CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

CLEER

The International Responsibility of the European Union and its Member States for Breaches of Incomplete Mixed Agreements

Cathleen Berg

CLEER PAPERS **2024/2**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION AND ITS MEMBER STATES FOR BREACHES OF INCOMPLETE MIXED AGREEMENTS

CATHLEEN BERG

CLEER PAPERS **2024/2**

Editorial policy

The governing board of CLEER, in its capacity as board of editors, welcomes the submission of legal papers and commentaries (max. 40,000 resp. 4.000 words, incl. footnotes, accompanied by keywords and short abstracts) at E.Kassoti@asser.nl. CLEER applies a double blind peer review system. When accepted, papers are published on the website of CLEER.

ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

CONTENTS

ABSTRACT

Incomplete mixed agreements pose particular difficulties as regards the international responsibility of the European Union and its Member States. In Opinion 1/19, the Court of Justice showed no sensitivity towards the Member States' fear that the EU might incur liability if a Member State which is not a party to the Istanbul Convention in its own right infringes provisions of the Convention which correspond to external competences of the Member States. In fact, the Court of Justice found that, by acceding to the Istanbul Convention, the EU would not 'take on commitments exceeding the scope of its own competences'. This paper seeks to assess whether the EU incurs liability for breaches of incomplete mixed agreements by a non-ratifying Member State by examining the binding effect of incomplete mixed agreements from the perspective of the Court of Justice in Opinion 1/19, on the one hand, and from a public international law perspective, on the other hand. In particular, it scrutinizes whether the EU can limit its international responsibility for breaches of incomplete mixed agreements such as the Istanbul Convention. The paper analyses, *inter alia*, whether the EU can limit its international responsibility for breaches of the Istanbul Convention by having recourse to Articles 27, 46 of the Vienna Convention on the Law of Treaties (VCLT), by making a reservation, or by submitting a declaration of competence. The paper applies these findings to other incomplete mixed agreements and seeks to draw some general conclusions regarding the circumstances under which the EU and its Member States may incur international liability for breaches of incomplete mixed agreements by a non-ratifying Member State.

ABOUT THE AUTHOR

Cathleen Berg, doctoral student, University of Bayreuth.

The author would like to thank the anonymous reviewer and Dr. Eva Kassoti for their helpful remarks and suggestions on an earlier draft. The usual disclaimer applies.

INTRODUCTION

Mixed agreements pose a variety of difficulties. The international responsibility of the EU and its Member States for breaches of mixed agreements is one of them. Even greater difficulties arise in case of incomplete mixed agreements. A mixed agreement to which some, but not all Member States and the EU are a party, is called an 'incomplete mixed agreement'.[1] Indeed, if one Member State refuses to ratify a mixed agreement or withdraws from a mixed agreement, the consequences for the international responsibility of the EU and its Member States for breaches of the agreement by that non-ratifying or withdrawing Member State are far from clear. Third parties to the incomplete mixed agreement might hold the EU responsible for breaches by a non-ratifying Member State[2] because as a contracting party the EU is bound by the agreement (*pacta sunt servanda*, Article 26 VCLT of 1986[3]). In general, the EU cannot rely on the internal division of competences in order to reject its international responsibility (Article 27 VCLT of 1986). What is more, the EU cannot oblige the non-ratifying Member State to comply with the obligations arising from the international agreement if the provision violated by said Member State does not fall under EU external competence.

This paper argues that Opinion 1/19[4] of the Court of Justice regarding the

---

[1] G. Kübek, 'Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention', 59 *Common Market Law Review* (2022), pp. 1465-1500. On the distinction between complete mixed agreements and incomplete mixed agreements see also J. Heliskoski/G. Kübek, 'A Typology of EU Mixed Agreements Revisited', in N. Levrat *et al*. (eds.), *The EU and its Member States' Joint Participation in International Agreements* (Oxford: Hart Publishing 2022), pp. 33-34; L. Granvik, 'Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague: Kluwer Law International 1998), at 255.

[2] The paper focuses on the international responsibility of the EU and its Member States for a breach by a non-ratifying Member State rather than on the international responsibility of the non-ratifying Member State for its breach of the incomplete mixed agreement; in this regard, see L. Granvik, *supra* note 1, pp. 255-272.

[3] Vienna Convention on the Law of Treaties, 23 May 1969, UNTS, vol. 1155, p. 331; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, not yet in force, available at <https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>. The EU is not a party to the Vienna Convention of 1986, cf. <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-3&chapter=23&clang=_en#1>. Still, the rules can be considered customary law, cf. M. Bothe, 'Article 46 Vienna Convention of 1969', in O. Corten/P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press 2011), paras. 5-7, which is also binding upon the EU, cf. ECJ, Case C-162/96, *Racke* [1998] ECR 1998 I-3655, paras 45-46. See also E. Neframi, *Les accords mixtes de la Communauté européenne* (Bruxelles: Bruylant 2007), at 335.

[4] Opinion 1/19, *Istanbul Convention*, ECLI:EU:C:2021:198. For an analysis of this Opinion see D. Simon, 'Accords internationaux – Accords mixtes', *Europe* 2021, n°12 Décembre, pp. 15-17; C. Berg, 'Institutionelles: EU-Beitritt zur Istanbul-Konvention', *Europäische Zeitschrift für Wirtschaftsrecht* 2022, pp. 23-41; P. Koutrakos, 'Confronting the complexities of mixed agreements – Opinion 1/19 on the Istanbul Convention', 47 *European Law Review* (2022), pp. 247-263; G. Kübek, *supra* note 1, pp. 1465-1500; M. Meisel et al., 'Recent Austrian Practice in the Field of European Union Law', *Zeitschrift für öffentliches Recht* 77 (2022), pp. 892-894; J.-P. Jacqué, 'Le processus de decision au sein du Conseil', *Revue trimestrielle de droit européen* 2022, pp. 803-804; F. Castillo de la Torre, 'El Dictamen 1/19 del TJUE sobre el Convenio de Estambul sobre la Prevención y Lucha contra la

conclusion of the Istanbul Convention has not brought clarity to the issue of the international responsibility of the EU and its Member States for breaches of incomplete mixed agreements. In fact, the Court of Justice merely brushed aside the Member States' argument that the EU would incur international responsibility if it concluded the Istanbul Convention in absence of a common accord of all Member States to be bound by the Convention in their own right. Whereas AG Hogan considered that the EU might incur international responsibility for breaches of the Istanbul Convention by a non-ratifying Member State, the Court concluded that the EU would not 'take on commitments exceeding the scope of its own competences'.[5]

This paper seeks to assess how the allocation of obligations and rights arising from incomplete mixed agreements between the EU and the Member States relates to the international responsibility for a breach of those agreements. The Istanbul Convention is used as a case study. It is particularly suited for this analysis as the parties to the proceedings as well as AG Hogan explicitly addressed the division of competences to conclude the Istanbul Convention and the issue of international responsibility for breaches of that Convention.

The paper aims to proceed as follows: First, the paper sets the scene by providing the necessary background to the concept of mixed agreements and the Istanbul Convention as well as Opinion 1/19 of the Court of Justice (1). Next, the paper explores the principles guiding the international responsibility of the EU and its Member States for breaches of mixed agreements and addresses the difficulties arising when applying these principles to incomplete mixed agreements (2). Section (3) of the paper will deal with the binding effect of the Istanbul Convention on the EU and its Member States following the Court's reasoning in Opinion 1/19. In this regard, it scrutinizes which provisions of the Istanbul Convention are legally binding upon the EU and the Member States and which provisions are binding upon the Member States in their individual capacity. Section (4) of the paper examines whether the EU and its Member States can be held liable for breaches of provisions of the Istanbul Conventions by a non-ratifying Member State in case the provisions breached fall under exclusive Member State external competence. Based on the analysis of the international responsibility for breaches of the Istanbul Convention, the paper seeks to draw general conclusions on the international responsibility of the EU and its Member States for breaches of incomplete mixed agreements by analyzing other incomplete mixed agreements, such as the Energy Charter Treaty[6] (5).

Violencia contra la Mujer y la Violencia Doméstica: entre el rigor y el pragmatismo', *Revista Española de Derecho Europeo* 2022, pp. 93-124.

[5] Opinion 1/19, *supra* note 4, para. 273.

[6] *OJ* [1994] L 380/24, 31.12.1994.

1. THE CONCEPT OF MIXED AGREEMENTS AND THE ISTANBUL CONVENTION

1.1 **Mixed agreements**

A mixed agreement is an international agreement which is concluded jointly by the EU as well as by its Member States in their own right. Concluding a mixed agreement means that the procedure provided for in Article 218 TFEU regarding the conclusion of international agreements must be successfully completed on the EU side and national ratification procedures must be successfully completed in every Member State according to the requirements established in their national constitutions. Mixed agreements are usually concluded because the international agreement at issue covers matters falling both under EU external competence and under Member State external competence, so that neither the EU nor the Member States alone have the requisite external competence to conclude the international agreement in its entirety.[7]

1.2 **Mandatory vs. facultative, complete vs. incomplete mixed agreements**

Mandatory mixity or obligatory mixity is a term used for agreements which contain provisions falling both under (exclusive[8] or shared) EU external competence

[7] Scholars distinguish between a formal or procedural definition of mixed agreements and a substantive definition of mixed agreements. Under a formal or procedural definition, a mixed agreement is every international agreement concluded by the EU and the Member States regardless of whether mixity was necessary from a competence perspective. Under a substantive definition, a mixed agreement is only a 'true mixed agreement' if neither the EU nor the Member States have the requisite external competence to conclude the agreement alone; therefore, under a substantive definition, an international agreement which is concluded as a mixed agreement regardless of the fact that either the EU or the Member States have the requisite competence to conclude the agreement alone is considered a 'false mixed agreement'. See H. G. Schermers, 'A Typology of Mixed Agreements', in D. O'Keeffe/H. G. Schermers (eds.), *Mixed agreements* (Deventer: Kluwer 1983), pp. 23-28; J. Heliskoski/G. Kübek, *supra* note 1, pp. 33-34. This paper takes the formal or procedural definition of 'mixed agreement' as the starting point for the analysis. Instead of using the term 'substantive definition of a mixed agreement', it will refer to the distinction between 'mandatory mixed agreements' and 'facultative mixed agreements'.

[8] Mixed agreements concerning exclusive Member State competence and EU shared competence could be considered as mere facultative mixed agreements or facultative Member States-only agreements, as the EU could – in theory – decide not to exercise its shared competence at all; cf. Opinion of AG Wahl, *Opinion 3/15*, ECLI:EU:C:2016:657, para. 122: '(…) [A] mixed agreement would be required, generally, where an international agreement concerns coexistent competences: that is, it includes a part which falls under the exclusive competence of the Union and a part which falls under the exclusive competence of the Member States (…)'; J. Heliskoski/G. Kübek, *supra* note 1, at 28. However, most observers also consider the combination of exclusive Member State external competence and shared EU external competence as a mandatory mixed agreement; this is also how the remarks of AG Szpunar in his Opinion, Case C-600/14, *Germany* v. *Council*, ECLI:EU:C:2017:296, para. 85, can be interpreted, where the AG states: 'EU law requires the conclusion of a mixed agreement only in the event that that agreement includes a part which falls under the competence of the European Union and a part which falls under the exclusive competence of the Member States, without any of those parts being ancillary to the other.' This paper

and exclusive Member State external competence.[9] In this case, the EU cannot conclude the agreement alone without acting in breach of the principle of conferral as enshrined in Article 5(1), (2) TEU.[10] Mixity is mandatory for the EU in case the external competence for parts of the international agreement lies with the Member States because the EU has no external competence at all. The EU may have no external competence at all either because the Member States have not conferred an external competence on the EU in this area ('non-conferral') or because EU primary law provisions reserve parts of an area covered by EU competence to Member State competence.[11]

In contrast, facultative mixity refers to international agreements which are concluded by the EU and its Member States (in their own right), although the EU has the requisite external competence to act alone.[12] Issues of facultative mixity, therefore, arise in case of shared competences[13] between the EU and the Member States. In these cases, the Council enjoys discretion to decide whether the EU will exercise its shared competence alone (facultative EU-only agreement), whether it will leave the exercise of the shared competence to the Member States (facultative Member States-only agreement) or whether it will exercise its shared competence together with the Member States (facultative mixed agreement).[14] This discretion is implied in Article 2(2) TFEU.[15] Although Article 2(2) TFEU does not provide for the option of the Union and the Member States exercising the shared competence together (the wording of Article 2(2) TFEU seems to be confined to two alternatives: EU action or Member State

---

prefers using the term 'mandatory mixed agreement' for agreements covering exclusive Member State external competence and shared EU external competence.

[9] A. Rosas, 'The European Union and Mixed Agreements', in A. Dashwood/C. Hillion (eds.), *The General Law of E.C. External Relations* (London: Sweet & Maxwell 2000), at 206; A. Rosas, 'Mixed Union – Mixed Agreements', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague: Kluwer Law International 1998), pp. 131-132; A.J. Kumin, 'Mixed Agreements After ECJ Opinion 2/15 on the EU-Singapore Free Trade Agreement', in S. Lorenzmeier *et al*. (eds.), *EU External Relations Law* (Cham: Springer 2021), pp. 81-82; G. Kübek, *supra* note 1, pp. 1469-1470.

[10] A.J. Kumin, *supra* note 9, pp. 81-82. For association agreements based on Art. 217 TFEU see ECJ, Case C-81/13, *United Kingdom* v. *Council*, ECLI:EU:C:2014:2449, para. 61.

[11] A.J. Kumin, *supra* note 9, pp. 81-82.

[12] A. Rosas, 'The European Union and Mixed Agreements', *supra* note 9, pp. 205-206; A. Rosas, 'Mixed Union – Mixed Agreements', *supra* note 9, pp. 131-132.

[13] According to Article 4 TFEU, a shared competence is every competence which does not relate to the areas referred to in Articles 3 and 6 TFEU, that means shared competence with Member State pre-emption (Art. 4(2), 2(2) TFEU) and shared competence without Member State pre-emption (Art. 4(3) and (4) TFEU, so-called parallel competences). The term 'shared competence' is used very inconsistently in the Court's case-law and in academic literature. It is not always clear whether the term 'shared competence' refers to the nature of EU external competence within the meaning of Article 4 TFEU or whether it refers to a situation where both the EU and the Member States have exclusive external competences for parts of the international agreement, so they 'share' the external competence to conclude the agreement in its entirety; regarding this ambiguity see A. Rosas, 'Mixity Past, Present and Future: Some Observations', in M. Chamon/I. Govaere (eds.), *EU External Relations Post-Lisbon* (Leiden: Brill/Nijhoff 2020), pp. 13-14.

[14] Cf. Opinion of AG Szpunar, Case C-600/14, *supra* note 8, para. 77.

[15] Cf. Opinion of AG Szpunar, Case C-600/14, *supra* note 8, para. 78; Opinion of AG Wahl, Opinion 3/15, *supra* note 8, paras. 119-121.

action), it is settled case-law of the Court of Justice that Article 2(2) TFEU does not prevent the recourse to facultative mixity.[16]

As was mentioned *supra* (see Introduction), a mixed agreement is a 'complete mixed agreement' when all Member States become parties to the agreement in their own capacity. It is an incomplete mixed agreement when only some, but not all Member States become parties to the agreement in their own capacity.

1.3 The Istanbul Convention as an example of an incomplete mandatory mixed agreement and Opinion 1/19

In view of the above, the paper will now provide some background information on the Istanbul Convention and the issues which led the Parliament to request an opinion by the Court of Justice. Furthermore, the Court's reasoning in Opinion 1/19 will be outlined. The Istanbul Convention[17] on preventing and combating violence against women and domestic violence is an example of an incomplete mandatory mixed agreement. The Convention was negotiated within the Council of Europe. It was opened for signature by member States of the Council of Europe, non-member States which have participated in its elaboration and by the European Union on 11 May 2011. It entered into force on 1 August 2014. Its purpose is to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence; to contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men; to design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence; to promote international co-operation with a view to eliminating violence against women and domestic violence; and to provide support and assistance to organizations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence (Art. 1(1) of the Istanbul Convention).

The Convention contains provisions on equality and non-discrimination as well as general obligations (chapter 1); provisions on integrated policies and data collection (chapter 2); on measures to prevent all forms of violence covered by the Convention (chapter 3); on the protection of victims of violence and support to victims of violence (chapter 4); on substantive civil and criminal law (chapter 5); on investigation, prosecution, procedural law and protective measures (chapter 6); on migration and asylum (chapter 7); on international co-operation (chapter 8); provisions on a mechanism to monitor the implementation of the Convention by the parties (chapter 9); provisions on the relationship with other international instruments (chapter 10); provisions on amendments to the Convention (chapter 11) and final clauses (chapter 12).

[16] Cf. ECJ, Case C-600/14, *Germany* v. *Council*, ECLI:EU:C:2017:935, para. 68.
[17] Available at <https://www.coe.int/en/web/istanbul-convention/text-of-the-convention>.

The Council adopted two decisions on the signing, on behalf of the EU, of the Istanbul Convention: Council Decision 2017/865 with regard to matters related to judicial cooperation in criminal matters[18], based on Article 82(2) and Article 83(1) TFEU; and Council Decision 2017/866 with regard to asylum and non-refoulement[19], based on Article 78(2) TFEU.[20] As it was generally accepted that some provisions of the Convention were not covered by EU competence[21], the EU organs agreed to conclude the Convention as a mandatory mixed agreement. Furthermore, the Council had opted for a 'narrow accession'[22] of the EU to the Istanbul Convention. This means that the EU only accedes to the Istanbul Convention to the extent of its exclusive external competences. The Council explicitly decided not to exercise external competences which are shared between the EU and the Member States.[23] As a consequence, the exercise of shared external competences was left to the Member States.

EU accession to the Istanbul Convention was a thorny issue for the Member States, not only because the Convention affects exclusive Member State competence, but also on grounds of political sensitivity. Some Member States considered the ratification of the Istanbul Convention in their own capacity as incompatible with their national traditions, their national laws or constitutions.[24] They argued that the Istanbul Convention was incompatible with their national concepts of 'traditional family values'[25] and gender[26]. Moreover, they feared that

---

[18] *OJ* [2017] L 131/11, 20.5.2017.

[19] *OJ* [2017] L 131/13, 20.5.2017.

[20] The Council opted for splitting the Decision on the signing of the Convention due to the fact that parts of the Convention fall under Titel V TFEU, meaning that Ireland, the United Kingdom and Denmark had specific rights to opt-out; cf. recital 11 of Council Decision 2017/865 and recital 10 of Council Decision 2017/866, *supra* note 18 and note 19.

[21] Cf. COM(2016) 109 final, Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, at 7: 'Whereas the Member States remain competent for substantial parts of the Convention, and particularly for most of the provisions on substantive criminal law and other provisions in Chapter V to the extent that they are ancillary, the EU has competence for a considerable part of the provisions of the Convention, and should therefore ratify the Convention alongside Member States.'

[22] See paras. 90-93 of Opinion 1/19, *supra* note 4; G. Kübek, *supra* note 1, at 1471.

[23] Cf. recital 6 of Council Decision 2017/865, *supra* note 18: 'The Convention should be signed on behalf of the Union as regards matters falling within the competence of the Union in so far as the Convention may affect common rules or alter their scope. This applies, in particular, to certain provisions of the Convention relating to judicial cooperation in criminal matters and to the provisions of [that convention] relating to asylum and non-refoulement. The Member States retain their competence in so far as the Convention does not affect common rules or alter the scope thereof.'

[24] Cf. para. 65 of Opinion 1/19, *supra* note 4.

[25] See S. Prechal, 'The European Union's Accession to the Istanbul Convention', in K. Laenarts *et al*. (eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Oxford: Hart Publishing 2019), at 284; European Parliament, verbatim report of proceedings of 13 June 2018, available at <https://www.europarl.europa.eu/doceo/document/CRE-8-2018-06-13-ITM-004_EN.html?redirect#x0026;language=EN>.

[26] European Parliament, *supra* note 25; R. Vassileva, 'Bulgaria's Constitutional Troubles with the Istanbul Convention', *VerfBlog* 2018/8/02, available at <https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention/>, DOI: 10.17176/20180803-101332-0; K. Nousiainen/C. Chinkin, 'Legal implications of EU accession to the Istanbul Convention', Report to the Commission of December 2015, available at <https://www.europarl.europa.eu/cmsdata/115843/

the Istanbul Convention might oblige them to introduce a right to same sex marriage into their national constitutions or to award refugee rights to transgender and intersex persons.[27] As a consequence, the Council decided to wait for a 'common accord' of all Member States before issuing a Council Decision on the conclusion of the Istanbul Convention.[28] This means that the EU would not conclude the Istanbul Convention before all Member States had consented to be bound by the Convention in their own capacity.[29] This procedure resulted in a 'deadlock situation'[30] in the Council, as some Member States (Bulgaria, Slovak Republic, Hungary) refused to consent to be bound by the Convention due to concerns that the Istanbul Convention was incompatible with their national constitutions.[31]

The Parliament then issued a request for an opinion by the Court based on three grounds[32]: First, the Parliament doubted the Council's choice of legal basis for its Council Decisions on the signing of the Istanbul Convention.[33] Second, the Parliament contested the admissibility of splitting the Council Decision on the signing of the Convention in two separate decisions, one on asylum and non-refoulement and one with regard to matters related to judicial cooperation in criminal matters.[34] Third, the Parliament argued that the practice of 'common accord' of the Member States is incompatible with Article 218(6)TFEU, which provides that the Council shall adopt a decision authorizing the signing of the agreement (without referring to any necessity of a common accord of the Member States).[35] For present purposes the focus is on the issue of common accord rather than on the issues of the splitting of the Council Decisions and the choice of legal bases.

During the proceedings, some Member States argued that the EU might incur international liability for breaches of the Istanbul Convention if the EU acceded to the Convention without the prior consent of all Member States to be bound by the provisions falling under Member State competence.[36] As will be set out

commission-report.pdf>, pp. 93-94.

[27] See S. Prechal, *supra* note 25, at 284; European Parliament, *supra* note 25.

[28] Paras. 70-71 of Opinion 1/19, *supra* note 4. On the practice of common accord in general see F. Castillo de la Torre, 'On "Facultative" Mixity: Some Views from the North of the Rue de la Loi', in M. Chamon/I. Govaere (eds.), *EU External Relations Post-Lisbon* (Leiden: Brill/Nijhoff 2020), pp. 233-234.

[29] Paras. 70-71 of Opinion 1/19, *supra* note 4.

[30] Para. 72 of Opinion 1/19, *supra* note 4.

[31] P. Koutrakos, *supra* note 4, pp. 249-251; I. Zamfir, 'EU accession to the Istanbul Convention', PE 739.323 –February 2023, available at <https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739323/EPRS_ATA(2023)739323_EN.pdf>; K. Nousiainen/C. Chinkin, *supra* note 26, pp. 92-94; R. Vassileva, *supra* note 26; M. Chamon, 'The Court's Opinion in Avis 1/19 regarding the Istanbul Convention', *EU Law Live*, Op-Ed 12.10.2021, with further references. Poland, however, has announced to withdraw from the Istanbul Convention.

[32] Paras. 52-61 of Opinion 1/19, *supra* note 4.

[33] Paras. 52-56 of Opinion 1/19, *supra* note 4.

[34] Paras. 57-58 of Opinion 1/19, *supra* note 4.

[35] Paras. 59-61 of Opinion 1/19, *supra* note 4.

[36] Paras. 181-182 of Opinion 1/19, *supra* note 4.

in the following paragraphs, the Court of Justice brushed aside this argument and considered that concluding the Istanbul Convention as an incomplete mixed agreement was in accordance with EU law. The EU finally acceded to the Convention by a Council Decision in May 2023.[37] Nevertheless, Bulgaria, the Czech Republic, Hungary, Lithuania and the Slovak Republic have only signed the Convention but have not ratified it yet.[38] As a consequence, the Istanbul Convention remains for now an incomplete mixed agreement and the issue of international responsibility remains unsolved.[39]

In Opinion 1/19, the Court rejected the admissibility of the practice of common accord within the Council. According to the Court, Article 218(1), (2), (6) and (8) TFEU do not provide for the necessity of a common accord of all Member States before concluding an international agreement; in particular, the Court found that the Council is bound by these rules and cannot modify them on its own.[40]

As regards the argument that the EU might incur international liability for breaches of the Convention by a non-ratifying Member State if the Council did not wait for the common accord of all Member States, the Court seemed to take a two-fold approach: First, the Court considered that EU accession to the Convention without the common accord of all Member States would not infringe the principles of conferral (Art. 5(1), (2) TEU), sincere cooperation (Art. 4(3) TEU), legal certainty and unity in the external representation of the EU.[41] In this regard, the Court held that neither the EU nor the Member States would be bound by the Convention beyond the extent of their external competences exercised by concluding the Convention.[42] The Court then inferred from the existence of a regional economic integration organization (REIO) clause in Article 75 of the Convention that the EU would accede to the Convention only to the extent that it exercises its external competences (partial accession).[43] Article 75(1) of the Convention stipulates that the Convention 'shall be open for signature by the

---

[37] Council Decision (EU) 2023/1075 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union, *OJ* [2023] L 143I/1, 2.6.2023; Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement, *OJ* [2023] L 143I/4, 2.6.2023.

[38] Available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210>. Latvia only ratified the Convention on 10.1.2024.

[39] P. Koutrakos, *supra* note 4, at 262; G. Kübek, *supra* note 1, at 1482; cf. also F. Castillo de la Torre, *supra* note 4, at 118.

[40] Paras. 229-239, 243-249 of Opinion 1/19, *supra* note 4.

[41] Paras. 257-260 of Opinion 1/19, *supra* note 4. The unity of external representation was first mentioned by the Court in Opinion 2/91 concerning Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work, [1993] ECR I-1061, para. 36. On this 'principle' of EU external relations law see M. Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press 2014), at 191; C. Hillion/M. Chamon, 'Facultative Mixity and Sincere Cooperation', in M. Chamon/I. Govaere (eds.), *EU External Relations Post-Lisbon* (Leiden: Brill/Nijhoff 2020), pp. 91-95.

[42] Paras. 258-260 of Opinion 1/19, *supra* note 4.

[43] Para. 261 of Opinion 1/19, *supra* note 4. See also C. Berg, *supra* note 4, at 41.

member States of the Council of Europe, the non-member States which have participated in its elaboration and the European Union.' The Court further inferred from the existence of the REIO clause that the 'Council of Europe' was 'aware of the limited nature of the European Union's competences'[44]; therefore, the EU would only accede to the Convention to the extent of its exclusive external competences.[45] Furthermore, the Court argued that the choice of legal basis for the Council Decisions indicates to third parties the extent to which EU external competence exists and that the external competences are divided between the EU and the Member States.[46] The Court also held that the EU can still issue a declaration of competence when acceding to the Convention specifying the division of competences between the EU and its Member States.[47]

Second[48], the Court maintained that the opinion procedure enshrined in Article 218(11) TFEU serves to assess the potential incompatibility of an EU international agreement with EU primary law and that examining whether EU accession to the Convention might infringe international law is not part of the opinion procedure.[49] Nevertheless, the Court seemed to consider it necessary to refer once more to the fact that the EU would not be bound by the Istanbul Convention to an extent exceeding its external competences.[50]

In conclusion, the Court considered that the EU would only partially accede to the Istanbul Convention to the extent that it exercises its exclusive external competence. This suggests that it is worth to take a look again at the international responsibility for mixed agreements from a competence-based perspective, which will be done in the following section.

2. INTERNATIONAL RESPONSIBILITY FOR BREACHES OF MIXED AGREEMENTS: THE LINK BETWEEN BINDING EFFECT AND INTERNATIONAL RESPONSIBILITY

The Court's conclusion in Opinion 1/19 sits uneasily with its past case-law on the responsibility of the EU and its Member States for breaches of mixed agreements. This section, first, explains why a competence-based approach is chosen

[44] Para. 261 of Opinion 1/19, *supra* note 4.
[45] Para. 261 of Opinion 1/19, *supra* note 4.
[46] Para. 262 of Opinion 1/19, *supra* note 4.
[47] Para. 263 of Opinion 1/19, *supra* note 4.
[48] The Court rejected the Member States' arguments that EU accession to the Convention without the common accord of all Member States would force those Member States acceding to the Convention to ensure compliance with the Convention in violation of their national constitutions (which would constitute a violation of the principle of sincere cooperation and the obligation to respect the national identity of the Member States, as enshrined in Article 4(2) TEU); paras. 265-266 of Opinion 1/19, *supra* note 4. The Court further opined that EU accession to the Convention without the common accord of all Member States would be compatible with the autonomy of the EU legal order; paras. 267-269 of Opinion 1/19, *supra* note 4.
[49] Para. 272 of Opinion 1/19, *supra* note 4.
[50] Para. 273 of Opinion 1/19, *supra* note 4.

to assess the international responsibility for breaches of mixed agreements (2.1) Second, this section introduces the distinction between mixed agreements with and mixed agreements without a clause dividing the binding effect of the agreement (2.2). Third, this section analyses the international responsibility of the EU and its Member States for breaches of mixed agreements containing a clause dividing the binding effect of the agreement (2.3). Fourth, this section assesses the international responsibility of the EU and its Member States for mixed agreements without a clause dividing its binding effect (2.4). Last, this section explains which difficulties arise when applying the principles guiding the international responsibility for breaches of mixed agreements to incomplete mixed agreements (2.5).

2.1 Following a competence-based approach to assess the international responsibility for breaches of mixed agreements

By starting from the internal division of competences between the EU and its Member States, this paper follows an approach proposed by some scholars[51] for assessing the international responsibility for breaches of mixed agreements which has been called a 'competence-based approach'[52]. In following a competence-based approach, the paper starts from the assumption that the international responsibility of the EU and its Member States requires the binding effect of the provisions of an agreement. In other words, the EU will be held liable for violations of provisions of international agreements which are binding upon the EU because they fall under EU competence.[53]

---

[51] E. Neframi, *supra* note 3, pp. 338 *et seq*.; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot 2001), pp. 240-250.

[52] C. Contartese, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States', *International Organizations Law Review* 17 (2020), pp. 421-426.

[53] P.J. Kuijper/E. Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations', *International Organizations Law Review* 1 (2004), at 116. A similar approach is taken by *Nedeski*, who argues in favour of an 'obligations-based approach'; according to this approach, it is the shared character of international obligations arising from mixed agreements which justifies shared responsibility of the EU and the Member States for breaches of these obligations; see N. Nedeski, 'Shared Obligations and the Responsibility of an International Organization and its Member States: The Case of EU Mixed Agreements', *Amsterdam Law School Legal Studies Research Paper* No. 2020-12. Yet, this approach presupposes the existence of a specific wrongful act. Furthermore, it seems hardly feasible to attribute obligations arising from an international agreement to the EU and/or the Member States without taking into consideration the respective division of external competences. *Marín Durán* proposes a 'competence/remedy' model to assess the international responsibility of the EU for breaches of mixed agreements; see G. Marín Durán, 'Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model', 28 *European Journal of International Law* (2017), pp. 697-729. According to *Marín Durán*, it is the division of internal competences which determines the attribution of international responsibility, not the division of external competences. Nevertheless, for the purposes of this paper, the 'competence/remedy model' is not adequate because there is no internationally wrongful act yet which might serve as a reference point for the internal competence to undo the internationally wrongful act.

Another approach which is proposed in order to assess the international responsibility of the EU for breaches of mixed agreements seeks to attribute the international responsibility to the entity exercising 'normative control' over the wrongful act at issue.[54] This approach is based on the International Law Commission (ILC) Draft Articles on the Responsibility of International Organizations which use, *inter alia*, the effective control over the internationally wrongful act by a state or international organization as a criterion to attribute the act to that state or international organization.[55] However, the Court, in Opinion 1/19, appears to have taken the division of competences as a starting point for its analysis when it considered that the EU would not take on commitments beyond the scope of its external competences.[56] Furthermore, the 'normative control' approach requires a specific wrongful act which infringes the incomplete mixed agreement.[57] At the time of the conclusion of the agreement, there is no wrongful act yet which can serve as a reference point to attribute normative control to the EU or to the Member States. Therefore, in order to determine who might be held responsible for breaches of an incomplete mixed agreement at the time of the conclusion of the agreement, the only starting point available is the division of external competences. It appears then that the attribution of conduct according to the 'normative control' approach is preceded by the apportionment of external competence according to a competence-based approach.[58] As a consequence, this paper focuses on the allocation of international responsibility between the EU and its Member States rather than on the attribution of conduct.

---

[54] A. Delgado Casteleiro, *The International Responsibility of the European Union* (Cambridge: Cambridge University Press 2016), pp. 25-30, 41-53; P. Eeckhout, *EU External Relations Law* (Oxford: Oxford University Press, 2nd edition 2011), at 264: 'In those cases where the mixed agreement itself does not distinguish between an EU and a Member States part, the other contracting parties appear to have every right to focus on the question of attribution of conduct under international law, rather than the internal division of competences between the EU and its Member States'. See also the contributions in M. Evans/P. Koutrakos, *The International Responsibility of the European Union* (Oxford: Hart Publishing 2013), in particular, J. Heliskoski, 'EU Declarations of Competence and International Responsibility', in M. Evans/P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart Publishing 2013), pp. 193-196.

[55] See, for example, Arts. 7, 15 and 59 of the Draft Articles, available at <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf>.

[56] Cf. Opinion 1/19, *supra* note 4, para. 273: '(…) it has not been established that, by concluding the Istanbul Convention in the absence of a "common accord" of the Member States to be bound by that convention in the fields falling within their competences, the European Union would take on commitments exceeding the scope of its own competences.'

[57] Cf. P.J. Kuijper/E. Paasivirta, *supra* note 53, at 115: 'Logically the question of attribution of conduct to an international organization can only arise after the question of apportionment has been settled'.

[58] P.J. Kuijper/E. Paasivirta, *supra* note 53, at 115. This is also the opinion advocated by the EU Commission; see ILC, Responsibility of International Organisations: Comments and Observations Received from International Organisations (ARIO Comments), Doc. A/CN.4/545, 25 July 2004, at 26, para. 3. 'Normative control' could be used as a criterion, for example, where the Member States act within an area of exclusive EU external competence although they have not been authorized by the EU to do so (Article 2(1) TFEU).

2.2 The distinction between mixed agreements with and without a clause dividing the binding effect of the agreement

Third parties to a mixed agreement are confronted with two actors on the EU side. The question arises then which of the two actors on the EU side is responsible for breaches of the agreement. In other words, it must be decided whether the EU or the Member States (or both of them) can be held internationally responsible for the breach. As third parties to the agreement are mostly unfamiliar with the exact division of external competences between the EU and the Member States[59], there must be rules as to which entity is the right respondent for third parties' claims. The interests of all parties to the agreement must be kept in mind when searching for a solution as regards the international responsibility for breaches of mixed agreements. On the one hand, the EU and the Member States want to be held liable only for breaches of parts of the mixed agreement for which they actually have competence. On the other hand, third parties to the agreement demand legal certainty and transparency as to who is responsible for breaches of the mixed agreement.

In this regard, it is common to distinguish between two kinds of mixed agreements[60]: Mixed agreements might explicitly divide the binding effect of their provisions between the EU and the Member States, that means, they state that the EU and its Member States are only bound by the mixed agreement to the extent of their respective external competences.[61] At the same time, mixed agreements might be silent on this matter, that means, they do not contain any clause stating that the EU and its Member States are only bound by the agreement to the extent of their respective external competences.[62] Such a clause explicitly dividing the binding effect is called 'clause dividing the binding effect of a mixed agreement'.[63] This paper defines a clause dividing the binding effect of a mixed agreement as a clause which apportions the rights and obligations set out by the international agreement to the EU or to the Member States.[64] A mixed agreement divides its binding effect between the EU and the Member States by defining the 'EU party', that means, by stating whether the EU and/or the Member States are obliged by a provision of a mixed agreement and whether the EU and/or the Member States can infer rights from a provision of

---

[59] As established in the Court's early case-law, third parties do not need to know about the exact division of competences ('res inter alios acta'); ECJ, Ruling 1/78, [1978] ECR 2151, para. 35.

[60] See for this distinction E. Neframi, *supra* note 3, pp. 338-359; E. Neframi, 'International Responsibility of the European Community and of the Member States under Mixed Agreements', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer 2002), pp. 194-198. Cf. also C. Pitschas, *supra* note 51, pp. 239-240.

[61] E. Neframi, *supra* note 3, pp. 338-359.

[62] E. Neframi, *supra* note 3, pp. 387-451.

[63] E. Neframi, *supra* note 3, at 341 ('clauses de répartition de l'effet obligatoire'); K.D. Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft* (Berlin: Duncker & Humblot 1986), at 94 ('Trennungsklauseln'); C. Tomuschat, 'Liability for Mixed Agreements', in D. O'Keeffe/H.G. Schermers (eds.), *Mixed Agreements* (Deventer: Kluwer 1983), pp. 127-131 ('competence clause'); C. Pitschas, *supra* note 51, pp. 240-250 ('Bindungsklauseln').

[64] E. Neframi, *supra* note 3, at 341; K.D. Stein, *supra* note 63, at 94.

a mixed agreement.[65] Either the agreement specifies directly which provisions are binding upon the EU or the Member States or it refers to the internal division of competences between the EU and the Member States as enshrined in the Treaties (indirect link to the sphere of Union or Member State external competence).[66]

2.3 The international responsibility for breaches of mixed agreements containing a clause dividing the binding effect of the agreement

The Court's reasoning in Opinion 1/19 resembles *Neframi's* analysis of the international responsibility for breaches of mixed agreements in her dissertation of 2007.[67] In her analysis, *Neframi* focuses on the basic principles of contract law in order to establish the binding effect of mixed agreements on the EU and its Member States. As *Neframi* provided one of few extensive contributions on this issue, this sub-section will take a closer look at the requirements to divide the binding effect of a mixed agreement suggested by this author. Whereas most scholars only focus on the *existence* of a clause dividing the binding effect of a mixed agreement in order to assume that the international responsibility is divided between the EU and its Member States[68], *Neframi* breaks this requirement down into two components. From her point of view, the assumption that the binding effect of a mixed agreement is divided is justified if the following conditions are fulfilled:

First, the mixed agreement must provide for a clause dividing the binding effect of the agreement (objective component).[69] According to *Neframi*, a clause dividing the binding effect necessarily consists of two elements: The first element is a clause incorporated into the mixed agreement specifying that the REIO and the Member States perform the obligations under the agreement in line with their internal division of competences.[70] The second element is a unilateral declaration of the EU specifying the extent to which it has external competence to conclude the agreement (for example, a declaration of competence issued by the EU when ratifying the agreement).[71]

The second component in order to determine whether the binding effect of a mixed agreement is divided between the EU and the Member States consists of a subjective component. According to *Neframi*, in line with the principle of

[65] E. Neframi, *supra* note 3, at 341.
[66] E. Neframi, *supra* note 3, pp. 350-359.
[67] See *supra* note 3.
[68] E.g. C. Pitschas, *supra* note 51, pp. 239-240.
[69] E. Neframi, *supra* note 3, at 342.
[70] E. Neframi, *supra* note 3, pp. 343-349.
[71] E. Neframi, *supra* note 3, pp. 343-349. See also J. Heliskoski, *supra* note 54, at 201, stressing that the declarations of competence issued by the EU must be sufficiently precise, without, however, preferring a competence-based approach in general, and J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague: Kluwer Law International 2001), pp. 143-146.

consent it must be established that the parties intended to divide the binding effect of the agreement.[72] A subjective component is needed because an agreement is only valid if all provisions of the agreement are covered by concurrent declarations to be bound made by the parties (concurrence of wills[73]). In other words, *Neframi* distinguishes between the objective content of each Party's declaration to be bound by an international agreement and the Party's intention to be bound by the treaty. This resembles the basic principles of contract law, according to which a declaration of a contract party to be bound by this contract requires an objective and a subjective element.[74] On the one hand, if the agreement contains a clause dividing the binding effect, then, according to *Neframi*, the Member States and the third parties to the agreement intended to divide the binding effect of the agreement.[75] On the other hand, if the objective component, that is, a clause dividing the binding effect of the agreement, is missing, then, according to *Neframi*, the subjective component is also lacking.[76]

This provokes the question whether the subjective component has an independent meaning in comparison with the objective component. Of course, one might assume that the subjective component is fulfilled if the objective component is fulfilled. Likewise, one might assume that the lack of the objective component results in the lack of the subjective component. Indeed, it seems doubtful that parties to a mixed agreement incorporate a clause dividing the binding effect into the agreement without, at the same time, willing to accept a division of the binding effect. Still, one can also imagine a situation where a party claims that it did not accept the division of the binding effect although the agreement contains a clause dividing its binding effect. Likewise, one can imagine a situation where a party claims that the subjective element is fulfilled although the agreement lacks a clause dividing its binding effect (as was the argument of the Court in Opinion 1/19, see *supra* section 1.3 and *infra* section 3.1). In the latter case, it is decisive whether the intention of the parties to accept the binding effect of the agreement must be reflected in the agreement by including a clause dividing the binding effect. In this regard, this paper, for reasons of legal certainty, argues that the intention to divide the binding effect of a mixed

---

[72] E. Neframi, *supra* note 3, pp. 359-360. See also E. Suy, *Les actes juridiques unilatéraux en droit international public* (Paris: Librairie Générale de Droit et de Jurisprudence 1962), pp. 21-25.

[73] Cf. E. Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law* (Leiden: Brill Nijhoff 2015), at 87; K. Widdows, 'What is an Agreement in International Law', 50 *British Yearbook of International Law* (1978), pp. 118-119; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. i (Cambridge: Grotius 1986), pp. 67-68.

[74] Although the view is generally rejected that international treaties between states are just the same as private contracts, references to the principles of contract law can be useful for the analysis of international treaties between states; in this regard, see M.R. Meek, 'International Law: Reservations to Multilateral Agreements', *DePaul Law Review* 5 (1955), at 40.

[75] E. Neframi, *supra* note 3, pp. 359-374, 377-380. In the same vein, J. Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer Law International 1996), at 70, argues that the subjective intent of a party to be bound by an international treaty must be manifest to third parties. See also J. Klabbers, *Treaty Conflict and the European Union* (Cambridge: Cambridge University Press 2008), at 21.

[76] E. Neframi, *supra* note 3, at 387, without, however, specifying how the objective and the subjective component relate to each other.

agreement (subjective component) is insufficient to divide the binding effect of a mixed agreement without a corresponding clause being incorporated into the agreement (objective component).

Overall, if either the objective component or the subjective component of the division of the binding effect is missing, the EU is bound by the mixed agreement in its entirety (see also *infra* section 2.4). In particular, if the agreement lacks a clause dividing its binding effect, the division of the binding effect can only take place if it is accepted by third parties to the agreement as a lawful reservation (see also *infra* section 4.1.4).[77]

The rules on Community accession in Article 305 of the UN Convention on the Law of the Sea (UNCLOS)[78] and Annex IX to that Convention are often considered as an example of a mixed agreement dividing its binding effect between the EU and the Member States.[79] According to Article 4(2) of Annex IX an international organization shall be a Party to this Convention to the extent that it has competence. According to Articles 2 and 5(1) of Annex IX an international organization shall make a declaration at the time of signature specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States which are signatories, and the nature and extent of that competence. The UNCLOS therefore obliges the EU to issue a declaration of competence when acceding to that Convention. Articles 2 and 4(2) of Annex IX state that the EU will only be a party to the Convention to the extent that it has the requisite external competence. Articles 2 and 4(2) of Annex IX can be considered a clause dividing the binding effect of UNCLOS; Article 5(1) of Annex IX incorporates the declaration of competence issued by the EU into the Convention.[80] Together, they constitute the objective component for the division of the binding effect of UNCLOS.[81] By including such clauses into the text of the Convention, the parties show that they accept the division of the binding effect of the Convention (subjective component).[82]

2.4 The international responsibility for breaches of mixed agreements without a clause dividing the binding effect of the agreement

In general, it is believed that in case of a (complete) mixed agreement where the division of competences between the EU and the Member States has not been clarified by including a clause dividing the binding effect and a sufficiently precise declaration of competence, the EU and the Member States are jointly

[77] According to *Neframi*, this amounts to implicitly inserting a clause dividing the binding effect of the agreement into the mixed agreement; see E. Neframi, *supra* note 3, pp. 381-382.
[78] UNTS vol. 1833, I-31363.
[79] C. Pitschas, *supra* note 51, pp. 247-250; E. Neframi, *supra* note 3, pp. 355-359.
[80] E. Neframi, *supra* note 3, pp. 355-358.
[81] E. Neframi, *supra* note 3, pp. 355-358.
[82] E. Neframi, *supra* note 3, pp. 377-380.

and severally liable for breaches of the mixed agreement.[83]

However, there have also been voices contending that the international responsibility of the EU for breaches of a mixed agreement is limited to the extent of its external competences.[84] In particular, it has been argued that the EU lacks legal personality as regards the provisions of a mixed agreement not falling under EU external competence.[85] Therefore, the EU can neither be bound by provisions not falling under its external competence nor can it incur international liability for breaches of these provisions.[86] This appears to be in line with Article 6 VCLT of 1986[87] which states that 'International organizations have the capacity to enter into commitments *to the extent* that this is allowed according to their internal rules'.[88] However, the existence of rules like Articles 27, 46 VCLT of 1986 shows that a distinction must be made between the international legal capacity to conclude international agreements and the internal competence to do so.[89] In other words, while an international organization might lack the requisite external competence to conclude an international agreement, it might still be legally bound by an international agreement *ultra vires*.

Some want to distinguish between mixed agreements falling under shared competences of the EU and the Member States and mixed agreements falling partly under exclusive EU competence and partly under exclusive Member State com-

---

[83] See, *inter alia*, E. Neframi, *supra* note 3, pp. 524-571; C. Pitschas, *supra* note 51, pp. 240-250; C. Tomuschat, *supra* note 63, at 130; G. Gaja, in D. O'Keeffe/H.G. Schermers, *Mixed agreements* (Deventer: Kluwer 1983), pp. 135, 137; A. Nollkaemper, 'Joint responsibility between the EU and Member States for non-performance of obligations under multilateral environmental agreements', in E. Morgera (ed.), *The External Environmental Policy of the European Union* (Cambridge: Cambridge University Press 2012), at 330. In general, A. Bleckmann, 'The Mixed Agreements of the EEC in Public International Law', in D. O'Keeffe/H.G. Schermers (eds.), *Mixed agreements* (Deventer: Kluwer 1983), pp. 155-156, lists three options to assign the rights and obligations of mixed agreements to the Community and the Member States. In the first scenario, the mixed agreement actually consists of two separate agreements: One agreement between the Community and the third parties to the treaty and one agreement between the Member States and the third parties to the treaty. In the second scenario, the mixed agreement creates obligations and rights between the Community, the Member States and the third parties as regards the entire agreement. In the third scenario, the mixed agreement is considered as one agreement but again is split in half, with the result that the agreement creates rights and obligations between the Community and third parties to the extent that the Community has the external competence, and between the Member States and third parties to the extent that the competence lies with the Member States. The first and third scenario are in line with the reasoning that the binding effect of a mixed agreement is divided between the EU and the Member States. The second scenario is in line with the reasoning that the agreement is binding upon the EU and its Member States in its entirety.

[84] See P.T. Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements* (Cham: Springer 2019), pp. 33-35.

[85] R. Arnold, 'Der Abschluß gemischter Verträge durch die Europäischen Gemeinschaften', 19 *Archiv des Völkerrechts* (1980/1981), at 433; M. Nettesheim, 'Kompetenzen', in A. von Bogdandy (ed.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (Berlin: Springer 2003), at 433; C. Pitschas, *supra* note 51, pp. 31-32.

[86] R. Arnold, *supra* note 85, pp. 433-434; C. Pitschas, *supra* note 51, pp. 240-242.

[87] See P.T. Stegmann, *supra* note 84, at 34.

[88] Emphasis added.

[89] P.T. Stegmann, *supra* note 84, pp. 34-35. Cf. also E. Neframi, *supra* note 3, pp. 419-421.

petence.[90] They argue that joint responsibility of the EU and the Member States for breaches of mixed agreements arises only in case the whole international agreement is covered by shared competences.[91] Otherwise, the EU only incurs international liability to the extent of its exclusive external competence and the Member States incur international liability to the extent of their exclusive external competence.[92] Nevertheless, looking at the rules enshrined in Articles 27, 46 VCLT of 1986, such a distinction cannot be upheld.

The assumption of joint responsibility of the EU and the Member States for breaches of mixed agreements presupposes that the EU can assume valid international obligations beyond the external competences attributed to it. Whether the EU can assume international obligations when acting *ultra vires* has been highly controversial among scholars. Those arguing that an international agreement of the EU concluded *ultra vires* is void tend to argue that the EU is only bound by a mixed agreement to the extent that it has external competence for the agreement.[93] In turn, those arguing that the EU can assume international obligations although, internally, it lacks the requisite external competence tend to argue that the EU is bound by the mixed agreement in its entirety.[94]

How can the EU incur responsibility for breaches of *any part* of the treaty although it only has competence for *certain parts* of the agreement? Some authors suggest that the EU and the Member States authorize each other to conclude the respective parts of the mixed agreement falling under the competence of the other.[95] Some argue that the consent of the EU and the Member States to be bound by the mixed agreement must be interpreted as a separate agreement between the Member States which revises EU primary law insofar as the EU needs external competence to conclude the agreement in its entirety (in German: 'punktuelle Vertragsdurchbrechung').[96] It is doubtful that the Member States actually intend to modify EU primary law each time they conclude a mixed agreement, considering that these are modifications of primary law beyond the ordinary amendment procedure as enshrined in Article 48 TEU.[97] Furthermore, this approach is problematic in view of legal certainty as to the division of external competences.[98] Therefore, it is more convincing to strictly distinguish between the international legal capacity of the EU to conclude international agreements and the internal competence of the EU to conclude these agreements. This

[90] C. Pitschas, *supra* note 51, at 240.
[91] C. Pitschas, *supra* note 51, at 240.
[92] C. Pitschas, *supra* note 51, at 240.
[93] R. Arnold, *supra* note 85, pp. 433-434.
[94] E. Neframi, *supra* note 60, pp. 198-201.
[95] E. Neframi, *supra* note 60, at 201.
[96] A. Bleckmann, 'Der gemischte Vertrag im Europarecht', *Europarecht* 1976, at 303; H. Krück, *Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften* (Berlin: Springer 1977), at 142.
[97] Cf. E. Neframi, *supra* note 3, pp. 462-463, who argues that the procedure for treaty amendments established in Art. 48 TEU is mandatory.
[98] E. Neframi, *supra* note 3, pp. 461-463; R. Arnold, *supra* note 85, pp. 440-441; C. Tomuschat, *supra* note 63, at 130.

distinction is also implied in Articles 27, 46 VCLT of 1986.[99]

Those authors arguing in favor of joint responsibility of the EU and its Member States as well as those arguing for international responsibility limited to the extent of EU external competences contend that their approaches are in line with the case-law of the Court. Ruling 1/78 is used to justify the assumption that the binding effect of a mixed agreement can also be divided if the mixed agreement does not contain a clause providing for the division of the binding effect.[100] Here, the Court of Justice held that it is enough to let third parties to a mixed agreement know that the external competences to conclude the agreement are divided between the Community and the Member States; according to the Court, 'the exact nature of that division is a domestic question in which third parties have no need to intervene'.[101]

Others regard the Court's case-law as a confirmation that without a specific clause dividing the binding effect of a mixed agreement, the EU and its Member States incur joint liability for breaches of the agreement.[102] They refer to the Court's judgment in Case C-316/91 regarding the Fourth Lomé Convention. Here, the Court stated that 'in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are *jointly liable* to those latter States for the fulfilment of every obligation arising from the commitments undertaken' [emphasis added].[103]

It is more convincing to assume that the EU and the Member States are jointly liable for breaches of a mixed agreement in the absence of a clause dividing the binding effect. In Ruling 1/78, the Court did not examine whether the bind-

---

[99] E. Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO', 17 *European Journal of International Law* (2006), at 842.

[100] C. Pitschas, *supra* note 51, at 241.

[101] Ruling 1/78, *supra* note 59, para. 35.

[102] N. Nedeski, *supra* note 53, pp. 12-13; see also P.T. Stegmann, *supra* note 84, at 31. *Stegmann* makes additional reference to the Court's judgments in Case C-239/03 (Étang de Berre) and C-53/96 (Hermès). ECJ, Case C-239/03, *Commission* v. *France*, ECLI:EU:C:2004:598, concerned an action under Article 226 EC of the Commission against France for failure to fulfil obligations under the Barcelona Convention for the protection of the Mediterranean Sea against pollution and under the Athens Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, the Barcelona Convention and its Protocol both being mixed agreements. The Court affirmed its jurisdiction to adjudicate on this case on the ground that the Convention and the Protocol were largely covered by Community law, whether or not the specific obligation at issue was covered by Community law. ECJ, Case C-53/96, *Hermès*, ECLI:EU:C:1998:292, concerned the Court's competence to interpret a provision of the TRIPs (a mixed agreement) falling under Member State competence. The Court held 'that the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties'; para. 24 of the judgment. However, both judgments did not deal with the EU's international responsibility for breaches of mixed agreements but rather concerned the Court's authority to interpret mixed agreements and the Member States' obligation to ensure compliance with commitments arising from a mixed agreement within the EU system.

[103] Cf. ECJ, Case C-316/91, *Parliament* v. *Council (EDF)* [1994] ECR I-653, para. 29. In contrast, ECJ, Case C-327/91, *French Republic* v. *Commission* [1994] ECR I-3641, concerned the international responsibility of the Community for breaches of an agreement concluded by the Commission when the Commission is not the competent organ to conclude the agreement.

ing effect of a mixed agreement can be divided when third parties are ignorant of the division of competences between the EU and its Member States. The Court rather argued that there is no need to inform third parties of the division of competences because it is not of their interest. The Court's reasoning in Ruling 1/78 therefore speaks neither in favour nor against joint international responsibility of the EU and the Member States in case the agreement lacks a clause dividing the binding effect.

Overall, the past case-law of the Court supports the view that in case the binding effect of a mixed agreement cannot be divided according to the rules established above, the EU and the Member States are bound by the mixed agreement in its entirety. Provided that the EU and the Member States cannot successfully rely on Articles 27, 46 VCLT of 1986 (see *infra* section 4.1.5)[104], they are, therefore, jointly internationally responsible for breaches of the mixed agreement.

2.5 Difficulties in applying the principles guiding the international responsibility for breaches of mixed agreements to incomplete mixed agreements

Academic literature has widely discussed the international responsibility of the EU and its Member States for breaches of mixed agreements[105], especially, in the context of breaches of WTO law and the applicability of Articles 27, 46 VCLT of 1986.[106] In a few cases, scholars have also discussed the international responsibility of the EU and its Member States for breaches of incomplete mixed agreements.[107]

---

[104] E. Neframi, *supra* note 3, pp. 336-337, calls the extent of the binding effect of a mixed agreement for the EU *at the time of the conclusion of the agreement* the 'static aspect' of the binding effect. The 'dynamic aspect' of the binding effect, in contrast, refers to the validity ('validité') of the *ultra vires* legal ties, that means the extent to which the EU can actually be held internationally responsible for failing *to fulfil the obligations arising* from the mixed agreement. Most scholars, however, do not distinguish between a static and a dynamic aspect of the binding effect of a mixed agreement.

[105] See, *inter alia*, E. Neframi, *supra* note 3, pp. 524-571; C. Pitschas, *supra* note 51, pp. 240-250.

[106] See for example E. Steinberger, *supra* note 99, pp. 837-862; G. Marín Durán, *supra* note 53, pp. 703-704.

[107] See, *inter alia*, P. Allott, 'Adherence To and Withdrawal From Mixed Agreements', in D. O'Keeffe/ H.G. Schermers (eds.), *Mixed agreements* (Deventer: Kluwer 1983), pp. 97-121, who refers to incomplete mixed agreements as 'partial participation'. Furthermore, see J. Heliskoski, *supra* note 71, pp. 128-132; H.G. Schermers, *supra* note 7, pp. 23, 26; M.J.F.M. Dolmans, *Problems of Mixed Agreements* (The Hague: Asser 1985), pp. 64-70; L. Granvik, *supra* note 1, pp. 255-272; E. Neframi, *supra* note 3, pp. 612-616; as regards the international responsibility for breaches of the Energy Charter Treaty see P.T. Stegmann *supra* note 84, pp. 41-43, 60-64; for a discussion on the legal implications of a Member State's refusal to ratify a mixed agreement see G. Van der Loo/R.A. Wessel, 'The non-ratification of mixed agreements: Legal consequences and solutions', 54 *Common Market Law Review* (2017), pp. 735-770; G. Kübek, 'The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States', 23 *European Foreign Affairs Review* (2018), pp. 21-40.

In general, the requirements necessary to assume a division of the binding effect of a mixed agreement can also be applied to incomplete mixed agreements. What is more, the principles enshrined in Articles 27, 46 VCLT of 1986 that apply to establish the international responsibility for breaches of mixed agreements also apply to incomplete mixed agreements. Indeed, the Vienna Conventions of 1969 and 1986 do not distinguish between complete and incomplete mixed agreements.[108] However, as regards incomplete mixed agreements, it is even more important to separate the Union sphere of competence from the Member State sphere of competence.[109] 'Joint responsibility' is not a fallback option in case of incomplete mixed agreements. This is because neither the EU nor the ratifying Member States would internally have any chance of making the non-ratifying Member State comply with the incomplete mixed agreement when this Member State has not ratified the agreement. Also, the non-ratifying Member State is not obliged under EU law to comply with parts of the incomplete mixed agreement falling under exclusive Member State competence because an obligation under EU law to comply with international agreements concluded by the EU (Article 216(2) TFEU) only covers parts of the agreement falling under EU competence.[110]

3. THE CJEU PERSPECTIVE: THE BINDING EFFECT OF THE ISTANBUL CONVENTION DEPENDS ON THE EXTENT TO WHICH THE EU AND THE MEMBER STATES EXERCISE THEIR RESPECTIVE EXTERNAL COMPETENCE

In the last section, it has been established that the EU and its Member States incur joint responsibility for breaches of mixed agreements in the absence of a so-called 'clause dividing the binding effect of a mixed agreement'. That means that the EU and its Member States can only avoid international responsibility for breaches of mixed agreements by relying on Articles 27, 46 VCLT of 1986.[111] Articles 27, 46 VCLT of 1986 exceptionally allow the internal division of competences between the EU and its Member States to gain relevance in relation to third parties. The Court's reasoning in Opinion 1/19 sits uneasily with this

---

[108] Cf. Art. 1 and Art. 2(1)(a) VCLT of 1969 and VCLT of 1986 for the scope of application of the Conventions; as regards partial consent in line with Article 17 of the Vienna Convention, see *infra* section 4.1.4.

[109] C. Tomuschat, *supra* note 63, at 130.

[110] Cf. ECJ, Case C-13/00, *Commission* v. *Ireland*, ECLI:EU:C:2002:184, paras. 13-15; ECJ, Case C-239/03, *Commission v France*, *supra* note 102, paras. 25-29.

[111] Art. 27(2) VCLT of 1986 reads: 'An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.' According to Art. 46(2) VCLT of 1986 'An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.' Last, Art. 46(3) VCLT of 1986 stipulates that '[a] violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.' See also *infra* section 4.1.5.

analysis. This is why, in this section, it will be assessed, following the Court's reasoning in Opinion 1/19, to what extent the EU (3.1) and the Member States (3.2) are bound by the provisions of the Istanbul Convention when concluding it as an incomplete mixed agreement.

3.1 **Binding effect of the Istanbul Convention on the EU**

From the Court's perspective, the binding effect of a provision of the Istanbul Convention depends on whether the EU, by concluding the Istanbul Convention, has exercised its external competence. As a consequence, according to the Court, the EU is not bound by provisions of the Istanbul Convention that fall under EU competences which are exercised by the Member States. Following this reasoning, the EU is only bound by the provisions of the Istanbul Convention insofar as they fall under exclusive EU external competence.[112]

Looking at the Court's reasoning in Opinion 1/19, it becomes quite clear which provisions of the Convention fall under exclusive EU competence, thus, where to draw the line between the EU's external competence and the Member States' external competence. According to the Court, the EU's exclusive external competence comprises the substantive provisions of Articles 7, 8, 10-16, 18-28, 33-44, 47-65 of the Istanbul Convention.[113] The substantive provisions of Articles 4-6, 9, 17, 29-32, 45 and 46 of the Istanbul Convention either belong to the exclusive external competences of the Member States or they are shared competences to be exercised by the Member States (cf. Art. 2(2) TFEU).

It is the provisions on substantive criminal law in Chapter V of the Istanbul Convention which require that the Convention is concluded by the EU and the Member States as a mandatory mixed agreement (see *supra* section 1.3). In his Opinion, AG Hogan found that the EU had only limited competence to conclude chapter V of the Istanbul Convention on substantive criminal law. The AG opined that the Member States retained most of the competences as regards chapter V of the Convention.[114] In particular, he argued that a loose connection between domestic violence and trafficking in human beings or the sexual exploitation of women and children (which are covered by Article 83(1) TFEU), is not sufficient to justify the use of Article 83(1) TFEU as a legal basis in the Council Decisions to conclude the Istanbul Convention.[115] Similarly, the Court of Justice, in Opinion 1/19, argued that the external competence under Article 83(1) TFEU and the provisions of the Istanbul Convention only overlap to a small extent, which does not justify using Article 83(1) TFEU as a legal basis.[116]

---

[112] Non-ratifying Member States would only be bound by the Convention to the extent that it is covered by exclusive EU external competence. See P. Koutrakos, *supra* note 4, at 262.

[113] Paras. 295-310 of Opinion 1/19, *supra* note 4.

[114] Para. 155 of the Opinion of AG Hogan, Opinion 1/19, ECLI:EU:C:2021:198.

[115] Para. 155 of the Opinion of AG Hogan, *supra* note 114.

[116] Opinion 1/19, *supra* note 4, para. 301.

Indeed, the EU's competences in matters of criminal law are limited. Those areas of criminal law which are not covered by Article 82(2) and Article 83(1) TFEU are areas falling under exclusive Member State competence.[117] Article 82(2) TFEU provides for a shared EU competence in matters of criminal procedural law. Article 83(1) TFEU provides for the adoption of minimum rules in the area of substantive criminal law, that is, the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension. The cross-border dimension may result from the nature or the impact of such offences or from a special need to combat them on a common basis. Article 83(1) TFEU also exhaustively[118] lists certain areas of crime which fulfil these conditions. In other areas of crime not falling under Article 83(1) TFEU, the Council may adopt common rules based on a unanimous decision after obtaining the consent of the European Parliament. In areas not mentioned in Article 83(1) TFEU and not covered by a unanimous Council decision, the EU has no internal competence to adopt minimum rules. By inference, when the EU has no internal competence to adopt minimum rules, it has no external competence in these areas, either.[119]

For this reason, the EU has no external competence for criminal offences under the Istanbul Convention other than trafficking in human beings and sexual exploitation of women and children and, therefore, according to the Court, is not bound by the corresponding provisions of the Istanbul Convention. The EU is neither bound by provisions falling under shared external competences which are exercised by the Member States. From the point of view of the Court, the EU is only bound by the Convention to the extent of its exclusive external competences.[120]

---

[117] For the EU's internal competence for substantive criminal law see W. Schroeder, 'Limits to European Harmonisation of Criminal Law', *eucrim* 2020, pp. 144-148; V. Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing 2009), pp. 107-109; C. Aksungur, *Europäische Strafrechtsetzungskompetenzen* (Baden-Baden: Nomos 2014), pp. 297-337; as regards the EU's external competence for substantive criminal law cf. paras. 154-155 of the Opinion of AG Hogan, *supra* note 114; K. Nousiainen/C. Chinkin, *supra* note 26, pp. 47-50, 66.

[118] See para. 153 of the Opinion of AG Hogan, *supra* note 114.

[119] See W. Schroeder, *supra* note 117, pp. 147-148. Cf. the discussion on the Commission's Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM(2022) 105 final, which might serve to integrate the provisions of the Istanbul Convention into the EU legal order regardless of whether all Member States ratify the Istanbul Convention in their own capacity; see F. Castillo de la Torre, *supra* note 4, at 100. Those Member States opposing a ratification of the Istanbul Convention also oppose the adoption of the Directive on similar grounds. See, for example, the statement entered by Poland, Council Document 9305/23 ADD 2 of 7 June 2023, the statement entered by Bulgaria, Council Document 9305/23 ADD 3 of 16 June 2023, and the statement entered by Hungary, Council Document 9305/23 ADD 1 of 31 May 2023. In contrast, the Council opined that the EU has the requisite internal competence to adopt the Directive; see Opinion of the Legal Service, Council Document 1427/22 of 31 October 2022, para. 83.

[120] Another issue would be to decide whether an exclusive EU external competence in line with Article 3(2) TFEU cannot be established due to Article 73 of the Istanbul Convention, which provides that the rules of the Convention are only minimum requirements; see Opinion of AG Hogan, *supra* note 114, paras. 99-103; M. Chamon, 'AG Hogan's Opinion in Avis 1/19 regarding the Istanbul Convention', *EU Law Live*, Op-Ed 15.3.2021; F. Castillo de la Torre, *supra* note 4, pp. 105-106. Arguing in favour of an ERTA effect, see S. Prechal, *supra* note 25, at 289. The Court, in Opinion 1/19, does not deal with this issue but appears to assume an implied EU external competence in

3.2 **Binding effect of the Istanbul Convention on the Member States**

Following the Court's reasoning in Opinion 1/19, most obligations established under chapter V of the Convention fall under exclusive Member State external competence. From the Court's perspective, the EU is not internationally bound by these provisions.[121] As a consequence, the binding effect of the Istanbul Convention is divided between the EU and its Member States along the lines of the division of competences. This means that the Member States are bound by the Convention insofar as the agreement covers exclusive Member State competence and shared external competence exercised by the Member States. However, based on the argument put forward by *Neframi* (see *supra* section 2.3 and *infra* section 4), the Court's reasoning is not convincing because it does not require *both* an objective and a subjective component to divide the binding effect of the Convention.

4. THE PUBLIC INTERNATIONAL LAW PERSPECTIVE: THE INTERNATIONAL RESPONSIBILITY OF THE EU AND ITS MEMBER STATES FOR BREACHES OF THE ISTANBUL CONVENTION BY A NON-RATIFYING MEMBER STATE

This section will analyse the international responsibility of the EU and its Member States for breaches of the Istanbul Convention by a non-ratifying Member State from a public international law perspective. In this regard, it will also distinguish between the binding effect of the Istanbul Convention on the EU (4.1) and the binding effect of the Convention on the (ratifying) Member States (4.2).

4.1 **Binding effect of the Istanbul Convention on the EU**

As regards the EU's international responsibility, this section, first, examines whether the REIO clause in Article 75 of the Istanbul Convention can be considered a clause dividing the binding effect of the Convention between the EU and the Member States (4.1.1) Next, it assesses whether the declaration of competence as recently adopted by the Council is enough to divide the binding effect of the Istanbul Convention (4.1.2). Moreover, it scrutinizes whether a division of the binding effect of the Convention might be established by issuing a declaration as regards the territorial applicability of the Convention (3.) or by making a reservation (4.1.4). Last, this section examines whether the EU can invoke Articles 27, 46 VCLT of 1986 to avoid international responsibility for breaches of the Istanbul Convention by a non-ratifying Member State (4.1.5).

line with the ERTA doctrine.

[121] Cf. para. 261 in conjunction with paras. 294-301 of Opinion 1/19, *supra* note 4.

4.1.1 *REIO clause in Article 75 of the Istanbul Convention as a clause dividing the binding effect of the Convention?*

The Istanbul Convention does not contain provisions which determine whether the EU and/or the Member States are obliged by a specific provision or enjoy the rights conferred by a specific provision of the Convention. The Istanbul Convention does not even mention the relationship between the EU and its Member States but is confined to mentioning the option of EU accession to the Convention (Article 75 of the Convention). In contrast to UNCLOS (see *supra* section 2.3), the Istanbul Convention does not contain a REIO clause providing for the accession of international organizations *along the lines of the provisions covered by their external competence*. Article 75 of the Istanbul Convention only allows the EU to accede to the Convention, without specifying the extent to which the EU accedes to the Convention. As the REIO clause does not refer to the division of external competences between the EU and the Member States, it cannot be qualified as a clause dividing the binding effect of the Istanbul Convention.

4.1.2 *The declaration of competence adopted by the Council: Is it enough to divide the binding effect of the Convention?*

The Council approved a declaration concerning the competence of the European Union regarding matters governed by the Istanbul Convention in February 2023.[122] The declaration reads as follows:

1. The European Union (hereafter 'the Union') hereby declares the specific areas of its competences in the matters covered by the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter 'the Convention'), at the time of its accession to the Convention.

2. In accordance with Articles 3 and 4 of the Treaty on the Functioning of the European Union (TFEU), in some matters the Union has exclusive competence and in other matters competence is shared between the Union and its Member States. For all matters in respect of which no competence has been conferred to the Union, the Member States remain solely competent.

3. The Union has exclusive competence to accept the obligations set out in the Convention with respect to its own institutions and public administration, within the scope of Article 336 TFEU.

4. In other matters covered by the Convention where EU rules have been adopted– namely as regards:
   - action to combat discrimination, in particular based on sex,

[122] Council Doc. 6088/23 of 9 February 2023. The wording of the declaration submitted to the Council of Europe as available at <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=210&codeNature=10&codePays=1> differs slightly from the wording of the declaration first adopted by the Council but does not justify a different conclusion.

- action regarding the coordination of diplomatic or consular protection of citizens of a non-represented EU Member State in a third country,
- action on matters of asylum, subsidiary protection, temporary protection, and immigration,
- judicial cooperation in civil and criminal matters and police cooperation,
- equality between women and men with regard to labour market opportunities and treatment at work and in matters of employment and occupation,

the Union has exclusive competence to enter into this Convention only to the extent that provisions of the Convention may affect common rules or alter their scope within the meaning of Article 3(2) TFEU. When Union rules exist but there is no risk of affectation, in particular as may be the case where Union law establishes minimum standards, the Member States have competence, without prejudice to the competence of the Union to act in this field.
In particular, the scope of Union rules may be affected or altered by international commitments where the latter fall within an area already largely covered by such rules. When assessing whether an area is already largely covered by Union rules, account must be taken, in particular, not only of Union law as it now stands in the sphere concerned, but also of its future development, insofar as that is foreseeable at the time of that analysis. The extent of the Union's competence must be assessed on the basis of a comprehensive and detailed analysis of the relationship between the Convention and the precise provisions of each measure of Union law.
For that purpose a list of relevant acts adopted by the Union appears in the Annex hereto.

5. The Union's accession to the Convention which concerns the matters falling within its exclusive competence, is without prejudice to the Member States' competence as regards the ratification, acceptance or approval of the Convention, for matters falling within their national competences.

6. The scope and exercise of Union competence are, by their nature, subject to continuous development. Where appropriate, the Union will complete or amend this declaration.

7. In accordance with Article 77 of the Convention, the Union would like to specify that the Convention shall apply, with regard to the competence of the Union, to the territories in which the EU Treaties are applied and under the conditions laid down, in particular in Article 52 of the Treaty on European Union and Article 355 TFEU thereof.

The Annex lists several acts of secondary law in the areas of cooperation in criminal matters and police cooperation, asylum and migration, data protection, consular protection, equality and non-discrimination, statistics and others.

This declaration of competence raises several issues: First, although the Istanbul Convention lacks a clause dividing its binding a declaration of competence might need to be taken into account when interpreting the Convention as an instrument made in connection with the conclusion of the Convention within the meaning of Article 31(2)(b) VCLT of 1986. Second, it is doubtful whether a unilateral declaration of competence made by the EU without a clause in

the Istanbul Convention obliging the EU to issue such a declaration would be enough to divide the binding effect of that Convention. Third, the question arises whether a unilateral declaration of competence would be admissible under the Law of Treaties. However, the fact that the provisions of the Istanbul Convention falling under exclusive EU external competence and Member State external competence are inseparable would not prevent the division of the binding effect of that Convention.

4.1.2.1 Declaration of competence as an instrument made in connection with the conclusion of the Istanbul Convention (Article 31(2)(b) VCLT of 1986)

It has been suggested that a declaration of competence issued by the EU when concluding the Istanbul Convention might serve as an instrument made in connection with the conclusion of a treaty within the meaning of Article 31(2)(b) VCLT of 1986.[123] According to Article 31(1) of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(2)(b) of the Vienna Convention provides that the context for the purpose of the interpretation of a treaty shall comprise, *inter alia*, any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Treaty practice suggests that a declaration made by the EU when concluding an international agreement might very well be interpreted as a declaration within the meaning of Article 31(2)(b) of the Vienna Convention.[124]

However, in order to form part of the context to be considered when interpreting the Istanbul Convention within the meaning of Article 31(2)(b), the declaration must be approved in some way by the other parties to the Convention, which is a consequence of the principle of consent.[125] One might argue that the accep-

---

[123] G. Kübek, *supra* note 1, at 1482. See also A. Delgado Casteleiro, *supra* note 54, at 116; A. Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base', 17 *European Foreign Affairs Review* (2012), at 496; I. MacLeod et al., *The External Relations of the European Communities* (Oxford: Clarendon Press 1996), pp. 161-162. P. Okowa, 'The European Community and International Environmental Agreements', 15 *Yearbook of European Law* (1995), at 196, states that 'a declaration of competence, although not necessarily an integral part of the Treaty will be regarded as an authoritative statement on the scope of the parties' commitment under the Convention', without, however, making reference to Art. 31(2)(b) VCLT of 1986.

[124] Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, paras. 279-280, as mentioned by G. Kübek, *supra* note 1, at 1482 note 94. The declaration made by the EU upon the adoption of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse contained a disconnection clause, which serves to exclude the application of the Convention among EU Member States as well as between the EU Member States and the EU. Nevertheless, a disconnection clause cannot be compared to a declaration of competence as its purpose is limited to exclude the application of the Convention among EU Member States, not between the EU or its Member States and third parties to the Convention.

[125] O. Dörr, 'Art. 31', in O. Dörr/K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (Berlin: Springer 2nd edition 2018), paras. 61, 65; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff 2009), 'Art. 31 VCLT 1969',

tance by third parties can also be given tacitly. Therefore, it could be considered sufficient that third parties to the Istanbul Convention do not oppose a declaration of competence issued by the EU as a declaration within the meaning of Article 31(2)(b) VCLT of 1986.[126] Still, the acceptance by third parties (explicitly or tacitly given) must be proven by the party issuing the declaration.[127] Arguably, it is hard to prove that third parties to the agreement have tacitly given their consent to a division of the binding effect without some indication within the agreement in this regard. If the third parties to the agreement accede to the agreement after the EU issued its declaration of competence, they might have been aware of the fact that the EU is not willing to be bound by the agreement in its entirety. However, if the third parties acceded to the agreement before the EU issues its declaration of competence, they cannot have been aware of a partial accession of the EU to the agreement. For this reason, it is doubtful that the EU would be able to prove that third parties were indeed aware that an EU declaration of competence would limit the binding effect of the Convention on the EU. It rather seems that third parties to the Convention would oppose such an effect of a declaration of competence in the same manner that they might reject a declaration of competence as an unlawful reservation (see *infra*). What is more, in the context of multilateral agreements, it seems inadmissible that the extent of the binding effect towards third parties depends on the order of accession of third parties (before or after the EU) to the treaty. In case a party to the treaty is not willing to be bound by the treaty in its entirety, the provisions on reservations within the VCLT provide a sufficient mechanism to modify the binding effect of an agreement in relation to third parties.

4.1.2.2 A declaration of competence without a corresponding clause dividing the binding effect of the Istanbul Convention: Is it enough to divide the binding effect of the Convention?

The second issue which arises is that the declaration of competence is not envisaged in the text of the Istanbul Convention. This provokes the following question: Is a declaration of competence without a corresponding clause dividing the binding effect enough to divide the binding effect of the Istanbul Convention? In order to assume that the declaration of competence is sufficient on its own, one would have to argue that an objective component of the binding effect, that is, a provision explicitly referring to the division of competences between the EU and the Member States, is not necessary. Similarly, the Court argued in Opinion

---

para. 19. Cf. G. Van der Loo/R.A. Wessel, *supra* note 107, at 764; K. Schmalenbach, 'Acts of International Organizations as Extraneous Material for Treaty Interpretation', 69 *Netherlands International Law Review* (2022), pp. 274-275, 277.

[126] Arguing in favour of a 'tacit reservation in the sense that the Community cannot be held liable for matters which are obviously outside its competence' H.G. Schermers, *supra* note 7, at 28; R. Leal-Arcas, 'The European Community and Mixed Agreements', 6 *European Foreign Affairs Review* (2001), at 498. Arguing against a tacit limitation of the binding effect K.D. Stein, *supra* note 63, at 110.

[127] O. Dörr, 'Art. 31', *supra* note 125, para. 68.

1/19 that it is sufficient that the parties to the Istanbul Convention knew that the external competence to conclude the Convention was shared between the EU and the Member States (see *supra* section 1.3).[128]

In this regard, *Neframi* contends that a declaration of competence needs a reference point within the mixed agreement so that the matters of EU competence envisaged in the declaration can be linked to specific provisions of the agreement.[129] A declaration of competence without a corresponding clause dividing the binding effect serves the purpose of informing third parties to the agreement of the fact that the EU has competence to conclude the agreement but it is not sufficient to demonstrate *the extent* to which the EU participates in the agreement.[130]

As has been established *supra*, it is difficult to argue that third parties to a mixed agreement tacitly consent to dividing the binding effect of a mixed agreement when that consent is not integrated into the text of the agreement. Therefore, this paper contends that the division of the binding effect of an incomplete mixed agreement needs to be enshrined in the agreement itself at least in a very general way and needs to be complemented by a declaration of competence setting the division of binding effect into practice.[131] This means that if the agreement lacks a clause dividing its binding effect (objective component), it seems irrelevant whether the EU, the Member States and the third parties to the Istanbul Convention knew that the EU's external competence did not cover the Convention in its entirety (subjective component).[132] In order to divide the binding effect of an agreement, the agreement must contain a provision which establishes that the competence to conclude the agreement is divided between the EU and its Member States. Without such an objective reference point within the agreement, the mere knowledge of third parties that the EU might not have had the requisite external competence to conclude the agreement in its entirety is irrelevant.

The Court's reasoning in Opinion1/19 disregards the objective component necessary in order to assume a division of the binding effect, that is, a clause in the agreement providing for the division of the binding effect. Still, the declaration of competence might be considered sufficient if the mixed agreement did at least provide for the option to issue such a declaration of competence. This would

---

[128] Opinion 1/19, *supra* note 4, para. 261. Arguing that a declaration of competence might sufficiently divide the binding effect of a mixed agreement without, however, contemplating whether the mixed agreement must provide for the option to issue a declaration of competence, see A. Nollkaemper, *supra* note 83, at 329.

[129] E. Neframi, *supra* note 3, pp. 354-359.

[130] E. Neframi, *supra* note 3, pp. 348-349. Cf. also N. Nedeski, *supra* note 53, pp. 13-14.

[131] Cf. E. Neframi, *supra* note 3, pp. 346-349, 354-359.

[132] In this regard, *Neframi* argues that in case a mixed agreement does not provide for the division of its binding effect, the objective component as well as the subjective component for incorporating the division of competences into the mixed agreement are missing because the agreement lacks a reference point for the parties' intent to divide the binding effect of the agreement; E. Neframi, *supra* note 3, at 387.

incorporate the declaration of competence into the agreement. Without such a clause, a declaration of competence issued by the EU might be regarded as a unilateral act which is not binding upon third parties to the Convention (see also *infra*).[133]

Irrespective of the unilateral or bilateral/multilateral nature of the declaration of competence, the question arises whether the declaration of competence issued by the EU is specific enough to divide the binding effect of the Istanbul Convention. It is true that the declaration of competence regarding matters covered by the Istanbul Convention is far more comprehensive than most other declarations of competence the EU has made in the past. Starting from the purpose of the declaration – which is to divide the binding effect of the Convention – one might argue that the declaration must be as specific as possible. On the one hand, because any doubts as to the division of competences might be held against the Union and lead to the Union's international responsibility for breaches of the Convention. On the other hand, the more specific the EU's declaration of competence, the more legal certainty it provides for third parties. This means that at least the respective areas of EU competence and the respective areas of Member State competence must be named. In the case of the Istanbul Convention, due to the detailed considerations of the Court in Opinion 1/19 (see *supra* section 3.1), it could be argued that the EU would be obliged to enumerate the specific provisions falling under exclusive EU external competence. However, although the Convention is clearly structured in chapters which can be linked to areas of EU competence, within these chapters there are provisions which fall outside of EU external competence. In particular (see *supra* section 3.1), chapter V of the Istanbul Convention comprises provisions which – depending on the case at hand – might be covered by EU external competence or exclusive Member State competence. Therefore, it does not seem appropriate to require that the declaration of competence must clarify which specific provisions of the Convention fall under exclusive EU external competence. It must suffice that the declaration of competence maps out the areas where the EU has exclusive competence in conjunction with the list of common rules adopted by the EU and the criteria to be applied in order to establish an implied exclusive external competence of the EU.

In accordance with this reasoning, the declaration of competence does not need to be unambiguous or all-comprehensive as regards the division of com-

[133] See, however, E. Neframi, *supra* note 3, at 384, who contends that declarations of competence made according to 'clauses de répartition de l'effet obligatoire' are not unilateral acts under public international law because they are not independent from the acceptance of third parties to the international agreement; instead, they form part of the international agreement itself. See for a definition of unilateral acts in public international law E. Suy, *supra* note 72, pp. 25-30. For a similar approach see E. Kassoti, *supra* note 73, at 94, who argues that unilateralism is 'the autonomy of the author's intention to produce legal effects irrespective of the existence of any corresponding acceptance or reliance on behalf of the addressee/s'. Nevertheless, without a clause incorporating the declaration of competence into the Convention, a declaration of competence cannot be considered as part of the agreement.

petences between the EU and the Member States. It seems sufficient that the declaration lays down in a very general way how the competences are divided between the EU and the Member States.[134] Moreover, the EU has the option to further specify the exact extent of EU external competences in case an issue of international responsibility arises.[135] Still, without a clause dividing the binding effect integrated into the text of the Istanbul Convention, the declaration issued by the EU will not be sufficient to divide the binding effect of the Convention.

4.1.2.3 Admissibility of a declaration of competence to the Istanbul Convention under the Law of Treaties

Even if it is argued that the declaration of competence does not need to be envisaged in the Istanbul Convention as such, the issue remains whether the EU would be allowed to issue such a declaration under the Law of Treaties. In this regard, AG Hogan, in his Opinion, stated that third parties might consider such a declaration of competence an unlawful reservation under Article 78 of the Istanbul Convention.[136]

There has been some discussion among scholars whether a declaration of competence can be considered a *reservation*.[137] To recall, according to Article 2(1)(d) VCLT of 1986

> "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization.

A declaration of competence issued by the EU might indeed be regarded as a unilateral statement. Yet, it seems doubtful whether a declaration of competence purports to exclude or to modify the legal effect of certain provisions in their application to the EU.[138] In this regard, it might be considered whether a declaration of competence merely serves the purpose to inform third parties about the division of competences without purporting to modify the legal effect of a mixed agreement at the same time.[139] Similarly, the parties to the proceedings

---

134 E. Neframi, *supra* note 3, at 358.

135 Cf. E. Neframi, *supra* note 3, pp. 358-359.

136 Para. 214 of the Opinion of AG Hogan, *supra* note 114.

137 E. Neframi, *supra* note 3, pp. 374-382; M.J.F.M. Dolmans, *supra* note 107, at 66.

138 For a similar argument see J.T. Lang, 'The Ozone Layer Convention: A New Solution to the Question of Community Participation in "Mixed" International Agreements', 23 *Common Market Law Review* (1986), at 163: 'It is probably right to say that such a statement is not a reservation in the ordinary sense of the term, since a reservation is a statement that one is unwilling to accept a certain obligation, rather than a statement that one is not in a position to accept it'. Arguing that a narrow accession of an international organization to an international agreement can be qualified as a reservation see E. Neframi, *supra* note 3, at 375; arguing that issuing a declaration of competence amounts to making a reservation see M.J.F.M. Dolmans, *supra* note 107, at 66.

139 Cf. para. 214 of the Opinion of AG Hogan, *supra* note 114.

leading up to Opinion 1/19 argued that a declaration of competence is made due to an objective lack of competence to conclude parts of the agreement; in contrast, a reservation is made in spite of sufficient competence to conclude the agreement in its entirety but due to a lacking willingness to be bound by parts of the agreement.[140]

However, AG Hogan opined that the objective pursued by a declaration of competence is irrelevant when determining whether the declaration is a reservation within the meaning of Article 2(1)(d) VCLT of 1986; according to the AG, it is only relevant whether the declaration of competence has the *effect* of excluding or modifying the legal effect of provisions of an agreement.[141] The AG's reasoning is to be preferred: The term 'reservation' as envisaged in Article 2(1)(d) VCLT of 1986 can be interpreted widely.[142] As a consequence, it is irrelevant that the EU issues the declaration of competence because it lacks the requisite competence to assume all obligations arising from an international agreement. By issuing a declaration of competence the EU purports to exclude the binding effect of parts of the agreement within the meaning of Article 2(1)(d) VCLT of 1986. Based on this reasoning, a declaration of competence can therefore be considered a reservation.

Next, the question arises whether the declaration of competence adopted by the Council can also be considered a *lawful* reservation within the meaning of Article 19 VCLT of 1986. Even if it is argued that the Istanbul Convention does not explicitly prohibit a declaration of competence as a reservation (lit. a), according to Article 19(b) VCLT of 1986 a reservation is unlawful if the treaty provides that only specified reservations, which do not include the reservation in question, may be made. This is the case for the Istanbul Convention (see *infra* section 4.1.4). As a consequence, a declaration of competence issued by the EU when acceding to the Istanbul Convention amounts to an unlawful reservation under the Law of Treaties. That means that it is irrelevant whether the third parties to the Istanbul Convention accept the declaration of competence within the meaning of Article 20 VCLT of 1986. In other words, even if the declaration of competence was accepted by the third parties to the Convention, it would still be inadmissible under the Law of Treaties. Therefore, the AG was right to argue that the EU cannot avoid its international responsibility by issuing a declaration of competence as it amounts to an unlawful reservation.

---

[140] Cf. Para. 208 of the Opinion of AG Hogan, *supra* note 114. See also G. Kübek, *supra* note 1, pp. 1478-1479.

[141] Paras. 209-210 of the Opinion of AG Hogan, *supra* note 114. R. W. Edwards, 'Reservations to Treaties', *Michigan Journal of International Law* 1989 (10), at 368, C. Tomuschat, 'Admissibility and Legal Effects of Reservations to Multilateral Treaties', 27 *Heidelberg Journal of International Law* (1967), at 465, and M.R. Meek, *supra* note 74, at 41, who are cited by the AG in this regard, discuss a criterion of finality to distinguish a reservation from a mere interpretative declaration. However, this paper contends that declarations of competence must be distinguished from interpretative declarations, see *supra*.

[142] Cf. P. Gautier, 'Art. 2 1969 Vienna Convention', in O. Corten/P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press 2011), paras. 39-42; A. Winkler, *Zulässigkeit und Rechtswirkungen von Vorbehalten nach der Wiener Vertragsrechtskonvention* (Hamburg: Dr. Kovač 2007), pp. 14-19.

4.1.2.4 The impossibility to divide the binding effect of a mixed agreement when the provisions of the agreement are inextricably linked

A last question must be answered: Does the division of the binding effect of a mixed agreement depend on whether the provisions of the agreement can be separated from one another? As regards the Istanbul Convention, the parties to the proceedings leading up to Opinion 1/19 agreed that the provisions of the Convention falling under EU external competence and the provisions falling under Member State external competence were 'inextricably linked'.[143] This led some Member States to believe that the common accord of the Member States to be bound by those parts of the Istanbul Convention falling under Member State competence was indispensable.[144]

For example, the provisions of the Istanbul Convention on substantive criminal law (chapter V of the Convention) cover the criminal offences of trafficking in human beings and sexual exploitation of women and children as well as other criminal offences without such a cross-border dimension.[145] For certain criminal offences with a cross-border dimension, Article 83(1) TFEU grants the EU an internal competence to act which can serve as a basis for an implied external competence.[146] However, for criminal offences not mentioned in Article 83(1) TFEU, the Member States retain exclusive internal and external competence (see also *supra* section 3.1).[147]

In Opinion 1/19, the Court did not go into detail as regards the issue whether the provisions of the Istanbul Convention are inextricably linked. The Court merely acknowledged that close cooperation between the EU and the Member States is necessary in case an international agreement covers EU external competences and Member State external competences.[148] Although, in practice, it might be more difficult to establish which actor (the EU or the Member States) is responsible for a breach of a mixed agreement when the provisions of the agreement are intertwined, it is not necessary (and hardly feasible) to separate the provisions falling under EU external competence from those falling under Member State external competence.[149] Some mixed agreements like the European Convention on Human Rights (ECHR) provide for a respondent mechanism in order to establish the right respondent to a claim of international

---

[143] Paras. 150, 178 of Opinion 1/19, *supra* note 4.

[144] Paras. 150, 178 of Opinion 1/19, *supra* note 4.

[145] Cf. the argument made by the European Parliament in the proceedings leading up to Opinion 1/19, as summed up by AG Hogan in his Opinion, *supra* note 114, para. 64.

[146] Paras. 300-301 of Opinion 1/19, *supra* note 4; Opinion of AG Hogan, *supra* note 114, paras. 154-155.

[147] Paras. 300-301 of Opinion 1/19, supra note 4; Opinion of AG Hogan, *supra* note 114, paras. 154-155.

[148] Para. 254 of the Opinion, *supra* note 4. For the duty of sincere cooperation in case the provisions of a mixed agreement are intertwined see Ruling 1/78, *supra* note 59, paras. 33-34.

[149] Cf. E. Neframi, *supra* note 3, at 358: *Neframi* argues that the fact that the provisions of a mixed agreement are intertwined and therefore cannot be linked either to the sphere of Community external competence or to the sphere of Member State competence does not prevent the division of the binding effect if a clause dividing the binding effect is incorporated into the agreement.

responsibility.[150] These mechanisms allow the EU and the Member States to specify which entity is responsible for a breach in case a dispute arises. Therefore, the existence of such mechanisms proves that the binding effect of a mixed agreement can also be divided if the provisions of the agreement cannot be separated from one another. In other words, the provisions of a mixed agreement falling under EU external competence and the provisions falling under Member State external competence do not need to be separable for the division of the binding effect to take place.

4.1.3 *Dividing the binding effect of the Istanbul Convention by issuing a declaration on the territorial application of the Convention (Article 77 of the Istanbul Convention)?*

Article 77(1) of the Istanbul Convention on territorial application reads:

> Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

In his Opinion, AG Hogan considered whether the EU could limit the binding effect of the Convention with regard to the parts of the Convention falling under Member State external competence by issuing a declaration specifying that the Convention does not apply to the territories of non-ratifying Member States.[151] At first glance, this solution seems quite appealing. However, Article 77 of the Convention seems to have a different scenario in mind as regards its applicability. This can be shown by comparing the scope of application of Article 77(1) of the Convention to the scope of application of Article 77(2): According to Article 77(2) of the Convention, '[a]ny Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and *for whose international relations it is responsible or on whose behalf it is authorised to give undertakings* [emphasis added]'. When interpreting norms of an international agreement, Article 31(1) VCLT of 1986 states that a norm must be interpreted by considering its context, i.e., the remaining paragraphs of the norm to be interpreted.[152] This means that Article 77(1) must have the same scope of application as Article 77(2). Therefore, it is more convincing to limit the application of Article 77(1) of the Istanbul Convention to territories for whose international relations a party to the Convention is responsible or on whose

[150] Cf. J.T. Lang, *supra* note 138, at 174: 'In the case of treaties in which the obligations undertaken by the Community and its Member States cannot be separated, it would seem that the division of responsibilities is not a matter into which other parties are entitled to enquire. This may seem tautologous, but what it means in practice is that other contracting parties are entitled only to a statement that the Community and its Members will divide the responsibilities under the treaty in accordance with their respective competences, not to an answer to the question which entity is undertaking the obligations under Article X or Y of the Convention.'

[151] Para. 216 of the Opinion of AG Hogan, *supra* note 114.

[152] M.E. Villiger, *supra* note 125, 'Art. 31 VCLT 1969', para 10.

behalf a party to the Convention is authorised to give undertakings, as provided for in Article 77(2) of the Convention.[153] The territory of non-ratifying Member States is not a territory for whose international relations the EU is responsible or on whose behalf it is authorised to give undertakings. For this reason, Article 77(1) of the Istanbul Convention is not applicable to a declaration issued by the EU specifying that the Convention does not apply to territories of non-ratifying Member States. Also, in public international law, declarations issued by the EU pertaining to non-consenting Member States are not binding upon these States (*res inter alios acta*).

Moreover, according to the AG, such a declaration to limit the territorial application to Member States ratifying the Istanbul Convention would be incompatible with the unity of EU law and the principle of equal treatment.[154] The Istanbul Convention is concerned with general issues of human rights protection which apply to all Member State citizens. It is therefore impossible to reach a sufficient level of human rights protection within the EU when the provisions of the Istanbul Convention are not applied in the territory of all Member States. In conclusion, the AG rightly stated that a Union declaration pursuant to Article 77(1) of the Istanbul Convention could not limit the EU's international responsibility for breaches of the Convention by a non-ratifying Member State.[155] This also becomes apparent when looking at the declaration of competence adopted by the Council (see *supra* section 4.1.2), which specifies that the Istanbul Convention is applicable to the territories in which the EU Treaties are applied and under the conditions laid down in Articles 52 TEU and 355 TFEU (see paragraph 7 of the declaration).

4.1.4 *Dividing the binding effect of the Istanbul Convention by making a reservation?*

Partial EU accession to a mixed agreement that does not provide for a clause dividing its binding effect can be considered a reservation to that agreement.[156]

---

[153] This is confirmed by the wording of Article 77: Article 77(1) of the Convention provides for the limitation of the territorial application at the time of signature or when depositing the instrument of ratification, acceptance, approval or accession by a party, whereas Article 77(2) provides for a declaration to limit the territorial application at any later date. The difference between paras. (1) and (2) then seems to be the point in time when such a declaration is issued, but there appears to be no substantive difference as to the content of the declaration. On the historical background of these clauses on territorial application see P. Allott, *supra* note 107, at 110.

[154] Opinion of AG Hogan, *supra* note 114, para. 216.

[155] Furthermore, in his Opinion, *supra* note 114, para. 216, the AG argued that – provided that the EU was allowed to issue a declaration pursuant to Article 77(1) Istanbul Convention – it would be necessary to wait for a common accord of all Member States to be bound by the Convention, in order to know which Member States would have to be excluded from the scope of territorial application. As this paper contends that Article 77(1) of the Convention is not applicable in the case of an incomplete mixed agreement, there seems to be no need to resort to this argument.

[156] P. Allott, *supra* note 107, at 111; E. Neframi, *supra* note 3, at 381: 'Nous considérons que la répartition de l'effet obligatoire peut résulter de l'acte juridique même en l'absence de clause de répartition de l'effet obligatoire. En effet, si la délimitation des compétences par la Communauté et ses États membres est acceptée par leurs cocontractants en tant que réserve, la condition

The Istanbul Convention contains explicit requirements for admissible reservations to the Convention. According to Article 78(1) of the Convention, reservations in respect of the Convention are in general prohibited, with the exception of paragraphs (2) and (3).[157] The fact that the Convention allows for reservations only in exceptional cases suggests that a reservation of the EU as to which Member States are bound by those parts of the Convention falling under Member State competence is not admissible under the Convention.[158] What is more, looking at Article 77 of the Istanbul Convention, it could be argued that this provision is a *lex specialis* to Article 78 of the Convention as regards the territorial application of that Convention.

The conclusion that a reservation to limit the binding effect of the Istanbul Convention on the EU is not admissible is also confirmed by Article 17 VCLT of 1986. According to Article 17(1) of the Vienna Convention, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States and contracting organizations so agree. In this regard, the ILC stressed that partial consent to an international agreement is only possible in case the agreement itself allows for partial accession of a party to the agreement.[159] Scholars have argued that, in order for Article 17 VCLT of 1986 to apply, a mixed agreement, first, would have to make explicit reference to the option of partial consent and, second, would have to specify regarding which parts of the mixed agreement a partial consent is admissible.[160] As the Istanbul Convention does not explicitly provide for partial accession, limited international responsibility of the EU for breaches

---

subjective du consensualisme est remplie. Quant à la condition objective impliquée par la sécurité juridique, elle est également remplie. En premier lieu, la délimitation des compétences permet le rattachement des dispositions de l'accord à la sphère des compétence communautaire ou étatique. Quant à la complémentarité de la délimitation des compétences avec la clause de répartition de l'effet obligatoire, nous pouvons considérer l'acceptation de la réserve par les États tiers *comme une insertion implicite d'une clause de répartition de l'effet obligatoire dans le texte de l'accord*' [emphasis added].

[157] Article 78(2) allows the parties to the Convention to make reservations regarding specific articles of the Convention: Article 30(2), 44(1)(e), (3) and (4), Article 55(1) (in respect of Article 35 regarding minor offences), Article 58 (in respect of Articles 37-39) as well as Article 59 of the Convention. Article 78(3) of the Istanbul Convention allows the parties to the Convention to provide for non-criminal sanctions for the behaviors referred to in Articles 33 and 34 instead of criminal sanctions.

[158] See para. 207 of the Opinion of AG Hogan, *supra* note 114. Cf. also C. Tomuschat, *supra* note 141, at 470, with regard to Article 16(b) of the ILC's 1966 Draft Articles on the Law of Treaties: 'International agreements are generally elaborated with greatest care so that any enumeration of the articles allowing for reservations must be understood as being limitative.'

[159] Reports of the International Law Commission on the Work of its 18th Session (4 May – July 1966), UN Doc A/CN.4/191, YILC 1966, vol. II, pp. 201-202; First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, UN Doc A/CN.4/144, YILC 1962, vol. II, at 53. An earlier draft of Article 17 Vienna Convention required that the agreement expressly contemplated partial consent; see ILC, Summary Records of its 14th Session (24 April – 29 June 1962), UN Doc A/CN.4/SR.647, at 111. The word 'expressly' was deleted in the final version of Article 17; see S. Schaefer/J. Odermatt, 'Nomen est Omen?: The Relevance of 'EU Party' in International Law', in N. Levrat *et al*. (eds.), *The EU and its Member States' Joint Participation in International Agreements* (Oxford: Hart Publishing 2022), at 134.

[160] S. Schaefer/J. Odermatt, *supra* note 159, at 135.

of the Convention cannot be established by making a reservation specifying which parts of the Convention are not binding upon the EU.

4.1.5 *Invoking Articles 27, 46 VCLT of 1986 to avoid international responsibility?*

Last, this section scrutinizes whether Articles 27, 46 VCLT of 1986 allow the EU to relinquish its international responsibility for breaches of provisions of the Istanbul Convention falling under Member State competence by having recourse to the internal division of competences.[161] Pursuant to Article 27 of the Vienna Convention, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Article 27(3) states that this (general) rule is without prejudice to Article 46 of the Vienna Convention. According to Article 46(2) VCLT of 1986 an international organization 'may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance'. Therefore, it is crucial whether it was objectively evident to third parties to the Istanbul Convention that the EU did not have the requisite external competence to conclude the Convention in its entirety. If the requirements of Article 46 VCLT of 1986 are met, this provision enables the EU to invoke the invalidity of its consent to be bound by the Istanbul Convention because it was expressed in violation of its internal rules on the division of competences.[162]

In Opinion 1/19, the Court of Justice did not analyse the relevance of Articles 27, 46 of the Vienna Convention for the EU's international responsibility for breaches of the Istanbul Convention. For this reason, this section assesses whether the requirements of Articles 27,47 VCLT of 1986 in order to reject the EU's international responsibility for breaches of the Istanbul Convention by a non-ratifying Member State are met. In this regard, it must be shown, first, that the EU acted in breach of its internal rules on competence when it concluded the Istanbul Convention in its entirety and that the violation concerned a rule of fundamental importance. Second, it must be shown that the violation was manifest to third parties to the Istanbul Convention.

4.1.5.1 Violation of EU's internal rules on external competence and violation of a rule of fundamental importance

The EU law rules on the division of competences are rules of fundamental importance within the meaning of Article 46(2) VCLT of 1986.[163] These rules

[161] Cf. Opinion of AG Hogan, *supra* note 114, para. 211. See, however, M.J.F.M. Dolmans, *supra* note 107, pp. 64-65.

[162] Cf. R. Leal-Arcas, *supra* note 126, pp. 499-500.

[163] M. Bothe, 'Article 46 Vienna Convention of 1986', in O. Corten/P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press 2011), para. 4.

would be violated if the EU was bound by the Istanbul Convention in its entirety (see *supra* section 3.1). Article 46 VCLT of 1986 is not only applicable to cases where an international agreement was concluded by an organ of an international organization which lacked competence to conclude the agreement; it also applies to cases where the international organization lacks the requisite external competence to conclude the agreement.[164]

The issue remains then whether the EU can assume obligations *ultra vires* from a public international law perspective by concluding an incomplete mandatory mixed agreement. If it is argued that EU international action *ultra vires* is void (see *supra* section 2.4 for complete mixed agreements), the EU could not be bound by the agreement insofar as the EU exceeds its external competences. Two of the approaches suggested above to justify the binding effect *ultra vires* cannot be applied to incomplete mixed agreements in the same manner as they have been applied to complete mixed agreements (see *supra* section 2.4). If it is contended that the EU and the Member States authorize each other to conclude the parts of the agreement not falling under their external competence, one would have to take into consideration that not all Member States are parties to the incomplete mixed agreement. It would have to be established that it is enough that some Member States authorize the EU to conclude those parts of the incomplete mixed agreement falling under Member State external competence. Indeed, it seems improbable that non-ratifying Member States would authorize the EU to conclude parts of the agreement falling under exclusive Member State external competence if they do not intend to exercise their own exclusive competence themselves. Furthermore, it seems difficult to argue that the Member States perform an *ad hoc* revision of primary law to the extent that the EU has no external competence as a treaty revision – even *ad hoc* – requires the consent of all EU Member States.[165] Instead, it is more convincing to argue that the EU can assume international obligations beyond the scope of its external competences. As was argued above (see *supra* section 2.4), the existence of the provisions of Articles 27, 46 VCLT of 1986 proves that the EU can be bound by international action *ultra vires*.

4.1.5.2 Manifest violation of rules of EU external competence

Article 46(3) VCLT of 1986 provides that '[a] violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.'

To establish that it was manifest to third parties that the EU lacked the external

[164] E. Neframi, *supra* note 3, pp. 411-421; T. Rensmann, 'Art. 46', in O. Dörr/K. Schmalenbach, *Vienna Convention on the Law of Treaties* (Berlin: Springer 2nd edition 2018), paras. 62-63.

[165] A partial revision of primary law would require that *all* Member States participate in the conclusion of the agreement; as incomplete mixed agreements are not concluded by all Member States, a partial revision of primary law is impossible unless all Member States participate; cf. R. Arnold, *supra* note 85, at 439.

competence for a provision of the Istanbul Convention falling under Member State competence, two criteria must be fulfilled: First, it must be objectively evident that the EU lacked external competence for the provision at issue. Scholars suggest that objectively evident means 'without further investigation' or 'easily ascertainable'.[166] The third parties must have had actual knowledge of the division of competences or must have been 'negligently ignorant' of the division of competences.[167] This criterion seems to comprise a subjective and an objective element.[168] 'Evident to any State or any international organization' seems to suggest that it is the perspective of another State or another international organization which determines whether a lack of competence is manifest or not.[169] 'Objectively evident' seems to suggest that the perspective of another State or another international organization is 'objectified', meaning that there must be reasonable grounds to believe that the international organization lacked the requisite external competence.[170]

Second, in determining whether another State party or international organization could reasonably believe that the international organization lacked external competence, it must be shown that the State or international organization conducted itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith. This seems to be another 'objectified criterion'.[171] The evident violation of internal competence rules must be established according to the normal practice of States and in good faith.[172]

---

[166] Cf. as regards Art. 46 VCLT of 1969 T. Rensmann, *supra* note 164, para. 48.

[167] Cf. as regards Art. 46 VCLT of 1969 T. Rensmann, *supra* note 164, para. 45. While the expression that other parties to a treaty have been 'negligently ignorant' of a violation of the internal rules of an organization seems to be a synonym of the expression 'objectively evident', 'actual knowledge' seems to go beyond that. Nonetheless, it can be argued *a maiore ad minus* that the violation of internal rules was objectively evident to third parties when the parties had actual knowledge of it.

[168] An earlier draft of Art. 46 VCLT of 1986 required that the violation was or ought to be within the knowledge of any contracting State or any contracting organization; see YILC 1982, vol. II, at 51. M. Bothe, *supra* note 163, para. 2, calls this solution a 'rather subjective' solution. Later on, the 1986 Vienna Conference approved a solution equivalent to Art. 46 VCLT of 1969, which focuses on the assessment whether the violation of internal rules was objectively evident to third parties to the agreement. M. Bothe, *supra* note 163, para. 2, considers this an 'objective' solution. See also T. Rensmann, *supra* note 164, para. 68.

[169] T. Rensmann, *supra* note 164, para. 68.

[170] Cf. concerning Art. 46 VCLT of 1969 M. E. Villiger, 'Art. 46 VCLT 1969', *supra* note 125, para. 15: 'The burden of showing the manifest lack of competence or defect in procedure falls on the party claiming invalidity of consent. It either has to demonstrate that the other party had actual knowledge of the violation, or that the circumstances show that the violation was so obvious that the other party must be deemed to have been aware of it'.

[171] Cf. E Klein/M. Pechstein, *Das Vertragsrecht internationaler Organisationen* (Berlin: Duncker & Humblot 1985), at 28: 'Zur entscheidenden Größe wird sozusagen das billig und gerecht denkende Völkerrechtssubjekt als abstrakte Größe gemacht'. These authors also use the German term 'Empfängerhorizont' to describe the perspective of a third party when interpreting an international agreement.

[172] See T. Rensmann, *supra* note 164, paras. 68-69. Therefore, it is decisive whether the international organization has sufficient practice of its own which can be referred to, whereas State practice must always be taken into consideration.

When interpreting Article 46 of the Vienna Convention it is important to bear in mind that the general rule is that a State or an international organization cannot invoke its internal law to justify a breach of a treaty. The rule in Article 46 is, therefore, an exception, which must be interpreted narrowly.[173]

When analysing whether the lack of EU external competence to conclude the Istanbul Convention in its entirety was manifest to third parties to the Convention, the following aspects deserve some further clarification: First, is it necessary to distinguish between EU Member States and non-EU Member States as regards the knowledge of the division of competences? Second, it will be analysed which circumstances suggest that the division of competences between the EU and the Member States was objectively evident to third parties to the Istanbul Convention. Last, this sub-section draws a comparison between the Istanbul Convention and the ECHR which was also negotiated under the auspices of the Council of Europe.

4.1.5.2.1 Necessity to distinguish between Member States and third parties to the Istanbul Convention?

An earlier draft of Article 46 VCLT of 1986 distinguished between Member States and non-Member States of an international organization in order to establish whether third parties knew or ought to have known about the division of competences.[174] In other words it was discussed whether it should be distinguished between Member States of the international organization and third states when determining whether the organization should be allowed to invoke internal rules to reject its international responsibility.[175] According to this proposal, Member States of the international organization were supposed to know about the internal division of competences and, therefore, were in no need for protection as no legitimate expectation is conferred[176]; in contrast, third states could not reasonably be expected to know about the division of competences between the

[173] Cf. the general remarks on Article 46 Vienna Convention of 1969 by M. Bothe, *supra* note 3, para. 4, which can be applied *mutatis mutandis* to Article 46 of the 1986 Vienna Convention. Cf. also G. Gaja, *supra* note 83, at 138: 'Given the way in which agreements are generally concluded within the Community – by the consent of all the Member States' representatives expressed in the Council – it would be impossible to claim that a violation is "manifest", and therefore that the agreement may be invalid under international law'. P.T. Stegmann, *supra* note 84, at 38, however, rightly argues in favour of a case-by-case analysis.

[174] See Variant B of draft Article 46, para. 4: 'In the case referred to in paragraph 3, a violation is manifest if it would be objectively evident to any State not a member of the organization concerned and any international organization conducting itself in the matter in accordance with the normal practice relating to that organization and in good faith'; see YILC 1979, vol. II(1), Documents of the thirty-first session, at 132.

[175] See Document A/CN.4/319, Eighth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur, YILC 1979, vol. II(1), at 135.

[176] See Document A/CN.4/319, *supra* note 175, at 135. However, the Special Rapporteur considered that, as a consequence, it is the internal rules of the organization which decide which legal consequences arise for the international agreement from the violation of the internal division of competences. Following this reasoning, it would have to be decided whether the EU can be bound by international action *ultra vires* (see *supra* section 2.4).

international organization and its Member States, so that their interests would be worth protecting.[177]

What follows from this distinction for the international responsibility of the EU in case of an incomplete mixed agreement? Arguably, applying the said distinction would result in a different outcome depending on who invokes a breach of the incomplete mixed agreement by a non-ratifying Member State. In case a third state or another international organization claims that the EU can be held responsible for the breach, the EU cannot invoke its internal division of competences. In case a non-ratifying Member State or a ratifying Member State claims that the EU can be held responsible, the EU could successfully reject the claim. However, the ILC did not integrate this distinction into the final version of Article 46 VCLT of 1986. The adopted version of Article 46 is regarded as an 'objective solution'[178] for the sake of legal certainty.[179] Still, it might be argued that Member States knowing about the internal division of competences and nevertheless relying on Article 46 VCLT of 1986 would not act in good faith. In this regard, Article 26 VCLT of 1986 establishes that the parties to an international agreement must perform the treaty in good faith. Although Article 46 VCLT of 1986 does not distinguish between Member States and non-Member States of an international organization, EU Member States might still be prevented from relying on Article 46 to invalidate the EU's consent to be bound by the Istanbul Convention in its entirety.

4.1.5.2.2 Circumstances required to assume that the violation of internal rules was objectively evident to third parties

When analysing whether the violation of the division of competences was objectively evident to third parties to the Istanbul Convention, it could be argued that recognizing the EU as a subject of international law also implies recognizing that the EU has only limited competences as derived from the Treaties.[180] Similarly, the Court in Opinion 1/19 argued that third parties to the Istanbul Convention knew that the external competence of the EU to conclude the Convention was limited. However, Article 6 VCLT of 1986 shows that recognizing an international organization as subject of obligations and rights under public international law does not necessarily equal recognizing the exact extent of the competences of this organization.[181] Article 6 stipulates that the capacity of an international organization to conclude treaties is governed by the rules of that organization. This provision makes only general reference to the internal division of competences. Therefore, even if the third parties to the Istanbul Convention had actual knowledge that the EU external competence did not cover the Convention in its

[177] M. Bothe, *supra* note 163, para. 2; T. Rensmann, *supra* note 164, paras. 73-74.

[178] M. Bothe, *supra* note 163, para. 2.

[179] M. Bothe, *supra* note 163, para. 2; P.K. Menon, *The Law of Treaties between States and International Organizations* (Lewiston: Edwin Mellen Press 1992), at 97.

[180] H. Krück, *supra* note 96, at 142; A. Bleckmann *supra* note 96, at 311; in this direction see also P. Allott, *supra* note 107, pp.119-120. Cf. E. Neframi, *supra* note 3, at 395.

[181] E. Neframi, *supra* note 3, pp. 396-397; K.D. Stein, *supra* note 63, pp. 78-80.

entirety, this fact would not be sufficient without knowledge about the specific division of competences to conclude the Convention.[182] Furthermore, referring to the knowledge of the 'Council of Europe' does not appear sufficiently precise. Indeed, it is not the organs of the Council of Europe which must be aware of the division of competences, but the third parties to the Convention.

In Opinion 1/19, the Court of Justice discussed several aspects which – according to the Court – justify the assumption that the lack of EU competence to conclude the Istanbul Convention in its entirety was objectively evident to third parties to the Convention. First, the Court argued that Article 75 of the Istanbul Convention provides a sufficient basis to consider that the parties to the Convention were aware of the fact that the EU's accession to the Istanbul Convention is limited to areas covered by exclusive EU external competence:

> the Council of Europe is aware of the limited nature of the European Union's competences, with the result that there is no reason to assume that Article 75 of that convention, where it states that the convention is open for signature by, inter alia and specifically, the 'European Union', envisages an accession of the European Union exceeding its competences.[183]

The Court seems to claim that Article 75 of the Istanbul Convention provides a sufficient basis for assuming that the third parties to the Convention were aware of the fact that the EU external competence did not cover the Convention in its entirety. Yet, Article 75 of the Istanbul Convention differs to a great extent from clauses dividing the binding effect of mixed agreements as discussed above. While these clauses contain at least a reference to the division of competences between the EU and the Member States, Article 75 merely provides for the option of EU accession to the Convention. Stating that the EU can accede to the Convention does not equal stating that the EU only accedes to the Convention to the extent that the Convention is covered by EU external competence, let alone *exclusive* EU external competence (see *supra* section 4.1.1). On the one hand, the EU might also have had the requisite external competence to conclude the Convention without the Member States (EU only-agreement) but decided not to do so based on political considerations. On the other hand, if a participation clause (REIO clause) in an international agreement is sufficient to assume that the binding effect of the agreement is divided between the EU and the Member States, the provisions of Articles 27, 46 of the Vienna Convention would be superfluous. Therefore, the REIO clause does not reveal more than the fact that the EU can accede to the Convention alongside its Member States. In particular, it does not reveal the exact division of competences to conclude the Convention to third parties. It is just a mere indication of the fact that the

[182] Cf. E. Neframi, *supra* note 3, at 399: 'Il en résulte que la conclusion d'un accord avec la Communauté, qu'il soit mixte ou pas, entraîne l'opposabilité, à l'égard des cocontractants, du caractère limité de la compétence communautaire. […] *Néanmoins, en l'absence de précision dans le texte de l'accord, l'opposabilité à l'égard des États tiers de l'étendue exacte de la compétence communautaire ne peut pas se fonder sur la reconnaissance du caractère limité de la compétence communautaire*, la règle de l'effet relatif des traités y trouvant pleine application' [emphasis added].

[183] Opinion 1/19, *supra* note 4, para. 261.

agreement is concluded as a mixed agreement. For this reason, it is doubtful that the third parties to the Istanbul Convention really were aware of the exact division of competences between the EU and its Member States.[184]

Second, the Court held that the choice of legal basis for the Council Decision on the conclusion of the Istanbul Convention sufficiently indicates to third parties that the EU only accedes to the Convention to the extent that it is covered by exclusive EU external competence.[185] According to the Court, a Council decision gives indications as regards

> first, the legal scope of that decision, secondly, the extent of EU competence in relation to that agreement and, lastly, the division of competences between the European Union and its Member States (…).[186]

The Court, however, disregards the fact that the choice of legal basis for the Council Decisions on the signing and on the conclusion of the Istanbul Convention depends on the centre of gravity of the Decisions. First of all, it is not the international agreement in its entirety which serves as a basis for defining the centre of gravity but the Council decision to be adopted.[187] If, therefore, the Council decides to exercise EU external competence only to a limited extent, the choice of legal basis can never reflect all areas of existing EU external competence affected by the agreement. For example, in the case of the Istanbul Convention, the Council decided not to exercise the shared EU external competence for measures against discrimination (Article 19 TFEU).[188] As the EU did not exercise that shared competence, Article 19 TFEU will not be cited as the legal basis for the Council Decisions on the signing and on the conclusion of the Istanbul Convention.[189] Therefore, the legal basis cited in the Council Decisions does not need to cover all areas of EU competence affected by the Convention. Second, as the choice of legal basis is made according to the centre of gravity, the legal basis enounced in the Council Decision does not necessarily cover

---

[184] Cf. for this distinction E. Neframi, *supra* note 3, at 338: '(…) si l'existence de la répartition intra-communautaire des compétences est, non seulement aperçue, mais aussi reconnue par les États tiers, en tant qu'inhérente au concept de mixité, il n'en est pas ainsi en ce qui concerne l'étendue exacte des compétences respectives, laquelle est éventuellement aperçue au cas par cas.'

[185] Para. 262 of Opinion 1/19, *supra* note 4. In this regard, the Court refers to its case-law where it held that 'the indication of the legal basis determines the division of powers between the Community and the Member States' (ECJ, Case C-370/07, *Commission* v. *Council*, ECLI:EU:C:2009:590, para. 49). The Court also held in its past case-law that by stating the legal basis for the decision to approve an international agreement 'the Community is also giving indications to the other parties to the Convention both with regard to the extent of Community competence in relation to that Convention […] and with regard to the division of competences between the Community and its Member States […]'; see ECJ, Case C-94/03, *Commission* v. *Council*, ECLI:EU:C:2006:2, para 55. In fact, the Court, in the case-law cited, only referred to the legal basis serving as an indicator for third parties in order to argue that the choice of legal basis should be correct and based on the criteria the Court established. The Court, however, did not argue that the binding effect of the agreements in question was to be assessed having regard to the choice of legal basis. The Court, in Opinion 1/19, also cited ECJ, Case C-687/15, *Commission* v. *Council*, ECLI:EU:C:2017:803, para. 58, which does not allow conclusions to be drawn in this regard.

[186] Para. 262 of Opinion 1/19, *supra* note 4.

[187] Para. 79 of the Opinion of AG Hogan, *supra* note 114.

[188] Para. 135 of the Opinion of AG Hogan, *supra* note 114.

[189] Para. 135 of the Opinion of AG Hogan, *supra* note 114.

all the areas of external competence exercised by the EU when concluding the agreement.[190] Third, the Council Decisions on the signing and on the conclusion of the Convention are mere internal Union acts which are not necessarily brought to the attention of third parties to the Convention. This is what distinguishes a declaration of competence from the Council Decisions on the signing and on the conclusion of the Convention. The choice of legal basis, therefore, is not a sufficient indicator for the division of competences between the EU and the Member States as regards the conclusion of the Istanbul Convention.

Third, the Court claimed that the EU could still issue a declaration of competence to make third parties to the Convention aware of the fact that the EU's competence to accede to the Convention is limited.[191] However, the fact that third parties to the Istanbul Convention might accept by acquiescence that the EU issues a declaration of competence to the Convention does not allow to infer the conclusion that the division of competences was evident to third parties, either: If the declaration of competence is not integrated into the Istanbul Convention it might be just a unilateral act (and could be considered an unlawful reservation, see *supra* section 4.1.2).

In conclusion, the Court's assumption that it was evident to third parties to the Istanbul Convention that the EU did not have the external competence to conclude the Convention in its entirety raises some doubts. First, it might raise the question why – if it was really that obvious that the EU did not have the requisite external competence for all provisions of the Convention – the parties did not include a clause in the Istanbul Convention demanding the EU to issue a declaration of competence. It appears that such a clause is not part of the standard clauses for conventions negotiated under the auspices of the Council of Europe. However, this may lead the observer to believe that the division of external competences between the EU and its Member States was just not part of the negotiations at all rather than that the parties knew that the EU did not have the requisite external competence for the entirety of the Convention. This is confirmed by the fact that the Istanbul Convention is also open to States non-members of the Council of Europe. While it can be presumed that EU Member States are aware of the division of external competences, it seems difficult to argue that a State which is not an EU Member State is aware of the exact division of external competences (see *supra*).

4.1.5.2.3 Is the Istanbul Convention comparable to the ECHR?

The discussion about the international responsibility of the EU and its Member States for breaches of the ECHR – a Convention also negotiated under the auspices of the Council of Europe – might allow conclusions to be drawn as regards the international responsibility of the EU and its Member States for breaches of the Istanbul Convention. After the formal accession of the EU (cf. Article 6(2) TEU), the ECHR will also be a mixed agreement. [192] The division of

[190] For these two arguments see also paras. 66-112 of the Opinion of AG Hogan, *supra* note 114.
[191] Para. 263 of Opinion 1/19, *supra* note 4.
[192] S. Stock, *Der Beitritt zur EMRK als gemischtes Abkommen* (Hamburg: Dr Kovač 2010),

competences between the EU and its Member States regarding the accession to the ECHR, however, is less clear than the division of competences as regards EU accession to the Istanbul Convention.[193]

A 'lack of binding effect' similar to that arising in case of breaches of an incomplete mixed agreement by a non-ratifying Member State might arise with regard to the ECHR. According to the Court in its second Opinion on EU accession to the ECHR (Opinion 2/13[194]), an asymmetry in the binding effect of the ECHR could arise as a consequence of the Member States' right to make reservations under Article 57 ECHR. The revised Draft Accession Agreement establishes a 'co-respondent mechanism', which allows the EU to join the proceedings if a claim is brought against a Member State and *vice versa*.[195] Article 3(7) of the Draft Accession Agreement provides that 'If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the [ECtHR], on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.'[196] It follows from this that the EU and the Member States can be jointly liable for breaches of the ECHR, irrespective of whether a Member State made a reservation to the ECHR provision at issue. According to the Court of Justice '[t]hat provision [Article 3(7) of the Draft Accession Agreement] does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR'.[197] Therefore, the Court explicitly acknowledged the risk that the EU would incur international responsibility for breaches of ECHR provisions by its Member States when those provisions were the object of a reservation by the correspondent Member States and, thus, there was a 'lack of binding effect'.

The Draft Accession Agreement does not provide for a declaration of competence concerning the division of competences between the EU and the Member States. Nevertheless, it becomes apparent from the case-law of the Court (cf. Opinion 2/13) and the discussion regarding the Draft Accession Agreement to the ECHR that the apportionment of international responsibility to the EU and its Member

---

pp. 191-195.

193 S. Stock, *supra* note 192, pp. 191-195.

194 ECJ, Opinion 2/13, ECLI:EU:C:2014:2454.

195 See Article 3 of the Revised Draft Accession Agreement, Final report to the CDDH, Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 47+1(2013)008rev2 of 10 June 2013, available at <https://www.echr.coe.int/documents/d/echr/UE_Report_CDDH_ENG>. For an analysis of the international responsibility of the EU for breaches of the ECHR, following the 'normative control' approach, see E. Cannizzaro, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR', in M. Evans/P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart Publishing 2013), pp. 295-312.

196 *Supra* note 195.

197 Opinion 2/13, *supra* note 194, para. 227.

States was an issue well discussed.[198] For this reason, a procedure to determine the right respondent was incorporated into the Draft Accession Agreement.[199]

This shows that the Council of Europe is indeed aware of the division of competences between the EU and its Member States. Nevertheless, it also shows that the parties to a convention negotiated under the auspices of the Council of Europe are willing to address these issues by incorporating specific provisions as regards the international responsibility of the EU and its Member States into the convention. *A contrario*, the lack of corresponding provisions in the Istanbul Convention can be interpreted as a sign that the parties to the Istanbul Convention saw no need to include provisions into the Convention in this regard. The discussion on the international responsibility for breaches of the ECHR therefore does not allow conclusions to be drawn as regards the international responsibility for breaches of the Istanbul Convention.

4.1.6 *Interim conclusions on the EU's international responsibility for breaches of the Istanbul Convention by a non-ratifying Member State*

In this section, the principles established in order to assume that the binding effect of a mixed agreement is divided were applied to the Istanbul Convention. It became apparent that the Convention itself does not contain a clause providing sufficiently clear whether the EU and/or the Member States shall be bound by a certain provision of the Convention. Neither does the Convention contain a provision enabling the EU to make a declaration of competence which would provide more clarity on the division of competences. The declaration of competence adopted by the Council in 2023 is not sufficient to divide the binding effect of the Istanbul Convention. Neither can a declaration of competence issued by the EU be qualified as an instrument made in the connection with the conclusion of the Istanbul Convention within the meaning of Article 31(2)(b) VCLT of 1986. Also, the EU cannot limit its international responsibility for breaches of the Istanbul Convention by a non-ratifying Member State by issuing a declaration on the territorial application of the Convention or by making a reservation. Applying the general principles regarding the international responsibility of the EU and the Member States for breaches of mixed agreements, it appears that the EU and the Member States are each bound by the Istanbul Convention in its entirety.

In absence of a clause dividing the binding effect of the Istanbul Convention, the EU would have to invoke Articles 27, 46 VCLT of 1986 to reject its international responsibility for breaches of the Istanbul Convention by a non-ratifying Member State. However, in contrast to the Court's reasoning in Opinion 1/19, it

[198] Cf. Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Appendix V of the Final report to the CDDH, *supra* note 195, paras. 7, 31, 91.

[199] Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 198, para. 62.

cannot be assumed that third parties to the Convention were aware of the exact division of competences between the EU and its Member States. Therefore, the violation of the rules on external competence was not manifest within the meaning of Article 46(2), (3) VCLT of 1986.

4.2 **Binding effect of the Istanbul Convention on the (ratifying) Member States**

The extent of the EU's international responsibility for breaches of an incomplete mixed agreement by a non-ratifying Member State has direct implications for the international responsibility of those EU Member States which ratified the incomplete mixed agreement.

As the binding effect of the Istanbul Convention is not divided among the EU and its Member States, the EU incurs international responsibility for the whole agreement and, therefore, also for the parts that internally fall under Member State external competence. Therefore, the EU and the Member States are jointly and severally liable for breaches of the Convention by a non-ratifying Member State.[200] It might be contended that the conduct of a non-ratifying Member State as a distinct subject of international law cannot be attributed to the ratifying Member States. Yet, as the EU and its Member States form one 'EU party' when concluding the Istanbul Convention, it seems more convincing to argue that the Member States cannot escape their international responsibility by referring to the fact that a non-ratifying Member State is responsible for the breach of the Convention.[201]

5. IMPLICATIONS OF THESE FINDINGS FOR OTHER INCOMPLETE MIXED AGREEMENTS

In view of the above, the paper now analyses whether the findings concerning the international responsibility for breaches of the Istanbul Convention can be extrapolated to other incomplete mixed agreements. In doing so, the paper provides some general conclusions on the international responsibility of the EU and its Member States for breaches of incomplete mixed agreements by a non-ratifying Member State.

It has been argued that the Court's reasoning as regards the Istanbul Convention might be relevant for other mixed agreements currently debated in the Council, in particular, the Council of Europe Convention on the Manipulation of Sports Competitions (Macolin Convention[202]; 5.1) and the United Nations Con-

[200] E. Neframi, *supra* note 3, pp. 529-538; E. Neframi, *supra* note 60, pp. 201-203.

[201] Cf. E. Neframi, *supra* note 3, pp. 529-538; E. Neframi, *supra* note 60, pp. 201-203. Of course, this depends on the criteria established for the attribution of conduct which are not the focus of this paper.

[202] Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMCon

vention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention[203]; 5.2).[204] Other relevant international agreements in this regard are the Energy Charter Treaty[205] (5.3) and the UN Firearms Protocol[206] (5.4). In particular, it will be examined whether these Conventions might need to be treated differently depending on whether they are facultative mixed agreements or mandatory mixed agreements.

5.1 Council of Europe Convention on the Manipulation of Sports Competition (Macolin Convention)

Only few Member States signed and ratified the Macolin Convention; the EU has neither signed nor ratified the Convention yet.[207] The Macolin Convention envisages the prevention, detection and sanctioning of national or transnational manipulation of national and international sports competitions as well as the promotion of national and international co-operation against manipulation of sports competitions between public authorities and sports organizations as well as organizations involved in sports betting (Art. 1 of the Macolin Convention). For this purpose, the Convention contains provisions on the prevention of the manipulation of sports competitions and illegal sports betting, substantive criminal law and co-operation with regard to enforcement, provisions on jurisdiction, criminal procedure and enforcement measures, criminal and other sanctions and international co-operation in judicial and other matters. The Council and Commission Documents preparing EU accession to the Macolin Convention appear to advocate mandatory mixity. The Commission stated that Article 15 of the Convention does not only cover corrupt practices of manipulation of sports competitions but also non-corruptive behavior; non-corruptive behavior, however, is not covered by EU competence under Article 83(1) TFEU.[208] In this respect, according to the Commission, the EU lacks the requisite external competence to conclude the Convention.[209] Similarly, the Council stated:

> As the negotiations will cover matters *which fall partly within the Union's competence and partly within the Member States' competence*, the Union should participate in

tent?documentId=09000016801cdd7e>.

[203] Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf>.

[204] G. Kübek, *supra* note 1, at 1467.

[205] *Supra* note 6.

[206] Available at <https://treaties.un.org/doc/source/RecentTexts/18-12_c_E.pdf>.

[207] See <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=215>.

[208] Cf. COM(2015) 86 final, Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on the manipulation of sports competitions with regard to matters related to substantive criminal law and judicial cooperation in criminal matters, at 6.

[209] Cf. COM(2015) 86 final, *supra* note 208, at 6: 'Certain offences are currently not covered by Article 83(1) TFEU. The Union has competence over the rest but is exclusive only over two provisions - Article 11 (to the extent that it applies to services from and to third countries) and Article 14 on data protection (in part). The remainder is shared or "supportive" competence.'

> these negotiations together with its Member States. Member States may therefore attend negotiations and negotiate on matters falling within their competence [emphasis added].[210]

The Macolin Convention does not contain a clause dividing the binding effect of the Convention; the REIO clause in Article 32(1) of the Macolin Convention is formulated in a similar way as Article 75 of the Istanbul Convention (see *supra* section 4.1.1). Article 35 of the Macolin Convention allows the parties to the Convention to specify the territorial application of the Convention, which, however, does not cover a declaration to limit the territorial application of a mixed agreement to ratifying Member States (see *supra* section 4.1.3 for the corresponding provision of the Istanbul Convention).[211] Article 37 of the Macolin Convention allows for reservations only to a very limited extent, that is, regarding Articles 19(2) and 36(1) of the Convention. This prevents the EU from making a reservation to limit its international responsibility. What is more, Article 37(1) of the Macolin Convention explicitly prohibits other reservations. In contrast to the Istanbul Convention, Article 36 of the Macolin Convention contains a 'federal clause' which stipulates that

> [a] federal State may reserve the right to assume obligations under Chapters II, IV, V and VI of this Convention consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities, provided that it is still able to co-operate under Chapters III and VII.

Nevertheless, the EU is not a federal *state*. Therefore, it cannot be argued that the 'fundamental principles governing the relationship between its central government and constituent States' refer to the division of competences between the EU and the Member States. As a consequence, a lot argues in favour of the EU's international responsibility for breaches of the Macolin Convention by non-ratifying Member States, the EU and the ratifying Member States being jointly responsible for breaches of the Convention. The implications for the international responsibility of the EU and its Member States for breaches of the Macolin Convention are the same as those derived above from the analysis of the Istanbul Convention.

---

[210] Council Decision (2013/304/EU) authorising the European Commission to participate, on behalf of the EU, in the negotiations for an international Convention of the Council of Europe to combat the manipulation of sports results with the exception of matters related to cooperation in criminal matters and police cooperation, *OJ* [2013] L 170/62, 22.6.2013, recital 5.

[211] This conclusion is confirmed by the explanatory report to the Macolin Convention. According to para. 236 of the explanatory report, '[i]t is well understood, however, that it would be contrary to the object and purpose of this convention for any contracting Party to exclude parts of its main territory from the convention's scope and that it was unnecessary to make this point explicit in the convention. *This provision is only concerned with territories having a special status, such as overseas territories*' [emphasis added]. Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383f>.

5.2 United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention)

The United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention)[212] was adopted in December 2014 and entered into force on 18 October 2017. The Mauritius Convention provides for the application of the UNCITRAL Rules on Transparency to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules (Article 2(1) of the Mauritius Convention); failing that, Article 2(2) of the Mauritius Convention provides for the option of a unilateral offer of application of the UNCITRAL Rules on Transparency. Some EU Member States have signed the Convention, but have not ratified it yet (Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Sweden).[213] The Commission proposed EU accession to the Convention to the Council in 2015[214] but the EU has not signed the Convention yet. According to the Commission, the EU has exclusive external competence as regards foreign direct investment according to Article 207(1) TFEU; as regards foreign non-direct investment, the Commission opined that the EU has an implied exclusive external competence based on Articles 63 to 66 TFEU in conjunction with Article 3(2) TFEU.[215] In spite of the EU's exclusive external competence, the Commission argued that the Convention should be concluded as a mixed agreement: The Commission opined that the Member States should be authorized by the EU to conclude the Convention (Article 2(1) TFEU) to ensure that the Mauritius Convention would apply to the Member States' bilateral investment agreements (BITs) with non-EU countries as well.[216]

After Opinion 2/15 of the Court concerning the conclusion of the Free Trade Agreement with Singapore (EUSFTA), the Commission's considerations as regards the division of competences can no longer be upheld. This is because the Court, in Opinion 2/15, rejected the Commission's argument that the EU had an exclusive external competence in the area of portfolio investment. Instead, the Court argued that the EU only had a shared external competence in the area of portfolio investment pursuant to Article 63 TFEU in conjunction with Article 216(1) TFEU.[217] The Court of Justice later clarified in its COTIF I judgment that the EUSFTA was concluded as a mixed agreement because there was no majority in the Council to exercise the EU's shared external competence in the area of portfolio investment (facultative mixed agreement), which would have pre-

[212] Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf>.

[213] See <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status>.

[214] COM(2015) 21 final, Proposal for a Council Decision on the signing, on behalf of the European Union, of the United Nations Convention on transparency in treaty-based investor-State arbitration; COM(2015) 20 final, Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the United Nations Convention on transparency in treaty-based investor-State arbitration.

[215] See p. 3 of both proposals, *supra* note 214.

[216] See pp. 3-4 of both proposals, *supra* note 214.

[217] ECJ, Opinion 2/15, ECLI:EU:C:2017:376, paras. 239-243.

empted Member State action in line with Article 2(2) TFEU.[218] Reading Opinion 2/15 in light of the Court's clarifications in COTIF I, it can be inferred that the EU has exclusive external competence in the area of foreign direct investment and shared external competence in the area of portfolio investment.[219] As regards non-substantive provisions on investment protection, the Court held in Opinion 2/15 that the provisions on transparency 'fall within the same competence as the substantive provisions' on foreign direct investment and portfolio investment.[220] Therefore, as the Mauritius Convention contains non-substantive rules on transparency, the EU has external competence to accede to the Convention to the extent that it has external competence for substantive provisions on foreign direct investment and portfolio investment.

Assuming that there is no majority in the Council to exercise the EU's shared external competence in the area of portfolio investment when acceding to the Mauritius Convention, the Mauritius Convention would be a facultative mixed agreement. If only the Member States which signed the Convention and the EU ratified the Convention, the Convention would also be an incomplete mixed agreement.

The Mauritius Convention contains a REIO clause in its Article 7 which allows REIOs that are constituted by States and that are contracting parties to an investment treaty to accede to the Convention. Further details are specified in Article 8 of the Convention on participation by REIOs. However, neither Article 7 nor Article 8 of the Mauritius Convention refer to the fact that REIOs only accede to the Convention to the extent that they have external competence for matters covered by the Convention. Therefore, they cannot be qualified as clauses dividing the binding effect of the Convention. Also, the Mauritius Convention does not allow REIOs to issue a declaration of competence when acceding to the Convention, so a declaration of competence issued by the EU might be regarded as a unilateral declaration not binding upon third parties to the Convention (see *supra* section 4.1.2).

As regards reservations to the Mauritius Convention, Article 3 of that Convention allows for several reservations: A party to the Convention may declare that the Convention shall not be applied to investor-State arbitration under a specific investment treaty (Art. 3(1)(a) of the Convention). A party may declare that the UNCITRAL Rules on Transparency shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules and in which the party making the reservation is a respondent (Art. 3(1)(b) of the Convention concerning Art. 2(1) and (2) of the

[218] ECJ, Case C-600/14, *supra* note 16, para. 68.

[219] See, *inter alia*, L. Prete, 'Facultative Mixity after the Singapore Opinion: Clarity or Fresh Doubts?', in: M. Chamon/I. Govaere (eds.), *EU External Relations Post-Lisbon* (Leiden: Brill/Nijhoff 2020), at 215; G. Kübek/I. van Damme, 'Facultative Mixity and the European Union's Trade and Investment Agreements', in: M. Chamon/I. Govaere (eds.), *EU External Relations Post-Lisbon* (Leiden: Brill/Nijhoff 2020), pp. 137-153; A.J. Kumin, *supra* note 9, at 86.

[220] ECJ, Opinion 2/15, *supra* note 217, paras. 282-284.

Convention). Last, a party may declare that Article 2(2) of the Convention regarding the unilateral offer of application of the UNCITRAL Rules on Transparency shall not apply in investor-State arbitration in which the party making the reservation is a respondent (Art. 3(1)(c) of the Convention). Therefore, the Mauritius Convention only allows for specific reservations in line with Article 19(b) of the Vienna Convention. As a consequence, the EU cannot make a reservation to avoid its international responsibility for breaches of the Mauritius Convention by a non-ratifying Member State. Without a clause dividing the binding effect of the Convention being incorporated into the Convention, the EU and its Member States would be jointly liable for breaches of the Convention by a non-ratifying Member State.

The question arises then whether the facultative mixed character of the Mauritius Convention might change this assessment: One could argue that in case of facultative incomplete mixed agreements the EU could still decide to exercise all shared competences and thus conclude an EU-only agreement instead of a mixed agreement.[221] Based on this reasoning, it might be contended that neither the EU nor the Member States can invoke a lack of competence to conclude parts of the agreement to escape their international responsibility. However, it is more convincing to argue that if the EU and the Member States are jointly liable in case an incomplete mixed agreement comprises matters falling under exclusive EU competence and matters falling under exclusive Member State competence, then the EU and the Member States should also be jointly liable, *a fortiori*, in case the agreement covers matters falling under shared external competence.[222] There is, therefore, no need to distinguish between mandatory incomplete mixed agreements and facultative incomplete mixed agreements as regards the binding effect of the agreement. In particular, in the absence of a clause dividing the binding effect of a facultative incomplete mixed agreement, it seems even less manifest to third parties to the agreement that the EU did not exercise its (shared) external competence with respect to the agreement in its entirety.[223]

5.3 **Energy Charter Treaty**

Another widely discussed example of an incomplete mixed agreement has been the Energy Charter Treaty[224] after the withdrawal of Italy.[225]

---

[221] M.J.F.M. Dolmans, *supra* note 107, pp. 67-68; G. Kübek, *supra* note 1, at 1483; see also M. Chamon, *supra* note 31.

[222] Nevertheless, if it had been established above that the binding effect of incomplete mandatory mixed agreements was divided between the EU and its Member States, another conclusion as regards facultative incomplete mixed agreements would have been acceptable. In this direction see A. Rosas, *supra* note 13, pp. 17-18. Arguing that a distinction between mandatory mixed agreements and facultative mixed agreements must be made, see G. Kübek, *supra* note 1, at 1484.

[223] Cf. P.T. Stegmann, *supra* note 84, at 41.

[224] *Supra* note 6.

[225] See J. Heliskoski/G. Kübek, *supra* note 1, pp. 35−39. A list of Contracting Parties to the

The Energy Charter Treaty contains provisions on commerce (Part II), investment promotion and protection (Part III), miscellaneous provisions (Part IV) and provisions on dispute settlement (Part V). Following the case-law of the Court that investor-State arbitration under the Energy Charter Treaty between a Member State and a third party to the Treaty is incompatible with the autonomy of the EU legal order[226], more and more Member States have declared their withdrawal from the Energy Charter Treaty.[227] As a result, the Energy Charter Treaty might become an EU only-agreement in the future. However, due to the sunset clause (Article 47(3) of the Energy Charter Treaty), the Energy Charter Treaty remains applicable for another 20 years to investor-State arbitration proceedings between the Member States and third parties which originated before the Member States' withdrawal.

Although the Energy Charter Treaty was concluded as a mixed agreement, it is contended that after the Treaty of Lisbon the Energy Charter Treaty could have been concluded as an EU only-agreement, considering that the EU now has exclusive external competence as regards foreign direct investment and shared external competence as regards portfolio investment.[228] In view of what has been established above (see *supra* section 5.2), it can be argued that all provisions of the Energy Charter Treaty on investment promotion and protection now fall under EU external competence and that mixity is therefore only facultative.[229]

According to Articles 38 and 41 of the Energy Charter Treaty, the Treaty is open for signature or accession by States and REIOs which have signed the Energy Charter, on terms to be approved by the Charter Conference. Article 40(1) of the Energy Charter Treaty stipulates that any state or REIO may at the time of signature, ratification, deposited with the Depositary, declare that the Treaty shall be binding upon it with respect to all the territories for the international relations of which it is responsible, or to one or more of them. This provision

---

Energy Charter Treaty is available at <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>.

[226] ECJ, Case C-741/19, *Republic of Moldova* v. *Komstroy LLC*, ECLI:EU:C:2021:655, paras. 42-65.

[227] See <https://www.iisd.org/articles/statement/energy-charter-treaty-withdrawal-announcements>.

[228] F. Germelmann, '12. Internationaler Investitionsschutz im Energierecht. Energiecharta-Prozess und Energiecharta-Vertrag', in C. Theobald/J. Kühling (eds.), *Energierecht* (München: C.H. Beck 119. Ergänzungslieferung Februar 2023), para. 33; J. Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty', 15 *Journal of International Economic Law* (2012), at 106.

[229] However, others contend that the ECT is a mandatory mixed agreement; see L. Ankersmit. 'Withdrawal from mixed agreements under EU law: the case of the Energy Charter Treaty', 7 *Europe and the World* (2023), at 5; Dutch government, '*Kamerbrief over Energy Charter Treaty (ECT)*' (Letter by the Dutch minister for economic and climate affairs to the Dutch parliament DGKE/22548182) 22 November 2022, available at <https://www.rijksoverheid.nl/documenten/kamerstukken/2022/11/22/kamerbrief-over-schriftelijk-overleg-energy-charter-treaty-ect>. They argue that the ECT contains clauses on investor-state dispute settlement (ISDS) similar to those in the EUSFTA. In Opinion 2/15, the Court of Justice held that the EUSFTA provisions on ISDS could not be concluded by the EU alone; see Opinion 2/15, *supra* note 217, para. 292. Still, according to the view advanced here, whether the ECT is a mandatory or a facultative mixed agreement does not have consequences for the binding effect of the ECT on the EU. In either case, the EU is bound by the ECT in its entirety.

states clearly that its scope of application is confined to territories for whose international relations a state or organization is responsible; it does not allow to limit the territorial application of the Energy Charter Treaty to EU Member States which have ratified it. What is more, Article 46 of the Energy Charter Treaty prohibits all reservations. The Energy Charter Treaty does not allow REIOs to issue a declaration of competence when acceding to the Treaty. Therefore, the binding effect of the Energy Charter Treaty is not divided between the EU and its Member States. Both are jointly and severally liable for breaches of the Energy Charter Treaty by a non-ratifying Member State.[230]

5.4 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (UN Firearms Protocol)

A final example of an incomplete mixed agreement is the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime (UN Firearms Protocol; ratified by most Member States and the EU but neither signed nor ratified by Ireland and Malta).[231] According to its Article 2, the purpose of the Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. The Protocol provides for the criminalization of illicit manufacturing of firearms, trafficking in firearms and falsifying or illicitly obliterating, removing or altering the marking(s) on firearms (Art. 5 of the Protocol), provided that those offences are transnational in nature and involve an organized criminal group (Art. 4(1) of the Protocol). The Protocol also provides for the confiscation, seizure and disposal of illicitly manufactured or trafficked firearms (Art. 6). Moreover, the Protocol containes provisions on the prevention of illicit manufacture and trafficking of firearms by measures such as record-keeping (Art. 7), marking of firearms (Art. 8) and deactivation of firearms (Art. 9). Furthermore, it stipulates general requirements for export/import/transit licensing/authorization systems (Art. 10) and the security of firearms (Art. 11).

The Protocol contains a REIO clause in Article 17(2), which provides for the signature by REIOs if at least one of its Member States is a signatory to the Protocol. Article 17(3) and (4) specifies that a REIO shall declare in its instrument of ratification, acceptance, approval or accession the extent of its competence with respect to matters governed by the Protocol. In view of the above findings, Article 17 can be qualified as a clause dividing the binding effect of the Protocol.

---

[230] Cf. also P.T. Stegmann, *supra* note 84, pp. 33-35, 44, who argues that the EU cannot invoke Article 46 of the Vienna Convention to avoid international responsibility, pp. 36-44. L. Ankersmit, *supra* note 229, pp. 10-11, rejects the division of the binding effect of the ECT even when following the Court's reasoning in Opinion 1/19.

[231] See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&clang=_en>.

The declaration of competence attached to the Council Decision on the conclusion of the Protocol[232] refers to the exclusive external competence of the EU over commercial policy (Art. 207 TFEU) as well as the shared external competence over rules for the achievement of the internal market (Art. 114 TFEU). Moreover, the declaration refers to an implied exclusive EU external competence in the areas of fight against illicit manufacturing of and trafficking in firearms, regulating standards and procedures on commercial policy of the Member States (concerning record keeping, marking of firearms, deactivation of firearms, requirements for exports, import and transit licensing authorization systems, strengthening of controls at export points and brokering activities). This implied exclusive EU external competence results from common rules adopted within the EU (Art. 3(2) TFEU; ERTA effect[233]). The declaration of competence does not indicate whether the EU, by concluding the Protocol, exercises its shared external competence over rules for the achievement of the internal market (Art.114 TFEU), nor does it contain references to competences remaining with the Member States. It might be inferred from this that no Member State external competences are affected by the Protocol. However, it seems more plausible that, seeing that EU accession to the Protocol was impossible without the accession of at least one Member State, there was no need to clarify whether Member State external competences were affected by the Protocol.[234] What is more, the declaration of competence allows to attribute the provisions of the Protocol to the areas of Union competence envisaged in the declaration. By incorporating a clause dividing the binding effect into the Protocol, the third parties to the Protocol also manifested their intention to respect the division of competences between the EU and its Member States and to accept the division of the binding effect of the Protocol resulting from it.

Therefore, the EU does not incur international liability for breaches of the UN Firearms Protocol by a non-ratifying Member State. The ratifying Member States are not internationally responsible, either, as the misconduct cannot be attributed to them (see *supra* section 4.2).

5.5 **Interim conclusions**

The analysis of other incomplete mixed agreements has shown that incomplete mixed agreements differ significantly as regards the division of their binding effect between the EU and the Member States. It has also become apparent that in applying the criteria established to determine whether the binding effect

---

[232] Council Decision 2014/164/EU on the conclusion, on behalf of the European Union, of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, *OJ* [2014] L 89/7, 25.3.2014.

[233] ECJ, Case 22/70, *Commission* v. *Council* (ERTA), EU:C:1971:32; see, *inter alia*, M. Chamon, 'Implied Exclusive Powers in the ECJ's Post-Lisbon Jurisprudence: The Continued Development of the ERTA Doctrine', 55 *Common Market Law Review* (2018), pp. 1101-1142.

[234] Which might be called mandatory mixity for reasons of public international law; cf. J. Heliskoski/G. Kübek, *supra* note 1, at 28 note 23.

of an incomplete mixed agreement is divided, there is no difference between mandatory incomplete mixed agreements and facultative incomplete mixed agreements. What might differ, nevertheless, is the assessment whether the violation of internal rules was manifest to third parties within the meaning of Article 46(3) VCLT of 1986. In case of shared external competence, it might be more difficult for third parties to assess whether the EU and/or the Member States exercised a shared external competence.

CONCLUSION: IS THERE A WAY FORWARD?

This paper assessed whether the EU and its Member States can be held liable by third parties to an incomplete mixed agreement for breaches of that agreement by a non-ratifying Member State. It has been shown that, in general, there are no differences between the international responsibility for breaches of mixed agreements and for breaches of incomplete mixed agreements. The same criteria to assess the international responsibility of the EU and its Member States for breaches of mixed agreements apply to incomplete mixed agreements. From a competence perspective, the EU is only bound by the provisions of an incomplete mixed agreement for which the EU has external competence provided that the EU has exercised its external competence. In contrast, from a public international law perspective, the requirements to establish that the binding effect of an incomplete mixed agreement is divided between the EU and its Member States are only exceptionally met. As the division of external competences is usually not manifest to third parties to an incomplete mixed agreement (especially in case of facultative incomplete mixed agreements), the EU and the Member States cannot invoke Articles 27, 46 VCLT of 1986 to avoid international responsibility. As a consequence, the EU and its Member States are usually jointly and severally liable for breaches of an incomplete mixed agreement by a non-ratifying Member State. In Opinion 1/19, the Court erred in stating that the EU would not incur international liability for breaches of the Istanbul Convention by a non-ratifying Member State. Arguably, the Court did not sufficiently take into account the public international law perspective as regards the international responsibility of the EU for breaches of the Convention.

Is there a way forward? It might be suggested that in case of incomplete mixed agreements, the EU could be presumed to have exercised all EU external competences when concluding the agreement.[235] This might work in case of facultative incomplete mixed agreements, but it cannot work in case of mandatory mixed agreements such as the Istanbul Convention; the EU cannot perform the obligations arising from those parts of the agreement falling under exclusive Member State competence. As there is no obligation for Member States to ratify mandatory mixed agreements in their own capacity, it seems indispensable to reconsider the standard provisions for drafting incomplete mixed agreements in order to include a REIO clause with specific reference to a declaration of competence.

[235] A. Rosas, *supra* note 13, pp. 17-18.

ASSER INSTITUTE
Centre for International & European Law

Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
T.M.C. Asser Instituut inter-university research centre

CLEER is hosted by the T.M.C. Asser Instituut,
Schimmelpennincklaan 20-22
2517 JN, The Hague, The Netherlands

CLEER

E-mail: info@cleer.eu
Website: http://www.cleer.eu