33</sup>Case 812/79, *Attorney General v Burgoa*. If over time, the EU has fully subsumed areas of competence in which all the Member States had previously entered into treaty relations, ‘functional succession’ may take place, with the Union replacing them and assuming their legal entitlements and obligations. For the precise conditions, see Joined Cases 41-44/70, *NV International Fruit Company and others v Commission*; Case C-188/07, *Commune de Mesquer v Total France and Total International Ltd*; Case C-301/08, *Bogiatzi v Deutscher Luftpool, Société Luxair, European Communities, Luxembourg Foyer Assurances SA*; Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

The freedom of the Member States to uphold their preceding treaty commitments with external partners is subject to four limitations. Firstly, the powers that they have retained may not be abused, and should always be exercised in a manner that avoids provoking inconsistencies with the policies agreed in the context of the EU.<sup>34</sup> Contrary to what one might think, the principle of sincere cooperation contained in Article 4(3) TEU is of general application and not restricted to situations where the Union possesses an exclusive power.<sup>35</sup> This should be kept well in mind whenever Member States seek to take up new commitments. At the same time, when and where the Union disposes of neither an exclusive nor a shared power, the risk of clashes would in practice appear to be minimal.<sup>36</sup>

A second limitation concerns the exercise of the rights stemming from the earlier treaty commitments, referred to in the first sentence of Article 351 TFEU. As the ECJ has established, Member States cannot award priority to those over their Union law obligations when the agreement *allows*, but does not *require* the Member State to adopt a measure that seems to be contrary to EU law.<sup>37</sup>

A third limitation also relates to the earlier treaty commitments, and is to be found in the second sentence of Article 351 TFEU. As a rule, in case an agreement concluded by a Member State before it joined the Union should prove to be incompatible with the Treaties, all appropriate steps must be taken to eliminate the incompatibilities. This behest is actually quite strong, and exceeds a simple ‘best efforts’ obligation. It necessitates the attainment of a specific result, imposing a duty of re-negotiation.<sup>38</sup> Should this come to nothing, the prior agreement will ultimately have to be denounced. Member States are thus unable to plead in their defence that they ran into grave difficulties when attempting to bring their obligations to a third country in line with their obligations under EU law.<sup>39</sup>

A fourth and final limitation concerns the fact that the second sentence of Article 351 TFEU can bite even if an incompatibility arises through subsequent EU law.

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<sup>34</sup>See Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*.

<sup>35</sup>See Case C-266/03, *Commission v Luxembourg*; Case C-433/03, *Commission v Germany*.

<sup>36</sup>Of course, in case the EU does enjoy an exclusive power, any new commitments undertaken by the Member State in the field concerned would immediately constitute an egregious violation of EU law. Member States should proceed cautiously in case the EU possesses a shared power: judging from Case C-205/06, *Commission v Austria* and Case C-249/06, *Commission v Sweden*, they have to avoid a potential conflict of rules, and may have to rescind prior treaty commitments that potentially clash with provisions of EU law, even when the Union has not yet exercised its powers.

<sup>37</sup>Case C-324/93, *The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd*.

<sup>38</sup>Case C-62/98, *Commission v Portugal*. This entails that the inclusion of a ‘disconnection clause’, a provision according to which certain partners to a multilateral convention will apply special rules (here: EU law) in their relations *inter se* (in so far as such special rules govern the particular subject and apply to the case at hand), will not be enough. For illustrations of such clauses and their working, see Cremona (2010).

<sup>39</sup>See e.g. Case C-170/98, *Commission v Belgium*; Case C-84/98, *Commission v Portugal*.

What is more, the Court has ruled that the obligation to eliminate incompatibilities extends to hypothetical ones, with the rationale being that the prevention of a potential norm conflict at the earliest possible stage guarantees the effective implementation of future EU rules.<sup>40</sup>

At the end of the day then, the Member States appear to be severely constricted by the Union loyalty obligation on the one hand, and the second sentence of Article 351 TFEU on the other. Ostensibly, the combination of these provisions renders largely nugatory the prerogatives handed by the first sentence of Article 351 TFEU.<sup>41</sup> Nonetheless, the Member States continue to enjoy room for manoeuvre in their individual treaty commitments, and since overt conflicts with EU rules can be avoided through the principle of consistent interpretation, the available space becomes a little bit more appreciable.<sup>42</sup>

### 9.3.2 EU Treaty Commitments

In the foregoing, it has already been explained that, notwithstanding the reluctance of the EU Courts to allow for an uninhibited influx of ‘foreign norms’, the international agreements the Union has concluded with third countries and international organisations form an integral part of the European legal order.<sup>43</sup> Consequently, the EU institutions, bodies and agencies will be bound to the terms of those agreements, and should proceed to implement them in good faith.

One might then be inclined to presume, pursuant to the *pacta tertiis nec nocent nec prosunt* maxim, that the Member States are not bound by these agreements in their capacity of sovereign individual actors on the international scene—that is to say, as far as the Union exercised an exclusive competence to bring those agreements into being.<sup>44</sup> The *pacta tertiis* principle is however brushed aside by Article 216(2) TFEU, which stipulates that agreements concluded by the Union are not only binding upon its institutions, but also on its Member States. So, combined with the aforementioned obligations flowing from Article 4(3) TEU and 351 TFEU, it becomes clear that the latter do not represent true *tertiis*. They therefore have to abide by the terms of treaties or conventions concluded by the EU, and should, as far as necessary, implement them in good faith as well.

As regards the status in the domestic legal order of the Member States of international agreements concluded by the EU, the principle of European law

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<sup>40</sup>See Case C-205/06, *Commission v Austria*; Case C-249/06, *Commission v Sweden*; Case C-118/07, *Commission v Finland*.

<sup>41</sup>The Court’s tenacity in letting the rules of EU law triumph over the Member States’ (prior) international commitments is magisterially portrayed in Klabbers (2009).

<sup>42</sup>See e.g. Case C-216/01, *Budvar v Rudolf Ammersin GmbH*.

<sup>43</sup>Of course, as long as there existed an adequate legal basis and no procedural errors were committed.

<sup>44</sup>Evidently, at the exercise of a shared competence the Member States will be bound *ipso facto*.

supremacy inexorably holds sway here too. Furthermore, any determination of the Courts in Luxembourg regarding the (lack of) direct effect of provisions of an international agreement will in the same way be binding for all national courts. As a result, the latter are for example not allowed to award a broader effect to GATT/WTO norms than ECJ case law permits. The national courts will be similarly bound by the Courts' jurisprudence on the principle of indirect effect.<sup>45</sup>

It goes without saying that all treaties and conventions ratified by a Member State that lie completely outside the scope of EU law remain within the reserved domain of national law. Obviously then, the precise rank and effect thereof will be determined by the domestic rules that ordinarily apply (depending on the degree of monism/dualism the country subscribes to).

### 9.3.3 The Management of Mixed Agreements

Mixed agreements are the typical product of the exercise of a competence shared between the EU and the Member States. The triangle between these two separate entities and the external contracting party can give rise to convoluted legal puzzles.<sup>46</sup> The provisions of a mixed agreement are binding on all contracting parties, the contracting parties are jointly and severally responsible vis-à-vis one another for its further implementation, and they can all be held to account in case of deficiencies or a wholesale default.<sup>47</sup>

Here again, the Member States are specifically guided and restricted by the principle of sincere cooperation, encapsulated in Article 4(3) TEU. Over the years, the Courts have steadily widened the ambit of the relevant obligations.

As remarked above, the principle of Union loyalty is applicable irrespective of whether the EU competence at stake is exclusive or shared.<sup>48</sup> The ECJ has stressed that, even when the subject matter of a treaty or convention falls partly within the competence of the Union and partly within the competence of the Member States, they are required to cooperate with the EU institutions as intensely as possible, at the stage of negotiation, the stage of conclusion and the stage of implementation.<sup>49</sup> Once the Council adopts a decision that authorises the Commission to negotiate the agreement on behalf of the EU, this marks the start of a concerted action at international level. According to the Court, from that moment on, the Member

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<sup>45</sup>See e.g. Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* and Case C-53/96, *Hermès International v FHT Marketing Choice BV*.

<sup>46</sup>The literature on this subject is voluminous; see inter alia Schermers and O'Keeffe (1983); Heliskoski (2001); Hillion and Koutrakos (2010).

<sup>47</sup>Cf. Delgado Casteleiro (2016).

<sup>48</sup>Case C-266/03, *Commission v Luxembourg*; Case C-433/03, *Commission v Germany*.

<sup>49</sup>This obligation has been held to stem from a general principle of unity in the international representation of the EU, e.g. in Opinion 2/91, *Conclusion of ILO Convention No. 170 concerning safety in the use of chemicals at work*.

States are bound to work together with the Union institutions.<sup>50</sup> Strikingly, the ECJ has gone a step further, ruling that the Member States are already bound by special duties of action and abstention once the Commission has submitted proposals to the Council for a concerted EU action—even if the Council did not (yet) adopt them.<sup>51</sup>

As discussed before, if decisions are to be adopted in an international organisation the Union is unable to join or participate in (despite possessing competences in the field concerned), the Member States are to act as its trustees.<sup>52</sup> The Court has nevertheless empowered the Council to coordinate their actions in advance, pursuant to Article 218(9)—especially warranted when it concerns a field of exclusive EU competence.<sup>53</sup> In Opinion 1/13, this Council prerogative was even deemed to cover decisions on the admission of third countries to the organisation concerned.<sup>54</sup>

In the conclusion of mixed agreements, a duty to facilitate the exercise of Union competence may be considered implicit, flowing from Article 4(3) TEU and the specific obligations of solidarity that govern all external action. The obligation to cooperation in full sincerity can be made explicit in a Council decision inviting the Member States to ratify a mixed agreement.<sup>55</sup>

In the implementation of mixed agreements, the second and the third sentences of Article 4(3) TEU play a particular role. On that footing, the Courts have expanded their jurisdiction significantly, empowering themselves to interpret mixed agreements in their entirety (i.e. including the provisions that are outside EU competence).<sup>56</sup> In the view of the judiciary, mixed agreements have the same status in the European legal order as ‘pure’ EU agreements, since the provisions come within the scope of EU competence.<sup>57</sup> As a result, should national courts entertain

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<sup>50</sup>Case C-266/03, *Commission v Luxembourg*; Case C-433/03, *Commission v Germany*.

<sup>51</sup>Case C-246/07, *Commission v Sweden*, elaborated on in Chap. 5, Sect. 5.3.1. See also Case C-45/07, *Commission v Greece*, entailing that in the absence of a Union common position, Member States are equally to refrain from individual action within the framework of international organisations.

<sup>52</sup>Opinion 2/91, *Conclusion of ILO Convention No. 170 concerning safety in the use of chemicals at work*.

<sup>53</sup>Case C-399/12, *Germany v Council*.

<sup>54</sup>Opinion 1/13, *Accession of third states to the Hague Convention on the civil aspects of international child abduction*.

<sup>55</sup>See e.g. Council Decision 2000/278/EC on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, OJ [2006] L 89/6; Council Decision 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, OJ [2002] L 130/1.

<sup>56</sup>Case C-53/96, *Hermès International v FHT Marketing Choice BV*; Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*.

<sup>57</sup>Case C-13/00, *Commission v Ireland*.

doubts with regard to any aspect of a mixed agreement, they are obliged to refer preliminary questions to the ECJ.<sup>58</sup>

One might think that, in a domain of shared powers, because the Member States act in the context of a competence they have (partially) retained for themselves, an absence of collaboration or a lagging behind in implementation does not necessarily lead to an infringement procedure. An infringement procedure may however be initiated concerning the execution of provisions that lie outside the scope of the competence of the Union, but within the scope of EU law. According to the ECJ, in such situations, the Union has a keen interest in ensuring the implementation of a mixed agreement in its entirety.<sup>59</sup> In the *Etang de Berre* case, France was condemned for failing to live up to its part of a mixed agreement, even though the alleged breach pertained to an aspect thereof not covered by European rules.<sup>60</sup> For the Court, harking back to the 'ILO effect', it sufficed that the general field was covered in large measure by EU legislation; decisive weight was attached once again to the Union interest in compliance by both the EU and its Member States.

### 9.3.4 Litigating at International Courts

Should disputes arise on the terms or interpretation of an international agreement, the common route in international law is to seek resolution at an international court or tribunal. If the EU has an argument with one of its contracting parties in relation to a treaty or convention it has concluded under an exclusive competence, the matter may be resolved by the forum stipulated in the agreement concerned. If no special arrangements have been made, the usual forums may be approached (e.g. the International Court of Justice, the WTO Dispute Settlement Body, the UN Tribunal for the Law of the Sea).<sup>61</sup>

Similarly, if a Member State has a difference of opinion with a treaty partner, and the agreement in question has been concluded on the basis of a reserved competence (i.e. outside the scope of EU law), it may equally seek resolution of the dispute before international conflict resolution bodies.

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<sup>58</sup>Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*; Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co. Inc. and Merck Sharp & Dohme Lda*.

<sup>59</sup>Case C-13/00, *Commission v Ireland*.

<sup>60</sup>Case C-239/03, *Commission v France*.

<sup>61</sup>Yet, as the EU is not itself a member of the UN, any action at the ICJ will have to be initiated by one or more Member States.

**Box 9.4 The Powers of the Commission in International Litigation**

Article 335 TFEU renders the Commission competent to represent the Union, a power commonly assumed to extend to representation vis-à-vis international courts and tribunals. Nonetheless, Article 16(1) TEU hands key policy-making and coordination prerogatives to the Council, which should not be too easily overlooked in such dossiers. For many years, the Council clung to the idea that the Commission was unable to act when no EU position had been (pre)defined, in accordance with Article 218(9) TFEU. In surprising contrast, in a dispute regarding an advisory procedure at the International Tribunal for the Law of the Sea (Case C-73/14), the ECJ held that the Commission may submit written statements to international courts on behalf of the EU, without it needing to ask prior approval from the Council.

Where the dispute pertains to a mixed agreement, the room for litigation by the Member States is stymied by the legal obligations resulting from EU membership. In the seminal *Mox Plant* case, Ireland was held to account for suing the United Kingdom at the ITLOS.<sup>62</sup> The ECJ considered that the subject matter of the dispute related to an area of shared external competence, as the matters covered by the UNCLOS provisions were to a large extent already regulated by Union measures. Ireland was therefore condemned for violating Article 4(3) TEU, as well as Article 344 TFEU, which prohibits Member States from submitting a dispute on the interpretation or application of the Treaties to any methods of settlement other than those provided for therein.<sup>63</sup> Again, the Court presumed that it is in the Union's interest to rein in a Member State for violating any part of an international agreement, with the fact that it had been concluded under a shared competence presenting no reason to turn a blind eye.

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## 9.4 Conclusion

The preceding chapters have highlighted the interplay between the different sets of rules that together make up the layered global player. As the current chapter has demonstrated, at the heart of this legal construction are the Member States, which are gradually coalescing but—in the absence of a comprehensive federal or unitary constitution—still proudly present on the global scene themselves. They remain independent actors that are active under, and fully recognised by, the rules of public international law.

At the same time, while the body of international legal rules envelops both the Union and the Member States that make up its core, these norms have a differing

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<sup>62</sup>Case C-459/03, *Commission v Ireland*.

<sup>63</sup>Remarkably, the UNCLOS in fact stipulated itself that specific dispute resolution mechanisms should take precedence over those in part XV of the Convention.

weight and relevance within the different layers. In the foregoing, we have seen for example how the classic adage of *pacta tertiis nec nocent nec prosunt* cannot be adhered to without qualification where it concerns the external engagements of the EU and its Member States. We have also observed how in the European context, the principle of *pacta sunt servanda* has mutated into a much more potent duty of loyalty.<sup>64</sup>

At this point though, it should be admitted that the norms reviewed, stemming from a kaleidoscope of international, European and domestic sources, do not dovetail completely, and that the emerging picture is therefore not one of a seamless web. In its own way, the difficulty of categorising the Union's reception of external norms in the classic terms of monism and dualism testifies to that fact. It is open to question whether a clearer alignment may be expected in the future, while the legal world order grows ever more complex, and the dilemmas before the European Courts proliferate.

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<sup>64</sup>Cf. De Baere and Roes (2015).