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THE EU AND ITS MEMBER STATES IN THE WORLD: LEGAL AND POLITICAL DEBATES

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INTERNATIONAL AGREEMENTS: AN ASSESSMENT OF A FRAGMENTED PRACTICE

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ABSTRACT

This paper examines the legal aspects of the relationship between the European Union legal order and international agreements concluded by Member States with third countries, by analysing various forms of interference on the part of EU institutions in the exercise of Member States' treaty-making powers. The paper focuses in particular on three different mechanisms used by the EU to coordinate Member States' external action: agreements concluded on behalf (or in the interest) of the Union, agreements concluded under a previous EU authorisation and the practice of common positions that Member States have to follow in international organisations to which the EU is not a party. Although still being sovereign entities within the international community, Member States are required to uphold the Union's interest in their relationship with third countries or international organisations and to avoid any action capable of affecting the EU legal order.

1. Introduction

Research on the relationship between the European legal order and international law has traditionally focused on the issue of international obligations directly binding upon EU institutions. The European Union (EU) can be bound by an international norm by virtue of an agreement concluded by the EU itself with third countries, or by the existence of a norm of customary international law.[1]

At the same time, detailed analyses have been devoted to the international obligations Member States have assumed towards third countries before the creation of the EU or before their accession to the organisation. This kind of international obligations – "previous international obligations" or "anterior treaties" – are relevant for the EU legal order in so far as they are protected by Article 351 of the Treaty on the Functioning of the European Union (TFEU).[2] The Court of Justice of the EU (CJEU) has addressed the issue of previous agreements on several occasions, and this has led to a certain extent of clarity on their value within the EU legal order and on Member States obligations towards the EU in case of conflicting international norms.[3]

Much less has been said about a different case of interaction between EU law and international law, that is on so called "posterior treaties", agreements concluded by Member States after the creation of the then European Community (EC) or after their accession to the EU. The reason for this lack of interest is perhaps due to the fact that the CJEU has only incidentally intervened on the matter, generally avoiding the most problematic aspects arising in these situations. Moreover, while the Treaties, after the entry into force of the Treaty of Lisbon, contain many provisions on EU international agreements, they are silent on the matter of international treaties binding only EU Member States. Nevertheless, in recent years, scholars have started to devote more attention to the matter, due to the increasing number of treaties that Member States are still ratifying on their own, even if with some forms of control by the EU.[4] This raises several questions on the scope of Member States' foreign powers, the

[1] According to art. 216 of the TFEU "[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States." See the recent study of M. MENDEZ, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford, Oxford University Press, 2013. On the status of customary law within the EU legal order see J. WOUTERS, D. VAN EECKHOUTTE, *Giving Effect to Customary International Law Through European Community Law*, Working Paper 25, June 2002, Leuven Institute for International Law; T. KONSTADINIDES, *The Meso Level: Means of Interactions between EU and International Law: Customary International Law as a Source of EU Law, A Two-Way Fertilisation Route?*, in *Yearbook of European Law*, 2016, p. 513 ff.

[2] Art. 351(1) TFEU reads: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."

[3] For the relevant case law and an analysis on agreements pre-dating accession to the EU see P. EECKHOUT, *EU External Relations Law*, Oxford, Oxford University Press, 2011, pp. 421-434. However, the Court's position in relation to art. 351 of the TFEU has been criticized for having interpreted the clause as a way for balancing EU law with international commitments of Member States. See J. KLABBERS, *Treaty Conflict and the European Union*, Cambridge, Cambridge University Press, 2009, p. 148.

[4] See e.g. J.V. VAN ROSSEM, Interactions between EU Law and International Law in the Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not the Community, in Netherlands Yearbook of International Law, 2009, p. 183 ff. A. ROSAS, The Status in EU Law of International Agreements Concluded by EU Member States, in Fordham International Law Journal, 2011, p. 1304 ff.; M. CREMONA, Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union, in A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (Eds.), A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood, Oxford, Hart Publishing, 2011, p. 435 ff.; ID, Member States Agreements as Union Law, in E.

status in the EU legal order of agreements concluded by them with third countries and the possibility to consider those agreements as binding on EU institutions.

The present contribution is aimed at describing the mentioned phenomenon and at understanding its legal implications for both the EU legal order and for Member States' positions *vis-à-vis* third States. In the first part, the article will make an attempt to conceptualize the issue and to present various situations in which Member States continue to retain a form of treaty-making power at the international level. In the next sections, the paper will provide an analysis of the practice of the EU in relation to agreements concluded by Member States on its behalf and on agreements authorized by the Union itself, trying also to identify the effects that Member States agreements can produce within the EU legal order.[5] In the last part, the work will offer a brief account of the questions raised in the context of common positions established by the EU in relation to Member States' action within other international organisations.

2. International Agreements of EU Member States: a Fragmented Practice

Posterior treaties of Member States are not easy to define nor to classify. Using a negative definition, we should understand posterior agreements as agreements which do not fall under the scope of application of Article 351 of the TFEU.

Some authors have attempted to classify Member States international agreements by focusing on different elements: the time of the conclusion of the agreement, the type of EU competence to which the agreement is related or the effect they produce in the EU legal order.

Rosas has proposed to classify Member States treaties as: agreements binding on the Union through functional succession; agreements to which Union secondary law makes a *renvoi*; agreements concluded in the interests of the Union; and agreements that should be taken into account in the application or in the interpretation of EU law.[6] As it is clear, this classification already takes into account the effects Member States agreements can produce within the EU legal order.

There exists a wide range of situations in which Member States can exercise their treaty-making power on the international plane, and they are not strictly limited to matters that fall outside the competence of the EU. In fact, on several occasions, EU Member States have ratified treaties which were (at least partly) covered by an EU competence, even by an exclusive one. Thus, competence is not a clear defining criterion to classify posterior treaties concluded by Member States.

The time of conclusion could offer a better perspective, although it is not always easy to distinguish between an anterior and a posterior treaty, especially when an external

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CANNIZZARO, P. PALCHETTI, R. A. WESSEL (eds.), International Law as the Law of the European Union, Leiden, Martinus Nijhoff Publishers, 2012, p. 291 ff.

[5] This paper does not deal with international agreements between EU Member States (so called *inter se* agreements), since they pertain to a completely different legal situation, which is regulated by different rules. On this issue, see generally R. SCHÜTZE, *Foreign Affairs and the EU Constitution. Selected Essays*, Cambridge, Cambridge University Press, pp. 138-155; A. DIMOPOULOS, *Taming the Conclusion of* Inter Se *Agreements between EU Member States: The Role of the Duty of Loyalty*, in *Yearbook of European Law*, 2015, p. 296 ff.

[6] A. ROSAS, *The Status in EU Law of International Agreements Concluded by EU Member States*, *supra* note 4, p. 1324 ff.

competence of the EU later emerges by virtue of the AETR doctrine, or when amendments to anterior agreements lead to the exclusion of the applicability of Article 351 TFEU.[7]

There is another relevant category of agreements, that is those binding on the EU according to the doctrine of functional succession.[8] The doctrine has been applied by the CJEU only in relation to the GATT, and it requires very specific and strict conditions in order for the EU to succeed in Member States' international obligations.[9] Moreover, even if it could theoretically be applied in cases of posterior treaties, it has usually been invoked to establish the binding character for the EU of Member States' anterior treaties.

However, rather than constituting a proper category of agreements, the case of the functional succession should be seen as one of the possible effects that Member States' agreements have in the EU legal order, in the sense that, whenever there has been a complete transfer of competence to the Union (a supervening exclusive competence) in the subject matter regulated by a treaty to which all Member States are party, the latter could become binding for the Union itself.[10]

It is nonetheless clear that attempts to classify posterior treaties have not led to more clarity on their relationship with EU law. Thus, it seems that an analysis of the practice concerned could be conducted by looking at the degree of EU "interference" in the exercise of Member States' treaty-making power. This choice leads – for the purpose of this article – to distinguish between different patterns that create limits to Member States' autonomy in the management

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[7] See, e.g., the *Open Skies* judgments: CJEU, case C-467/98, *Commission v. Denmark*, EU:C:2002:625, para. 39; CJEU, case C-468/98, *Commission v. Sweden*, EU:C:2002:626, para. 37; CJEU, case C-469/98, *Commission v. Finland*, EU:C:2002:627, para. 39; CJEU, case C-471/98, *Commission v. Belgium*, EU:C:2002:628, para. 50; CJEU, case C-472/98, *Commission v. Luxemburg*, EU:C:2002:629, para. 45; CJEU, case C-475/98, *Commission v. Austria*, EU:C:2002:630, para. 47; CJEU, case C-476/98, *Commission v. Germany*, EU:C:2002:631, para. 66; more recently, CJEU, case C-523/04, *Commission v. Netherlands*, EU:C:2007:244, paras. 51-52.

[8] The Court has accepted in at least one case that an agreement concluded by Member States can have binding effects upon the Union. In *International Fruit Company* the Court was asked to assess the compatibility of a trade regulation in the light of the GATT 1947. Although previously concluded only by Member States, the Court acknowledged that the then Community had already assumed the functions inherent in the tariff and trade policies and that "[b]y conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the General agreement. From this transfer of powers – also recognised by the other contracting parties – it followed that the provisions of the GATT had the effect of binding the Community. See CJEU, joined cases C-22-24/72, *International Fruit Company*, EU:C:1972:115, paras. 14-18. The succession is defined "functional" in so far as it relates to a transfer of functions and not of territory, which is instead required by general international law for the succession of States in international treaties. See R. UERPMANN-WITTZACK, *The Constitutional Role of International Law*, in A. VON BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, Oxford, Oxford University Press, 2009, p. 131, 149, where the author stresses that "[t]he rules of state succession are applicable when territorial sovereignty over an area has passed from one state to another. In the case of the EC, this is not what has happened. The EC is not a state. In particular it has not replaced its member States as territorial sovereignties but has just taken over some of their functions. One could ask if such a functional succession leads to a transfer of obligations under international law; however, such a functional succession has thus far been recognized neither by international treaties nor by customary international law as a reason for a legal succession."

[9] See J. WOUTERS, J. ODERMATT, T. RAMOPOULOS, *Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law*, in M. CREMONA, A. THIES (eds.), *The European Court of Justice and External Relations Law*, Oxford, Oxford University Press, 2014, pp. 255-261.

[10] The effects of this succession, however, will only involve the EU and its Member States and not the other third States. Consequently, the agreement will become binding on the Union and EU secondary law could be reviewed in the light of its norms, but the position of Member States *vis-à-vis* third States will stay unchanged. They will still be responsible for any breach of the treaty.

of their international relations.[11] In particular, the article will present three forms of interactions between EU law and international agreements of Member States which have recently acquired a remarkable relevance for the field of EU external action, namely: agreements concluded by the entirety of EU Member States in the interest or on behalf of the Union; agreements concluded with a prior authorization of the EU; and the practice of the establishment of a common position Member States have to adopt in the context of other international organisations.

The EU has several times authorized the Member States to ratify treaties falling within an exclusive external competence, whether express or implied and has recently intervened on how Member States should behave in other international organisation to which the Union is not a party. There are different reasons for the EU to adopt such decisions, and they are not necessarily of a legal nature.

First of all, the EU could deem that, notwithstanding its legal capacity to directly ratify the treaty, it would be better to leave the negotiation and the ratification to the Member States. It is a matter of political discretion, by which the EU acknowledges a *de facto* situation, leaving some room for Member States treaty-making power. In the *AETR* case, the then Community, even if claiming an implied external competence in relation to the agreement, decided to let Member States ratify the convention on its behalf, due to the advanced stage of the on-going negotiation.[12]

Another example has been recently provided by a 2012 Regulation establishing a system of transitional arrangements for Member States' bilateral investment treaties (BITs) with third countries. According to the new Article 207 of the TFEU, foreign direct investments have become part of the Common Commercial Policy and thus have become an exclusive external competence of the EU. However, instead of imposing the forced termination of all the existing Member States' BITs with third countries, the Regulation provides that Member States must notify to the Commission all the treaties in force and requests a previous authorization for any amendment to those treaties or for the conclusion of a new BIT with a third country.[13]

In some cases, the reason for authorizing the Member States to act on behalf of the Union is a legal impediment. There are treaties that are open for accession only to States and not to international organisations or other entities, nor to regional economic integration organisations. The usual examples are agreements negotiated within UN agencies, like the

[11] On this perspective, see G. GAJA, Restraints Imposed by European Community Law on the Treaty-Making Power of the Member States, in I. CAMERON, A. SIMONI (eds.), Dealing with Integration, volume II: Perspectives from Seminars on European Law 1996-1998, Uppsala, 1998, p. 97 ff. See also J. KLABBERS, Restraints on the Treaty-Making Powers of Member States Deriving from EU Law: Towards a Framework of Analysis, in E. CANNIZZARO (ed.), The European Union as an Actor in International Relations, Leiden, Martinus Nijhoff Publishers, 2002, p. 151 ff.; 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, C. BARNARD, M. DOUGAN, E. SPAVENTA (eds.), A Constitutional Order of States. Essays in EU Law in Honour of Alan Dashwood, Oxford, Hart Publishing, 2011, p. 545 ff.

[12] It was the Court itself that, accepting the Council's argument, decided to let Member States conclude the agreement on behalf of the then European Community. See CJEU, case 22/70, *Commission v. Council (AETR)*, EU:C:1971:32, paras. 82-90. The Regulation that implemented the Agreement recognised this result, by providing that "Whereas, since the subject matter of the AETR Agreement falls within the scope of Regulation (EEC) No. 543/69, from the date of entry into force of that Regulation the power to negotiate and conclude the Agreement has lain with the Community; whereas, however, the particular circumstances in which the AETR negotiations took place warrant, by way of exception, a procedure whereby the Member States of the Community individually deposit the instruments of ratification or accession in a concerted action but nonetheless act in the interest and on behalf of the Community." See Regulation EEC No. 2829/77 of 12 December 1977.

[13] Regulation (EU) No. 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investments agreements between Member States and third countries.

International Labour Organisation (ILO) and the International Maritime Organisation (IMO). In *Opinion 2/91*, the Court held that the ILO Convention n. 170 concerning Safety on the Use of Chemicals at Work was covered by an exclusive EU competence, but since the EU was not able to ratify the Convention it was for the Member States to conclude the treaty "jointly acting in the Community's interest".[14] Indeed, this is a dynamic that pertains to cases of exclusive competence of the EU. In the event of an agreement falling within a shared competence, the most likely solution will be a mixed agreement, jointly ratified by the EU and the entirety of its Member States.[15]

There are still other cases in which an agreement binding on the Member States could become relevant for the EU, and it is the one of a *renvoi* to the agreement provided by EU primary or secondary law. Examples of the former are the United Nations (UN) Charter and the European Convention on Human Rights (ECHR) or the 1951 UN Convention of the Status of Refugee and the Protocol to the same convention of 1977.[16] There are instead several references contained in secondary law to international agreements of Member States[17].

As it is evident, there is still a great variety of situations in which Member States exercise their treaty-making power. In this article, however, we will address only three specific hypotheses that assume relevance both for the EU and for the international legal order, in order to understand how the Union has come to manage the Member States' international agreements.

3. Agreements Concluded by Member States on Behalf of the EU

The practice of agreements being concluded by Member States on behalf of the Union has acquired a notable relevance in recent years.[18] As we have seen, there could also be political reasons for the Union to decide to act externally through its Member States, even if it is often a matter of legal impediments. In all these cases, Member States enjoy a very limited degree of "contractual autonomy", certainly the most limited if compared to other situations in which

[14] CJEU, Opinion *2/91 (ILO Convention n. 170)*, EU:C:1991:490, para. 5.

[15] Furthermore, the TFEU recognises a residual treaty-making power of Member States in specific matters. Arts. 34(2) allows for Member States participation in international organisations and conferences. Articles 165(3), 166(3), 167(3) and 168(3) provide that Member States shall enhance cooperation with third countries in the field of education, sport, vocational training, culture and public health. Also articles 191(4), 209(2), 212(3) and 214(4) preserve a role for Member States, stating that the competence of the Union to conclude treaties in the fields of environmental protection, development cooperation, economic, financial and technical cooperation is "without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements."

[16] The effects produced by a *renvoi*, even if included in primary law, is however limited. The Court has recently acknowledged not to be competent to interpret the 1951 Geneva Convention, since the EU has not accessed it. See CJEU, case C-481/13, *Qurbani*, EU:C:2014:2101, para. 25: "The fact that Article 78 TFEU provides that the common policy on asylum must be in accordance with the Geneva Convention and that Article 18 of the Charter of Fundamental Rights of the European Union makes clear that the right to asylum is to be guaranteed with due respect for that convention and the Protocol relating to the status of refugees of 31 January 1967 is not such as to call into question the finding in paragraph 24 above that the Court does not have jurisdiction."

[17] See, e.g., Regulation No. 338/97/EC on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein; Regulation No. 392/2009/EC on the Liability of Carriers of Passengers by Sea in the Event of Accidents; Directive No. 2005/35/EC on Ship-Source Pollution and on the Introduction of Penalties for Infringements. The Court has recognised in these cases that the reference provided by secondary legislation could entail a duty to take the agreement into consideration as an interpretative source. See CJEU, case C-510/99, *Xavier Tridon*, EU:C:2001:559, paras. 23-25.

[18] In contrast to what was originally expected. See P. KLEIN, *La Responsabilité des Organisations Internationales*, Bruxelles, Bruylant, 1998, p. 329 : "L'hypothèse de la représentation de la Communauté européenne par ses Etats membres dans le domaine conventionnel appartient donc globalement au passé."

they negotiate and ratify international treaties. Indeed, the conclusion of these agreements requires a considerable involvement of EU institutions.

The procedure followed by the Commission and the Council for these agreements recalls the one set up by Article 218 of the TFEU for the conclusion of treaties by the Union itself. The Commission makes a proposal to the Council for a decision authorising Member States to negotiate and ratify an agreement in the interest of the EU. The terminology of these decisions has changed during the years. While, originally, they were drafted in terms of Member States acting "in the name and on behalf" of the Union, recent decisions have shifted to less technical formulations, usually requesting Member States to act "in the interest of the Union". However, the change in terminology seems not to be particularly relevant as regards the nature of the decision or its effects.

It is worth noting that the role of the negotiator is attributed to the Member States, which have to act according to a specific negotiating position, agreed by the Council and by the Commission.[19] The entire negotiation phase must be conducted in compliance with the duty of sincere cooperation, enshrined in Article. 4(3) TEU.[20] The value of the common position is self-evident: the result of a unitary representation of the Union by way of its Member States is achieved only in so far as the Member States conform themselves to the jointly defined negotiating position. In this sense, the duty of cooperation becomes an obligation of result, meaning that if Member States are not able to achieve the objective set forth in the common position, they are obliged not to conclude the agreement.[21]

Once the text has been negotiated, the Council can authorise the Member States to conclude the treaty on behalf of the Union. The adoption of this decision, which must also provide the legal basis under which the agreement is to be ratified, should follow the same procedure of Article 218 of the TFEU. This must include, of course, the necessary consent of the European Parliament when required according to article 218(6) TFEU. This is also confirmed by the practice of the Commission. In a recent proposal to the Council, for a decision authorizing the Member States, in the interest of the EU, to ratify ILO no. 170 Convention, the Commission has stated that the proposal "is based on Article 218(6), applicable by analogy".[22] Council decisions also provide Article 218 of the TFEU as a legal basis for this kind of authorisation. The institutional balance that the Treaties have created between the different EU institutions should not be altered by the recourse to exceptional forms of external action.

Even if it will become increasingly rare, the practice of the agreements concluded on behalf of the EU has developed also in relation to agreements not entirely covered by an exclusive competence of the EU. Nonetheless, with the aim of preserving the integrity of internal norms and, at the same time, of guaranteeing the coherence of its external action, the EU has

[19] Note, however, that there are cases where the role of the negotiator has been attributed to the Commission, as, for instance, in the negotiation of the Protocols of amendment to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy.

[20] See M. CREMONA, *Member States Agreements as Union Law*, *supra* note 4, pp. 296-297. See, in this sense, the remarks of the Commission in COM (2014) 0559 final, Proposal for a Council Decision authorising Member States to ratify, in the interest of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation with regard to matters related to judicial cooperation in criminal matters, Explanatory memorandum, p. 3.

[21] The content of the duty of cooperation would thus be rather different from that applicable in case of mixed agreements for the exercise of shared competences, where it is only an obligation of best efforts. This inevitably derives from the exclusive nature of the competence of the EU at stake.

[22] See, e.g., COM/2012/0677, Commission Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning Safety in the Use of Chemicals at Work, 1990, of the International Labour Organization (Convention No 170); COM/2013/152, Commission Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organization (Convention No 189).

preferred to adopt such an instrument. Having its Member States as agents on the international level, even when they are partly exercising their own external competences, would grant the Union the possibility to participate in legal regimes that would otherwise be precluded.

A remarkable number of international treaties has until today been concluded by Member States as agents of the EU (or the then EC). Apart from the already mentioned AETR and ILO No. 170 Convention, even recent practice is rather extensive. In 2002, the Council authorised Member States to ratify the Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunkers Convention) of 2001.[23] The case is relevant, as parts of the Bunkers Convention, particularly those related to matters of jurisdiction and recognition or enforcement of judgements, were covered by EU exclusive competence, while all the other substantive norms provided in the treaty clearly fell within the competence of the Member States. Notably, Article 5 of the Council Decision imposes on Member States the duty to 'use their best endeavours to ensure that the Bunkers Convention is amended to allow the Community to become a contracting party to it'.[24]

Other examples are offered by the Decision authorising the Member States to ratify the 2003 Protocol to the 1992 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage and the Decision authorising the Member States to ratify the 1996 Hague Convention on Parental Responsibility.[25] Recently the Council has authorized Member States to ratify, in the interest of the Union, two ILO Conventions, namely the No. 170 Convention and the No. 189 Convention concerning Decent work for Domestic Workers.[26] Member States have also been authorised to ratify in the interest of the Union the

[23] Council Decision No. 2002/762/EC of 19 September 2002.

[24] Other authorizations by the Council are to be found in the nuclear field, in relation to the Convention of 29 July 1960 on Third-Party Liability in the Field of Nuclear Energy, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982. See Council Decision No. 2003/882/EC and Council Decision No. 2004/294/EC. See also Council Decision No. 2007/727/EC, which subsequently authorized Slovenia to individually ratify, in the interest of the Union, the Protocols to the Convention, due to the fact that, at the time of the previous authorizations, Slovenia was not yet a member of the EU. This is, however, a different case from that of authorization given on individual basis, which will be discussed in the next section.

[25] See Council Decision No. 2004/246/EC of 2 March 2004 and Council Decision No. 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

[26] See Council Decision No. 2014/52/UE of 28 January 2014, authorising Member States to ratify, in the interest of the European Union, the Convention concerning Safety in the Use of Chemicals at Work, 1990, of the ILO (Convention No 170); Council Decision No. 2014/51/EU of 28 January 2014, authorising Member States to ratify, in the interest of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189).

2014 Protocol to the ILO Forced Labour Convention[27] and the Arms Trade Treaty, which has been directly negotiated by the Commission.[28]

Lastly, a number of Council decisions, authorising the Member States to conclude in the interest of the Union certain bilateral agreements for the accession of new States to the 1980 Hague Convention on Child Abduction, have been the object of the recent *Opinion 1/13* by the CJEU.[29] Interestingly, the Court has confirmed that decisions related to Member States' agreements could be scrutinised under the Article 218(11) TFEU procedure, thus extending the scope of the opinion procedure beyond the terms of the provision.[30] This also seems to confirm that EU institutions are now likely to consider agreements concluded by the Member States on behalf of the EU as a particular form of EU external action.[31] This is also linked to the fact that agreements concluded in the Union's interest constitute a form of collective representation of the EU by means of its Member States acting collectively on the international plane, which marks the difference with agreements concluded individually by a single Member State with a third country, analysed in the next section.

[27] Due to the presence of opt-out clauses in the field of criminal cooperation, the authorisation to the ratification of the Protocol has been split into two different decisions, one addressing criminal cooperation provisions and the other addressing social policy issues. See Council Decision n. 2015/2071/EU of 10 November 2015, authorising Member States to ratify, in the interests of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation as regards Articles 1 to 4 of the Protocol with regard to matters relating to judicial cooperation in criminal matters, in OJ L 301/47 and Council Decision n. 2015/2037/EU of 10 November 2015, authorising Member States to ratify, in the interests of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation with regard to matters relating to social policy, in OJ L 298/23.

[28] See Council Decision n. 2014/165/EU of 3 March 2014, authoring Member States to ratify, in the interests of the European Union, the Arms Trade Treaty, in OJ L 89/44. Art. 1 of the Decision makes clear that it applies only "to those matters falling under the exclusive competence of the Union".

[29] The dispute arose when the Commission proposed to the Council the adoption of certain decisions authorising Member States to conclude bilateral agreements with new States wishing to accede to the 1980 Hague Convention on Child Abduction. Art. 38 of the Convention, in fact, provides that any new acceding States must conclude a bilateral agreement of accession with every State party to the Convention itself. The Council did not adopt the proposed decisions and the Commission brought a request for an opinion by the Court pursuant art. 218(11) TFEU. EU Member States objected during the proceeding that these agreements could not be considered as falling within the scope of application of an opinion procedure, since they do not constitute proper international agreements but merely acts of implementation of the Convention. See CJEU, *Opinion 1/13*, EU:C:2014:2303, paras. 29-32.

[30] See *Opinion 1/13*, paras. 43-44, once again stating that "[..]the question whether it may not be possible for the EU formally to become a party to an international agreement is irrelevant. In a situation where the conditions for being a party to such an agreement preclude the EU itself from concluding the agreement, although the latter falls within the EU's external competence, that competence may be exercised through the intermediary of the Member States acting in the EU's interest." This conclusion had been already envisaged in M. CREMONA, *Trustees of the Union Interest*, *supra* note 4, p. 445, noting also that a negative decision of the Court on the compatibility of the agreement with EU law would not invalidate the agreement under international law. Of course, States will remain responsible for an unlawful exercise of their treaty-making power under EU law.

[31] However, the decision of the Court has been criticised also in the light of the fact that many of the concerned agreement were not more 'envisaged' according to art. 218(11) TFEU, since they've already been concluded by some Member States with third States, without the Council's intervention. In these cases, it seems that a better solution would have been to start an infringement procedure against Member States, in order not to jeopardise the preventive function of the opinion mechanism. See on this point I. GOVAERE, *"Setting the International Scene": EU External Competence and Procedures Post-Lisbon Revisited in the Light of Opinion 1/13*, in *Common Market Law Review* 52, pp. 1299-1305.

4. The Authorization of Member States to Conclude International Agreements

A rather different practice is that of prior authorisation for individual Member States to conclude an agreement with one or more third States. This section will present the main features of this kind of procedure, in order to distinguish these cases from those previously analysed.

First, this practice is usually followed when the agreement that the Member State is ratifying falls partly within an EU exclusive competence. Although the procedure for authorisation for the conclusion of treaties has been provided by some regulations in limited fields, it might be possible that there exists a general duty for Member States to ask for prior authorization when they are about to conclude a treaty with third States in a matter falling within the exclusive competence of the EU. This duty can be derived from the general provision of Article 2(1) of the TFEU, which provides that

> 'When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts'.

Thus, whenever Member States are willing to act on the international level in a field of EU exclusive competence, they will be able to do so only if previously empowered by the Union, that is by requesting a prior authorisation to conclude of the international agreement. This seems also to be confirmed by the preamble of the regulations, in which, beside the legal basis, Article 2(1) TFEU is usually mentioned.

One of the first examples is the Regulation on air service agreements between the Member States and third countries. The regulation followed the *Open Skies* cases, decided by the European Court of Justice in 1998, in which the Court found some Member States to be in breach of their EU obligations, for having unilaterally re-negotiated their bilateral air service agreements with the United States.[32] In 2004 the above-mentioned Regulation was adopted, providing for a duty upon the Member States to notify the Commission of all the existing bilateral agreements on air service and to request authorisation for the conclusion of new bilateral agreements or for the amendment of existing ones. The rationale for such a regulation is to ensure that newly assumed international obligations of Member States are compatible with the EU legal order, and thus avoiding any possible normative conflicts between EU law and international commitments of Member States.[33]

[32] Regulation No. 847/2004/EC of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries. See references to judgments reported in note 7.

[33] The same objective is pursued by a recent regulation regarding Member States' agreements in the energy field. However, the regulation does not provide for a proper authorisation procedure, but instead it sets forth a system of information sharing between Member States and the Commission aimed at verifying the compatibility of envisaged agreements with EU law legislation in the energy sector. This could also be explained in the light of the shared nature of the Union competence in these matters. See Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, in OJ L 299/13. See also COM (2016) 053 final, Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU.

After the air service agreements Regulation, two other Regulations have been adopted in the field of cooperation in civil matters.[34] These Regulations set forth a more sophisticated mechanism, according to which the authorisation is to be requested by Member States before the opening of the negotiations. Member States will be authorised to enter into bilateral agreements under strict conditions.[35] Before the signing of the agreement they have to notify to the Commission the outcome of the negotiation, so that the Commission can assess its compatibility with EU law. Moreover, the negotiated text must provide for special clauses regarding the possibility of full or partial denunciation in the event of the conclusion of a subsequent agreement of the EU – or of the EU and its Member States – with the same third country, and the direct replacement of the relevant provisions of the agreement with the provisions of the subsequent agreement concluded by the EU with the same third country.[36] In the event of a refusal, the Commission will adopt an opinion that will be discussed with the Member State concerned.

In 2012, the new Regulation on Member States BITs was adopted. It followed the extended scope of the EU exclusive competence in the field of common commercial policy, which today, according to Article 207 of the TFEU, also covers foreign direct investments.[37] The EU, however, has preferred not to oblige its Member States to terminate all their BITs and to renegotiate them, but instead has decided to set up a procedure to assess the compatibility of already existing and of newly concluded BITs with EU law and with EU external policy. The Regulation is indeed very similar to those on civil cooperation matters, although conditions under which the authorisation is to be issued are different.[38]

In all these cases, it is for the Commission to verify the compatibility of the foreseen agreement with EU law and to decide whether to issue the authorisation. This is usually to be sought

[34] See e.g. Regulation No. 664/2009/EC of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and the law applicable to maintenance obligations; Regulation No. 662/2009/EC of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations.

[35] In particular, that the EU does not have an agreement on the same subject matter nor an agreement of this kind is likely to be concluded by the EU in the next 24 moths; that Member States have demonstrated that they have a specific interest in concluding the agreement due to economic, geographical, cultural, historical, social or political ties with the third country concerned; that the envisaged agreement will not render EU law ineffective and will not undermine the proper functioning of that law; that the agreement will not undermine the object and purpose of EU's external relations policy.

[36] Art. 5 of both Regulation No. 662/2009/EC of 13 July 2009 and Regulation No. 664/2009/EC of 7 July 2009.

[37] See L. PANTALEO, Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment, in European Foreign Affairs Review 19, 2014, pp. 312-315, arguing that the Regulation could be considered as an application by analogy of the priority rule of anterior treaties provided by art. 351(1) TFEU. See also J. P. TERHECHTE, Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties, in European Yearbook of International Economic Law, 2011, pp. 79 ff.

[38] See Regulation No. 1219/2012/EU of 12 December 2012 establishing transitional arrangements for bilateral investments agreements between Member States and third countries. Art. 9 provides conditions for the authorisation to open the negotiation: that the agreement is not in conflict with Union law, apart from the incompatibilities arising from the allocation of competences between the EU and its Member States; that it is not superfluous, because the Commission has submitted a proposal to open negotiations for the same agreement under art. 218(3) TFEU; that is consistent with Union's principles and objective for external action; that it does not constitute an obstacle for the conclusion of BITs with third countries by the EU. The Commission may also require Member States to include or remove from such agreements any clauses where necessary to ensure consistency with the Union's investment policy or compatibility with EU law.

before the signature of the treaty, once the text has been adopted. In fact, according to Article 18 of the Vienna Convention on the Law of Treaties (VCLT), the signature is the moment which triggers a general good faith obligation on the parties not to behave contrary to the object and purpose of the treaty, although the agreement only enters into force with the ratification. This procedure is aimed at facilitating the work of the Commission, which can conduct its verification on the basis of a fixed and definitive text, but before the assumption of any kind of international obligation by the Member State.

5. Effects of Member States Agreements in the EU legal order

What effects do agreements ratified by Member States have within the EU legal order? Since the EU is formally not a party to the treaty, at least from an international law point of view, what consequences does the ratification by its Member States have for the Union? The answer depends on the degree of EU involvement in the conclusion of the agreement. The different effects will be analysed according to the order followed in the sections above.

5.1 Agreements Concluded on Behalf of the EU: the Doctrine of Representation

A related issue concerns the question whether an international organisation is bound by its Member States' international obligations. It can be argued that the set of international obligations which bind an international organisation cannot be defined without taking into account the international duties of its Member States.[39] At the same time, the so-called *pacta tertiis* rule, enshrined in Article 34 of the VCLT,[40] provides that treaties can have no legal effects on third parties. However, agreements concluded by Member States on behalf or in the interest of the Union, have quite contradictory legal implications. On the one hand, they provide international obligations that States have assumed merely as agents of the EU, adhering to international legal regimes the EU has an interest to be part of, while, on the other hand, Member States remain the only subjects responsible, on the international level, for any form of non-compliance or breach of those agreements, in particular as far as implementation is concerned.

Some authors have observed that when Member States of an international organisation are concluding treaties on its behalf, the international obligations should be considered to bind the organisation as well.[41] They have thus recalled the doctrine of international representation (inspired by contract law) according to which a subject of international law can be represented by another subject in the adoption of legal acts or in the commission of legally relevant facts with one or more third parties.[42] The legal consequence of the relationship between the representative subject and the represented one is that all the obligations assumed by the

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[39] P. KLEIN, *La responsabilité des Organisations Internationales*, *supra* note 18, p. 326.

[40] Art. 34 of the 1969 Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third party without its consent." The same provision is to be found in art. 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations.

[41] P. KLEIN, *La responsabilité des Organisations Internationales*, *supra* note 18, pp. 326-331; F. NAERT, *Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations, supra* note 22, pp. 132-133.

[42] The original definition is to be found in R. DAOUDI, *La représentation en droit international*, Paris, L.G.D.J., 1980, p. 228: "un phénomène de substitution du sujet de droit représentant au sujet de droit répresenté dans l'accomplissement d'actes juridiques internationaux ou d'activités matérielle dans les relations de ce dernier avec un ou des tiers." See also A. P. SERENI, *Agency in International Law*, in *American Journal of International Law* 34, 1940, p. 638. During the preparatory works for the Vienna Convention on the Law of Treaties, the ILC discussed the matter of States concluding treaties on behalf of other States or international organisations. Much of the debate was related as to whether this practice would fall within the scope of the rules on capacity and thus would not deserve a specific regulation. During the Conference of Vienna the matter was set aside and no rule is to be found in the Convention. See ILC, 781st Meeting, in *Yearbook of the International Law Commission*, vol. I, 1965, p. 39 ff.

representative will be binding upon the represented. However, the possibility under international law of applying the doctrine of representation needs to be cautiously verified.

The VCLT does not contain any reference to the possible application of the doctrine of international representation, nor does the 1986 Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations (VCLT-IOs). Should the doctrine be considered as based on customary international law, it would be quite difficult to find the necessary evidence in State practice. Apart from the EU, examples of States representing international organisations in the conclusion of treaties with third parties are extremely rare and debated.[43] Of course, the possibility of considering the EU directly bound, *vis-à-vis* third States, to international obligations assumed by Member States on its behalf would enhance the clarity of the applicable law regime, and would help to avoid conflicts between EU law and international law. At the same time, it seems difficult to accept that such a doctrine is applicable in international treaty relations, for the reasons mentioned above.[44]

Moreover, the CJEU has never intervened on the matter, except only incidentally in the *Commune de Mesquer* case.[45] The Court made clear that both the International Convention on Civil Liability for Oil Pollution Damage and the provisions of the International Oil Pollution Compensation Fund Convention were not applicable to the case at hand, since the then Community had never ratified them and not even all the Member States were contracting parties to these treaties at the time of the judgment. The Court also referred to Council Decision No. 2004/246, which authorised Member States to conclude in the interest of the EU the 2003 Protocol to the Fund Convention, but considered that it had no relevance in that proceedings.[46] The Court does not seem, however, to have in principle excluded that agreements concluded in the interest of the EU could also be binding on the EU itself, but simply did not accept the argument that the convention had become (retroactively) binding on the Union, merely because Member States had ratified the Protocol to one of the invoked conventions in the interest of the EU. According to the settled case law of the CJEU, this can only happen throughout the application of the functional succession doctrine.[47]

To a certain extent, this problem is related to a more general question, that is whether international organisations can be considered bound by their Member States' international obligations. According to some authors, international organisations are 'transitively bound' to obligations of their Member States.[48] Moreover, the answer could also change depending on

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[43] See, e.g., P. KLEIN, *La responsabilité des Organisations Internationals*, *supra* note 18, pp. 326-330, giving an account of UN practice, with particular reference to some treaties ratified by the United States on behalf of the UN during the Korean War, and of the practice of the Danube Commission.

[44] See e.g. F. MÉGRET, F. HOFFMAN, The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities, in Human Rights Quarterly, 2003, p. 318.

[45] The case, related to the Erika accident and to its grave consequences for the French coasts, also raised the question on the status within EU law of the Convention on the liability for oil pollution damage. See CJEU, case C-188/07, *Commune de Mesquer*, EU:C:2008:359.

[46] *Ibid.,* paras. 85-86.

[47] The high threshold set by the Court's case-law, however, has rendered the application of the functional succession extremely difficult. The succession of the Union has been rejected in a number of cases, among which see CJEU, case C-301/08, *Bogiatzi*, EU:C:2009:649, paras. 26-34 (in relation to the Warsaw Convention for the unification of certain rules relating to the international carriage by air of 1929); CJEU, case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change (ATAA)*, EU:C:2011:864, para. 63 (in relation to the Chicago Convention on International Civil Aviation of 1944).

[48] See e.g. H. G. SCHERMERS, N. M. BLOKKER, *International Institutional Law*, Leiden, Martinus Nijhoff Publishers, 2011, p. 996, that, drawing upon the principles on State succession, have considered that "by analogy, an organisation formed by States will be bound by the obligations to which the individual states where committed when they transferred powers to the organisation."

the number of Member States that have ratified a certain convention.[49] Indeed, it is preferable to consider the organisation bound only to agreements ratified by all Member States, to exclude the risk of indirectly applying a treaty norm to third parties. In a recent judgment, the CJEU has upheld a similar reasoning, confirming the possibility of interpreting EU secondary legislation in conformity with an international agreement only when the latter has been ratified by all EU Member States.[50] In any case, it remains unclear whether this "transitive" assumption of Member States obligations by the organisations will apply only in relation to previous agreements or even to subsequent ones.[51]

Even if decisions authorizing Member States to conclude a treaty on behalf of the Union cannot produce any external effect, that is to bind the Union on the international level, the internal effects of these decisions must be analysed.

It is submitted, in fact, that agreements that all Member States have concluded in the interest of the EU should be considered as internally binding on the Union, that is, in its relationship with the Member States. Indeed, when the competence exercised by the Union is exclusive and it is in the interest of the Union itself to enter into an agreement with third States, but it proves to be difficult to achieve this, it can be argued that the EU has shown the political will and has somehow expressed its consent to be bound by the treaty.[52] In that case the participation of the Union in the negotiations and the acknowledgement by third States of the fact that Member States are simply representing the EU in the conclusion of the agreement, seems to confirm that the agreement is directly binding on the Union.[53]

Furthermore, in the majority of the cases the responsibility for the implementation of these agreements will fall on the EU. In fact, while Member States are responsible for the implementation of the agreement *vis-à-vis* the other contracting parties, they will not have the power to adopt any national measure which is covered by an EU exclusive competence. It is thus inevitable that the duty of implementation – at least as far as matters of EU exclusive competence are concerned – rests solely on EU institutions.[54]

All the above considerations, of course, also provide an answer to another question. When the agreement concluded by the Member States is implemented by the EU, would this amount to an integration of the agreement into the EU legal order? Would it be possible, then, to review the implementation measures in light of the agreement?

The matter is rather different in the case of agreements recalled in Union law by a *renvoi*. In *Intertanko*, the Court has recognised that the validity of an EU Directive could not be reviewed

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[49] For instance, according to De Schutter, the number of ratifying Member States will be irrelevant for the agreement to have binding effects on the organisation. O. DE SCHUTTER, *Human Rights and the Rise of International Organisations*, in J. WOUTERS, E. BREMS, S. SMIS, P. SCHMITT (eds.), *Accountability for Human Rights Violations by International Organisations*, Antwerp, Intersentia, 2010, p. 64.

[50] CJEU, case C-537/11, *Manzi v. Capitaneria di Porto di Genova*, EU:C:2014:19, paras. 45-49.

[51] See K. DAUGIRDAS, How and Why International Law Binds International Organisations, in Harvard International Law Journal, 2016, p. 350 ff.

[52] This could essentially amount to an "anticipated succession" of the EU into the obligations of Member States. See F. CASOLARI, *La Corte di giustizia e gli obblighi convenzionali assunti dall'insieme degli Stati membri verso Stati terzi: obblighi comuni o… obblighi comunitari?,* in *Il Diritto dell'Unione europea*, 2009, pp. 271-273.

[53] Moreover, in the *Libor Cipra* case, the Court has affirmed that the AETR forms part of the Community law and that it had the jurisdiction to interpret it. See CJEU, case C-439/01, *Libor Cipra and Vlastimil Kvasnicka v. Bezirkshaupt- mannschaft Mistelbach*, EU:C:2003:31, paras 23–4.

[54] Conversely, when parts of the assumed obligations fall within a retained competence of the Member States, they will also be responsible for implementing them. This implies a far more complex coordination with EU institutions, which resembles the pattern of implementation of mixed agreements, governed by the duty of loyalty. On this latter aspect see E. NEFRAMI, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, in *Common Market Law Review*, 2010, pp. 332-337.

in the light of the Marpol 73/78,[55] even though some of the provisions contained in the Directive made explicit reference to Marpol.[56] However, the Court took the view that the relevant provisions of the Directive were to be interpreted consistently with the Marpol 73/78.[57] A *renvoi* to an international agreement that is not binding upon the EU could trigger the application of the principle of consistent interpretation, in order to avoid possible conflicts between EU secondary law and international obligations of Member States.[58]

The case of agreements concluded by Member States on behalf of the EU is, however, different. If we assume that the agreement is binding upon the Union – at least from an internal point of view – this would imply that secondary law could be reviewed in the light of that agreement, subject to its capability of producing direct effects within the EU legal order.[59] This is the only way to enhance the consistency of EU external action by means of Member States representation and to avoid situations in which Member States could be deemed internationally responsible for the actions of the EU.[60]

5.2 Agreements Concluded Under Prior EU Authorisation

The main difference between agreements concluded on behalf of the EU and agreements concluded under EU authorisation is that in the latter case Member States are usually acting individually and in their own interest.[61] Their treaty-making power, however, suffers some restraints deriving from the fact that they are a member of the EU. This is caused by two main concerns: that Member States do not escape from their EU law obligations by entering into

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[55] The International Convention for the Prevention of Pollution from Ships (so-called Marpol) is one of the main instrument in international law dealing with pollution of the maritime environment by ships from operational or accidental causes. The Marpol was adopted within the International Maritime Organisation (IMO) in 1973. The Protocol of 1978 absorbed the previous convention and both of them entered into force in 1983.

[56] CJEU, case C-308/06, *The Queen, on the application of International Association of Independent Tank Owners (Intertanko) and Others v. Secretary of State for Transport*, EU:C:2008:312, paras. 50-52.

[57] *Ibid*., para. 52. See also, with reference to the CITES Convention, *Criminal Proceedings against Xavier Tridon*, *supra* note 17, paras. 23-25; CJEU, case C-154/02, *Criminal Proceedings against Jan Nilsson*, EU:C:2003:590, para. 39.

[58] The doctrine – originally conceived in order to strengthen the effectiveness of directives lacking direct effect – requires national law to be interpreted in the light of the directive's provisions. See generally M. KLAMERT, *Judicial Implementation of Directives and Anticipatory Direct Effect: Connecting the Dots*, in *Common Market Law Review*, 2006, p. 1251 ff. See also 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 the Law of the European Union*, Leiden, 2012, pp. 395-415. Authors have suggested that the duty of consistent interpretation may be considered as a corollary of the principle of systemic integration set forth by art. 31(3)(c) of the VCLT. See e.g. M. ARCARI, *The Creeping Constitutionalisation and Fragmentation of International Law: From "Constitutional" to "Consistent" Interpretation*, in *Polish Yearbook of International Law*, 2013, p. 19.

[59] However, if we consider that the agreement is binding upon the EU by the sole virtue of its implementation, it would be difficult to affirm that it could take primacy over EU secondary legislation. See M. CREMONA, *Member States Agreements as Union Law, supra* note 12, p. 309.

[60] See, in this respect, the Declaration by the ILO regarding the responsibility of Member States deriving from actions attributable to the EU, presented in relation to the conclusion of ILO No. 170 Convention, cited in *Opinion 2/91*, *supra* note 10.

[61] The need to distinguish between the two categories of agreements has been highlighted by various Authors. See, e.g., A. ROSAS, *The Status in EU Law of International Agreements Concluded by EU Member States*, supra note 4, p. 1333; M. CREMONA, *Member States Agreements as Union Law, supra* note 12, pp. 315-322. See also F. NAERT, *Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations*, in J. WOUTERS, E. BREMS, S. SMIS, P. SCHMITT (eds.), *Accountability for Human Rights Violations of International Organisations*, Antwerp, Intersentia, 2010, p. 132.

international regimes with third countries; and that the integrity and the autonomy of the EU legal order is protected from contradictory actions undertaken by different Member States.

As already seen, the duty to request an authorisation found its *raison d'etre* in preventing Member States to assume international obligations that could conflict with EU law. At the same time, the authorisation is somehow a useful tool to protect the Member States' position *vis-à-vis* third States.

Despite the EU intervention in the phases preceding the conclusion of the agreement, this cannot be considered as binding upon the Union, at least for two reasons. Firstly, the authorisation for the conclusion issued by the Commission is not in any way a proof of the consent of the Union itself to be bound by the treaty. Not only does the Commission have limited powers in the external representation of the EU,[62] its role in these agreements is to avoid any possible infringements of EU law by the external action of EU Member States, which serves a purely internal function. Secondly, agreements concluded with a prior authorisation of the EU are usually bilateral agreements. It seems difficult to argue that a single Member State, in its bilateral relations with third countries, has the power to bind the EU and the entirety of its Member States within the meaning of Article 216(2) of the TFEU. The lack of consent on the part of the EU and of the other Member States to conclude that agreement seems sufficient to exclude such an effect.

Still, these agreements are not without relevance for the EU legal order. Once the agreement has been concluded upon authorisation of the EU, it is submitted that Article 4(3) of the TFEU should govern the relationship between the EU and the Member State concerned by that agreement. Consequently, it flows from the principle of sincere cooperation, but also from the international law principles of *pacta sunt servanda* and of good faith, that EU institutions are obliged not to impede Member States to comply with their international obligations.[63] It has been argued that the principle of primacy of Member States' anterior agreements (provided in Article 351 TFEU) cannot be applied to posterior treaties.[64] AG Kokott has argued, in the conclusion to the *Commune de Mesquer* proceedings, that an application of Article. 351 TFEU is even 'conceivable where an international obligation on the part of a Member State conflicts with a subsequently agreed measure of secondary law'[65]. The Court, however, has remained silent on the argument.

6. Member States Position within Other International Organisations

The last form of interaction between EU law and Member States' international obligations relates to the position of the latter in other international organisations. Even in this case, recent practice is showing a growing degree of interference by EU institutions as to how Member States should behave within other international organisations, particularly as regards the use of voting rights. To this aim, the Treaty of Amsterdam and, subsequently, the Treaty of Nice, had provided the EU with the power to establish a common position that Member States have

[62] For an overview of the recent practice on EU institutions and external representation of the Union see A. P. VAN DER MEI, *Case Note on EU External Relations and Internal Inter-Institutional Conflicts*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 1051-1076; see also P. G. ANDRADE, *The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, in *European Papers*, 2016, pp. 115-125.

[63] Even if this duty has been until today recognized by the CJEU only with reference to international agreements falling within the scope of art. 351 of the TFEU. See, e.g., CJEU, case 812/79, *Attorney General v. Juan C. Burgoa*, EU:C:1980:231, para. 9.

[64] See Capotorti AG in Case C-181/80, *Procureur Général v. Arbelaiz-Emazabel*, EU:C:1981:192, para. 4.

[65] See Kokott AG in Case C-188/07, *Commune de Mesquer*, *supra* note 45, para. 95. According to this argument, however, the posterior treaty would not prevail over prior secondary law.

to follow when they are acting in the framework of international organisations.[66] Until recently, however, the norm has been usually applied to organisations to which both the Union and the Member States were parties.

Today, Article 218(9) TFEU attributes to the Council the competence to adopt such a common position. The norm is a confirmation of the Court's case-law on the duty of sincere cooperation under Article 4(3) TEU and its implications on the scope of Member States' individual action. Article 218(9) TFEU reads as follows:

> 'The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement'.

It follows from this Treaty article that the rationale behind the common position is to strengthen the coherence of the external action of the EU by requiring Member States to behave on the international level in a manner consistent with EU law and according to EU interests. This was clearly the argument behind the Court's decision in the *Commission v. Greece* case, which was related to a unilateral proposal put forward by Greece within the framework of the IMO.[67] In this case, however, the breach attributed to Greece consisted in the adoption of a unilateral proposal in a matter falling within the Union's exclusive competence, notwithstanding the fact that the Union was not a member of the IMO. According to the Court, the fact 'that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest'.[68] The argument of a *de facto* exercise by the Member States of Union's external powers is not new for the Court and evidently it recalls the one applied in the context of agreements concluded by Member States on behalf of the EU. The aim, once again, is to avoid actions on the international plane that might negatively affect the integrity of EU law, particularly when there is a risk of Member States assuming international obligations capable of affecting internal common rules.

In a similar vein, the Court considered a few years later, in the *Commission v. Sweden* case, that Sweden had breached its EU law obligations by unilaterally proposing the listing of a substance within an annex to the Stockholm Convention on Persistent Organic Pollutants.[69]

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[66] The EEC Treaty did not contain any such procedure, even if art. 116 provided that "[f]rom the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organisations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action." The Court has frequently made reference to the rule. See CJEU, joined cases C-3/76, 4/76, 6/76, *Kramer and others*, ECLI:EU:C:1976:114, paras. 42-44; CJEU, *Opinion 1/78*, ECLI:EU:C:1979:224, paras. 49-50, in which the Court affirmed that art. 116 was conceived with a view to evolving common action by Member States in international organisations of which the Community was not part and that, in such situations, "the only appropriate means is concerted, joint action by Member States as member of the said organisation."

[67] The proposal was related to the establishment of a system of monitoring of compliance with the SOLAS and the International Ships and Port Facility Security Code, whose objects fell within the scope of already adopted EU secondary legislation.

[68] CJEU, case C-45/07, *Commission v. Greece*, EU:C:2009:81, paras 31-31.

[69] CJEU, case C-246/07, *Commission v. Sweden (PFOS),* EU:C:2010:203. On the case see G. DE BAERE, *"O, Where is Faith? O, Where is Loyalty?" Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the Light of the PFOS case*, in *European Law Review*, pp. 405-419. See also M. CREMONA, *Case C-246/07, Commission v. Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010*, in *Common Market Law Review*

In that case, a particular emphasis was put on the obligations for Sweden deriving from the general duty of sincere cooperation in the field of external relations, but Sweden's breach was mainly a consequence of the fact that the Union was trying to set a common position from which Sweden decided to depart. Therefore, even if the competence at stake was a shared one, the Court applied the principle of sincere cooperation as entailing a duty on the Member States to facilitate the achievement of the objectives set forth in the Treaties and, in any event, not to jeopardise them.[70]

Although *Commission v. Greece* and *Commission v. Sweden* were relevant in assessing the scope of Member States' obligations when acting on the international plane – in particular as regards the need to adopt a common attitude *vis-à-vis* third States or international organisations – they were not directly related to the question of EU powers in relation to an international organisation to which only Member States were parties.

Even after the *CITES* case, in which the Courts addressed the interpretation of Article 218(9) TFEU, the question remained unsettled. This case was about a dispute regarding an EU common position within the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The EU was not a party to the Convention, but it had adopted secondary legislation with a view to implement CITES within the EU legal order. The issue at stake was mainly related to the nature of Article 218(9) TFEU and to whether it could be regarded as a sufficient and autonomous legal basis for the establishment of a common position by the Council. In this particular case, though, it was not a common position of the EU that the Council had established but a common position to be adopted by the Member States within the Conference of the CITES. The Court, following the opinion of the Advocate General, deemed that Article 218(9) TFEU could not constitute the only legal basis for such an act, being a competence of a procedural character. It confirmed that a substantive legal basis would have been necessary for the act to be legitimate. The Court did not take any position as to whether Article 218(9) TFEU could be applicable also to international organisations or agreements to which only Member States are parties. But the fact that it deemed necessary for such a decision to mention a substantive legal basis could be read as an implicit acknowledgment of this possibility.[71]

In the recent *OIV* case the Court has firmly confirmed the applicability of Article 218(9) TFEU to situations in which only the Member States are parties to an agreement or members of an organisation. The judgment is of great relevance for the whole field of EU external relations and of course it is of a particular significance in the analysis of the interaction between EU law and international agreements of Member States.

In 2012 Germany brought an action for annulment of a Council decision establishing, in accordance with Article 218(9) TFEU, a common position to be adopted by the Member States on behalf of the EU with regard to the adoption of certain resolutions in the context of the International Organisation for Wine and Vine (OIV), in which the Union is not a member nor an observer. The dispute involved two issues that have a great impact on the duties imposed on Member States in the management of their international affairs. Germany contested the Council's decision on two different grounds, namely that Artcile 218(9) TFEU would not be applicable to agreements to which the EU is not a party and that a common position could not

48, pp. 1639-1666. The Convention, however, is a mixed agreement and thus both the EU and its Member States are parties to it.

[70] *Commission v. Sweden*, paras. 69-71, recalling *Opinion 1/03*, par. 119 and *Mox Plant*, par. 164. In this sense, the duty of loyal cooperation implies a duty of abstention even if the competence at issue is neither originally exclusive nor exclusive by virtue of the ERTA doctrine. See on this point G. DE BAERE, *"O, Where is Faith? O, Where is Loyalty?", cit.,* pp. 417-418.

[71] See P. KOUTRAKOS, *EU International Relations Law*, Hart, Oxford, 2015, p. 156.

be established in relation to acts not having a binding force under international law, as was the case with OIV resolutions.[72]

As for the first claim, Germany had argued that the fact that the Union was not a member of the organisation could not *per se* be decisive on the issue, citing Article 34 TEU as an example of a provision expressly obliging Member States to represent the Union's position in international organisations and international conferences.[73] The Council, supported by the Commission, objected to the claim with different arguments, based both on the wording of Article 218(9) TFEU, which just makes a general reference to 'agreements' and on the necessity to protect the exercise of EU competences through the coordination of Member States' international action.

The conclusions of the Advocate General provide a detailed analysis of the provision concerned, starting from its drafting history and trying to apply both a contextual and a teleological interpretation in order to fully understand the scope of Article 218(9) TFEU. After having excluded the relevance of the *CITES* judgment to the case at hand,[74] the Advocate General addressed the interpretation of the provision from different angles. He highlighted the fact that the provision concerns a special procedure that should be followed both for the suspension of international agreements and for the establishment of a common position. Since the suspension can only occur in relation to EU agreements, the term 'agreements' should be read as being limited to agreements to which the EU is a party.[75] More interestingly, the Advocate General takes into account the exception, provided in the second part of the provision, on the inapplicability of the simplified procedure in relation to acts 'supplementing or amending the institutional framework of the agreement'. This exception would qualify the simplified procedure set forth in Article 218(9) TFEU as a *lex specialis* with regard to the general procedure for the conclusion of international agreements. In fact, the simplified procedure provides a limit to the Parliament's participation and it is therefore not applicable in cases where the acts concern such a relevant issue as the modification of the terms of an international agreement. The consequence of having established a relationship of speciality between the general procedure for the conclusion of EU agreements and the simplified one

[72] CJEU, case C-399/12, *Germany v. Council (OIV),* EU:C:2014:2258, paras. 29-36.

[73] This is the case of Member States sitting within the UN Security Council. See I. GOVAERE, *Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case*, in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE, S. ADAM (eds.), *The European Union in the World. Essays in Honour of Marc Maresceau*, Leiden, Martinus Nijhoff Publishers, 2014, pp. 234-235. Note, however, that being this case related only to PESC matters, the principle does not seems applicable to other areas of EU competence. In particular, where the object or the activity of the organisations falls outside the PESC, Member States would not enjoy the possibility of a constructive abstention and will thus remain subjected to the general majority rule when voting in the Council on the EU's common position. See art. 31 TEU, according to which "When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted." In this situation a State opposing the decision would just have the duty not to impede the Union action. Then, whenever an EU position could not be adopted, the State will remain free to act unilaterally and independently. Another example is provided by art. 138(1) TFEU in relation to international financial organisations: "In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank."

[74] Conclusions of AG Cruz Villalón in *Germany v. Council (OIV),* EU:C:2014:289, paras. 53-59.

[75] *Ibid.*, paras. 66-69.

under Article 218(9) TFEU is, according to the Advocate General, that the latter is not applicable to the international agreements of Member States.[76]

Regarding the second issue of the case, the one related to the meaning of 'acts having legal effects', the dispute concerned the question whether these effects should be assessed according to international law or to EU law. In fact, under international law, resolutions as those usually adopted within the OIV are not binding and thus do not produce legal effects.[77] As a consequence, Germany argued that these acts were therefore not capable of triggering the mechanism of Article 218(9) TFEU. According to the Council's position instead, the assessment of the legal effects should focus on the impact of the acts on the Union *acquis*. In particular, the potential effects would be derived from the dynamic reference to OIV resolutions in several EU acts since 2008.[78] The Advocate General considered the fact that EU legislation had made reference to OIV resolutions not sufficient to confer on them a quality they did not possess. In fact, Article 218(9) TFEU, when referring to acts having legal effects which the body set up by the agreement 'is called upon to adopt', creates a close relationship between these acts and the action of the international body and it is in this perspective that the notion of its effects is to be assessed. Thus, according to the Advocate General

> 'The body would thus be called upon to adopt acts which have legal effects *ab origine*. The contested provision does not therefore concern cases where acts without legal effects acquire them for all intents and purposes only *ex post facto*, through the internal law of a contracting party (in this case, the European Union), not even where this occurs automatically by means of a dynamic reference, but rather cases where acts exhibit that quality from the outset (and, therefore, in the legal order of the body itself, that is to say, international law).'[79]

The Court addressed both claims in a rather brief manner and upheld the arguments of the Council by acknowledging the applicability of Article 218(9) TFEU to Member States' international agreements. Without any reference to the arguments put forward by the Advocate General, the Court found that

> 'where an area of law falls within a competence of the European Union, the fact that the European Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through Member States which are party to that agreement acting jointly in its interest.'[80]

It seems that the Court has adopted a pure competence perspective, without addressing the interpretation of the terms of Article 218(9) or taking into account the context in which the provision is settled. With a rather circular argument, the Court reached the conclusion that

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[76] *Ibid.*, paras. 74-77.

[77] See, however, ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, in *I.C.J. Reports 1996*, p. 226, para. 70, where the ICJ recognised that certain acts, like General Assembly's resolution, can have a normative value, even if not binding upon the Member States. On the relationship between recommendations and good faith obligations see P. DAILLIER, A. PELLET, *Droit international public*, Paris, L.G.D.J., 2002, pp. 379-380.

[78] See in particular Council Regulation n. 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No. 1493/1999, (EC) No. 1782/2003, (EC) No. 1290/2005, (EC) No. 3/2008 and repealing Regulations (EEC) No. 2392/86 and (EC) No. 1493/1999, OJ L 148/1; Council Regulation n. 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L 299/1, as amended by Council Regulation n. 491/2009 of 25 May 2009, OJ L 154/1.

[79] AG Cruz Villalón in *Germany v. Council (OIV), supra* note 75, para. 90.

[80] *Germany v. Council (OIV), supra* note 72, para. 52. The Court also makes reference to the *Commission v. Greece* judgment and to *Opinion 2/91*, even if, as already observed, the issues at stake in those cases were not properly the same.

Article 218(9) concerns the establishment of common positions in relation to agreements to which the Union is not a party because, otherwise, EU external competence could not be fully exercised.[81]

The Court also applied an extensive approach in relation to the notion of 'acts having a legal effect'. Following again the Council's argument, the Court recognised that, by virtue of the reference to OIV resolutions contained in EU secondary legislation, the acts of the OIV are 'decisively' capable of influencing EU rules in the area of the common organisation of the wine markets. This argument seems justifiable at least from an EU law perspective, since the reference contained in secondary legislation is a dynamic one, thus incorporating not only existing OIV resolutions but also resolutions to be adopted in the future.[82] No mention is to be found in the Court's reasoning as to the fact that resolutions of the OIV are mere recommendations and thus, according to international law, do not have any binding force.

By looking at recent practice, it is quite clear that EU institutions have realized a situation in which the EU will have the relevant power to intervene in the position that Member States should adopt within other international organisations or international fora.[83] This certainly has some advantages, in particular as far as coherence of EU external action and effectiveness of EU competences are concerned.[84] However, it also bears some complexities: the duty to fully implement the common pre-established position, without having the Union present in the organisation, could affect not only the position of Member States, but also the functioning of the organisation itself.[85] This also raises some questions as to what extent the EU can interfere in the international relations of its Member States and, consequently, how the latter can justify this mechanism vis-à-vis third States participating in other international organisations. All these aspects do not seem to have received the attention they deserved by the EU institutions.

7. Conclusion

This paper has tried to give a brief account of rather a peculiar practice in the external relations of the EU. The treaty-making power Member States can still exercise in the examined cases is a delegated one, limited by the exclusive competence of the EU and anyway pre-empted by EU secondary legislation.

It has been argued that the EU has to be seen as an 'open federal Union', since both the Union and its Member States can operate on the international level.[86] However, this can sometimes

[81] See in this sense *Germany v. Council (OIV), supra* note 72, para. 54.
[82] See for instance art. 120(g) of the Single CMO Regulation: "The methods of analysis for determining the composition of the products of the wine sector and the rules whereby it may be established whether these products have undergone processes contrary to the authorised oenological practices shall be those recommended and published by the OIV." For the effects of a reference contained in EU secondary legislation and the relevant CJEU case-law see *supra* para. 5.2.
[83] In the recent *ITLOS* case, the Court has affirmed that art. 218(9) is not applicable in relation to the adoption of common position to be taken before international tribunals. See CJEU, case C-73/14, *Council v. European Commission*, EU:C:2015:663. On the judgment see S. R. SÀNCHEZ-TABERNERO, *Swimming in a Sea of Courts: The EU's Representation before International Tribunals*, in *European Papers*, 2016, pp. 751-758.
[84] See T. KONSTADINIDES, In the Union of Wine: Loos Ends in the Relationship between the European Union and the Member States in the Field of External Representation, in European Public Law, 2015, pp. 686-688, claiming that the judgement confirms that "agency" exercised by Member States has become a key feature of EU external representation. According to the Author, though, framing these mechanisms in terms of agency could translate Member States' obligations of conduct deriving from loyalty into obligations of result.
[85] See I. GOVAERE, Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case, supra note 73, pp. 240-241.
[86] See R. SCHÜTZE, *Foreign Affairs and the EU Constitution. Selected Essays, supra* note 5, p. 207.

lead to legal uncertainty, especially for third States or other international organisations, as far as competence, implementation, and issues of international responsibility are concerned.

As to the latter aspect, it cannot be ignored that, notwithstanding the status or the protection that Member States agreements could enjoy in the EU legal order, Member States remain fully responsible under international law for any form of non-compliance with international obligations deriving from them.[87] It is a well-established principle of the law of international responsibility that States cannot justify an internationally wrongful act by the attribution of competences to other entities such as regional organisations. At the same time, EU law cannot produce any effect for third States according to the *pacta tertiis* principle in Article 34 of the VCLT.[88] This could create a paradoxical situation in which Member States can no longer guarantee the compliance with agreements whose object falls within a competence of the EU, while, at the same time, the EU can claim that those agreements do not create any duty for the organisation to act in conformity with them.[89]

Some of the procedures that the EU has developed in the recent years are certainly relevant in coordinating Member States' external action and in protecting the interests of the Union. However, it is desirable that, in a near future, the EU – and especially the Court of justice – will be able to clarify the effects that these kind of instruments produce both on the internal and on the international plane. It is submitted, in fact, that the principle of sincere cooperation could provide a valuable legal basis for finding a balance between the need to ensure the integrity of the EU legal order and the necessity to take into consideration the legitimate expectations of third States, which to a certain extent have acknowledged that the action of the Member States has been guided by EU institutions. This could be done, for instance, by expressly recognising that agreements concluded in the interest of the Union are to be considered binding as a matter of EU law and that EU secondary legislation must be compatible with them.

Moreover, it is also submitted that the procedure of a previous authorisation to the conclusion of international agreements with third States should be extended to a wider range of situations,[90] so as to ensure form the very beginning the compatibility of international obligations to be assumed with the EU legal order. This would at least bring some legal certainty and stability in Member States' relationships with other countries and avoid further fragmentation on the internal level.

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[87] See *Manzi*, *supra* note 44, para. 41, in which the CJEU expressly acknowledged the possibility that a conflict between EU law and international obligations of Member States, not suitable to be solved by means of consistent interpretation, will oblige Member States to violate the agreement and, eventually, to incur in international responsibility *vis-à-vis* third parties.

[88] Nor the scenario will change in case EU law was considered as a constitutional legal order, given the rule of art. 27 of the VCLT prohibiting the invocation of domestic law in order to justify a violation of an international obligation.

[89] Recently, the EU has tried to solve the question related to financial responsibility arising from international investment disputes and to find suitable criteria for the apportionment of responsibility between EU institutions and Member States. However, the Regulation is applicable only in cases of settlement procedures established by an agreement to which the EU is party. See Regulation n. 912/2014 of the European Parliament and of the Council of 23 July 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, in OJ L 257/121.

[90] For instance in the case of bilateral extradition agreements with third countries, where issues of compatibility with the prohibition of discrimination under EU law may arise, as already happened in the recent Petruhhin case, where the Court held that the nationality exception provided by an extradition agreement can run counter EU citizenship rights. See CJEU, case C-182/15, *Petruhhin*, EU:C:2016:630.