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Principles and practices of EU external representation

Steven Blockmans and Ramses A. Wessel
(eds.)

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**PRINCIPLES AND PRACTICES
OF EU EXTERNAL REPRESENTATION**

**STEVEN BLOCKMANS
RAMSES A. WESSEL
(eds.)**

CLEER WORKING PAPERS 2012/5

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INTRODUCTION: PRINCIPLES AND PRACTICES OF EU EXTERNAL REPRESENTATION

Steven Blockmans and Ramses A. Wessel

Since the entry into force of the Treaty of Lisbon, the Centre for the Law of EU External Relations (CLEER) has paid attention to the changing nature of the EU's institutional legal frameworks pertaining to external action,¹ with a specific focus on the recalibration of the Union's international objectives,² the chief organising principles of EU external relations,³ the role played by the Member States, EU institutions and High Representative in the negotiation process leading up to the creation of the Union's new diplomatic service,⁴ the legal nature and scope of the European External Action Service,⁵ and the mechanisms that allow for the participation of the European Union in the work of the United Nations.⁶ In terms of the substantive development of the EU's role in the world, the first signs of operational strengths and weaknesses of EU external action post-Lisbon have been studied,⁷ as well as the international role played by the European Union in fields like human rights,⁸ military crisis management,⁹ the environment,¹⁰ and international taxation.¹¹ The Lisbon Treaty's aim to raise the EU's international profile by strengthening the coherence, visibility and effectiveness of external relations policy has indeed triggered many new legal questions.

With this working paper, CLEER aims to offer a better insight into selected legal aspects concerning the European Union's redefined diplomatic persona.

¹ See the contributions to P. Koutrakos (ed.), 'The European Union's external relations a year after Lisbon', *CLEER Working Paper* 2011/3.

² See J. Larik, 'Shaping the international order as a Union objective and the dynamic internationalisation of constitutional law', *CLEER Working Paper* 2011/5.

³ See C. Hillion, 'Mixity and coherence in EU external relations: the significance of the 'duty of cooperation'', *CLEER Working Paper* 2009/2.

⁴ See L. Erkelens and S. Blockmans, 'Setting Up the European External Action Service: an act of institutional balance', *CLEER Working Paper* 2012/1.

⁵ See B. Van Vooren, 'A legal-institutional perspective on the European External Action Service', *CLEER Working Paper* 2010/7.

⁶ See P. A. Serrano de Haro, 'Participation of the European Union in the work of the United Nations: General Assembly resolution 65/276', *CLEER Working Paper* 2012/4.

⁷ See S. Blockmans, 'The European External Action Service One Year On: First signs of strengths and weaknesses', *CLEER Working Paper* 2012/2.

⁸ See A. Rosas, 'Is the EU a human rights organisation?', *CLEER Working Paper* 2011/1.

⁹ See S. Blockmans and R. A. Wessel, 'The European Union and crisis management: will the Lisbon Treaty make the EU more effective?', *CLEER Working Paper* 2009/1.

¹⁰ See M. Klamert, 'New conferral or old confusion? The perils of making implied competences explicit and the example of the external competence for environmental policy', *CLEER Working Paper* 2011/6.

¹¹ See B. Van Vooren, 'The EU as a global Robin Hood: Proposal for a multilateral convention on a global financial transaction tax', *CLEER Working Paper* 2011/4.

In particular, the working paper will address issues pertaining to the Lisbon Treaty's organising principles of EU external action, both under EU law and international law, and the growing practice of external representation of the European Union, especially in the context of other international organisations and bodies. Many questions remain unanswered in this respect, for instance: how can we best understand the relationship between the way the EU decides upon international positions and organises its external representation on the one hand, and its influence, performance and/or effectiveness on the other hand? Does the European Union's formal status as a subject of international law justify an upgraded observer status within international organisations, a seat additional to that of the EU Member States, or should the EU replace them? Does it matter who speaks for the EU, and in what way? How should we square the emergence of the European External Action Service (EEAS), a hybrid organ consisting of EU civil servants and seconded diplomats from the Member States, with the traditionally state-centred body of international diplomatic law? And what can be expected from the High Representative, the EEAS and its vast network of diplomatic representations in third countries and multi-lateral settings in the pursuit of the Treaty's external objectives?

The first two contributions to this working paper are devoted to two general principles of the EU legal order which ought to work towards the unity and effectiveness of the European Union's external representation: the principle of loyal or sincere cooperation enshrined in Article 4 (3) TEU and the principle of consistency (Article 13 (1) TEU and 7 TFEU). Federico Casolari kicks off the exploratory analysis by asking whether the principle of loyal cooperation is a 'master key' for a more effective external representation of the EU in other international organisations. Tracing the principle's origins and development in the jurisprudence of the European Court of Justice (ECJ), from the inception of international relations of the European Communities to the incorporation of the duty of loyalty into the Lisbon Treaty's new common platform of EU policies (Article 4(3) TEU), he reveals that the unity of the international representation has been conceived as a means to apply the duty of cooperation within the EU legal order. As the principle of sincere cooperation is not an end in itself but is directed at achieving the Union's objectives, its aim is to ensure the coherence and consistency of the external action of the Union. In their contribution, Peter Van Elsuwege and Hans Merket argue that the Treaty of Lisbon has significantly strengthened the principle of sincere cooperation and the Court's authority by adding the principle of consistency to the ECJ's jurisdictional powers. They also contend that those two principles mitigate the potentially negative consequences of the vertical (between the EU institutions and the Member States) and horizontal (between the various EU policy areas) division of competences on the effectiveness of EU external action.

After these reflections on two general principles which ought to better organise the EU legal order so as to render the Union's external representation more visible and effective, the European Union is considered from the outside. In their contribution, Bart Van Vooren and Ramses Wessel analyse a host of issues which flow from the EU's peculiar status as a subject of international

law. The EU is not a state but an international organisation with rather special features: it enjoys international legal personality, which allows it to enter into legal relations with states and other international organisations. At the same time, its external competences are limited by the principle of conferral, and in many cases the EU is far from being exclusively competent and shares its powers with the Member States. The intensified global diplomatic ambitions of the EU since the entry into force of the Lisbon Treaty and its increased diplomatic action since the creation of the EEAS trigger the question to which extent the EU's diplomatic ambitions and activities are compatible with both the EU and international legal frameworks. The authors focus on five distinct aspects of diplomatic relations by the Union: (i) establishing a formal EU presence through its delegations; (ii) representing the Union through the delivery of statements in multilateral fora; (iii) diplomatic relations through visits and missions by top EU officials at political level; (iv) the task of gathering information by the Delegations as 'EU embassies'; and (v) the task of diplomatic protection of 'EU citizens'.

In the three remaining contributions, the external representation of the EU in three different institutional settings is gaged. Scarlett McArdle and Paul James Cardwell examine the European Union's external representation within the International Law Commission (ILC). The ILC is the United Nations body specifically created for the purpose of the codification and progressive development of international law. Traditionally, states are the only significant actors involved in and contributing to the work of the ILC. McArdle and Cardwell examine the extent to which the EU has succeeded in representing itself, i.e. above and beyond the Member States, in the ILC. The authors use the example of the development of international law on the responsibility of international organisations to argue that even in this area of 'pure' international law, the EU is evolving to possess a separate role and identity to exert at the international level. They also contend that this is a role which is progressively being taken more seriously.

At the regional level, Christina Eckes addresses questions that surround the EU's accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR): in what way is the EU's position different from that of the other Contracting Parties? What are the reasons for and consequences of the EU's *primus inter pares* position under the Convention and within the Council of Europe? How will the relationship change between the Court of Justice and the ECtHR? And what does the EU's accession mean for its Member States? After accession, the EU will become subject to legally binding judicial decisions of the European Court of Human Rights. It will also participate in statutory bodies of the Council of Europe when they act under the Convention. Eckes sheds light on all of these issues and also touches upon the new co-respondent mechanism, including the possibility to refer a case pending before the ECtHR to the Court of Justice for a 'preliminary assessment'.

In the final contribution to this working paper, Jan Wouters, Sven Van Kerckhoven and Jed Odermatt consider EU relations with the most intriguing 'global club', the G20, from two perspectives: the EU's representation at the G20

and the G20's impact on the EU and its legal order. First, the authors deal with the EU's unique membership of the G20, as it is the only non-state member of the club. Also, the EU's G20 membership amplifies the voices of the EU Member States already at the table, as they also have the strongest voice in drafting the EU's position for G20 meetings. The question arises to what extent smaller EU Member States, being excluded from direct participation in G20 meetings, have a say on the EU position at the G20. Furthermore, the 'double' representation of four EU Member States enables them to a certain extent to bypass the European decision-making process. In order to solve this, EU Member States increasingly coordinate before a G20 summit, but have no control over the behaviour of their peers during such a summit. The authors answer the question to what extent the EU's basic treaties prescribe such coordination. In the second part of their contribution, the authors address the strong influence of the G20 process on decisions taken at the EU level. The authors show that the Union's good follow-up on G20 decisions allows it to move faster internally and that the EU and the G20 thus have the potential to further each other's agendas.

Whereas the topics covered in the contributions cast a wide net over the new legal questions and challenges with which the European Union's institutional framework and law is currently faced, this working paper does by no means pretend to be exhaustive. Rather, by addressing 'selected legal aspects' of the principles and practice pertaining to the external representation of the European Union, the working paper offers new insights into the rapidly developing field of EU external relations law.

Finally, a word of thanks is in place. This working paper has been prepared in the framework of the LISBOAN Workshop 'EU external representation and the reform of international contexts: practices after Lisbon', organised by Dr Louise van Schaik (Netherlands Institute of International Relations) and Dr Edith Drieskens (University of Leuven), with the support of the Lifelong Learning Programme of the European Union, at the Clingendael Institute in The Hague on 21-22 February 2012. The contributors assembled here are grateful to the convenors of the LISBOAN workshop for allowing them to publish their revised contributions in the working papers series of the Centre for the Law of EU External Relations.

THE PRINCIPLE OF LOYAL CO-OPERATION: A 'MASTER KEY' FOR EU EXTERNAL REPRESENTATION?

Federico Casolari

1. INTRODUCTION

The principle of loyal co-operation (also known as duty of sincere co-operation) between the Member States of the European Union (EU) and the EU institutional actors lies at the very heart of the European integration process. The EU practice, and in particular the case-law of the European Court of Justice (ECJ), has made clear its systemic role in ensuring, to use Halberstam's words, 'the proper functioning of the system of governance as a whole'.¹ In particular, the principle – which is at the same time expression of the international principle of good faith, of the fidelity principle characterizing the federal systems ('*Bundestreue*'), and of the requirement of unity underlying the European integration process – results strictly linked with other fundamental principles of the EU legal order, such as effectiveness and supremacy.² The loyal cooperation has been taken into consideration in the different facets of the EU action, and loyalty duties have been established to ensure the internal functioning of the Union, as well as its external action. This paper intends to highlight the role the principle of loyalty may play in order to ensure a more effective representation of the European Union³ in international fora. It will thus not give an exhaustive review of the external aspect of the loyalty duties; rather, it will explore their contribution to the objective, explicitly mentioned in the founding Treaties, to promote EU values and interests in the relations with the wider world (Article 3(5) TEU).⁴

For the sake of clarity, it is convenient to provide first a brief description of the meaning of the term 'representation' that is used in this paper. Generally

¹ D. Halberstam, 'The Political Morality of Federal System', 90 *Virginia Law Review* (2004) 101, at 104.

² For a general overview, see M. Blanquet, 'L'article 5 du traité C.E.E. – Recherche sur les obligations de fidélité des Etats membres de la Communauté' *Librairie générale de droit et de jurisprudence*, Paris, 1994; M. Blanquet, 'Article I-5', in L. Burgorgue-Larsen, A. Levade, F. Picod (eds.) 'Traité établissant une Constitution pour l'Europe', vol. 1, Bruxelles: *Bruylant*, 2007, 96; K. Mortelmans, 'The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions', 5 *Maastricht Journal of European and Comparative Law* (1998) 67; O. Porchia, 'Principi dell'ordinamento europeo', Bologna: *Zanichelli*, 2008.

³ On the basis of the succession of the European Union to the European Community (Art. 1 TEU, as amended by the Lisbon Treaty), this paper refers to the European Union without distinguishing between the EU and EC framework, except where that distinction is relevant.

⁴ For a recent illustration of the application of loyalty duties in the field of external relations, see E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations', 47 *Common Market Law Review* (2010) 323, and the contribution by P. Van Elsuwege and H. Merket in this volume.

speaking, the EU external representation performs a threefold function. First, it concerns the political involvement of the Union in the international arena, and encompasses both the issuing of statements of a political nature and the adoption of political commitments (e.g. memoranda of understanding). Second, the EU representation relates to the exercise by the Union of the treaty-making power established in the founding Treaties and thus covers issues dealing with the negotiation, signing and conclusion of international agreements. Third, representation concerns the manifestation, from a legal point of view, of the Union's position in international fora. The focus of this paper will be devoted solely to the last two aspects related to the EU external representation. Furthermore, due to the lead taken by the ECJ in defining the scope and the implications of the loyalty principle, the paper will be essentially focused on the analysis of its relevant case-law.

In effect, the interaction between co-operation duties and the external action of the Union has been evoked on several occasions by the Court of Justice. Interestingly enough, however, in the early cases the Court's terminology did not expressly mention the *principle* of loyal co-operation. The Court exclusively stipulated the existence of co-operation duties, and examined their application in the context of mixed agreements. In particular, the Court made it clear that, where it appears that a subject matter of an agreement falls in part within the jurisdiction of a Community and in part within that of the Member States, 'a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into' should be ensured.⁵ Initially, the meaning of such an obligation was clarified in the ambit of the European Atomic Energy Community (EAEC). Then, the Court specified that '[t]his duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC [European Economic Community] Treaty since it results from the requirement of unity in the international representation of the Community'.⁶

Despite the affirmation of a close linkage between the co-operation duties and the external representation of the Union, the absence of references in the case-law to the loyalty principle prevented from clearly assessing its role in this respect.⁷ In the last few years, however, new features emerged, which could help to clarify what the duty of sincere co-operation in the international arena may entail.

⁵ Opinion 1/78 *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 2151, para. 34.

⁶ Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-01031, para. 36. See also Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR I-05267, para. 108, and Opinion 2/00 *Cartagena Protocol* [2001] ECR I-09713, para. 18.

⁷ D. Verwey, *The European Community, the European Union and the International Law of Treaties*, The Hague: T.M.C Asser Press, 2004, at 51; J. Heliskoski, 'Should There Be A New Article on External Relations? Opinion 1/94 "Duty of Cooperation" in the Light of the Constitutive Treaties', in M. Koskeniemi (ed.), Leiden: Martinus Nijhoff Publishers, 1998, 273, at 274.

On the one hand, the principle of loyal co-operation has gained a recurrent presence in the Court's terminology concerning the external relations of the Union (also in cases that do not address issues of mixity). In fact, a considerable number of recent judgments of the Court of Justice regarded cases where there was some problem concerning the respect of loyalty duties, and where specific questions on the implications stemming from that principle have arisen. The details of such decisions will be spelled out later.⁸ At this point, suffice it to recall the *MOX Plant* ruling,⁹ where the Court ultimately clarified that the co-operation duties between the Member States and the EU institutions in external relations represent a specific application of the loyalty clause set out in the founding Treaties (in Article 192 TEAEC and Article 10 TEC, respectively).¹⁰ Symbolically and substantively, such ruling marks a major advance in the judicial discourse on loyal co-operation. Indeed, despite early cases which may suggest otherwise, the Court has made it clear that the co-operation duties cannot represent self-standing commitments flowing from the 'requirement' of unity in the international representation of the Union, the former being just a manifestation of loyal co-operation.¹¹

On the other hand, the Lisbon Treaty has reshaped the pre-existing loyalty clause, and introduced three major innovations in this respect. First, it has incorporated the clause of sincere co-operation into the new common platform of EU policies (Article 4(3) TEU). Secondly, it has codified the fact that this clause constitutes a (general) *principle* of EU law. As a result, the duty of loyal co-operation represents today a general principle of the EU legal order, which covers, *inter alia*, all the branches of the EU external action (including the Common Foreign Security Policy).¹² Third, the Lisbon Treaty has emphasized the mutual nature of the principle: indeed, according to its new formulation, loyal co-operation shall be exercised by the Member States and the EU institutions 'in full mutual respect'.

In the light of the foregoing, this paper starts by giving a general overview of the recent case-law concerning the joint representation of the Union and its Member States at international level, such a context being, as already men-

⁸ See sections 2, 3 and 4, *infra*.

⁹ Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-04635.

¹⁰ *Ibid.* paras. 174-175.

¹¹ See in this respect the Opinion of Advocate General Maduro in *Commission v. Sweden*, where he stresses that '[t]he unity of international representation of the Community and its Member States does not have an independent value; it is merely an expression of the duty of loyal cooperation under Art. 10 EC'. Case C-246/07 *European Commission v Kingdom of Sweden* [2010] ECR I-03317; Opinion of Advocate General Poirares Maduro, 1 October 2009, para. 37. See also C. Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"', *CLEER Working Paper 2009/2*, <http://www.asser.nl/upload/documents/9212009_14629clee09-2full.pdf> (last visited 25 July 2012), at 5, and M. Cremona, 'Case C-246/07, *Commission v. Sweden* (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010', 48 *Common Market Law Review* (2011) 1639, at 1652.

¹² C. Hillion, 'Cohérence et action extérieure de l'Union européenne', *EUI Working Papers Law 2012/14*, <http://cadmus.eui.eu/bitstream/handle/1814/22354/LAW_2012_14_Hillion_FINAL.pdf?sequence=1> (last visited 30 July 2012), at 7. Co-operation duties between the Union and its Member States in external relations are (directly and indirectly) stressed in many provisions of the EU Treaties: see, for instance, Art. 24(3), 32, 34, 35 TEU, and Art. 221 TFEU.

tioned, the traditional one for invoking co-operation duties (section 2). In particular, the idea behind this section is to discuss the way in which the Court has reinterpreted the extent of co-operation duties after having identified their source in the principle of loyal co-operation. Then, issues relating to the exclusive participation of Member States in international fora will be faced (section 3). It should, indeed, be recalled that problems concerning the EU's external representation are not exclusively linked to the competences-allocation between the Union and its Member States. In many cases, even if the EU competence has clearly been established, problems may arise from the institutional framework of the international co-operation at stake.¹³ In this respect, the major obstacle is represented by the agreements' provisions, which prevent international organizations (including the EU) from participating in the co-operation they put in place.¹⁴ In situations like these, the recent EU practice shows an interesting trend, which aims to ensure EU presence in the international scene through its Member States' action. More precisely, as rightly pointed out by some scholars,¹⁵ in these cases, the latter are requested (and authorized) to act as 'trustees of the common interest' of the Union. In addition to these aspects, the paper analyses the mutual nature of duties stemming from the principle of loyal co-operation, taking into account the new formulation of Article 4(3) TEU (section 4). Of course, as a general matter, the fact that the duty of loyalty applies not only to the Member States but also to the EU institutions had already been established in the past by the case-law of the Court.¹⁶ But, as will be seen, only in recent times the Court has shown some practical examples of loyalty duties imposed upon the EU institutions which may influence the EU external representation. An assessment of what has been discussed in the preceding sections is presented in the final part (section 5).

2. DUTY OF LOYALTY AND JOINT REPRESENTATION

As anticipated, the Court of Justice has traditionally applied co-operation duties in the management of mixed agreements. The classic formula, affirmed for the first time in Opinion 1/78, imposes a *close association* between the EU institutions and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations stemming from those agreements. It thus seems that the duty of co-operation has initially been conceived as a *best efforts obligation*, imposing *procedural* obligations of reporting and consultation

¹³ P. Eeckhout, *EU External Relations Law*, 2nd ed., Oxford: Oxford University Press, 2011, at 223; Editorial Comments, 'The Union, the Member States and international agreements', 48 *Common Market Law Review* (2011) 1.

¹⁴ Another obstacle is represented by the Member States' reluctance to modify their status in the existing international organizations: P. Eeckhout, *supra* note 13, at 223.

¹⁵ M. Cremona, 'Member States Agreements as Union Law', in E. Cannizzaro, P. Palchetti, R.A. Wessel (eds.), 'International Law as Law of the European Union', Leiden: *Martinus Nijhoff Publishers*, 2012, 291, at 295.

¹⁶ See e.g. Case C-2/88 *J. J. Zwartveld and others* [1988] ECR I-03365, para. 17.

as well as an exercise of competences aiming at ensuring the unity of external representation.

Whilst mentioning the requirement of the unity in external representation and the international responsibility towards third parties of the Union and its Member States,¹⁷ this case-law was however careful to focus its attention on the *internal implications* stemming from the application of the co-operation duties. Having identified the existence of such duties, it proceeded to examine their extent only with a view to recognizing the Court's jurisdiction to globally assess the implementation of the international agreements at issue, even when they fell outside the scope of application of EU law or created rights and obligations in a field not completely covered by EU legislation.¹⁸

In general terms, this ('competence-based') approach deserves attention since it leads to a less fragmented implementation of international obligations by the EU Member States. The Court's line of reasoning implies, indeed, the incorporation of the mixed agreements into the EU legal order, and imposes thus a centralized mechanism of enforcement of their obligations.¹⁹ However, the Court does not appear to provide a definitive answer to the question of the external dimension of co-operation duties.

In fact, this question was only raised in the *FAO case*,²⁰ decided in 1996, where the Court was asked to directly assess the impact of co-operation duties on the implementation of a mixed agreement *at international level*. In particular, the case concerned the exercise by the European Community (EC) institutions of the decision-making power resulting from the participation in the activities of the Food and Agriculture Organization (FAO). In its judgment, the Court held

¹⁷ Case C-13/00 *Commission of the European Communities v Ireland* [2002] ECR I-02943, para. 15; Case C-239/03 *Commission of the European Communities v French Republic* [2004] ECR I-09325, paras. 26-29.

¹⁸ See, for instance, Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* [2000] ECR I-11307, paras. 36-40; Case C-13/00 *Commission of the European Communities v Ireland*, supra note 17, paras. 13-19; and Case C-239/03 *Commission of the European Communities v French Republic*, supra note 17, para. 29. For a more thorough analysis of this case-law, see L.S. Rossi, 'Conclusioni di accordi internazionali e coerenza del sistema. L'esclusività della competenza comunitaria', 90 *Rivista di diritto internazionale* (2007) 1008; F. Ippolito, 'Giurisdizione comunitaria e accordi misti: dal criterio della competenza alla leale cooperazione', 4 *Studi sull'integrazione europea* (2009) 657; E. Neframi, supra note 4, at 331.

¹⁹ On this subject-matter, see F. Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea*, Milan: Giuffrè Editore, 2008, at 216. For E. Neframi, 'Mixed Agreements as a Source of European Union Law' in E. Cannizzaro, P. Palchetti, R. A. Wessel (eds.), supra note 15, 325, at 345, '[a] mixed agreement is ... a source of EU law because only uniformity in its implementation can ensure unity in international representation'. According to this scholar, thus, the unity in international representation constitutes a pre-requisite of the incorporation of mixed agreements into EU law. In reality, such a requirement has been invoked by the Court for assimilating the position of mixed agreements to that of purely EU agreements, and for considering the former wholly part of the EU legal order. In effect, it shall be recalled that, from a formal point of view, mixed agreements should be considered part of the EU legal order, as their provisions fall within the competence of the Union (Case C-13/00 *Commission of the European Communities v Ireland*, supra note 17, para. 14). In this respect, their incorporation is imposed by Article 216(2) TFEU.

²⁰ Case C-25/94 *Commission of the European Communities v Council of the European Union* [1996] ECR I-01469.

that an inter-institutional arrangement regarding the preparation for FAO meetings, concluded between the Council and the Commission to set up a coordination procedure with the Member States, represented a means to fulfill the duty of co-operation between the Community and its Member States within the FAO.²¹ Consequently, the Community institutions had to respect its content in defining the EC position.²²

In its most recent case-law, the Court of Justice appears to take a similar approach in assessing the implementation by Member States of mixed agreements in the international arena, and, more generally, in defining the constraints on the exercise by the Member States of their external action in domains of shared competence. Such case-law paved the way for a global reconsideration of the shape of co-operation duties, which takes into account, together with the 'competence-based' line of reasoning of the early cases, some institutional facets directly linked to the participation in international agreements.

The first case to be mentioned is *MOX Plant*. As already highlighted, the importance of this judgment lies first in its confirmation of the fact that the duty of co-operation between EU institutions and Member States directly stems from the principle of loyal co-operation, as codified by the founding Treaties.²³ But what is also interesting is that the Court suggests that co-operation duties may also take the form of *substantive* obligations binding the Member States.

In the judgment, the Court held that Ireland had failed to comply with its duties of co-operation. In this respect, the Court identified two main breaches of the principle of sincere co-operation, flowing from different provisions of the founding Treaties. The first one, which is directly linked to Article 10 TEC (now Article 4(3) TEU), concerns the decision by Ireland to bring proceedings under the dispute settlement system set out in the United Nations Convention on the Law of the Sea (UNCLOS), without having first informed and consulted the competent EU institutions. Here the Court merely repeated its early jurisprudence, by conceiving the principle of loyal co-operation in terms of source of procedural obligations imposing consultation duties upon the Member States.²⁴ The second breach is exclusively focused on the recourse by the Member State to the UNCLOS dispute settlement system. What is worth mentioning in this respect is the fact that, according to the Court, Ireland violated 'a specific expression of Member States' more general duty of loyalty resulting from Article

²¹ *Ibid.* para. 49.

²² *Ibid.* para. 50. See also C. Flaesch-Mougin, 'Les relations avec les organisations internationales et la participation à celles-ci' in J. V. Louis and M. Dony (eds.), *Commentaire J. Megret Le droit de la CE et de l'Union européenne – Relations extérieures*, Bruxelles : Editions de l'Université de Bruxelles, 2005, 337, at 425-426, and I. Govaere, J. Capiiau and A. Vermeersch, 'In-Between Seats: The Participation of the European Union in International Organizations', 9 *European Foreign Affairs Review* (2004) 155, at 165. For other illustrations of co-operation duties between the Member States and the EU institutions within international organizations, see J. Heliskoski, 'The 'Duty of Cooperation' Between the European Community and Its Member States Within the World Trade Organization', 7 *Finnish Yearbook of International Law* (1996) 59.

²³ See *supra*, section 1.

²⁴ Case C-459/03 *Commission of the European Communities v Ireland*, *supra* note 9, paras. 172-182.

10 EC'.²⁵ Such a special rule is contained in Article 377 TFEU (former Article 292 TEC), which stipulates that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. According to the Court, thus, the duty of loyal co-operation may also take the form of a substantive obligation of result, which Member States have to respect when acting in the international arena.²⁶

The judgment is useful, and goes some way towards clarifying the extent of the co-operation duties in the international arena. However, the Court does not satisfactorily answer the question of what the role of the loyalty principle in the EU external *representation* could be. It makes, rather, reference to its application with regard to the interplay between international tribunals in light of the process of fragmentation of international law. In particular, such process is considered by the Luxembourg judges from a European perspective with a view to ensuring the authority of the Court's jurisdiction.²⁷ Viewed from this angle, and despite the evolution of the legal discourse on the co-operation duties marked by the *MOX* ruling, this Eurocentric approach echoes the line of reasoning expressed by the Court in its early cases concerning the implementation of mixed agreements, and shows thus the existence of a red thread running throughout the case-law devoted to mixity.

Issues concerning the relationship between the EU's external representation and Member States' co-operation duties have directly been faced by the Court in two infringement procedures against Luxembourg and Germany decided in 2005 (the so-called *Inland Waterways* cases).²⁸ In these judgments the Court concluded that, when there is 'a concerted Community action at international level' (*in casu*, the adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community in the field of transport of passengers and goods by inland waterway), the principle of loyalty 'requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions'.²⁹ In this respect, the Court held that the two Member States were in breach of their obligations under Article 4(3) TEU on the ground that, after the EU institutions had decided to negotiate a multilateral agreement,

²⁵ *Ibid.* para. 171.

²⁶ For an example of judgment enunciating loyalty obligations of result at internal level, see Case C-265/95 *Commission of the European Communities v French Republic* [1997] ECR I-06959.

²⁷ See in this respect, F. Casolari, 'Considérations «intersystémiques» en marge de l'affaire de l'Usine MOX' in H. Ruiz Fabri and L. Gradoni (eds.) 'La circulation des concepts juridiques: le droit international de l'environnement entre mondialisation et fragmentation', *Société de législation comparée*, Paris, 2009, 305, and, more generally, M. Parish, 'International Courts and the European Legal Order', 23 *European Journal of International Law* (2012) 141.

²⁸ Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxembourg* [2005] ECR I-04805, and Case C-433/03 *Commission of the European Communities v Federal Republic of Germany* [2005] ECR I-06985.

²⁹ Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, *supra* note 28, para. 60, and Case C-433/03 *Commission of the European Communities v Federal Republic of Germany*, *supra* note 28, para. 66.

they ratified and implemented bilateral agreements on the same subject matters, without consulting (or cooperating with) the Commission.

The approach taken by the Court in the *Inland Waterways* cases deserves close attention. The Court's line of reasoning is forceful in its tone as it is broad in its scope. On the one hand, the judgments indicate a clear willingness not to assess the concrete impact of the unilateral action by Member States on the external relations of the Union. The Court engenders indeed the idea that a unilateral action by the Member States at international level may constitute *per se* a violation of the loyalty principle.³⁰ The assessment of the consequences of the Member States' action is present, by contrast, in the Opinion of Advocate General Tizzano in *Commission v Germany*. In this respect, AG Tizzano concludes that a Member State's ratification of bilateral agreements in a field where the EU is preparing to negotiate and conclude its own agreements does jeopardize the attainment of the objectives of the Treaties, and it is thus inconsistent with the loyalty principle.³¹ On the other hand, as correctly pointed out by Delgado Casteleiro and Larik, in these judgments the Court 'interpreted the duty to inform and consult in such a way that in reality Member States at the end must provide a clear result': the abstention from assuming new obligations by means of a treaty.³² Viewed from this angle, the *Inland Waterways* cases mark a further shift in the Court's approach *vis-à-vis* the co-operation duties, insofar as they reveal that the procedural co-operation duties established in the early case-law may be re-interpreted as *substantial* obligations.

The reinforcement of co-operation duties emerging from *MOX* and the *Inland Waterways* cases has been confirmed in *Commission v Sweden*,³³ decided in 2010. The case deals with the implementation of the 2001 Stockholm Convention on Persistent Organic Pollutants, which has been concluded by the Union as a mixed agreement. In particular, the Court was asked to adjudge whether the decision by Sweden to unilaterally submit a proposal to list a new substance (perfluorooctane sulfonate, PFOS) in Annex A to the Stockholm Convention was consistent with its duty of loyalty to the Union. In support of the complaint alleging infringement of the duty of cooperation arising out of Article 4(3) TEU, the Commission maintained that Sweden did not take all the measures necessary to facilitate the achievement of the EU's tasks and did not abstain from measures which could jeopardize the attainment of the EU's objectives. Indeed, at the time when Sweden unilaterally proposed the listing, work on the matter was ongoing at Council level. More specifically, the Council had reached an agreement on a common strategy and decided *not* to propose the listing of the relevant substance.³⁴

In its judgment, the Court, after having recalled the *Inland Waterways* judgments and the *FAO* ruling, took the view that, in unilaterally proposing the

³⁰ See also Eeckhout, *supra* note 13, at 248.

³¹ Opinion of Advocate General Tizzano, 10 March 2005, paras. 81-82.

³² A. Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?', 36 *European Law Review* (2011) 524, at 533.

³³ Case C-246/07 *European Commission v Kingdom of Sweden*, *supra* note 11.

³⁴ *Ibid.* para. 89.

addition of PFOS to Annex A to the Stockholm Convention, Sweden dissociated itself from a concerted common strategy within the Council.³⁵ Moreover, the Court pointed out that such a unilateral proposal was able to produce consequences for the Union, since it could be bound by the resulting amendment to Annex A to the Convention. In the light of the foregoing, the Court concluded that: 'Such a situation is likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power with regard to the other parties to the Convention concerned'.³⁶

What is interesting to note in this respect is the fact that, as rightly pointed out by Cremona,³⁷ the Court, contrary to Advocate General Maduro, considers the case in terms of breaching of *substantive* obligations. Indeed, while the Advocate General argued that there had been no Council decision concerning the listing of PFOS,³⁸ and consequently Sweden should refrain from taking individual action (at least for a reasonable period of time) until a conclusion to that process had been reached,³⁹ the Court concluded that a decision (*rectius*, a common strategy) on PFOS did exist and that Sweden, by submitting a unilateral proposal, violated such a decision. In this respect, the Court appears to extend the scope of abstention duties elaborated in the *Inland Waterway* cases insofar as it affirms that also an informal decision of EU institutions may prevent Member States from unilaterally acting at international level.⁴⁰ The elaboration on the loyalty principle emerging from the above case-law deserves some comments. On the one hand, it is an undoubtedly remarkable circumstance that the Court has given some practical guidelines for the implementation (and the enforcement of) loyalty duties in EU external relations. In this respect, it is evident that, inasmuch that the approach expressed by the Court stresses the loyalty duties of the Member States to the Union, it may also contribute to strengthening the external representation of the latter. This is particularly apparent from the circumstance that the notion of 'loyalty' elaborated in the recent Court rulings is essentially represented by negative obligations imposed upon Member States, which prevent them from acting if their action risks undermining the capacity of the EU as an international actor. In this respect, the Court engenders the idea that loyalty in case of joint representation may *de facto* correspond to the classic conception of the principle of good faith in international law, whose concretizations generally take form of abstention obligations.⁴¹

³⁵ *Ibid.* para. 91.

³⁶ *Ibid.* para. 104.

³⁷ M. Cremona, 'Case C-246/07, Commission v. Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010', 48 *Common Market Law Review* (2011) 1639, at 1654.

³⁸ Opinion of Advocate General Maduro, *supra* note 11, para. 51.

³⁹ *Ibid.* para. 49. In this respect see also *infra*, section 3.

⁴⁰ P. Van Elsuwege, 'Commission v. Sweden. Case C-246/07', 105 *American Journal of International Law* (2011) 307, at 309-310.

⁴¹ See R. Kolb, 'Principles as sources of international law (with special reference to good faith)', 53 *Netherlands International Law Review* (2006), at 19-20; A. Berramdane, 'Solidarité, loyauté dans le droit de l'Union européenne' in C. Boutayeb (ed.), *La solidarité dans l'Union européenne*, Paris: Dalloz, 2011, 53, at 61-62.

On the other hand, however, the approach expressed by the Court may raise some problematic issues. First, the extent of the co-operation duties elaborated by the Court appears to suggest a 'DNA mutation' of the loyalty principle, insofar as it is envisioned as a sort of fidelity clause towards EU institutions binding Member States. As indicated in the introduction to this paper, the concept of 'loyalty' set out in EU primary law implies, rather, a full mutual respect between the Member States and the EU institutions: it follows thus that also the latter should be considered subject to its application. Secondly, the legal picture emerging from the case-law does not consider the possible interplay between the loyalty principle and other EU principles – namely the principle of conferred competences and the principle of proportionality – which could lead to a more cautious affirmation of 'fidelity duties' binding Member States. In considering the Court's approach in *MOX*, Hillion recently suggested the emergence of a new judicial conception of co-operation duties. According to the Author, while in the early conception 'the idea is to merge all voices into one and thus to obliterate plurality on the ground that it undermines the Community's international posture', in the new one, by contrast, 'plurality is acknowledged and addressed through constraining coordination, to ensure that all voices speak the same language.'⁴² In fact, such a conception seems to be more consistent with the EU practice of concluding international agreements, which continues to show the preference of the Member States for the mixed form.⁴³ Nevertheless, the case-law examined in this section appears to highlight the affirmation of a judicial trend in which the position of the Member States completely depends on that of the EU institutions. In other words, turning to Hillion's picture, the Court seems to suggest that the language spoken by the different EU actors shall in any case correspond ... to that of the EU institutions! Another ambiguity in the legal picture emerging from the case-law is represented by the fact that the shape of loyalty duties concerning mixed agreements looks very similar to that of the duties which are relevant in fields of exclusive competence of the Union. Such circumstance, which may challenge the model of intervention involved in fields of exclusive and shared competence may only be appreciated in the light of the case-law addressing loyalty duties in the area of EU exclusive competence. This will be considered in the next section.

⁴² C. Hillion, *supra* note 11, at 7. In particular, the Author refers to the circumstance that the Court in *MOX* does not only mention the requirement of unity in international representation, but also the need to ensure the coherence and the consistency of the EU action.

⁴³ A. Rosas, 'The Future of Mixity', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited*, Oxford: Hart Publishing, 2010, 367; E. Paasivirta, 'The EU's External Representation After Lisbon: New Rules, A New Era?', in P. Koutrakos (ed.), 'The European Union's External Relations a Year After Lisbon', *CLEER Working Paper 2011/3*, <http://www.asser.nl/upload/documents/772011_51358CLEER%20WP%202011-3%20-%20KOUTRAKOS.pdf> (last visited 25 July 2012), 39, at 46.

3. DUTY OF LOYALTY AND EXCLUSIVE MEMBER STATES' PARTICIPATION IN INTERNATIONAL FORA

3.1. Member States' participation on behalf of the Union

Issues concerning the application of loyalty duties have become of increasing significance also in the ECJ case-law concerning fields of exclusive competence. In this respect, the Court has been particularly sensitive to the role the principle of loyalty should play when Member States are called to act in the international arena on behalf of the Union.⁴⁴

The first case dealing with this issue is the *ERTA* case, which concerned the conclusion of the European Road Transport Agreement (ERTA). In this case the Court took the (pragmatic) view that, in carrying on the negotiations and concluding the European Road Transport Agreement simultaneously in the manner decided by the Council, the Member States acted in the interest and on behalf of the Community in accordance with their obligation under the loyalty principle set out in Article 4(3) TEU (former Article 5 TEEC).⁴⁵

A most interesting illustration of the Court's attitude was introduced in *Kramer*. This ruling is commonly known for the affirmation of the principle of implied (external) competence it contains.⁴⁶ Nonetheless, it also specifies the duties incumbent upon Member States participating in a convention regarding a field which has subsequently been covered by an EU exclusive competence (*in casu*, the North-east Atlantic Fisheries Convention). In this respect, the Court, after having recalled the obligations incumbent on the Member States according to Article 5 TEEC, held that in fields where the Community is now exclusively competent, the Member States are under a duty *not* to enter into any international commitment which risks undermining the Community's action.⁴⁷ Furthermore, according to the Court, the loyalty clause imposes in this case a duty to proceed by *common action* and to 'use all the political and legal means ... in order to ensure the participation of the Community in the convention and

⁴⁴ Indications on loyalty duties concerning the Member States' action on behalf of the Union are also set out in the EU acts authorising Member States' intervention. Such duties partially echo the case-law analysed in the previous section. Indeed, exactly as acknowledged by the Court in its case-law on Art. 351 TFEU, the duty of loyalty may impose over the Member States an obligation to adopt a common approach to resolve incompatibilities between their international law obligations and EU law, see, for instance, recital 11 of the Regulation (EC) No 561/2006 on the harmonisation of certain social legislation relating to road transport, OJ 2006 L 102/1. In other cases, like affirmed by the Court in *Kramer* (see *infra*), loyalty duties require the Member States to use their best endeavours to ensure that the concerned convention is amended to allow the Union to become a contracting party to it, cf. Art. 5 of the Council Decision No 2002/762/EC authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, OJ 2002 L 256/7.

⁴⁵ Case 22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 263, para. 90. The pragmatic nature of the solution adopted by the Court in this case is highlighted, *inter alia*, by I. Govaere, J. Capiu and A. Vermeersch, *supra* note 22, at 173.

⁴⁶ See for instance P. Koutrakos, *EU International Relations Law*, Oxford: Hart Publishing, 2006, at 89.

⁴⁷ Joined Cases 3, 4 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279, paras. 42-45.

in other similar agreements'.⁴⁸ Viewed from this angle, *Kramer* represents the first judgment dealing with the non-participation of the Community in international treaties falling within its exclusive competence where the Court *explicitly* stated that the respect of the duty of loyalty by the Member States may impose negative obligations of result. Significantly, this statement, which echoes the recent practice of the Court of Justice examined in the previous section, has been confirmed in the recent case-law on exclusive competences.⁴⁹

Particularly relevant in this respect is *Commission v Greece*,⁵⁰ decided in 2009. The case deals with the decision by Greece to submit to the Maritime Safety Committee of the International Maritime Organization (IMO) a proposal for the implementation of the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention). Since the subject-matter falls within the exclusive competence of the Community, the Commission decided to bring an action against Greece. Indeed, according to the Commission, Member States no longer have competence to submit to the IMO national positions on matters falling within the exclusive competence of the Community, unless expressly authorised to do so by the Community. The problem here was represented by the fact that the Community was not an IMO member and thus was unable to directly submit proposals to its Maritime Safety Committee.

This notwithstanding, the Court held that: '... [t]he mere fact that the Community is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty'.⁵¹ And added that: 'the fact that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest'.⁵²

Here, exactly as anticipated in *Kramer*, the Court concludes that the principle of loyalty imposes upon Member States a substantive duty of result, which requires *not to act* unilaterally at international level. Some years later, as already

⁴⁸ *Ibid.*

⁴⁹ In Opinion 2/91, where the Court was asked to assess the participation of the Community in the negotiation and conclusion of a convention under the auspices of the International Labour Organization (ILO), it recognized that: '*In this case, cooperation between the Community and the Member States is all the more necessary* in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States. It is therefore for the Community institutions and the Member States to take all the measures necessary so as best to ensure such cooperation both in the procedure of submission to the competent authority and ratification of Convention No 170 and in the implementation of commitments resulting from that Convention'. Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-01061, paras. 36-37 [emphasis added].

⁵⁰ Case C-45/07 *Commission of the European Communities v Hellenic Republic* [2009] ECR I-701. On this judgment, see also V. Michel, 'Répartition des compétences et coopération loyale dans la définition des actions communautaires au sein des organisations internationales', 19 *Europe* (4/2009) 10.

⁵¹ Case C-45/07 *Commission of the European Communities v Hellenic Republic*, *supra* note 50, para. 30.

⁵² *Ibid.* para. 31.

seen, the same abstention duties have been invoked by the Court in *Commission v Sweden*. In this respect, the question which arises is whether the distinction between shared and exclusive external competences, and ultimately its very existence, is subject to a redefinition.

At first sight, as correctly noted by Cremona, a judicial parallelism between exclusive and shared competences should not seem so surprising. This in particular when cases concerning exclusive EU competences exercised by Member States are involved. Indeed, when Member States act on behalf of the Union, they '[...] participate in the agreement not only as sovereign States but also as Member States of (and under the authorisation of) the Union. Here [...] we can [...] draw an analogy with mixed agreements, where the Member States participate in their own right but also with commitments as Union Member States'.⁵³

On the other hand, in *MOX Plant* the Court has made it clear that the principle of loyalty should govern the action of the EU actors '[i]n all the areas corresponding to the objectives of the Treaty'.⁵⁴ It thus follows that such principle 'does not depend either on whether the [EU] competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries'.⁵⁵ The problem is that the Court has interpreted this statement very broadly, and concluded that loyalty duties could *de facto* correspond in both domains.⁵⁶

In reality, a main difference between the two scenarios does exist. Indeed, while the implementation of the duty of loyalty in shared competence domains cannot exclude *a priori* a unilateral action by the Member States, in fields of exclusive competence the latter may only act in the Union's interest *and* with its authorisation. More precisely, as pointed out by Advocate General Maduro in *Commission v Sweden*, the application of loyalty duties in fields of shared competence implies that the Member States may unilaterally act only when a final decision by the Union is indefinitely postponed (*i.e.* after a reasonable period of time).⁵⁷ However, in *Commission v Sweden* the Court did not follow the Advocate General, and did not give thus any indication of what such a reasonable period of time would be.

In legal terms, such an approach appears not convincing insofar as it is inconsistent with the division of competences between the Member States and the Union, as it is set out in the founding Treaties. In political terms, whilst contributing to reinforce the EU presence in the international arena, the erosion

⁵³ M. Cremona, *supra* note 15, at 306 [emphasis added].

⁵⁴ Case C-459/03 *Commission of the European Communities v Ireland*, *supra* note 9, para. 174.

⁵⁵ Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, *supra* note 28, para. 58.

⁵⁶ See in this respect A. Delgado Casteleiro and J. Larik, *supra* note 32, at 538-539; and P. Van Elsuwege, *supra* note 40, at 310-311.

⁵⁷ Opinion of Advocate General Maduro, *supra* note 11, para. 57. In this respect, Advocate General concluded that '[t]he Community decision-making process is slow, and Member States must acknowledge that results will not be achieved as promptly as when they act individually' (*ibid.*, para 56).

of the distinction between exclusive and shared competences – and, consequently, the extension of the scope of application of Member States' abstention duties – may determine political tensions with the EU institutions, which risk undermining the mutual trust that lies at the heart of the loyalty clause (and, ultimately, of the European integration process).

3.2. Member States' participation in pre-existing agreements

The question of the effects of the loyalty clause *vis-à-vis* the Member States' international commitments is not confined to cases where the States act as trustees of the Union. Such question has also arisen in the context of Member States' participation in pre-existing agreements. Noticeably, the Court's approach to assessing the extent of loyalty duties applicable in this respect confirms the line of reasoning of the case-law examined in the previous section.

A first example which deserves to be mentioned is represented by the *BITS* judgments, decided in 2009.⁵⁸ Here the question concerned the application of Article 351 TFEU (former Article 307 TEC), which governs the relationship between EU law and the agreements concluded by Member States with third countries before 1 January 1958 or, for acceding States, before the date of their accession (so-called pre-existing agreements). As it is well-known, such a provision was the subject of a rich case-law of the Court, which for a long time solely focused on the first paragraph of that Article.⁵⁹ In this respect, the case-law made it clear that the purpose of that provision is to clarify, 'in accordance with the principles of international law, that application of EC Treaty does not affect the duty of the Member States concerned to respect the rights of non-member countries under an earlier agreement and to perform its obligations thereunder'.⁶⁰ Whilst criticized on its approach to the law of treaties,⁶¹ this Court's position was clearly put forward in order to ensure the fulfillment of the Member States' obligations *vis-à-vis* the third contracting parties: it thus expressed a friendly attitude towards international law.

A second line of case-law developed since 2000 suggests a new approach by the Court as far as Article 351 TFEU is concerned. In particular, the new

⁵⁸ Case C-205/06 *Commission of the European Communities v Republic of Austria* [2009] ECR I-1301; Case C-249/06 *Commission of the European Communities v Kingdom of Sweden* [2009] ECR I-1335; and Case C-118/07 *Commission of the European Communities v Republic of Finland* [2009] ECR I-10889.

⁵⁹ The first paragraph reads as follows: 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties'.

⁶⁰ See, for instance, Case C-216/01 *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH* [2003] ECR I-13617, para. 145. For a general overview of this jurisprudence see J. Klabbbers, *Treaty Conflict and the European Union*, Cambridge: *Cambridge University Press*, 2009, at 115.

⁶¹ In particular, what is criticised is the application of this line of reasoning to multipolar existing treaties, *i.e.* treaties that do not create bilateral rights and obligations between the parties. See in this respect, J. Klabbbers, 'Re-inventing the law of treaties: The contribution of the EC Courts', 30 *Netherlands Yearbook of International Law* (1999) 45, at 63-65.

line of reasoning of the Court seems to be based on the necessity to establish a more 'EU-oriented' balance between the foreign-policy interests of the Member States, which are incorporated in the first paragraph of Article 351, and the EU interest to ensure the effectiveness of internal law, enshrined in the second paragraph of that Article.⁶²

The *BITs* judgments are a clear example of this judicial evolution: here, indeed, the Court offers a very narrow interpretation of the obligations stemming from the second paragraph of the Article, according to which Member States are requested to take *immediately* all appropriate steps to *eliminate* incompatibilities between the pre-existing agreements (*in casu*, some bilateral investment agreements concluded with third States) and EU law (namely the law of free movement of capital), even if such incompatibilities may never arise *in concreto*.⁶³

In the judgments, the Court did not explicitly mention the principle of loyal co-operation. On the contrary, Advocate General Maduro, after having recalled that the obligation under Article 351 TFEU is an expression of the duty of loyal cooperation formulated in Article 4(3) TEU,⁶⁴ proposed to interpret this duty in order to extend to Member States' external action the interim obligation judicially established in respect of the transposition of directives. In other words, since, under Article 4(3) TEU, Member States are obliged to refrain from taking any measures liable seriously to compromise the result prescribed by the directives (even before the deadline for their implementation expires),⁶⁵ they should also be obliged 'to take all appropriate steps to prevent their pre-existing international obligations from jeopardizing the exercise of Community competence'.⁶⁶

The Court, without explicitly saying so, seems to agree with Maduro's approach. The aspect that distinguishes the Court's approach from the Advocate General's line of reasoning is that the Court does not rely upon the duty of loyal cooperation enshrined in Article 4(3) TEU. It directly applies Article 351 TFEU, which codifies the obligations of loyal cooperation as far as existing agreements concluded by Member States with third countries are concerned.⁶⁷ The recourse to the specific obligation of loyal cooperation enshrined in the second paragraph of Article 351 TFEU thus imposes a new reading of the content of this provision and determines a revised balance between the Member States' international commitments and EU law, which seems to ensure in any event the primacy of the latter. At the same time, as in the recent case-law on mixity, the specific loyalty clause introduces substantive duties of result

⁶² The second paragraph reads as follows: 'To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude'.

⁶³ See, for instance, Case C-205/06 *Commission of the European Communities v Republic of Austria*, *supra* note 58, paras. 34-40.

⁶⁴ Opinion of Advocate General Maduro of 10 July 2008, para. 33.

⁶⁵ See, *inter alia*, Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* [1997] ECR I-7411, para. 45. This obligation represents, in its turn, an application by analogy of the interim obligation laid down in Art. 18 of the 1969 Vienna Convention on the law of treaties.

⁶⁶ Opinion of Advocate General Maduro, *supra* note 64, para. 42.

⁶⁷ E. Neframi, *supra* note 4, at 343.

since the obligation to take all appropriate steps to eliminate incompatibilities (including renegotiation and denunciation of the pre-existing agreements) cannot be considered as a best efforts obligation.⁶⁸

As Lavranos rightly pointed out, this ‘hypothetical incompatibility’ test elaborated in the *BITs* rulings, which echoes the Court’s reasoning in the *Inland Waterways* cases, particularly expands the scope of application of Article 351(2) TFEU;⁶⁹ on the other hand, it also drastically reduces the discretion which Member States may exercise in fulfilling the obligations stemming from that. It is undeniable that such an approach may contribute to enhancing the international identity of the Union in the field of free movement of capital and of investments. On the other hand, it is questionable whether the test elaborated by the Court represents the most appropriate solution in this respect: its abstract nature shows indeed a less ‘international law-friendly’ attitude of the EU legal order which may easily entail the responsibility of Member States for not having fulfilled their international pre-existing commitments, and, ultimately, risks excessively undermining their foreign-policy interests.

That being said, to appreciate fully the impact of the loyalty clause on the pre-existing commitments of the Member States, one needs to mention the *Kadi* and *Al Barakaat Foundation* cases, decided by the Court in 2008.⁷⁰ In this judgment, the Court assessed the relationship between UN law and EU law⁷¹ and, thus, indirectly, the role played by the EU Member States in the UN.

Yet, the judgment does not contain any explicit reference to the Member States’ loyalty to the Union when implementing UN law. This notwithstanding, it implies that, according to the principle of loyalty, Member States should act in the ambit of other international organizations whose competences may affect the scope of application of EU law (including the UN), taking into account the need to respect EU law (in particular, EU primary law and the constitutional principles of the EU legal order).

Of particular interest in that regard is the reference to Article 351 TFEU (former Article 307 TEC), which is contained in the judgment. Indeed, like the Court of First Instance,⁷² the Court assumed that this Article may be invoked in assessing the relationship between EU law and UN law.⁷³ In considering

⁶⁸ *Ibid.* at 344.

⁶⁹ N. Lavranos, ‘European Court of Justice – infringement of Art. 307 – failure of member states to adopt appropriate measures to eliminate incompatibilities between the Treaty Establishing the European Community and bilateral investments treaties entered into with third countries prior to accession to the European Union’, 103 *American Journal of International Law* (2009) 716, at 720.

⁷⁰ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351.

⁷¹ See F. Casolari, ‘La Corte di giustizia e gli obblighi convenzionali assunti dall’insieme degli Stati membri verso Stati terzi: obblighi comuni o ...obblighi comunitari?’, 14 *Il Diritto dell’Unione europea* (2009) 267, at 273.

⁷² Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649, para. 196.

⁷³ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, *supra* note 70, para. 301.

such a relationship, Gaja maintained that, 'even if the requirements for applying Article 307 appear to be met, it does not seem appropriate to consider that the relations between obligations under the UN Charter and obligations under EC law are governed by this provision'.⁷⁴ Actually, it is difficult (or 'inconceivable', as Gaja further noted) to conclude, as acknowledged by the Court in the *BITs* cases, that, to the extent that UN law is not compatible with EU law, Member States should automatically take all the appropriate steps to eliminate the incompatibilities established: such a conclusion would, indeed, risk undermining the primary responsibility with which the UN is invested for the maintenance of peace and security.⁷⁵ In fact, to properly understand the reference by the Court to Article 351 TFEU, it should be recalled that in *Kadi* and *Al Barakaat Foundation* such a provision is mentioned, together with other Treaty norms, to demonstrate the desire of Member States to bind the Union to the UN obligations dealing with subject-matters falling within the scope of application of EU law.⁷⁶ It is exactly in this vein that the Court holds that: '*Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures ..., to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations*'.⁷⁷

The Court then proceeds to examine the consequences stemming from this clarification and concludes that: 'Article 307 EC [Article 351 TFEU] may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights'.⁷⁸ This extract marks a significant shift from the approach taken by the Court in its previous case-law to the interplay between EU law and UN law. In particular, it is worth mentioning here the *Centro-Com* case, where the Luxembourg judges, without imposing any limitation to its scope of application, invoked Article 351(1) TFEU to justify the primacy of UN law.⁷⁹

Viewed from this angle, it is possible to maintain that, according to *Kadi* and *Al Barakaat Foundation*, the specific loyalty duty which is codified by Article 351(2)⁸⁰ should first impose upon the Member States an obligation to imple-

⁷⁴ G. Gaja, 'Are the Effects of the UN Charter under EC Law Governed by Art. 307 of the EC Treaty?', 28 *Yearbook of European Law* (2009), at 611.

⁷⁵ Note that the primary role played by the UN Security Council in this respect has also been emphasised by the Court in its judgment: *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, *supra* note 70, para. 294.

⁷⁶ F. Casolari, *supra* note 71, at 280.

⁷⁷ *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, *supra* note 70, para. 293 [emphasis added].

⁷⁸ *Ibid.* para. 304.

⁷⁹ Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-00081, para. 56. See also J. Klabbers, *supra* note 60, at 157-158.

⁸⁰ As it has been clarified in the *BITs* cases.

ment UN law in conformity with 'the very foundations' of the EU legal order.⁸¹ It follows that, strictly speaking, the need to respect the fundamental values of the Union should also lead to interpret the principle of loyalty in the sense that Member States cannot assume UN obligations that are inconsistent with the constitutional principles of the Union. Such an interpretation should prevent the 'sandwich effect' highlighted by Eckes.⁸² After the *Kadi* and *Al Barakaat Foundation* ruling, indeed, the EU Member States have been placed before an awkward choice: either the Member States ensure the implementation of UN sanctions, and thus may be brought before the ECJ for failure to comply with EU law; or they ensure the respect of EU law, with all the concomitant consequences in terms of international responsibility *vis-à-vis* the UN legal order.

The reading of the cases which is proposed here exactly corresponds to the position expressed by Advocate General Maduro in his Opinions. According to AG Maduro, '[t]hat duty [*i.e.* the duty of loyalty] requires Member States to exercise their powers and responsibilities in an international organisation such as the United Nations in a manner that is compatible with the conditions set by the primary rules and the general principles of Community law. As Members of the United Nations, the Member States ... have to act in such a way as to prevent, as far as possible, the adoption of decisions by organs of the United Nations that are liable to enter into conflict with the core principles of the Community legal order. The Member States themselves, therefore, carry a responsibility to minimise the risk of conflicts between the Community legal order and international law'.⁸³

It is evident that such a reading of the position taken by the Court in *Kadi* and *Al Barakaat Foundation* may deeply influence the EU representation in the UN. As is well-known, this issue is only partially faced by EU primary law. In particular, for present purposes the wording of Article 34(2) TEU should be recalled, which reads: 'Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the *positions* and the *interests* of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter'.⁸⁴ According to several scholars, the last passage of the second sentence of that paragraph ('without prejudice to their responsibilities under the provisions of the United Nations Charter') makes express reference to the right to veto of the EU Member States which are permanent Security Council members and, consequently, allows them not to act on behalf of the Union in participating in Security Council's activities.⁸⁵

⁸¹ N. Lavranos, 'The Impact of the *Kadi* Judgment on the International Obligations of the EC Member States and the EC', 28 *Yearbook of European Law* (2009) 616, at 619.

⁸² C. Eckes, 'EU Counter-Terrorist Sanctions against Individuals: Problems and Perils', 17 *European Foreign Affairs Review* (2012) 113, at 130.

⁸³ Opinion of Advocate General Poiares Maduro, 23 January 2008, para. 32.

⁸⁴ [Emphasis added].

⁸⁵ See for instance N. Ronzitti, 'Il seggio europeo alle Nazioni Unite', 91 *Rivista di diritto internazionale* (2008) 79, at 91. In this sense see also the Declaration No 14 annexed to the Final Act of the Lisbon Intergovernmental Conference concerning the common foreign and security policy,

The provision, however, does not make reference to the protection of the Union's values (only the positions and the interests of the Organization are mentioned): it can thus be argued that, according to the findings of the Court in *Kadi* and *Al Barakaat Foundation*, the safeguard clause contained in Article 34 TEU should not be invoked by France and the United Kingdom to act in disregard of the constitutional principles of the Union.⁸⁶ Yet, due to the limitations to the Court's jurisdiction provided for by the Lisbon Treaty in the Common Foreign and Security Policy domain (Article 275 TFEU), enforcement actions by the Commission against Member States are not applicable in relation to Article 34 TEU. This circumstance, however, does not undermine the above-proposed reading of *Kadi* and *Al Barakaat Foundation*, which may also be extended to the participation of the Member States in other international organizations: the Court appears, indeed, to suggest that Member States should take into account the need to respect EU law (in particular, EU primary law and the constitutional principles of the EU legal order) even in the case in which they do not act within an international organization as trustees of the Union and the obligations they assume under international law are implemented by means of EU law. In such cases, Member States thus may be called, according to the principle of loyal cooperation, to protect EU values against the influence of an international organization they adhere to. Evidently, this application of the loyalty principle cannot replace the EU full membership in international fora.⁸⁷ Nonetheless, the outcome of the Court's reasoning is of great importance if one considers the legal and political obstacles that prevent the Union from adhering to international agreements or international organizations. In this respect, the loyalty duties may act as a veritable 'Trojan horse' that has been brought into the international forum at stake in order to ensure the protection of EU law.

4. THE MUTUAL NATURE OF LOYALTY

The discussion thus far has essentially considered the loyalty duties of Member States. However, as already recalled, the principle of sincere cooperation implies mutual obligations and consequently should impose analogous duties upon the EU institutions.

Whilst the Lisbon Treaty has codified the mutual nature of the principle, the case-law concerning the EU institutions' loyalty duties in the international arena is still not very rich. The earlier case involving the institutions' duties at the

which states that '... the provisions covering the Common Foreign and Security Policy ... *will not affect* the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and *participation in international organisations, including a Member State's membership of the Security Council of the United Nations*', [emphasis added].

⁸⁶ Opinion of Advocate General Poiares Maduro, *supra* note 83, paras. 39 and 44.

⁸⁷ See also P. Eeckhout, *supra* note 13, at 265.

international level is the *FAO* ruling.⁸⁸ As already seen, here the Court had simply acknowledged that, according to the principle of loyalty, the Council had to respect the inter-institutional arrangement concluded with the Commission concerning the participation of the Union in the activities of the Organization.

In *Commission v Greece*⁸⁹ the matter was less clear-cut. In this case, Greece retorted to the Commission's arguments that the institution infringed Article 4 TEU by refusing to include the Greek proposal on the agenda for the EU Maritime Safety Committee and allowed a debate on the subject. However, unlike the Opinion of Advocate General Bot,⁹⁰ the Court did not take the opportunity to give any further guidance thereon and the point was quickly, and perhaps somewhat hurriedly, dismissed.⁹¹ The Court held, indeed, that the breach by the Commission of Article 4(3) TEU could not entitle Greece to take an initiative likely to affect EU law.⁹² Such a conclusion is perfectly consistent with the settled case-law of the Court, which does not recognize the application of the *inadimplenti non est adimplendum* rule within the EU legal order.⁹³ However, as correctly pointed out by Cremona⁹⁴, it risks creating unequal positions between the Member States and the EU institutions *vis-à-vis* the principle of loyalty, due to the limits imposed by the primary law to infringement actions brought by the Member States (Article 265 TFEU).

In fact, to date the only detailed statements made by the Court on the EU institutions' loyalty duties *vis-à-vis* the Member States' external relations may be found in *Intertanko*.⁹⁵ The case concerned the status of the Marpol Convention within the EU legal order; in particular, the Court was asked to verify whether that Convention was capable of challenging the validity of EU acts (namely Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements). In this respect, the Court recalled first that '[s]ince the Community is not bound by Marpol 73/78, the mere fact that Directive 2005/35 has the objective of incorporating certain rules set out in that Convention into Community law is likewise not sufficient for it to be incumbent upon

⁸⁸ Case 25/94 *Commission of the European Communities v Council of the European Union*, *supra* note 20.

⁸⁹ Case C-45/07 *Commission of the European Communities v Hellenic Republic*, *supra* note 50.

⁹⁰ Opinion of Advocate General Bot, 20 November 2008, paras. 40-42.

⁹¹ V. Michel, *supra* note 50, at 11.

⁹² Case C-45/07 *Commission of the European Communities v Hellenic Republic*, *supra* note 50, paras. 24-25.

⁹³ See Joined Cases 90/63 and 91/63 *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* [1963] ECR 625, at 631: '... the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognisance of and penalising any breach of it. Therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands'. On this see also L. Gradoni, *Regime failure nel diritto internazionale*, Padue: CEDAM, 2009, at 227.

⁹⁴ M. Cremona, 'Extending the reach of the AETR principle: Comment on *Commission v Greece (C-45/07)*', 34 *European Law Review* (2009) 754, at 766.

⁹⁵ Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057.

the Court to review the directive's legality in the light of the Convention'.⁹⁶ Then, it concluded that the circumstance that Marpol Convention binds all the Member States is 'liable to have consequences for the interpretation of ... the provisions of secondary law which fall within the field of application of Marpol 73/78. In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78'.⁹⁷

Hence, under EU law, the duty of loyalty and the good faith principle impose over the EU institutions an obligation to interpret EU secondary law in the light of the wording and purpose of the Member States' international engagements they implement. This passage of the judgment deserves close attention. In general terms, under both the previous (internal) case-law and the primary law, the mutual obligations stemming from the duty of loyalty are considered relevant only insofar as the EU institutions and the Member States carry out tasks directly arising from the founding Treaties. The *Intertanko* ruling marks a significant change in this respect, by adopting a formula, which allows the Court to impose an obligation on the EU institutions to ensure the respect of the Member States' position in carrying out tasks, which, even though filtered through-out EU law, directly flow from the international agreements concluded by the States (*i.e.* instruments that are formally outside the Union legal system). This explains why the Court decided to invoke, together with the duty of loyal cooperation, the principle of good faith, which is enshrined in the *pacta sunt servanda* rule of the 1969 Vienna Convention on the law of treaties (VCLT).⁹⁸ Indeed, in the Court's view, the obligation of consistent interpretation represents, in this case, a tool to preserve the international commitments of the Member States.⁹⁹

The same emphasis on the effectiveness of Member States' international engagements has been endorsed, more clearly perhaps, by Advocate General Kokott. In her Opinion in *Intertanko*, she arrives at the conclusion that: 'A conflict between Community law and Member States' obligations under international law will ... always give rise to problems and is likely to undermine the practical effectiveness of the relevant provisions of Community law and/or of international law. It is therefore sensible and dictated by the principle of cooperation between Community institutions and Member States that efforts be made to avoid conflicts, particularly in the interpretation of the relevant provisions. This applies in particular where the Community measure concerned – as

⁹⁶ *Ibid.* para. 50.

⁹⁷ *Ibid.* para. 52.

⁹⁸ Art. 26 VCLT reads as follows: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

⁹⁹ See also F. Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation', in E. Cannizzaro, P. Palchetti, R. A. Wessel (eds.), *supra* note 15, 395. According to Pujol-Reversat, *Intertanko* formally declares that the good faith principle has been codified by the European loyalty principle: M. C. Pujol-Reversat, 'La bonne foi, principe général du droit dans la jurisprudence communautaire', 45 *Revue trimestrielle du droit européen* (2009) 201, at 224.

in this case – seeks to achieve the harmonised implementation of Member States' obligations under international law'.¹⁰⁰

That being said, it is also worth mentioning that the *Intertanko* formula has not been confirmed in the most recent case-law of the Court. In the *ATAA* case,¹⁰¹ the Court was *inter alia* asked to assess the validity of an EU Directive on the inclusion of the aviation activities in the scheme for greenhouse allowance trading within the Union in light of the 1944 Chicago Convention on International Civil Aviation (which has been ratified by all the Member States). In the judgment, the Court concluded that the Directive at issue could not be examined in the light of the Chicago Convention as such, since the latter was not binding upon the Union.¹⁰² In this case, however, the Court did not make any reference to the duty of consistent interpretation.¹⁰³ On this question, the Advocate General Kokott took a different line. As in *Intertanko*, she concluded: '... the European Union is not bound by the Chicago Convention; therefore that convention cannot serve as a benchmark against which the validity of EU acts can be reviewed. However, as all of the EU Member States are Parties to the Chicago Convention, it must nevertheless be taken into account when interpreting provisions of secondary EU law'.¹⁰⁴

Even though the Court's omission may be justified taking into account the absence of a real risk of conflict between EU law and the Chicago Convention,¹⁰⁵ from a theoretical point of view it is, at the very least, difficult to explain this differentiated approach.¹⁰⁶ This also in the light of the recent conclusion of a Memorandum of Cooperation (MoC) between the European Union and the International Civil Aviation Organization (ICAO),¹⁰⁷ which sets out the principles of the mutual EU-ICAO cooperation and states that this cooperation shall be exercised 'without prejudice to the rights or obligations of EU Member States under the Chicago Convention or to the relationship between EU Member States and ICAO resulting from their membership of ICAO'.¹⁰⁸

¹⁰⁰ Opinion of Advocate General Kokott, 20 November 2007, para. 78.

¹⁰¹ Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* not yet reported.

¹⁰² *Ibid.* para. 72. See also D. Simon, 'Droit international conventionnel et coutumier: l'invocabilité au cœur de la lecture juridictionnelle des rapports des systèmes (à propos de l'arrêt Air Transport)', 21 *Europe* (3/2012) 5, at 8, who affirms, however, that: 'les limites posées par cet arrêt ... n'interdit pas au juge de l'Union de recourir, dès lors que la demande ne tend pas à prononcer l'invalidité d'un acte communautaire, à la méthode de l'interprétation conforme, dont la productivité potentielle est de nature à concilier la garantie de l'autonomie de l'ordre juridique de l'Union et le respect des obligations imposées par l'ordre juridique international'.

¹⁰³ Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, *supra* note 101, para. 60.

¹⁰⁴ Opinion of Advocate General Kokott, 6 October 2011, para. 163.

¹⁰⁵ See in this respect the Opinion of Advocate General Kokott, *supra* note 104, para. 171, and B. Mayer, 'Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011, nyr', in 49 *Common Market Law Review* (2012) 1113, at 1135.

¹⁰⁶ The rationale of the Court's reasoning may only be found in an isolationist posture *vis-à-vis* international law: B. Mayer, *supra* note 105, at 1124.

¹⁰⁷ OJ 2011 L 232/2.

¹⁰⁸ Cf. the Preamble of the MoC.

That being said, and leaving aside the question of whether the *Intertanko* application of the consistent interpretation doctrine will be confirmed in the future, it remains in any case that such a tool could indirectly affect EU external representation. In fact, it is possible to maintain that the interpretative duties set out in *Intertanko* should also apply in cases where the EU institutions implement the international instruments binding the Union. In this respect, despite its limits,¹⁰⁹ the principle of consistent interpretation expresses a twofold function. First, it contributes to minimize the conflicts between the EU international commitments and other sources of international law; secondly, inasmuch as it highlights the importance of the international obligations assumed by each of the 27 Member States, the principle could represent an effective remedy to the excessive EU-oriented interpretation of the loyalty clause that has been analysed in the previous sections of this paper.

5. CONCLUDING REMARKS

In his Opinion in *Commission v Sweden*, Advocate General Maduro stated that '[t]he question whether such unity [the unity of representation] is required by the duty of loyal cooperation can be resolved only by analysing the obligations laid down in a specific agreement [i.e. only on a case-by-case basis]'.¹¹⁰ The above extract appears to define the flexibility that the loyalty principle may assume in defining the action of the Union in the international scene. Such a flexibility is also recognized, as far as Member States' duties are concerned, by Article 4(3) TEU, which states that '[t]he Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'. The provision makes clear that the loyalty clause may impose positive duties, as well as abstention obligations.

The analysis of the case-law so far clearly indicates that the loyal cooperation principle has become a fundamental tool for ensuring the external representation of the Union, and results mainstreamed in the EU external relations domain. Of course, the affirmation of loyalty duties in the EU external relations does not represent an ECJ prerogative. Illustrations of loyalty duties may also be found, indeed, in the Member States' practice¹¹¹ and in the EU institutions' conduct.¹¹² It is however apparent that the Court has played a leading role in

¹⁰⁹ In particular, one has to stress that the application of the doctrine of consistent interpretation cannot lead to a *contra legem* interpretation of EU law.

¹¹⁰ Opinion of Advocate General Poiares Maduro, *supra* note 11, para. 37.

¹¹¹ Consider, for instance, the practice of inserting disconnection clauses in the international agreements concluded by Member States with third parties. C.-P. Economidès, A.-G. Kolliopoulos, 'La clause de déconnexion en faveur du droit communautaire: une pratique critiquable', 110 *Revue générale de droit international public* (2006) 273, and M. Ličková, 'European Exceptionalism in International Law', 19 *European Journal of International Law* (2008) 463, at 484-489.

¹¹² In effect, the EU political institutions have developed—both at international and internal level—mechanisms and clauses which manage normative conflicts between EU law and the Member States' international commitments without calling into question the international responsibility of Member States *vis-à-vis* third parties. This paper cannot analyse in detail such a practice. For

this respect. This notwithstanding, the Court does not seem prepared to attribute to this principle the role of a veritable ‘master key’ for the EU representation. In particular, while the Member States’ duties stemming from that principle are increasingly conceived by the Court mainly in terms of abstention obligations, the corresponding duties of the EU institutions still remain unclear. Such an approach is of course consistent with the general ‘Euro-centric’ attitude of the European Court of Justice *vis-à-vis* international law.¹¹³ Furthermore, it may facilitate the coherence of the external action of the Union: this is particularly the case in the implementation of mixed agreements¹¹⁴ or when the accession of the Union to an international agreement/organization is precluded and the obligations flowing from the latter may influence (or undermine) EU law. Also, the major emphasis on the Member States’ loyalty duties might express the circumstance, highlighted by von Bogdandy, that, since ‘the European legal order ultimately rests on the voluntary obedience of its Member States, and therefore on their loyalty, the principle of loyalty [as applicable to the EU States] has a key role in generating solutions to open questions ...’¹¹⁵

On the other hand, however, the line of reasoning of the Court shows some structural limitations, which deserve to be highlighted. First, the Court’s reluctance to clarify the loyalty duties of the EU institutions appears not perfectly consistent with the new formulation of the principle of loyal cooperation by EU primary law, which expressly makes reference to its mutual nature. In particular, such a judicial restraint may prevent the reaching of a fair balancing between the position of the EU institutions and that of the Member States and thus lead to political tensions that risk undermining the mutual trust required by the Lisbon Treaty. Secondly, a similar risk is found, *mutatis mutandis*, in the recent case-law concerning the Member States’ position in fields of joint representation, which engenders the idea that States cannot intervene on the international scene even in cases where the EU indefinitely postpones its decision to act.¹¹⁶ Thirdly, such case-law also raises the issue of a clear distinction between the loyalty duties falling within domains of shared or exclusive competences. It is thus hoped that the Court’s case-law will further clarify the role that the principle of loyal cooperation may play to ensure a more effective standing of the EU in the multilateral arena, taking into account, together with the multifaceted

some illustrations concerning the external dimension of the EU Area of freedom, security and justice, see F. Casolari, ‘EU Member States’ international engagements in AFSJ domain: Between subordination, complementarity and incorporation’, in C. Flaesch-Mougin and L.S. Rossi (eds.), ‘La dimension extérieure de l’Espace de Liberté, Sécurité et Justice’, Bruxelles: *Bruylant*, 2012, forthcoming.

¹¹³ See J. Wouters, A. Nollkaemper and E. de Wet, ‘Introduction: The ‘Europeanisation’ of International Law’ in J. Wouters, A. Nollkaemper and E. de Wet (eds.), *The Europeanisation of International Law*, The Hague: T.M.C Asser Press, 2008, 1, at 9.

¹¹⁴ See C. Hillion, *supra* note 11, at 35.

¹¹⁵ A. von Bogdandy, ‘European Union: Founding Principles’ in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 2nd ed., Oxford: Hart Publishing, 2010, 11, at 42.

¹¹⁶ A. Delgado Casteleiro and J. Larik, *supra* note 32.

nature of that principle, the multilevel governance of the external powers of the Organisation.¹¹⁷

¹¹⁷ P. Van Elsuwege, *supra* note 40, at 313. See also, in this respect, E. Cannizzaro, 'Unity and Pluralism in the EU's Foreign Relations Power' in C. Barnard (ed.) *The Fundamentals of EU Revisited: Assessing the Impact of the Constitutional Debate*, Oxford: Oxford University Press, 2007, at 193. An opportunity for such a clarification could be offered by two cases pending before the Court of Justice, which concern, *inter alia*, the breach by the Council of the procedure and the conditions to authorise negotiations, the signing and provisional application of EU international agreements: Case C-28/12 *European Commission v Council of the European Union*, OJ 2012 C 73/23, and Case C-114/12 *European Commission v Council of the European Union*, OJ 2012 C 138/5.

THE ROLE OF THE COURT OF JUSTICE IN ENSURING THE UNITY OF THE EU'S EXTERNAL REPRESENTATION

Peter Van Elsuwege and Hans Market

1. INTRODUCTION

The fragmented nature of the EU's external representation, which reflects its complex structure of vertical and horizontal division of competences, often raises questions about the effectiveness and efficiency of the EU's external action.¹ Not seldom, it seems, the Union and its Member States are preoccupied with internal struggles about who is competent to speak in international fora. When the EU loses itself in such inward-looking discussions, this obviously complicates its ability to speak with one voice *vis-à-vis* the rest of the world and undermines its international reputation and negotiating power. A recent and striking example is the row over the EU's representation in UN committees, the Organisation for Security and Cooperation in Europe and the Council of Europe, that culminated in the fall of 2011. In this context, the United Kingdom blocked over 70 EU statements to protest against the fact that they were delivered only 'on behalf of the EU' rather than 'on behalf of the EU and its Member States'.² It is somewhat paradoxical that this controversy emerged after the entry into force of the Lisbon Treaty, primarily aiming to improve the EU's external representation.

Apart from the much commented institutional innovations and the abolition of the pillar structure,³ the strengthening of two constitutional principles is of particular significance. First, the duty of loyal or sincere cooperation is of general application within the Union legal order and has become a mutual legal obligation constraining both the Member States and the EU institutions in the exercise of their (external) powers. Second, consistency (or coherence)⁴ is

¹ E. Cannizzaro, 'Unity and Pluralism in the EU's Foreign Relations Power' in C. Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Oxford: Oxford University Press, 2007, at 193-234; S. Stetter, 'Cross-pillar Politics: Functional Unity and Institutional Fragmentation of EU Foreign Policies' (2004) 11(4) *Journal of European Public Policy*, at 720-739.

² J. Borger, 'EU anger over British stance on UN statements', *theguardian.co.uk*, 20 October 2011.

³ J. C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press 2010, at 238-287; J. Wouters, D. Coppens and B. De Meester, 'The European Union's External Relations after the Lisbon Treaty' in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*, Vienna: Springer, 2008, at 143-203; A. Missiroli, 'The New EU „Foreign Policy” System after Lisbon: A Work in Progress' 15(4) *EFA Rev* (2010), at 427-452.

⁴ On the terminological difference between consistency and coherence, see *infra* part I. In this text, the word 'consistency' will essentially be used because it reflects the wording of the English language version of the Treaties.

more than ever the guiding principle for EU external action. Since the entry into force of the Lisbon Treaty, it falls within the jurisdiction of the Court of Justice. Hence, a new balance between competence delimitation on the one hand and loyalty and consistency on the other may be expected to develop in the Court's case law.⁵

This contribution analyses how the principles of loyalty and consistency – at least partially – mitigate the complexities following from the internal allocation of competences for the external representation of the Union. After an overview of the relevant Treaty provisions (I) and a clarification of the relationship between the two constitutional principles (II), the legal implications for Member States and EU institutions are analysed on the basis of the Court's relevant case law (III). Finally, specific attention is devoted to the special position of the Common Foreign and Security Policy (CFSP) within the EU's constitutional structure and its consequences for the role of the Court in ensuring the unity of the EU's international representation (IV).

2. THE RELEVANT TREATY PROVISIONS

2.1. The Duty of Cooperation

The duty of cooperation is a concept that gradually developed in the context of the Court's case law on mixed agreements,⁶ quite confusingly with reference to various denominations, such as 'the duty of genuine cooperation'⁷, 'the obligation to cooperate in good faith'⁸ and 'the principle of the duty to cooperate in good faith'⁹. While the legal foundations of this duty have long been unclear,¹⁰ recent case law takes away all doubt and unequivocally establishes the Treaty provision on loyal or sincere cooperation (Article 4(3) TEU, ex Article 10 TEC) as legal basis of the duty to cooperate.¹¹

Article 4(3) TEU states:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

⁵ C. Hillion and R. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?', 46 *CML Rev.* (2009), at 581; P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance between Delimitation and Consistency' 47 *CML Rev.* (2010), at 987.

⁶ See: C. Hillion, 'Mixity and coherence in EU external relations: The significance of the duty of cooperation', *CLEER Working Papers 2009/2*; E. Neframi, 'The duty of loyalty: rethinking its scope through its application in the field of EU external relations', 47 *CML Rev.* (2010), at 331-337.

⁷ Case C-433/03, *Commission v Germany* [2005] *ECR* I-7011, para. 64.

⁸ Case C-246/07, *Commission v Sweden* [2010] *ECR* I-03317, para. 77.

⁹ Case C-355/04, *Segi and Others v Council* [2007] *ECR* I-1662, para. 52.

¹⁰ M. Cremona, 'Case C-246/07, *Commission v. Sweden* (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010' 48(5) *CML Rev.* (2011), at 1650-1652.

¹¹ Case C-266/03, *Commission v Luxembourg* [2005] *ECR* I-4805, para. 57; Case C-433/03, *Commission v Germany* [2005] *ECR* I-6985, para. 63.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

Compared to pre-Lisbon Article 10 TEC this provision has been significantly strengthened in a number of ways. First, the principle of sincere cooperation has acquired a central position at the inception of the Treaty on European Union, immediately after the articles on the EU's values and objectives. It is, therefore, a key constitutional principle of general application in the EU legal order.¹² Second, whereas a literal reading of former Article 10 TEC appeared to suggest a one-way duty incumbent on the Member States (an interpretation rejected by the Court),¹³ the principle is now explicitly reciprocal. This more balanced approach is further reinforced with a reference to the principle of conferred powers and the respect for national identities in the first and second paragraph of Article 4 TEU.

Moreover, Article 13 TEU states that the 'institutions shall practice mutual sincere cooperation'. The similar wording as in Article 4(3) TEU suggests the equal application of the principle of sincere cooperation to inter-institutional relations. This similarly codifies and clarifies the Court's jurisprudence where it had already stated that 'inter-institutional dialogue [...] is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions'.¹⁴

Despite the formal depillarisation undertaken by the Treaty of Lisbon and the explicit statement that the principle of sincere cooperation applies to the Union as a whole, a separate CFSP-specific duty of cooperation is maintained in Article 24(3) TEU.¹⁵ This seems at first sight a redundant repetition, the more so since the provisions of this article to a large degree mirror those of Article 4(3) TEU.¹⁶ The difference lies in the fact that the CFSP-duty to cooperate only entails obligations for the Member States and remains outside the Court's ju-

¹² Significantly, in the pre-Lisbon context, the principle of genuine cooperation was only explicitly mentioned in Art. 10 of the EC Treaty and thus, in theory, restricted to the former first pillar of the Union. Nevertheless, the Court in *Pupino* suggested that Art. 10 TEC had a trans-pillar application, Case C-105/03, *Pupino* [2005] ECR I-5285, para. 42. The Treaty of Lisbon logically confirms this approach taking into account the formal abolition of the pillar structure, without however abandoning the special treatment of the former second pillar (Common Foreign and Security Policy), expressed in Art. 24(3) TEU.

¹³ Case C-230/81, *Luxembourg v Parliament* [1983] ECR I-258, para. 37.

¹⁴ Case C-204/86, *Greece v Council* [1988] ECR I-5354, para. 16; Case C-65/93, *Parliament v Council* [1995] ECR I-660, para. 23.

¹⁵ Art. 24(3) states: 'The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council and the High Representative shall ensure compliance with these principles'.

¹⁶ G. De Baere, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press, 2008, at 262.

risdiction. Responsibility for ensuring compliance with the principle is entrusted to the Council and the High Representative (see further Chapter IV).

Also with regard to CFSP, the obligation of systematic cooperation has been considerably fortified. Article 32 TEU builds further on the pre-Lisbon requirement to ‘consult one another within the European Council and the Council on any matter of foreign and security policy of general interest’. The aim is now not merely to ensure that the Union is able to assert its interests and values on the international scene, which was already included in former Article 16 TEU, but also and essentially ‘to determine a common approach’. The definition of such a common approach imposes on the High Representative and the Ministers for Foreign Affairs of the Member States a requirement to coordinate their activities within the Council. Equally, the Member States’ diplomatic missions and Union delegations have to cooperate and shall moreover contribute to formulating and implementing this common approach. While these provisions constitute significant requirements that are formulated in binding terms,¹⁷ their practical implications are not further specified and their essential interpretation is left to the individual discretion of the Member States.¹⁸

Article 34 TEU further requires Member States to coordinate their action in international organisations and at international conferences; Article 35 TEU assigns diplomatic and consular missions of the Member States and Union delegations to cooperate in ensuring that decisions defining Union positions and actions are complied with and upheld; and Article 27 TEU obliges the EEAS to cooperate with Member States diplomatic services. This impressive range of Treaty provisions on cooperation in the area of CFSP could, at least in theory, provide the backbone of a well-established system of cooperation and coordination at EU-level.¹⁹

2.2. The Duty of Consistency

The importance of coherence and consistency is stressed in ample declarations, speeches and policy documents on issues of foreign policy.²⁰ The Lisbon Treaty changes this and raises those principles more than ever to the consti-

¹⁷ Denza even believes that these provisions ‘cannot be reconciled with independent nation status’, see E. Denza, ‘Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy’ in T. Tridimas and P. Nebbia (eds.), *European Union Law for the twenty-First Century: Rethinking the New Legal Order. Volume 1: Constitutional And Public Law. External Relations*, Oxford: Hart Publishing, 2004, at 269.

¹⁸ See further: C. Hillion and R. A. Wessel, ‘Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?’ 46(2) *CML Rev.* (2009), at 81.

¹⁹ M. Cremona, ‘Coherence in European Union Foreign Relations Law’ in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives*, Cheltenham: Edward Elgar, 2011, at 75.

²⁰ For instance: “if we are to make a contribution that matches our potential, we need to be more active, more coherent and more capable”(Council, ‘A Secure Europe in a Better World: European Security Strategy’, Brussels, 12 December 2003, at 11); “credibility requires consistency” (President of the European Council Herman Van Rompuy, ‘Europe on the World Stage’, speech delivered at Chatham House, London, 31 May 2012, EUCO 107/12, at 4); “we need CSDP action to be based on coherent and effective strategies” (High Representative Catherine Ashton, ‘Com-

tutional level. Former Article 3 TEU has been dissected and dispersed over a number of new Lisbon provisions.²¹ Article 13 TEU echoes the idea that the institutional framework shall 'ensure the consistency, effectiveness and continuity of its policies and actions'. In the light of the amalgamation of the Community with the Union, the new Article omits the requirement that this has to respect and build upon the *acquis communautaire*. Article 7 TFEU adds that the 'Union shall ensure consistency between its policies and activities' and balances this with the principle of conferred powers. Such a general unambiguous duty of consistency of all Union action does not have a predecessor under the previous Treaty regime. Article 21(3) TEU replicates the second paragraph of former Article 3 TEU and requires the Union to 'ensure consistency between the different areas of its external action and between these and its other policies'.

Besides scattering the provisions on the duty of consistency, the Lisbon Treaty also diffuses responsibility over its execution. Article 21(3) TEU states that the 'Council and the Commission, assisted by the [High Representative], shall ensure that consistency and shall cooperate to that effect'. Quite confusingly, while this article places the High Representative in a supporting role, Article 18(4) TEU seems to make the latter, in his/her capacity as Vice-President of the Commission, the sole responsible for ensuring external action consistency. Be that as it may, the High Representative is assisted by the European External Action Service in fulfilling his/her mandate 'to ensure the consistency of the Union's external action'.²² Further, Article 16(6) TEU assigns a central function to the General Affairs Council to 'ensure consistency in the work of the different Council configurations' and bestows the Foreign Affairs Council (FAC) with the responsibility of elaborating the Union's external action and ensuring that it is consistent.

While the reorganisation of provisions and political responsibility may seem to obscure the legal basis of the duty and assign it a less prominent position,²³ the Lisbon Treaty essentially confirms consistency between the various EU policies and actions as one of its central threads.²⁴ First of all, the new TEU assembles all the Union's external action principles and objectives in a single Article 21 and provides that these shall be respected and pursued in all the different areas of the Union's external action, as well as in the external aspects of its other policies. Article 24(2) TEU and 205 TFEU confirm that both CFSP and TFEU external policies shall be conducted within this general framework of Article 21 TEU.²⁵ Moreover, Title II of Part One on the Principles of the TFEU

mon Security and Defence Policy', speech delivered to the European Parliament, Strasbourg, 13 December 2011, A 512/11, at 1).

²¹ For an analysis of former Article 3 TEU, see: I. Bosse-Platière, *L'article 3 TEU. Recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne*, Bruxelles: Bruylant, 2009.

²² Council Decision (2010/427/EU) of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L201/30, 3.8.2010 (further: 'EEAS Decision'), Article 2(1).

²³ P. Eeckhout, *EU External Relations Law*, Oxford: Oxford University Press, 2011, at 186.

²⁴ M. Cremona, 'Coherence through Law: What difference will the Treaty of Lisbon make?' 3(1) *Hamburg Review of Social Sciences* (2008), at 30.

²⁵ See also: 207(1), 208(1), 212(1) and 214(1) TFEU.

puts forward a number of objectives that are to be protected and upheld in all the Union's activities, including equality between men and women, social protection, environmental protection and consumer protection. Another example of such a horizontal objective is development cooperation that shall, according to Article 208(1) TFEU, be taken into account in all the policies that the EU implements which are likely to affect developing countries. The Lisbon Treaty thus seems to focus on complementarity rather than hierarchy, and on integration rather than delimitation of the various EU policies within a single framework of external action principles and objectives.

The Lisbon Treaty's institutional innovations equally reflect the consistency rationale. This is clear from the triple-hatting of the High Representative combining the portfolios of conducting the CFSP, Vice-President of the Commission responsible for external relations and Chair of the FAC. These three hats are also reflected in the hybrid role and composition of its assisting body, the European External Action Service (EEAS). This service is composed of staff from the Commission, the General Secretariat of the Council and the Member States, and has responsibilities ranging from aid programming and crisis management²⁶ to administrative and political support for the chairs of certain preparatory organs of the FAC.²⁷ Finally, the Commission delegations have been transformed into Union delegations covering the entire range of EU competences.

Even more significant than establishing a broad duty of consistency is that the Lisbon Treaty enables the Court to adjudicate both on its general application and – most importantly for the purposes of this article – on the duty of a consistent EU external action. This is a crucial innovation because previously the duty was left to the individual discretion of the various policy actors involved.²⁸ However, the amalgam of actors and policies over which consistency is to be ensured may render this new judicial competence particularly challenging and the question arises how the Court will deal with this new situation. What implications will be attached to the duty of consistency and how will possible cases of inconsistency be resolved? Despite the considerable weight it attaches to the principle, the Lisbon Treaty does not give many hints in this regard. Some inspiration may be drawn from the relationship between the duties of loyalty and consistency (see further section II).

Adding to this complexity, the Court may have to settle the dust with regard to the well-known linguistic ambiguity concerning the concept of consistency, something the Lisbon Treaty has not elucidated. Whereas consistency is the term used in the English version of the Treaties, other language versions refer

²⁶ Article 9 and 4(3)(a) EEAS Decision.

²⁷ Council Decision (2009/908/EU) of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, O.J. L322/28, 9.12.2009, Annex II.

²⁸ Although it should be noted that a lack of jurisdiction did not stop the Court of First Instance in the Yusuf and Kadi cases to base its reasoning precisely on the duty of consistency, see Cases T-306/01 *Yusuf et al v Council and Commission* [2005] ECR II-3533, paras. 162 and 164; T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649, paras. 126 and 128.

to 'coherence'.²⁹ This at first sight rather trivial discussion may have important legal implications as both concepts are not interchangeable.³⁰ Consistency is generally referred to as a rather static notion aimed at avoiding contradictions (negative obligations), while coherence is more dynamic and is directed at building synergies (positive obligations).³¹ Taking into account the reality that most languages refer to the dynamic notion of coherence and, more important, based on a functional interpretation of the Treaties, there seems to be a consensus in literature that the requirement of 'consistency' foreseen in the English language version entails more than avoiding legal contradictions and presupposes a quest for synergy and added value between the different actions of the Union.³²

3. THE RELATIONSHIP BETWEEN THE DUTY OF COOPERATION AND THE DUTY OF CONSISTENCY

In its initial case-law on the duty of cooperation in the context of mixed agreements the Court almost axiomatically stated that this duty flows from 'the requirement of unity in the international representation of the Community'.³³ It was not until recently that the Court also linked this duty to the objective of consistency. In the so-called *Inland Waterways* cases, it held that the Member States and the EU institutions were bound by a duty of close cooperation 'in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation'.³⁴ The Court did however not further elaborate on this link, which may be due to its lack of jurisdiction over the duty of consistency prior to the entry into force of the Lisbon Treaty. It is also noteworthy that in the *PFOS* case, the Court

²⁹ R. A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' 37(5) *CML Rev.* (2000), at 1150.

³⁰ By referring to both 'coherence and consistency' of EU action in *Commission v Luxembourg* the Court seems to suggest that it indeed sees them as two distinct concepts, see Case C-266/03, *Commission v Luxembourg* [2005] *ECR* I-4805, para. 60.

³¹ Bart Van Vooren, for instance, distinguishes three levels of coherence: i) the absence of contradictions (consistency); ii) the effective allocation of tasks and iii) the achievement of positive synergies. See: B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy. A Paradigm for Coherence*, London: Routledge, 2011, at 69. See also P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law*, Portland: Hart Publishing 2001, at 39. and M. Cremona, *op. cit.* note 19.

³² C. Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union', in M. Cremona (ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008, at 12-16.

³³ Opinion 2/91, *ILO* [1993] *ECR* I-1061, para. 36; Opinion 1/94, *WTO* [1994] *ECR* I-5267, para. 106; Opinion 2/00, *Cartagena Protocol on Biosafety* [2001] *ECR* I-9713, para. 18. Hillion convincingly argues that this expression was first used to transplant the duty of cooperation from the EAEC to the EEC context and subsequently developed, in both case-law and legal writing, into a basis for the duty of cooperation between the Community and the Member States. See C. Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the Duty of Cooperation', *CLEER Working Paper* 2009/2 at 4-7.

³⁴ Case C-266/03, *Commission v Luxembourg* [2005] *ECR* I-4805, para. 60; *Commission v Germany* [2005] *ECR* I-6985, para. 66.

referred for the first time to the unity of international representation as a 'principle' rather than as a 'requirement'.³⁵ However, the legal foundation and nature of this principle remain somewhat obscure and it seems difficult to regard it as a 'self-contained obligation' that is disconnected from the general objectives of the EU's external action.³⁶

Intuitively, there appears to be an obvious link between the duties of cooperation and consistency, as they are both expressions of EU solidarity that seem essential to ensure the unity of the EU's international representation. Their interrelation is also clear from the wording of Article 4(3) TEU that to a certain extent mirrors the positive and negative obligations associated with the broad interpretation of the duty of consistency. It encompasses the negative obligation to avoid contradictions (the Member States shall 'refrain from any measure which could jeopardise the attainment of the Union's objectives') as well as the positive obligation to build connections and enhance compatibility (the Union and the Member States shall 'assist each other in carrying out tasks which flow from the Treaties'; the Member States 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties'; and 'shall facilitate the achievement of the Union's tasks').

The addition of the revised consistency provisions to the Court's jurisdiction may be instrumental to make this link more explicit. In this regard, it has been suggested that the duty of consistency could mean for the horizontal relationship between the EU institutions and policies, what the duty of cooperation has meant for the vertical relationship between the European Community (now Union) and the Member States.³⁷ However, this does not imply that the relationship between loyalty and consistency can be reduced to a classical distinction between the vertical and horizontal division of competences. Indeed, the duty of cooperation is not limited to the relationship between the Union and the Member States and applies in a similar fashion to inter-institutional cooperation. This was already clear from the Court's case-law³⁸ and is now made explicit in Article 13 TEU (cf. *supra*). In the same sense, also the duty of consistency is of general application.³⁹

An alternative interpretation of the link between the duties of cooperation and consistency is that the former governs the relationship between actors, whereas the latter's focus is on policy areas and initiatives. Both the actor-centred approach of the duty of cooperation and the policy-centred approach of the duty of consistency then apply to the so-called horizontal (between actors and policies at EU level) and vertical relationship (between actors and policies of the EU and the Member States).

³⁵ Case C-246/07, *Commission v Sweden* [2010] ECR I-03317, para. 104.

³⁶ A. Thies, 'The PFOS Decision of the Court of Justice of the EU: the Member States' Obligation to Refrain from Unilateral External Action in Areas of Shared Competences' in J. Díez-Hochleitner et al. (eds.), *Recent Trends in the Case Law of the Court of Justice of the EU (2008-2011)*, Madrid: Kluwer, 2012, forthcoming.

³⁷ C. Hillion and R. A. Wessel, *op. cit.* note 5; C. Hillion, *op. cit. supra* note 32, at 31-32.

³⁸ Case C-204/86, *op. cit.* note 14.

³⁹ C. Hillion, 'Cohérence et action extérieure de l'Union', in E. Neframi, (ed.), *Objectifs et compétences de l'Union européenne*, Paris : Editions Bruylant /Larcier, 2012, forthcoming.

The combined reading of Articles 4(3) TEU and 21 TEU offers further insights on this interpretation of the relationship between both duties. In Article 4(3) TEU it is specified that the duty to cooperate is not an objective in itself, but aimed at the achievement of the Union's tasks and objectives. With regard to external action, the Lisbon Treaty assembles all these tasks and objectives, including those relating to CFSP, in a single Article 21(2) TEU, and adds that the Union 'shall work for a high degree of cooperation in all fields of international relations'. Moreover, Article 21(3) TEU requires the Union to pursue this single list of objectives in the development and implementation of the different areas of the Union's external action,⁴⁰ as well as in the external aspects of its other policies, 'ensure *consistency* between' them and '*cooperate* to that effect' (emphasis added).

This clearly demonstrates how the duty of cooperation and the duty of consistency each fulfil their respective roles but are at the same time inextricably linked. Because the actors and the policies they develop and implement cannot be disassociated from each other, both duties must be seen as two sides of the same coin. So far, the Court's case law exclusively concerned the duty of cooperation but, as was clearly expressed in the *Inland Waterways* cases (cf. *supra*) the connection with the principle of consistency is obvious.

4. LEGAL CONSEQUENCES OF THE DUTY OF COOPERATION

After an initial period where the Court's position was based on a rather abstract understanding of the duty to cooperate,⁴¹ the more recent case law reveals that very concrete legal obligations for the Member States' behaviour at the international level can be derived from this principle (1).⁴² As observed in the Court's case law and now expressly laid down in Article 4(3) TEU, the duty of cooperation is a reciprocal principle including also obligations for EU institutions (2).

4.1. Obligations for the Member States

The duty of loyal cooperation significantly affects the scope for Member State action at the international level. Already in the famous *AETR* judgment of 1971,

⁴⁰ This requirement is repeated in Art. 205 TFEU.

⁴¹ A good example is *Opinion 2/91*, regarding the conclusion of a Convention concerning safety in the use of chemicals at work in the context of the International Labour Organisation (ILO). Taking into account that this Convention could not be concluded by the Community since the ILO is only open to states and the subject-matter of the Convention concerned Community competences, the ECJ observed that 'it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into', without however providing any concrete guidance on how to achieve this cooperation in practice. See *Opinion 2/91, ILO* [1993] *ECR* I-1061, para. 36.

⁴² On this evolution in the case law, see the contribution of F. Casolari to this volume and A. Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?', *ELRev.* (2011), at 524-541.

the ECJ derived from ex Article 5 EEC Treaty (now Article 4(3) TEU) a prohibition for the Member States to exercise their external competences when this would risk affecting internal Union rules or altering their scope.⁴³ Each time the Union institutions adopt common rules with a view to implement a common policy envisaged by the Treaties, the Member States no longer have a right to undertake obligations with third countries which affect those rules. Under such circumstances, only the Union is in a position to assume and carry out contractual obligations towards third countries.⁴⁴

In *Commission v. Greece*, the Court clarified that this so-called *AETR*-effect not only applies with regard to the conclusion of international agreements but also regarding the adoption of positions within international organisations.⁴⁵ The case concerned a Greek proposal made within the International Maritime Organisation (IMO) for monitoring compliance of ships and port facilities with the requirements of the International Convention for the Safety of Life at Sea ('SOLAS Convention') and International Ship and Port Facility Security Code ('ISPS Code'). Significantly, the EU is not a member of the IMO since, by virtue of the IMO Convention, membership is only open to states. Likewise, the Union cannot accede to Conventions agreed within the framework of the IMO. This does not prevent that many of the issues dealt with by the IMO have been incorporated in the EU legal order. For instance, Regulation 725/2004/EC on enhancing ship and port facility security essentially implements the SOLAS Convention and the ISPS Code. The Regulation *inter alia* provides for regular consultations between the Member States and the Commission in order to define common positions to be adopted in the competent international fora.⁴⁶ After the issue of compliance with the SOLAS Convention and the ISPS Code was not discussed in the relevant internal comitology structures, notwithstanding a Greek request to do so, Greece decided to autonomously bring the matter to the IMO. According to the Commission, this was in breach of the Member States' obligations under the duty of loyal cooperation.

The ECJ essentially followed the Commission's reasoning that the Greek initiative was likely to affect the provisions of Regulation 725/2004/EC. In line with its findings in *AETR*, the Court significantly curtailed the option for individual Member State action:

'The mere fact that the Community is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty'.⁴⁷

Whereas Member States can take part in international organisations of which the Union is not a member, they have to take into account their obligations

⁴³ Case 22/70, *Commission v Council* [1971] ECR 263, para. 22.

⁴⁴ *Ibid.* para. 17-18.

⁴⁵ Case C-45/07, *Commission v Greece* [2009] ECR I-701; M. Cremona, 'Extending the reach of the AETR principle: Comment on Commission v Greece (C45/07)', *ELRev.* (2009), at 754-768.

⁴⁶ Art. 10(4) of Regulation 725/2004, OJ 2004 L 129/6.

⁴⁷ Case C-45/07, *Commission v Greece* [2009] ECR I-701, para. 30.

under EU law. All positions adopted by the Member States within such organisations are to be the result of prior coordination within the Union.⁴⁸ If no Union position on a matter of exclusive competence can be adopted, the Member States can simply not act at all. This is, with so many words, expressed in the voluntary procedural framework for the adoption of positions within the IMO.⁴⁹ When the Council does not succeed in adopting a Union position, the Member States can only contribute to the debate with information or factual comments but without expressing a position of their own. This basic rule applies even when the Commission failed to take the necessary measures for instituting the internal coordination process. Member States are not entitled to unilaterally adopt corrective or protective measures to compensate a breach of the duty of cooperation on the part of the EU institutions.⁵⁰

The procedural rules on participation in the IMO also reveal that the Member States have, in principle, more flexibility in areas of shared competence. Here as well, there is a duty of prior coordination but the option of individual Member State action is not totally excluded. If the Council does not succeed in adopting a common position of the Union and its Member States, the representatives of the Member States retain their freedom to express their position on the matter concerned, as long as this does not conflict with the Union *acquis*.⁵¹ Hence, there appears to be a conceptual difference in the application of the duty of cooperation depending on the nature of the EU's competence. When the Union is exclusively competent, the Member States are under an *obligation of result*. They either follow an established Union position or do not act at all. With regard to shared competences, the duty of cooperation merely implies an *obligation of conduct*. A Member State must try to find common ground within the Council but if this is not successful, it is entitled to act alone. Any other interpretation appears to disrespect the division of competences and the principle of conferred powers.⁵²

⁴⁸ This rule was already expressed in Opinion 2/91, where the Court observed that in situations where the EU cannot accede to an international agreement but its Member States can, 'cooperation between the Community and the Member States is all the more necessary' where the Union must act 'through the medium of the Member States'. See Opinion 2/91, *ILO* [1993] ECR I-1061, para. 36.

⁴⁹ 'Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO', SEC (2005) 449, as amended after discussions in the Shipping Working Party of the Council, doc. 11851/05. Whereas the procedural framework has not been formally approved, it is voluntary used in practice. See: N. Liu and F. Maes, 'The European Union and the International Maritime Organization: EU's External Influence on the Prevention of Vessel-Source Pollution', *Journal of Maritime Law and Commerce* (2010), at 581.

⁵⁰ Case C-45/07, *Commission v Greece* [2009] ECR I-701, para. 26.

⁵¹ Council doc. 11851/05, at 12.

⁵² In this respect, Cremona observed that '[i]f it [the duty of cooperation] is to be kept conceptually separate from pre-emption, as a restraint on but not a denial of Member State competence, this obligation is best seen as a 'best efforts' obligation rather than requiring Member States to refrain from acting until agreement is reached'. M. Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance', in: M. Cremona and B. De Witte, (eds.), *EU Foreign Relations Law. Constitutional Fundamentals*, Oxford: Hart, 2008, at 168.

The Court's decision in *Commission v. Sweden* reveals that the line between cooperation and competence may be thin.⁵³ In this case, Sweden failed to fulfil its obligations under the duty of sincere cooperation by unilaterally proposing an addition to the list of dangerous substances in Annex A to the Stockholm Convention on Persistent Organic Pollutants (POPs). Under the Convention rules, any party may propose that a substance be considered a POP and added to the annexes of the Convention. Since both the EU and the Member States are parties to the Stockholm Convention they, in principle, all have the right to propose such an addition. However, the Court found that the independent Swedish proposal to add perfluorooctane sulfonate (PFOS) to the list went against a concerted common strategy within the Council, which was not to propose the listing of PFOS immediately, *inter alia* for economic reasons. Moreover, the decision-making process provided for by the Stockholm Convention implied that the unilateral Swedish initiative had significant consequences for the Union. Pursuant to Article 25 (2) of the Convention, the Member States and the EU are not entitled to exercise their voting rights under the Convention concurrently. Accordingly, either the Member State(s) supporting the proposal or the Union opposing the addition of PFOS are deprived of their right to vote. Even though the Union has the possibility to submit a declaration of non-acceptance of an amendment proposed and voted for by several Member States, the precise implications of such an action are unclear and could give rise to legal uncertainty, not only within the EU but also for non-member countries that are party to the Convention. Under those circumstances, the ECJ concluded that Sweden's unilateral initiative compromised the principle of unity in the international representation of the Union and its Member States.⁵⁴

The Court's judgment reveals that Member States are subject to special duties of action and abstention as soon as a 'concerted common strategy' exists at the level of the EU. The form of this strategy is irrelevant and does not require the adoption of a legally binding document. In this respect, the Court extends its previous case law, where it already held that the adoption of a decision authorising the Commission to negotiate a multilateral (mixed) agreement on behalf of the Community (now Union) marks the start of a concerted EU action at the international level,⁵⁵ to situations where the Council has not adopted any formal decision. As soon as a matter is discussed within the EU institutions, and even before the formal EU decision-making process enters into force, Member States are thus obliged to refrain from acting individually.

The duty of cooperation implies that Member States' actions at the international level may not affect the EU's decision-making process. By unilaterally proposing an amendment to Annex A of the Stockholm Convention only one week after the Council working group meeting decided to postpone the adoption of an EU position on the subject, Sweden bypassed the internal decision-

⁵³ Case C-246/07, *Commission v Sweden* [2010] ECR I-3317. P. Van Elsuwege, annotation of Case C-246/07, *American Journal of International Law* (2011), at 307-313.

⁵⁴ Case C-246/07, *Commission v Sweden* [2010] ECR I-3317, para. 104.

⁵⁵ Case C-266/03, *Commission v Luxembourg* [2005] ECR I-4805, para. 60; Case C-433/03, *Commission v Germany* [2005] ECR I-6985, para. 66.

making process. The question is, of course, how long Member States must refrain from acting individually? Whereas a one week interval between a Council meeting and the unilateral action is obviously unreasonable, Advocate General Maduro hinted that 'Member States must not be caught in a never-ending process, in which a final decision by the [Union] is postponed to the point of inaction. If that proves to be the case, a decision should be deemed to have been taken and Member States should be allowed to act'.⁵⁶ Whereas the starting point of the duty of cooperation is clearly established, i.e. the existence of a 'concerted common strategy', the point where the Member States are allowed to act unilaterally in the absence of a final EU decision remains undefined.

Hence, despite the conceptual differences between the application of the duty of cooperation in areas of shared or exclusive competence, a comparison of the IMO and PFOS cases seems to indicate that the practical effects are the same. Unilateral external action by the Member States is precluded in order to preserve the unity of the EU's external representation in both cases. In other words, it appears that the proverbial 'single voice' of the Union is imposed by the Court of Justice. The question is, of course, how such a far-reaching interpretation can be reconciled with the fundamental constitutional principle of conferral (Article 5 TEU). In this respect, it is noteworthy to recall the Court's conclusions in *Opinion 1/94*. In response to the Commission's argument that the joint participation of both the Community and the Member States in the World Trade Organisation (WTO) would risk to undermine the unity of action *vis-à-vis* the rest of the world and weaken its negotiating power, the Court unequivocally stated that, even though legitimate, such concerns cannot modify the division of competences.⁵⁷ Rather than being a competence conferring rule, the principle of loyalty entails a number of practical legal obligations to ensure the *effet utile* of the EU's (external) action.

Accordingly, the decisive criterion on the concrete implications of the loyalty principle for the scope of autonomous Member States action is not so much the nature of the EU competence at stake⁵⁸ but, rather, the impact of Member State action on the consistency and coherence of the EU's external action.⁵⁹ Reflecting the wording of Article 4(3) TEU, Member States cannot adopt individual positions in international organisations when this would impede or hinder the attainment of the Union's tasks and objectives. Such a harmful effect is presumed as soon as Member States act in an area covered by common EU rules. This follows from the AETR-rule as confirmed in the IMO case. When no

⁵⁶ Opinion of Advocate General Poiras Maduro delivered in Case C-246/07 *Commission v Sweden* [2010] ECR I-3317, para. 57.

⁵⁷ Opinion 1/94, *WTO* [1994] ECR I-5267, paras. 106-107.

⁵⁸ In this respect, it is noteworthy that 'the duty of genuine cooperation is of general application and does not depend either on whether the Union competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries'. See: Case C-246/07, *Commission v Sweden* [2010] ECR I-3317, para. 71; Case C-266/03, *Commission v Luxembourg* [2005] ECR I-4805, para. 58; Case C-433/03, *Commission v Germany* [2005] ECR I-6985, para. 64.

⁵⁹ G. De Baere, 'O, Where is Faith? O, Where is Loyalty? Some Reflections on the Duty of Loyal Cooperation and the Union's External Environmental Competences in the Light of the PFOS Case', *ELRev.* (2011), at 417-18.

common EU rules exist, such as in the PFOS case, independent Member State action is only excluded under two conditions. First, there has to be a ‘concerted Union strategy’. Significantly, Member States always have a duty to inform the Union institutions so that a Union strategy can be adopted. Moreover, the postponement of international action can qualify as a Union strategy. Second, individual Member State action is excluded when it is liable to have negative consequences for the Union. This was obviously the case in *Commission v. Sweden*, taking into account the possible adoption of a rule of international law that would be binding on the Union.⁶⁰ This also explains why the Court could not accept the argument that Article 193 TFEU (ex Article 176 TEC) allows Member States to take more stringent national measures to protect the environment.⁶¹ Contrary to a national measure, Sweden’s action could impose an internationally binding rule upon the EU and would thus compromise the exercise of Union competences.⁶²

Hence, the duty of loyalty can be regarded as a multifaceted legal instrument ensuring the unity of the EU’s international representation while respecting the internal division of competences. In a first step, it entails an obligation for the Member States to inform the EU institutions so that a concerted Union strategy can be contemplated. Such a duty of prior consultation has a preventive objective, i.e. to avoid future inconsistencies between Member State action and EU rules. For this reason, Member States also have to inform and consult the relevant institutions prior to instituting dispute-settlement proceedings.⁶³ In a further step, when individual Member State action would indeed negatively affect the Union’s tasks and objectives, the duty of loyalty effectively turns into an obligation of result. This *de facto* limitation of the Member States’ sovereign powers may be regarded as a natural consequence in a constitutional order where they accepted to ‘facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives’.⁶⁴

From this perspective, the, at first sight, rather ambiguous conclusion of the Court in the *Inland Waterways* cases is more comprehensible. In those cases, the ECJ left some flexibility regarding the concrete duties for the Member States flowing from the principle of loyalty:

‘The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires for that purpose, *if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation* between the latter and the Community institutions in order to facilitate the achievement

⁶⁰ Cf. *supra* note 54.

⁶¹ Case C-246/07, *Commission v. Sweden* [2010] ECR I-3317, para. 102.

⁶² Van Elsuwege, *op. cit.* note 53, p. 312.

⁶³ Case C-459/03, *Commission v Ireland* [2006] ECR -14635, para. 179.

⁶⁴ Art. 4(3) TEU.

of the Community tasks and to ensure the coherence and consistency of the action and its international representation.⁶⁵

This crucial paragraph illustrates very clearly the flexible legal nature of the loyalty principle, which implies a best efforts obligation – a duty of information and consultation – that may turn into an obligation of result – a duty of abstention – if required to ensure the coherence and consistency of the EU's international action and representation.

4.2. Obligations for the EU Institutions

In *Zwartveld and Others* the Court made clear that the principle of sincere cooperation 'not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law [...] but also imposes on Member States and the Community institutions mutual duties of sincere cooperation'.⁶⁶ It subsequently clarified that this also applies in areas of exclusive powers⁶⁷ and to the dialogue between institutions.⁶⁸ Already in its AETR judgment, the Court observed that it was for the two institutions whose powers were directly concerned, namely the Commission and the Council, 'to reach agreement on the appropriate methods of cooperation with a view to ensuring most effectively the defence of the interests of the Community'.⁶⁹ To give another example, in the context of the EU's participation to the Food and Agricultural Organisation (FAO), the Council and the Commission entered into a binding inter-institutional arrangement to decide who, of the Union or the Member States, should act at FAO meetings. After the Commission contested a Council decision granting the Member States the right to vote on an issue falling within the EU's exclusive competence as regards conservation of the biological resources of the sea, the Court confirmed the conclusion of the inter-institutional arrangement as an expression of the duty of sincere cooperation and recognised its legally binding obligations in light of the requirement of unity in the EU's international cooperation.⁷⁰

Whereas the FAO arrangement essentially concerned cooperation between the Union and the Member States, it seems logical that also classical inter-institutional cooperation agreements on, for instance, information exchange⁷¹ can be considered as expressions of the loyalty principle. Of course, the horizontal duty of sincere cooperation does not seem to go as far as to suggest

⁶⁵ Case C-266/03, *Commission v Luxemburg* [2005] ECR I-4805, para. 60 and Case C-433/03, *Commission v Germany* [2005] ECR I-6985, para. 66.

⁶⁶ Case C-2/88 *Imm., Zwartveld and Others* [1990] ECR I-3367, para. 17.

⁶⁷ Case C-45/07, *Commission v Greece* [2009] ECR I-701, para. 25.

⁶⁸ Case C-65/93 *European Parliament v Council* [1995] ECR I-643, para. 23.

⁶⁹ Case 22/70, *Commission v Council*, [1971] ECR 263, para. 87.

⁷⁰ ECJ, Case C-25/94, *Commission v Council* [1996] ECR I-1469.

⁷¹ An example is the inter-institutional agreement between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, OJ 2002 C 298/1.

that there is an obligation for the institutions to engage in binding inter-institutional arrangements.⁷²

Despite the reciprocal application of the loyalty principle, it appears that the obligations imposed on the EU institutions are less imperative in comparison to the more straightforward duties of cooperation and abstention for the Member States.⁷³ Notably, in *Greece v. Commission* the ECJ acknowledged that the Commission is expected to cooperate with the Member States but only cautiously formulated the institution's obligations:

'in order to fulfil its duty of genuine cooperation under Article 10 EC, *the Commission could have endeavoured to submit that proposal to the Maritime Safety Committee* and allowed a debate on the subject. As is apparent from Article 2(2)(b) of the Standard rules of procedure, such a committee is also a forum enabling exchanges of views between the Commission and the Member States. The Commission, in chairing that committee, *may not prevent such an exchange of views on the sole ground that a proposal is of a national nature*'.⁷⁴

This vigilant formulation raises the question whether the duty of cooperation is equally constraining the institutions and the Member States when they are exercising their powers. Apart from the different nature of the obligations resulting from the duty of loyalty, there is also a significant difference in terms of judicial review. Member States are subject to the scrutiny on the part of the European Commission under Article 258 TFEU. On the other hand, it seems more difficult for the Member States to bring a successful case against EU institutions for a failure to observe the duty of sincere cooperation. From the conclusions in the *IMO* case, where the Court excluded the adoption of compensation measures,⁷⁵ it follows that Member States first have to bring proceedings for failure to act to the Court under Article 265 TFEU (ex Article 232 EC). Under those circumstances, it is questionable whether the political inaction of the institutions to implement a concerted strategy within a reasonable period would be a sufficient argument. Despite the reciprocal application of the duty of cooperation, it thus appears that, in practice, this principle essentially restrains the scope of unilateral Member State action.

5. LOYALTY, CONSISTENCY AND THE DUAL NATURE OF THE EU'S EXTERNAL ACTION

Despite the formal abolition of the pillar structure and the attribution of a single legal personality to the Union, the Common Foreign and Security Policy (CFSP) remains 'subject to special rules and procedures' (Article 24(1) TEU). This is *inter alia* highlighted by the fact that a special loyalty provision is included in

⁷² P. Eeckhout *op. cit.* note 23, at 246.

⁷³ C. Hillion *op. cit.* note 6, at 28.

⁷⁴ Case C-45/07, *Commission v Greece* [2009] ECR I-701, para. 25 [emphasis added].

⁷⁵ *Ibid.* para. 26.

Article 24(3) TEU.⁷⁶ Hence, the question arises to what extent the duties of abstention and cooperation resulting from the loyalty principle bind the Member States and EU institutions in the field of CFSP differently in comparison to other areas of EU law. Several elements seem to indicate that, from a legal normative point of view, the importance of this distinction should not be over-estimated.

First, the Union's action on the international scene – including the CFSP – is guided by a single set of principles and objectives⁷⁷ and is based on a single institutional framework.⁷⁸ Second, whereas “mutual (political) solidarity” is not a traditional normative legal concept,⁷⁹ Article 28(2) TEU specifies that CFSP decisions “commit the Member States in the positions they adopt and in the conduct of their activity”. As a corollary, it can thus be argued that also in the field of CFSP the sovereignty of the Member States has been limited.⁸⁰ Third, the CFSP loyalty principle laid down in Article 24(3) is drafted in a rather straightforward and mandatory manner. The Member States ‘*shall support*’ the Union's external and security policy, they ‘*shall comply*’ with the Union's action in this area and ‘*shall refrain*’ from any action that is contrary to the Union's interests or is likely to impair the effectiveness of its international action as a cohesive external actor. Moreover, the text leaves little scope for exceptions as suggested by the expressions ‘*actively*’ and ‘*unreservedly*’.⁸¹ In his interpretation of former Article 11(2) TEU (current Article 24(3)) Advocate General Mazák concluded that there is ‘a strengthened obligation to act in good faith’, similar to that contained in (ex) Article 10 TEC.⁸² Fourth, the Court's pre-Lisbon case law regarding the former third pillar suggests a holistic application of general Union principles.⁸³ It is tempting to transpose this approach to the post-Lisbon context, which leaves the Union with ‘a dual pillar structure in all but name.’⁸⁴

Taken to its logical conclusion, the unity of the EU legal order implies that the Union's constitutional principles, including the requirements of consistency and sincere cooperation, equally apply throughout the Union with the Court of Justice as its ultimate arbiter.⁸⁵ However, the question is how such interpreta-

⁷⁶ *Op cit.* note 15.

⁷⁷ Art. 23 TEU.

⁷⁸ Art. 13 TEU.

⁷⁹ P. Koutrakos, ‘Primary Law and Policy in EU External Relations – Moving Away from the Big Picture’, 33 *EL Rev.* (2008), at 670.

⁸⁰ K. Lenaerts and T. Corthaut, ‘Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law’, 31 *EL Rev.* (2006), at 289-290.

⁸¹ C. Hillion and R. Wessel, ‘Restraining external competences of the Member States under CFSP’ in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law. Constitutional Fundamentals*, Oxford: Oxford University Press, 2008, at 91.

⁸² Opinion of Advocate General Ján Mazák delivered in Case C-203/07 P, *Greece v Commission* [2008] *ECR* I-08161, para. 83.

⁸³ See e.g. Case C- 105/03, *Pupino* [2005] *ECR* I-5285; Case C-355/04, *Segi and Others v Council* [2007] *ECR* I-1657. On this trend, see further: R. A. Wessel, ‘The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation’, 5 *European Constitutional Law Review* (2009), at 117-142.

⁸⁴ P. Koutrakos, *op. cit.* note 80, at 669.

⁸⁵ C. Hillion, ‘Cohérence et action extérieure de l'Union’, in E. Neframi, (ed.), *Objectifs et compétences de l'Union européenne*, Paris : Editions Bruylant /Larcier, 2012, forthcoming.

tion can be reconciled with the different formulation of loyal cooperation as far as action in the field of CFSP is concerned. Is Article 24(3) only a relic of the past which cannot affect the horizontal application of the EU's basic principles, or, should the inclusion of a specific CFSP principle of loyalty, alongside the general principle of Article 4(3) TEU, be regarded as an indication that the Member States, as Masters of the Treaties, intend to be less constrained in their actions in this particular field? The answer to this question has far-reaching consequences, particularly as far as the potential for judicial review is concerned. Whereas Article 24 TEU precludes the Commission to bring a Member State before the Court of Justice for breaching its duties under the CFSP, Member State actions jeopardising the attainment of the Union's external action objectives arguably fall within the Court's jurisdiction in the light of Article 4(3) TEU.⁸⁶

There are in any case two important exceptions to the general lack of judicial supervision on CFSP actions: the ECJ is competent to review the legality of restrictive measures against natural or legal persons and to police the borderline between CFSP and non-CFSP external action.⁸⁷ In both areas, the issue of consistency is of particular significance. First, with regard to the adoption of targeted sanctions, there is a natural overlap between the pursuit of objectives related to the CFSP on the one hand and the Area Freedom, Security and Justice (AFSJ) on the other hand, particularly when the fight against terrorism is concerned.⁸⁸ The pending inter-institutional conflict between the European Parliament and the Council regarding the correct legal basis for the adoption of sanctions against persons associated with *Al Qaida* provides a perfect illustration of the tension between both policy areas.⁸⁹ Second, the basic rule that the implementation of the CFSP shall not affect the application of the other EU competences and *vice versa* introduces a new horizontal delimitation rule between CFSP and non-CFSP external action.⁹⁰ Arguably, the complex interdependence of international relations implies that any attempt to establish a fixed boundary between areas of activity such as development cooperation and CFSP is almost by definition an artificial endeavour. Hence, additional elements may be taken into account to solve potential inter-institutional conflicts in the field of EU external action and this is where the duty of consistency, which since the Treaty of Lisbon falls within the Court's jurisdiction, comes into play.

For instance, the strengthened role of the consistency principle after Lisbon may reinforce the tendency towards the use of multiple legal bases for the adoption of EU legal instruments.⁹¹ Of course, according to the Court's estab-

⁸⁶ *Ibid.*

⁸⁷ Article 24(1) TEU; Article 275 TFEU.

⁸⁸ See: P. Van Elsuwege, 'The Adoption of Targeted Sanctions and the Potential for Inter-Institutional Litigation after Lisbon', *Journal of Contemporary European Research* (2011), at 488-499.

⁸⁹ Case C-130/10, *European Parliament v Council*, pending. (Opinion of Advocate-General Bot delivered on 31 January 2012).

⁹⁰ See: P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency', 47 *CML Rev.* (2010), at 987-1019.

⁹¹ Van Elsuwege, *supra* n.89.

lished case law, recourse to a dual legal basis can only exceptionally provide a way out on the condition that procedures laid down for the respective legal bases are not incompatible and do not undermine the rights of the European Parliament.⁹² Whereas a combination between qualified majority voting and unanimity in the Council appears to be excluded,⁹³ the Court's conclusion in *Opinion 1/08* and *International Fund for Ireland* revealed that this rule is not absolute.⁹⁴ Taking into account the very unusual provision of Article 40 TEU, which prescribes a balance between the procedural and institutional characteristics of the EU's CFSP and non-CFSP external competences, as well as the duty of consistency (Article 7 TFEU), a compromise solution of a double legal basis including CFSP and non-CFSP provisions seems, therefore, not by definition excluded.⁹⁵

Be that as it may, consistency is and remains essentially a policy imperative which largely depends on the political will of the Member States and the EU institutions.⁹⁶ More than increased judicial interference, practical arrangements and initiatives to agree on a comprehensive approach to EU external action seem of crucial importance to pursue the objective of increased consistency in the EU's external action. The 'internal arrangements to improve the European Union's external policy', adopted on the occasion of the September 2010 European Council point in this direction.⁹⁷ Another noticeable example is the Council Note on 'EU Statements in Multilateral Organisations' of 24 October 2011 that was drafted in response to the row with the UK over the delivery of EU statements (cf. *supra*).⁹⁸ In short, the Council Note sets out three possible scenarios. First, if a statement refers exclusively to actions undertaken by or responsibilities of the EU, including those of the CFSP, it shall be prefaced by 'on behalf of the European Union'. Second, if a statement expresses a position that is common to the EU and its Member States, 'pursuant to the principle of unity of representation',⁹⁹ it will be delivered 'on behalf of the EU and its Member States'. Third, where the Member States agree to be collectively represented by an EU actor on issues relating to the exercise of national competence, the statement will be made 'on behalf of the Member States'. In the light of the Court's case law an important provision is that the Member States are allowed

⁹² Case C-300/89, *Titanium dioxide* [1991] ECR I-2867, paras. 17-21; Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, para. 57.

⁹³ Case C-338/01, *Commission v Council* [2004] ECR I-4829, para. 58.

⁹⁴ S. Adam and N. Lavranos, 'Case note on Opinion 1/08', 47 *CML Rev.* (2010), at 1535; Case C-166/07, *European Parliament v Council of the European Union* [2009] ECR I-7135, with case note of T. Corthaut, 'Institutional Pragmatism or Constitutional Mayhem?', *CML Rev.* (2011), at 1271-1296.

⁹⁵ Significantly, in pending Case C-130/10, *European Parliament v Council*, pending. Advocate-General Bot indicates that such a combination of legal basis is excluded for procedural reasons (para. 69). In this respect, he follows the Opinion of Advocate General Mengozzi in *ECOWAS*, even though the judgment of the Court in the latter case did not raise this point.

⁹⁶ P. Koutrakos, *op. cit.* note 80, at 675.

⁹⁷ European Council Conclusions, 16 September 2010, EUCO 21/1/10.

⁹⁸ Council Note, 'EU Statements in Multilateral Organisations – General Arrangements', 24 October 2011, 15901/11.

⁹⁹ Interestingly, the Member States thus seem to support the Court's view of unity as a principle as expressed in the *PFOS* case (cf. *supra*).

to complement statements delivered on behalf of the EU 'whilst respecting the principle of sincere cooperation'.

This document is a clear illustration of the tension between the willingness of the EU and the Member States to ensure the unity of the EU's international representation and their preoccupation with protecting their prerogatives on the global scene. While the note sets out a number of practical arrangements to warrant that the preparation of statements remains 'internal and consensual', it stresses at the same time that 'external representation and internal coordination does not affect the distribution of competences under the Treaties nor can it be invoked to claim new forms of competences'.¹⁰⁰ The adoption of such pragmatic solutions and the increased linkage of CFSP and non-CFSP instruments¹⁰¹ ensure as far as possible the unity of the EU's external representation with respect to the dual nature of its internal constitutional structure.

6. CONCLUSIONS

The Treaty of Lisbon reinforces the constitutional principles of loyalty and consistency within the Union legal order, particularly with regard to the implementation of the EU's external action. It can be derived from the case law of the ECJ that both principles are closely interconnected. The duty of cooperation determines the margin of manoeuvre of the relevant actors (Member States and institutions) in order to ensure the coherence and consistency of the EU's activities at the international level. Since the entry into force of the Lisbon Treaty, the duty of consistency also falls within the Court's jurisdiction, which provides new opportunities for the Court to clarify the complex machinery underlying the Union's external action.

It follows from the Court's established case law that the rather abstract duty of cooperation implies concrete legal and procedural obligations for the Member States. Arguably, the duties imposed are more imperative when the Member States' action within the institutional and procedural framework of an international organisation (or agreement) has direct consequences for the Union¹⁰² and when the areas of competence of the Union and the Member States are closely interrelated.¹⁰³ The underlying motivation is obviously to protect the unity of the EU's international representation, which is in itself instrumental to achieve the objectives of the EU's external action as expressed in Article 21 TEU.

¹⁰⁰ *Ibid.* paras. 2 and 3.

¹⁰¹ Interesting examples are the Instrument for Stability, see Regulation (1717/2006/EC) of 15 November 2006 establishing an Instrument for Stability, *OJ* 2006 L327/1; see further the African Peace Facility, Decision of the APC-EC Council of Ministers (3/2003/EC) of 11 December 2003 on the use of resources from the long-term development envelope of the ninth EDF for the creation of a Peace Facility for Africa, *OJ* 2003 L345/108.

¹⁰² The impossibility for the Union to exercise its voting rights under the Stockholm Convention if any of the Member States exercises its right to vote is a clear example of such a situation.

¹⁰³ Case C-459/03, *Commission v Ireland (Mox Plant)* [2006] ECR I-4635, para. 176.

Whereas the requirement of unity of external representation has so far always been linked to the vertical relationship between the Member States and the Union, nothing seems to prevent an application of this reasoning in respect of the horizontal relationship between the institutions. The underlying rationale that the Union needs to present itself to the outside world as a unified system in order to ensure effective cooperation with third countries and international organisations is obvious with regard to mixed agreements but also applies to inter-institutional cooperation. It appears that inter-institutional conflicts about legal basis have a direct impact on the EU's external relations.¹⁰⁴ Moreover, the principle of sincere cooperation equally applies to relations between the institutions.¹⁰⁵

Finally, the principles of loyalty and consistency are of crucial importance so as to overcome the dual nature of the EU's external action. Despite the further integration of the CFSP in the EU's unitary legal order, it remains characterised by specific legal rules and institutional arrangements. The "mutual non-affected clause" of Article 40 TEU confirms the distinction between the CFSP and the other policies of the Union. Institutional innovations such as the High Representative for Foreign Affairs and Security Policy and the establishment of a European External Action Service intend to avoid that this division negatively affects the EU's international activities. Arguably, an at least equally important role is to be played by the Court of Justice in applying the principles of loyalty and consistency as instruments to ensure the unity of the EU's external representation, of course in respect to the vertical and horizontal division of competences.

¹⁰⁴ A good illustration is Case C-317/04, *European Parliament v Council* [2006] ECR I-4721. M. Cremona, *op. cit.* note 52, at 157-158.

¹⁰⁵ Significantly, the Commission recently lodged an application for the annulment of a Decision of the Council and of the Representatives of the Governments of the Member States of the European Union meeting within the Council concerning the signature, on behalf of the Union, and provisional application of the Air Transport Agreement between the United States of America, the EU and its Member States, Iceland and Norway. According to the Commission, the decision to sign and provisionally apply international agreements *by the Union* should have been solely taken by the Council and not by the Council and the Member States. Importantly, the Commission essentially claims a violation of the Council's duty of sincere cooperation as laid down in Art. 13(2) TEU: 'the Council should have exercised its powers so as not to circumvent the Union institutional framework and procedures in conformity with the Treaty objectives'. See: pending Case C-28/12, Council doc. 6200/12, 7 February 2012.

EXTERNAL REPRESENTATION AND THE EUROPEAN EXTERNAL ACTION SERVICE: SELECTED LEGAL CHALLENGES

Bart Van Vooren and Ramses A. Wessel

1. INTRODUCTION

The 2001 Laeken Declaration on the future of the European Union strongly asserted the need for the EU to be(come) a prominent global actor:¹ *‘Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?’* Via the meanderings of the Draft Constitution, the Lisbon Treaty translated this ambition into a number of external objectives (Articles 3 (5) and 21 TEU). In order to bring to fruition these ambitious objectives, the Treaty of Lisbon strengthened the institutional dimension of EU external representation, in particular through the establishment of the European External Action Service (‘EEAS’).²

This new body has been called ‘the first structure of a common European diplomacy’.³ However, the EU is not a state, although it is an active participant in the diplomatic network of states that is – primarily – regulated by the Vienna Convention on Diplomatic Relations of 1961 (‘VCDR’)⁴ and the Vienna Convention on Consular Relations of 1963 (‘VCCR’).⁵ Currently 138 Union delegations are active in states around the World, and at international organizations.⁶ The EU’s intensified global diplomatic ambitions in external representation trigger the question to which extent they are compatible with the European and international legal framework? Traditionally, diplomatic relations are established between states and the legal framework is strongly state-oriented. The EU is not a state but an international organization, albeit a very special one. It enjoys international legal personality, which allows it to enter into legal relations with

¹ European Council, Laeken Declaration on the Future of the European Union, 14-15 December, 2001, subheading ‘Expectations of Europe’s citizens’.

² Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30 (‘EEAS Decision’).

³ ‘Consular and Diplomatic Protection: Legal Framework in the EU Member States’, Report of the *EU CARE project*, December 2010, at 31; available at <<http://www.careproject.eu/images/stories/ConsularAndDiplomatic-Protection.pdf>>.

⁴ The VCDR was signed on 18 April 1961, entry into force 24 April 1964, *United Nations Treaty Series*, vol. 500, 95, No. 301. Currently 187 states are party to the VCDR. See <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en>.

⁵ The VCCR was adopted 24 April 1963, entered into force 19 March 1967, currently 172 states parties, *United Nations Treaty Series*, vol. 596, 262.

⁶ Updates may be found at <http://eeas.europa.eu/delegations/web_en.htm>. See also the EEAS document ‘EU Diplomatic Representation in third countries – First half of 2012’, Council of the European Union, Doc. 18975/1/11, REV 1, 11 January 2012.

states and other international organizations.⁷ At the same time, its external competences are limited by the principle of conferral,⁸ and in many cases the EU is far from exclusively competent and shares its powers with the Member States. Indeed, the TEU mandates that ‘essential state functions’⁹ of the Member States are to be respected by the Union and it is in diplomatic relations in particular that one may come across these state functions.¹⁰ Finally, within the Union the new Diplomatic Service is by no means the sole competent institution for EU external relations.

With this EU-internal complexity in mind, the present paper will utilize the VCDR’s description of ‘diplomatic activities’ in its Article 3, and on that basis, the article will explore the Union’s ‘diplomatic ambitions’ through its newly established EEAS. Subsequently, this contribution will then confront these with the European and international legal reality. It will analyse to which extent the current legal framework is able to allow the EU to act alongside states at the global level in exercising a number of diplomatic functions. Thus, in this paper we shall focus on five distinct aspects of diplomatic relations by the Union first, establishing a formal EU presence through its delegations; second, representing the Union through the delivery of statements in multilateral fora; third, diplomatic relations through visits and missions by top EU officials at political level; fourth, the task of gathering information by the Delegations as ‘EU embassies’; fifth and finally, the task of diplomatic protection of ‘EU citizens’. In all these areas, we shall explore the extent to which EU and international law is supportive or obstructive to successfully completing these diplomatic tasks.

2. THE EEAS AS A CATALYST FOR THE EU’S DIPLOMATIC DEVELOPMENT

In the report of December 2011 evaluating the first year of the new Diplomatic Service, its foundation is viewed as a historic opportunity to rise above ‘internal debates pertaining to institutional and constitutional reform’, and instead to focus on ‘delivering new substance to the EU’s external action’.¹¹ There is certainly no lack of ambition in post-Lisbon EU external relations, prompting

⁷ See more extensively R. A. Wessel, ‘Revisiting the International Legal Status of the EU’, *European Foreign Affairs Review* (2000), at 507-537; R. A. Wessel, ‘The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities’, in A. Dashwood and M. Maresceau (eds.) *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, 2008, at 145-180.

⁸ Art. 5 TEU.

⁹ Cf. Art. 4(2) TEU.

¹⁰ The EEAS Decision acknowledges this in Art. 5(9): ‘The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States’. See also B. Van Vooren, ‘A Legal-Institutional Perspective on the European External Actions Service’, *CMLR* (2011), at 475-502, who points out that due to consistency obligations this should be read as a general obligation to cooperate between the EEAS and the national diplomatic services (at 497).

¹¹ European External Action Service, ‘Report by the High Representative to the European Parliament, the Council and the Commission’, 22 December 2011, at 2.

one commentator to observe that ‘if there was an international award for “enthusiasm”, the EU would stand good chances for winning it.’¹² Such enthusiasm indeed permeated the 2001 Laeken Declaration, as was clear from the quotation above.¹³ The Lisbon Treaty is the result of that political ambition, and aims to create a more coherent, effective and visible foreign policy for the Union.¹⁴ Two of the major innovations are the explicit mission statement for EU international relations embedded as a binding obligation in EU primary law; and the new diplomatic body (the EEAS) to bring them to fruition. In relation to the former innovation, the Lisbon Treaty has introduced in its constituting document strongly worded external values and objectives the EU ‘shall’ promote and pursue in the world. As regards values, in Article 3 (5) TEU we find a list which sketches the EU’s cosmopolitan – if romantic¹⁵ – view of a just global order. Additionally, Article 21 TEU now bundles into a single, strongly-worded provision all international objectives to be pursued across all EU internal and external policies. It would be incorrect to consider these Treaty articles as nothing more than empathic claims or ambitions with no legal substantive consequence for EU institutions and Member States.¹⁶ They are legally binding in their nature as constitutional objectives of EU law, and Article 4 (3) TEU requires of the EU institutions and Member States ‘sincere cooperation in carrying out tasks which flow from the Treaties’. That this duty of cooperation is judicially enforceable is well known,¹⁷ but in a recent judgment of 22 December 2011 the Court also affirmed the binding nature of EU values stated in Article 3 (5) TEU, in that it imposes a substantive, legal obligation on the Union ‘to contribute to the strict observance and the development of international law.’¹⁸ In sum, when the EEAS is to deliver ‘new diplomatic substance’, the Treaties provide binding guidance on the method and substance of EU action in the world. How do these new legal obligations of effort – obviously not of result – translate into concrete diplomatic ambitions to be brought to fruition through the EEAS? So as to structure our reply to that question, we must briefly reflect on what we understand under the notion of ‘diplomacy’.

¹² J. Larik, ‘Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law’, *CLEER Working Papers 2011/5*, 2011, at 7.

¹³ European Council, ‘Declaration on the Future of the European Union’, *Laeken* 14-15 December, 2001, subheading ‘Expectations of Europe’s citizens’.

¹⁴ The European Convention, ‘Final Report of Working Group VII on External Action’, *CONV 459/02, Brussels*, 16 December 2002.

¹⁵ Larik, *op.cit.*, 12 (who refers to the ‘cosmopolitan romanticism’ of that treaty article).

¹⁶ See for a prominent example: Catherine Ashton, ‘Statement by High Representative Catherine Ashton on Europe Day’, *Brussels*, 7 May 2011, A 177/11.

¹⁷ A. Delgado Casteleiro and J. Larik, ‘The Duty to Remain Silent: Limitless Loyalty in EU External Relations’, *European Law Review* (2011).

¹⁸ See Case C-366/10 *Air Transport Association of America (ATAA)*, of 21 December 2011, not yet reported, para. 101. Here the Court utilizes Article 3(5) TEU in its reasoning and indicates that this article implies a substantive obligation for the EU. On the legal binding nature of objectives listed in Article 21 TEU, see: B. Van Vooren, ‘The Small Arms Judgment in an Age of Constitutional Turmoil’, *European Foreign Affairs Review* 14(1) 2009, at 231-248.

Defining such a rather open-ended concept is outside the scope of this paper,¹⁹ and hence we utilize the Vienna Convention on Diplomatic Relations (VCDR) to shed light on ambitions flowing from EU primary law. The VCDR does not exhaustively define diplomacy, but it does list in Article 3 that the functions to be carried out by a diplomatic mission are, *inter alia* to engage in the following five activities: (a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) Negotiating with the Government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. The objective of this paper is to examine the legal specificity of the Union in light of its new diplomatic ambitions post-Lisbon. Utilizing article 3 VCDR and its description of what are the most common activities of external diplomatic representation, we view the following areas as potentially problematic for the Union to pursue them in a fashion similar to that of states:

- (a) The formal status of Union Delegations and their staff in third countries and IO's;
- (b) the legal existence of the EU as a single entity post-Lisbon, and its representation through demarches at multilateral fora where Member States are equally present;
- (c) the conduct of diplomatic relations through visits and missions to third countries and international organizations by the EU's highest political representatives such as the European Council or Commission Presidents, as well as Commissioners and the HR/VP;
- (d) the task of political reporting by EU delegations, in the complex inter-institutional and Member State landscape that characterizes the EU;
- (e) and finally, the protection of 'European Union' citizens not merely as derived from Member State nationality but as an independent legal reality.

3. DIPLOMATIC REPRESENTATION BY THE EU AND THE REALITY OF EUROPEAN LAW

3.1. The organization of Union Delegations

The first indent of Article 3 (1) VCDR reads 'Represent the sending state in the receiving state'.²⁰ Several EU Treaty articles provide a solid basis for the Union to establish a formal and substantive presence as a single, fully matured dip-

¹⁹ G. Berridge, 'Diplomacy: theory and practice' *Palgrave Macmillan*, 2010, at 282; K. Hamilton and R. Langhorne, *The practice of diplomacy: its evolution, theory and administration*, 2nd edition, London: Routledge, 2011, at 317.

²⁰ Art. 3(a) VCDR.

lomatic actor represented in third countries and international organisations (IOs).²¹ As regards the physical presence through its delegations, EU activities are based on Article 221 (1) TFEU, which was newly inserted with the Lisbon Treaty: ‘*Union delegations in third countries and at international organisations shall represent the Union.*’ The ambition flowing from this new provision in the TFEU should be quite clear: The Union no longer wishes to have an international presence through delegations of only one of its institutions (e.g. Commission delegations), or through the diplomats of the Member State holding the rotating Presidency.²² The working group on external relations in the European Convention pointed out that too many spoke on behalf of the EU and that ‘in diplomacy a lot depended on trust and personal relationships’, which require a stable and coherent presence on the part of the Union.²³ The purpose of this new treaty provision was to have ‘less Europeans and more EU’,²⁴ e.g. a single diplomatic presence for the Union speaking on behalf of a single legal entity active globally. When Mrs Ashton took up her post in December 2009, she said that the EU delegations ‘should be a network that is the pride of Europe and the envy of the rest of the world’ and ‘a trusted and reliable ally on European issues’.²⁵ Speaking on Europe Day 2011 she underlined this continued ambition, that the EEAS should be a ‘single platform to protect European values and interests around the world’, and ‘a one stop shop for our partners’.²⁶ Implementing this ambition has meant that the former ‘Commission Delegations’ have been turned into ‘Union delegations’²⁷ and that for all practical diplomatic purposes they are seen as EU ‘embassies’.²⁸ In this respect, Heads of Delegations *de facto* act as ‘EU Ambassadors’,²⁹ with for example the letter of credentials presented to President Obama by Mr. Vale de Almeida opening with the words ‘As I assume the role of the European Union’s Ambassador and Head of Delegation to the United States [...]’³⁰ The EU Heads of delegations

²¹ Art. 220 and 221 TFEU, *io* Article 3(5) and 21(1) TEU.

²² But see the EEAS document ‘EU Diplomatic Representation in third countries – First half of 2012’, *Council of the European Union*, Doc. 18975/1/11, REV 1, 11 January 2012, which reveals that in some countries the EU is still represented by a Member State.

²³ ‘The European Convention, Final report of Working Group VII on External Action’, *CONV 459/02, Brussels*, 16 December 2002, at 321.

²⁴ A. Missiroli, ‘The New EU Foreign Policy System After Lisbon: A Work in Progress’, 25 (4) *European Foreign Affairs Review*, (2010), at 427 – 452.

²⁵ High Representative Catherine Ashton, ‘Quiet diplomacy will get our voice heard’, *The Times*, 17 December 2009.

²⁶ High Representative Catherine Ashton, ‘Statement by High Representative Catherine Ashton on Europe Day’, Brussels, 7 May 2011, A 177/11.

²⁷ European External Action Service, ‘Report by the High Representative to the European Parliament, the Council and the Commission’, 22 December 2011, at 16 and see also F. Bergmüller, ‘The EEAS: A Loss for the European Commission’s External Relations Capacities?’, in Paul Quinn (ed.), *Making European Diplomacy Work: Can the EEAS Deliver?*, *College of Europe, EU Diplomacy Paper*, 8/2011

²⁸ J. Wouters and S. Duquet, ‘The EU and International Diplomatic Law: New Horizons?’ *7 Hague Journal of Diplomacy* (2012) at 31-49.

²⁹ J. Wouters and S. Duquet, *op.cit.*, who point out that this is granted as a ‘Courtesy title’ by receiving states.

³⁰ See the introduction to the ‘Letter of Credentials from Ambassador Vale de Almeida to President of the United States Barack Obama.’ An extract of the letter is available through the Press

representing the Union in third states and at international organisations are thus conferred the authority to perform functions equivalent to those of national diplomats. In the reverse situation, the EU also continues the traditions of inter-state diplomacy: it is now President Van Rompuy who receives the letters of credentials of the Heads of Missions to the European Union of third countries, accompanied with the usual (e.g. state-like) protocol and official photograph.³¹

The transformation from Commission delegations into proper Embassies was not purely formal, but was in some cases accompanied by added powers to at least some of those representations abroad. While all 138 Commission delegations³² were transformed into EU Delegations mere weeks after the entry into force of the Lisbon Treaty, 54 were immediately transformed into 'EU embassies' in all but name.³³ This meant that these 'super-missions' were not merely given the new name, but also new powers in the form of an authorization to speak for the entire Union (subject to approval from Brussels); as well as the role to co-ordinate the work of the member states' bilateral missions. Prominent exclusions among those 54 delegations were those to international bodies such as the UN in New York or the OSCE in Vienna, since the Union still had to work out how to handle EU representation in multilateral forums under Lisbon.³⁴ However, it is certainly the EU's ambition to 'progressively' expand these powers to other EU delegations as well.³⁵ This process can be followed in the regular reports on 'EU Diplomatic Representation in third countries' published by the Policy Coordination Division of the EEAS, and has been recently evaluated in the December 2011 report on one year of EEAS. The latter report states that EU delegations 'have progressively taken over the re-

Release of the EU delegation to the United States 'New EU Ambassador presents his credentials', *EU/NR* 35/10, 10 August 2012. See also F. Fenton, 'EU Ambassadors: A New Creed?', in Paul Quinn (ed.), *Making European Diplomacy Work: Can the EEAS Deliver?*, *College of Europe, EU Diplomacy Paper*, 8/2011at 26-30.

³¹ European Council, the President, 'Presentation of letters of credentials to President Van Rompuy', *EUCO* 9/12, Brussels, 18 January 2012. Here President Van Rompuy received the credentials of the Ambassadors of Saudi Arabia, Rwanda, FYROM, Malaysia, Colombia, Peru, Turkey and Afghanistan.

³² This is the latest number including the two newly opened delegations in Libya and the South Sudan.

³³ Andrew Rettman, 'EU commission 'embassies' granted new powers', *EU Observer*, 21 January 2010.

³⁴ *Ibid.* Similarly, Andrew Rettman, 'Ashton designates six new 'strategic partners', quoting an EU official on the importance of the EEAS for the role of Mrs. Ashton in external representation: "Lady Ashton has de facto 136 ambassadors at her disposal", 16 September 2010.

³⁵ See for example: EEAS, 'EU diplomatic representation in third countries – second half of 2011', 11808/2/11 REV 2, Brussels, 25 November 2011, and EEAS, 'EU diplomatic representation in third countries – first half of 2012', 18975/11, Brussels, 22 December 2011. These documents always start with two paragraphs quoting Article 221 TFEU and an excerpt from the Swedish Presidency report on the EEAS of 23 October 2009, which set out the Member States' view on the scope of the EEAS in relation to the HR mandate. On that basis these reports continue by stating that the 'responsibility of representation and coordination on behalf of the EU has been performed by a number of Union delegations as of 1 January 2010, or later', and insofar as they have not taken over such functions, pre-Lisbon arrangements and the role of the Presidency continue to apply.

sponsibilities held by the rotating presidency for the co-ordination of EU positions and demarches'.³⁶ The report adds that this evolution has been a 'mixed success'. It argues that the transition 'has gone remarkably smoothly in bilateral delegations and has been welcomed by third countries', though other reports are cautious.³⁷ As regards EU representation at international organizations, the EEAS evaluation report states that 'the situation has in general been more challenging in multilateral delegations ... given the greater complexity of legal and competence issues'.³⁸

Indeed, the unified diplomatic presence for the EU in multilateral fora post-Lisbon has so far proven highly problematic, in spite of the TFEU's specific legal obligation in its Article 220 (1) TFEU. This provision requires that the EU 'shall establish all appropriate forms of cooperation' with various international organisations including, but not limited to (Article 220 (2) TFEU), the UN, the Council of Europe, the OSCE and the OECD. On the basis of this provision, the Union has already begun to implement its ambitions in terms of presence in multilateral fora.³⁹ The saga of speaking rights at the UN General Assembly and EU participation in the UN concluded in May 2011 is well known.⁴⁰ There is thus no need to dwell further on this example, and in this contribution we look at evolutions from the second half of 2011. In the following subsection 3.2 we shall look at the dispute concerning EU legal personality and formal presence in multilateral fora on the Member States' presence, with the International Civil Aviation Organization (ICAO) as a specific example.

3.2. Delivery of EU demarches on behalf of the EU and/or its Member States

With the EU wishing to establish its unified substantive diplomatic presence in multilateral fora, for some Member States – the UK notably – it has become problematic that the EU's legal personality is now explicitly recognised by the Treaty (Article 47 TEU) Indeed, with the Lisbon Treaty, the European Community (EC) has ceased to exist (Article 1 TFEU), and is now replaced by the

³⁶ European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, at 6.

³⁷ *Ibid.* at 7. Kaczynski reports that there have been problems there too: in Washington, some national ambassadors apparently did not show up for local coordination meetings for months P. M. Kaczynski, 'Swimming in Murky Waters: Challenges in Developing the EU's External Representation', *FIJ Briefing Paper 88*, September 2011, at 9.

³⁸ European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, at 8.

³⁹ As regards the Council of Europe, Art. 6(2) states that the Union shall accede to the European Convention on Human Rights, a negotiation process which was nearly completed at the time of writing, January 2012.

⁴⁰ The EU first sought to upgrade its observer status at the United Nations at the UNGA meeting in September 2010, but after a much publicised failure only managed to do so by May 2011. See Catherine Ashton, 'Statement by the High Representative following her call with UN Secretary-General Ban Ki-Moon', A 162/10, Brussels 18 August 2010, and Catherine Ashton, 'Statement by the High Representative on the adoption of the UN General Assembly Resolution on the EU's participation in the work of the UN', A 172/11, Brussels, 3 May 2011.

European Union which possesses legal personality. (See Article 1 io 47 TEU). While prior to the Lisbon Treaty the EU did already conclude many international agreements and could thus be argued to possess *implicit* legal personality,⁴¹ the ‘politically constructive ambiguity’ of ‘European Union’ allowed this label to function as a political umbrella term referring to the EC and its 27 Member States. The fact that now Article 47 TEU explicitly gives legal personality to the EU, has prompted the UK to deploy the rather legal-formalistic argument that the terminology ‘EU’ can no longer be utilized to designate ‘EC and its Member States’ when delivering statements on behalf of the EU in multilateral fora.⁴² The UK argues that because the Union’s legal personality has explicitly been recognized, ‘EU’ has become a purely legal concept. Therefore, it allegedly can no longer serve to represent areas covered both by EU and Member States competences as that might lead to competence creep to the Union.

The Commission and several Member States strongly opposed this reasoning, which led to ‘EU’ representation in multilateral fora such as at the OSCE and UN to ground to a halt during the second half of 2011. During that time, several dozen EU statements and demarches were blocked over deep disagreement as to who delivers the statement: ‘the European Union’ or ‘the European Union and its Member States’.⁴³ A temporary cease-fire, though not a permanent solution, was agreed on 24 October 2011 in the form of a document entitled ‘general arrangements for EU statements’.⁴⁴ Through this document the EU wishes to keep competence battles ‘internal and consensual’⁴⁵ so that the EU achieve ‘coherent, comprehensive and unified external representation’ in multilateral organisations. However, the time and effort spent on minutiae in Council Conclusions no less – (‘EU representation will be exercised from behind an EU nameplate’⁴⁶) show how difficult to reach the ambition for the EU as a diplomatic actor exhibiting these three qualities still is. Notably, the arrangement expresses a rather rigid interpretation of ‘international unity’ focusing on form rather than substance. This because it requires that each statement made in a multilateral organisation requires tracing who is competent for which area, and to ensure that the internal division of competences is adequately reflected *externally*, namely on the statement’s cover page and in the body of the text. It is beyond the scope of this paper to discuss the exact arrangements as to when a statement should say ‘on behalf of EU’, or ‘on behalf of the EU and its Member States’,⁴⁷ though it is tristic to state that such is hardly the core-business of multilateral diplomacy – the substance of the single message being of central importance. What is then notable in light of the single message is that even when there is agreement that the EU shall present a statement on

⁴¹ See note 8.

⁴² Discussion with senior official from a Member State, November 2011.

⁴³ See S. Blockmans, ‘The European External Action Service One Year On: First signs of strengths and weaknesses’, *CLEER Working Paper 2012/2*, at 33.

⁴⁴ Council of the European Union, ‘General Arrangements for EU Statements in Multilateral Organisations’, 16901/11, Brussels, 24 October 2011.

⁴⁵ *Ibid.* at 2.

⁴⁶ *Ibid.* at 3.

⁴⁷ *Ibid.* at 3.

its own behalf, according to the arrangement, still, 'Member States may complement statements made on behalf of the EU whilst respecting the principle of sincere cooperation.'⁴⁸ This statement is rather troubling diplomatically and legally: diplomatically, the utility of a Member State also taking the microphone to repeat what the EU delegate has just said (since the duty of cooperation in Article 4 (3) TEU would not allow that Member State to say anything that contravenes it), seems rather futile. In international diplomacy one may certainly consider it useful that specific Member States with specific skills, knowledge, or historically good diplomatic relations 'back up' EU action, though this is not what is envisaged by this arrangement: it concretely implies that Member States should still be allowed to repeat the same message of the Union, largely for the visibility of their own foreign ministers. Legally too, the duty of cooperation entails from the Member States that they respect 'the EU institutional process' and accept that their interests be defended 'through the Union' as a consequence of their EU membership.⁴⁹ In fact, when the EU has decided to act internationally, in many cases this will actually entail a 'duty to remain silent' on the part of the Member States, even in the area of shared competences.⁵⁰ Thus, the arrangement rather goes against pre-existing legal interpretations of shared competence and the duty of cooperation, and seems hardly conducive to the unified diplomatic actor *in substance*, the Lisbon Treaty and EEAS sought to create.

One example may further illustrate the concrete impact of this rigid interpretation of Union competence and legal personality from the perspective of unified diplomatic representation. On 22 February 2012, the Council adopted a Decision concluding the 'Memorandum of Cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation, and laying down procedural arrangements related thereto.'⁵¹ The Commission had proposed the negotiation of this Memorandum in June 2009, and it was authorized to do so by the Transport Council in December 2009. The final document was initialled in September 2010. The purpose of this document is to ensure deep EU involvement in a multilateral organization of which it is not a member, but where it has significant competences. In essence it deals with the situation at issue in Opinion 2/91, where the CJEU has decided that due to absence of EU membership in the International Labour Organization, the Member States owed a close duty of cooperation to the Union so to ensure adequate representation of the common 'Union interest'.⁵²

⁴⁸ *Ibid.* at 3.

⁴⁹ Opinion of Advocate General Maduro, Case C-246/07, *Commission v Sweden Stockholm Convention on persistent organic pollutants (PFOS)* [2009] Judgment of 20 April 2010, not yet reported, paras. 49 and 56.

⁵⁰ A. Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations', *European Law Review* (2011) 522-539.

⁵¹ Council Decision on the conclusion of a memorandum of Cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation, and laying down procedural arrangements related thereto, DOC 5560/12, Brussels, 22 February 2012.

⁵² R. Holdgaard, 'The European Community's Implied External Competence after the Open Skies cases', 8 *European Foreign Affairs Review* (2003), at 365-394; European Commission,

There should be no doubt that the Union has a strong legal and political interest to be represented in a singular fashion before the ICAO. Through the completion of the internal aviation market by the mid-nineties, as confirmed by the Open Skies judgments of 2002, many of the aspects on civil aviation covered by the 1944 Chicago Convention (safety, security, environment and air traffic management) fall within the scope of EU competence through the application of the ERTA doctrine.⁵³ In keeping with this reality, the EU-ICAO memorandum essentially sets out a regime of closer cooperation through the reciprocal participation in EU and ICAO consultative processes, joint mechanisms for regular dialogue, information sharing through databases, and so on. From the perspective of the EU Member States, supporting the EU in achieving its Treaty objectives through such a Memorandum in an organization of which it is not a member, is indubitably an expression of their duty of loyalty towards the Union embedded in Article 4 (3) TEU.⁵⁴ The response of the United Kingdom was the following:

The UK will be abstaining on the Decision on Conclusion of a Memorandum of Cooperation between the European Union and the International Civil Aviation Organisation. The UK *recognises the benefits of the Memorandum of Cooperation, but attaches great importance to the principle of Member State sovereignty in international organisations*. The UK is *cautious about any measures and processes which could eventually lead to a change of the distribution of competences between the EU and Member States*. We would wish to convey these concerns by abstaining on this Decision.⁵⁵ (emphasis added)

The UK had previously mulled a negative vote, but then decided that abstention would suffice to make their point. In any case, since the legal basis of this Council Decision is Articles 100 (2) io. 218 (6) TFEU, the Council adopts this decision by qualified majority and the adoption of the Memorandum was not blocked. However, it points to a road in EU external representation post-Lisbon which ought not to be taken. A close look at the substance of the Memorandum of Cooperation shows that it is 'procedural' in nature, by establishing forms of closer cooperation between the EU and the ICAO in areas where it already possesses competence. It thus does not 'expand' EU competence in scope or substance, and one might query what would be the on-the-ground consequences of this 'abstention' – read together with the general arrangement on external representation? In application of QMV it is normal that certain Member States may be outvoted, but the explicit adoption of this statement cannot be permitted to have any further consequences. Indeed, the UK remains bound by the duty to cooperate loyalty embedded in Article 4 (3) TEU: 'The Member

'Proposal for a Council Decision on the conclusion of a memorandum of Cooperation between the EU and the ICAO', Explanatory Memorandum, COM(2011) 107 final, Brussels, 10 March 2011, at 2.

⁵³ Holdgaard, *op. cit.*

⁵⁴ Opinion 2/91, 'Convention No 170 ILO on the safety in the use of chemicals at work', [1993] ECR I-1061.

⁵⁵ Council Decision of 22 February 2012, *supra* n. 51 at 3.

States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' Thus, in practice the UK must actively support EU activities in Montréal to implement this Memorandum of cooperation, and may not undertake any action that would hamper its implementation. Time must now tell whether that will be the case, but the blockage of EU presence in other multilateral fora in 2011 does not bode well.

3.3. Diplomatic visits by top EU political representatives: separate roles of the EEAS, EU Delegations and the Commission

The issue of competence as a challenge to the EU's effective, coherent and visible global representation is equally exemplified by the procedures relating to visits, missions and meetings of the Commissioners or the High Representative with third countries and international organisations – part and parcel of international diplomacy. The decision on the need for such visits, their preparation as well as their execution is rather complex within the Union, due to the co-existence of many 'high level political faces' of the Union. Post-Lisbon, additional complexity is created by the co-existence of the Commission and EEAS which each possess their own international relations responsibilities (Articles 17 and 27 *io.* 18 TEU). In January 2012 the EEAS and Commission therefore agreed a 'working arrangement' in implementation of Articles 3 (3) and 4 (5) of the EEAS Council Decision,⁵⁶ which duly illustrates the coordinative challenges of having two distinct actors with a significant and similar role in the single diplomatic task of external representation at the highest political levels. In legal terms, the procedures agreed in case of such visits are the expression of the duty of cooperation embedded in Articles 4 (3), 13 (2) and 24 TEU, as explicitly reiterated in Article 3 (2) of the EEAS Council Decision.⁵⁷ We briefly quote the latter article, as it is useful to examine to which extent the Working Arrangement implements or respects this article:

'The EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions, except on matters covered by the CSDP. The EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area.'⁵⁸

The Working arrangement's rules on cooperation in the case of visits and missions are set out in four paragraphs, which respectively deal with:

⁵⁶ European Commission, Secretariat General, Working Arrangements between Commission Services and the European External Action Service (EEAS) in relation to external relations issues, SEC (2012) 48, unpublished, on file with authors, at 4, hereafter: Working Arrangement.

⁵⁷ B. Van Vooren, 'A legal-institutional perspective on the European External Action Service', 48 *Common Market Law Review* (2011), 475-502, at 496-498.

⁵⁸ Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* 2010 L 201/30.

- 1) Ensuring that relevant EEAS and Commission services are properly informed about planned visits and missions.
- 2) Establishing the role of EU Delegations in such visits.
- 3) Establishing the role of the EEAS and the Commission in visits of commissioners and the HR/VP's visits and missions.
- 4) Establishing competence boundaries for the EEAS and Commission officials in multilateral contexts during such visits.

The first point is that of intra-EU information about impending visits. Namely, when a Commissioner will visit a third country or international organization, the relevant Commission services 'shall inform' the EU delegation and the EEAS country desk of such a visit for which they are responsible.⁵⁹ This paragraph of the working arrangement does not contain reciprocity however, and thus the EEAS must not inform Commission services of visits by the HR/VP. This is no coincidental omission, as that same first paragraph does state that 'information about the HR/VP's and Commissioners' missions shall also be communicated to [the Secretariat General, Directorate F3 on relations with the EEAS] which is maintaining a strategic planning calendar of missions and meetings.' We may of course query whether reciprocity in this regard would even be necessary, given her CFSP focus? Taking the example of Palestine, in which the HR/VP has taken a great personal interest and which she visits regularly, the utility of reciprocal information to and from DG DEVCO is rather truistic.⁶⁰ Undoubtedly, in practice, Commission development staff would come to know about such visits through staff at relevant EU delegations, the internal calendar, or other day-to-day contacts, but the formal absence of reciprocity in the Working Arrangement is nevertheless telling of 'competence sensitivities'. *Ad hoc* cooperation may take place, but at the principled, written level, the Arrangement reflects that the EEAS' personnel, a structure set up on a legal basis within the TEU's articles on CFSP,⁶¹ ought not inform Commission services of missions conducted by its top brass.

The second paragraph of the Working Arrangement focuses specifically on EU Delegations stating that they 'will provide all necessary support for the organisation of visits or missions to the countries or IO's for which they are responsible. They should be consulted in advance on the aim, content and timeliness of visits/and or demarches.' These consultations are indeed crucial, and in this case, silence is golden: the Working Arrangement does not state for whose visits they should be consulted upon – which is positive. On the basis of the EEAS' tasks as described in Article 2 of the EEAS Decision, we can thus assume that it concerns both Commissioners, the HR/VP, but also the President of the European Council. From the perspective of diplomatic ambitions, the working Arrangement is then laudable as it gives a rather broad

⁵⁹ Working Arrangement, at 4.

⁶⁰ See for example: Statement by High Representative Catherine Ashton following her meeting with the President of the Palestinian Authority, Mahboud Abbas, A 514/11, Brussels, 14 December 2011.

⁶¹ Art. 27(3) TEU.

'embassy'-like role to the EU delegations. In national contexts too, an embassy will indeed be in close consultation with headquarters on the timeliness, form, level and content of a visit to the third country or IO in light of current and future diplomatic relations. As and when the visit takes place, that embassy will put much effort in meticulously preparing a visit by its foreign (or prime) minister through an hour-by-hour calendar of the meetings, discussions etc. by the high official.⁶² The fact that this second paragraph is formulated 'in the abstract' is then arguably significant: no reference to specific competence-related limitations. EU delegations are quite simply expected to act as the proverbial one-stop-shop with important influence on visits and missions by EU representatives.

In paragraph 3, the Working Arrangement gets more complex (or at least, meticulous) when it comes to preparing the briefings of the visitor to the third country or IO. Here the Arrangement refers not to 'EU delegations' but rather to the more generic EEAS – which implies that this paragraph pertains to staff at headquarters based in Brussels, and again institutional competences and division do matter. Nonetheless, the notion of reciprocal cooperation of Article 3 (2) EEAS Council Decision does permeate this paragraph. The basic principle is that 'the EEAS will contribute to briefings for Commissioners' visits to third countries', and equally that 'Commission services will contribute to briefings for the HR/VP's visits' – with specific arrangements for briefings for candidate countries. Thus, the EEAS and Commission should together write the document the visiting official will read on the plane-ride to her or his destination. However, when it comes to meeting with the Commissioner or HR/VP, staff of 'the other' institution will not necessarily be present: 'Where appropriate, the relevant Commission service(s) and the EEAS will participate in preparatory meetings with the Commissioner(s). Where appropriate, the relevant Commission service(s) will participate in preparatory meetings with the HR/VP.'⁶³ Empirical research would be required what exactly 'where appropriate' means in this context, but past from experience in the field of EU external relations one might be suspicious of such phrases. In a sceptical reading, it may imply room for turf battles over the appropriateness of attending meetings with top politicians of the other institution, though in a more benevolent reading it may simply imply that when the EEAS has forwarded some documents to the Commission in preparing a visit by for example the Trade Commissioner, there is no need to attend the preparation meeting prior to the visit. Indeed, a Working Arrangement at this level must leave room for what EEAS Managing Director Christian Leffler rightly calls 'common sense':⁶⁴ Only when it is useful should staff be present in the work of the other institution, and the Working Arrangement reflects the same sentiment when it comes to making the journey itself. Where appropriate, 'Commission staff may be asked to accompany the HR/

⁶² These perhaps slightly generic observations are based on the time spent by one of the authors at the Belgian Permanent Representation to the United Nations, and the work of its staff preparing a visit of its foreign minister to New York.

⁶³ Working Arrangement, at 4.

⁶⁴ C. Leffler, in response to a question posed by one of the authors on EEAS diplomatic reporting obligations, at the conference 'Evaluating the Diplomatic System of the European Union', Brussels, 28 February 2012.

VP on visits. Similarly EEAS staff may be asked to accompany Commissioners on visits.⁶⁵

Finally, the Working Arrangement states that '[i]n accordance with Article 221 TFEU, EU Delegations in third countries and at international organisations represent the EU. Where the relevant Commissioner participates in meetings, conferences or negotiations related to international organisations, conventions and/or agreements, he/she will represent the EU position in non-CFSP matters. In meetings at official level, the non-CFSP EU position can be presented either by the EU Delegation or by Commission officials.'⁶⁶ That the High Representative speaks in CFSP matters and Commissioners in non-CFSP matters is no surprise,⁶⁷ but the sentence on meetings at 'official level' is perhaps more puzzling. This sentence concerns representation by the *EU institutions* in multilateral contexts such as the United Nations and the OSCE. Let us draw the parallel with national diplomatic activities: It is certainly not exceptional that diplomatic staff of a Member State to the United Nations would be joined by experts from national ministries (foreign ministry, agriculture, development, etc) on topical issues such as for example ECOSOC meetings. However, the working arrangement does not speak of EEAS officials from Brussels (EU equivalent of a national foreign ministry) and Commission officials (the 'other' ministries) presenting the non-CFSP EU position aside from the EU delegation, but only of the latter category. Here too, we can have two interpretations: the 'common sense'-interpretation implies that this simply replicates the situation of national experts joining their diplomats at the permanent representation in New York. However, the more 'suspicious' interpretation would be that this sentence is an extension of Article 17 (1) TEU, which is an article on which the Commission has been placing much emphasis in the post-Lisbon era. It reads: 'With the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union's external representation.' Thus, if this sentence in the Working Arrangement indeed means that the Commission shall ensure external representation alongside with, or instead of the EU delegations, this certainly detracts from the EU's ambition for them to be the "one stop shop" for EU diplomacy and external representation. This is especially so if it means that EU delegations are thus still associated with the task of representing the EU only on 'CFSP issues', something which Article 221 TFEU expressly seeks to avoid.

We may thus conclude that on the point of visits and missions by high officials the Working Arrangement leaves room for an optimistic reading and a more sceptical reading. On the one hand they do establish a set of rules which accord to "common sense" in the organization of diplomatic visits, but they do so in a charged environment where competence struggles are never far away, and which leave room for tension between the many 'high level' political representatives of the Union.

⁶⁵ *Ibid.* at 4.

⁶⁶ *Ibid.* at 4.

⁶⁷ Art. 40 TEU.

3.4. Rules pertaining to the information-gathering and reporting tasks of the EU delegations

The fourth indent of Article 3 VCDR states as one of the diplomatic activities of a state: ‘Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State’.⁶⁸ There should be no doubt that ‘diplomatic reporting’ is a core business for the EU delegations. In this subsection, we shall look specifically at the ‘lines of diplomatic reporting to headquarters’ by EU Delegations, headquarters being the EEAS and Commission services in Brussels. Related to that, given the structure of the Union as an international actor, we must also briefly reflect on information-sharing between the EU delegations and Member State Delegations on-the-ground. We have already seen that between the EEAS and the Commission the duty of cooperation exists in a reciprocal fashion; which is however not the case between EU delegations and the Member States. Article 5 (9) of the EEAS Council Decision states that ‘The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States.’ Notably, an early draft version of that article read ‘on a reciprocal basis’. However, this was omitted during the negotiations on the Council Decision, which is indeed potentially problematic.⁶⁹

Looking first at the EEAS-Commission relationship, we must again look at the Working Arrangement of January 2012. This document contains the following agreement on reporting back to ‘headquarters’: ‘EU Delegations shall provide political reporting to the HR/VP, President Barroso and relevant Commissioner(s), the EEAS and Commission services ... A two way flow of information is essential – from the political and trade/economic sections of EU Delegations to the EEAS and Commission services and in the opposite direction. The geographical desks in the EEAS shall be systematically copied on all reports and information relative to her/his respective country. Delegations shall provide relevant reporting to other Commission services outside the external relations “family”. The Commission services shall keep EU Delegations informed about relevant developments, providing lines to take etc.’⁷⁰ Specifically as regards multilateral organisations, the Working Arrangement states that ‘EU Delegations will report to both the EEAS and the relevant Commission DG(s)/services as appropriate. These Delegations may establish specific direct lines of reporting with the relevant Commission DG(s)/services in charge of the issues and policies dealt with (e.g. development, trade, economic issues, etc); systematically copying the EEAS. Reporting should, if relevant, also cover issues of a general nature concerning the international organisation in question.’⁷¹

⁶⁸ Art. 3(c) and (d) VCDR.

⁶⁹ B. Van Vooren, ‘A legal-institutional perspective on the European External Action Service’, 48 *Common Market Law Review* (2011) 475-502, at 497. Here the author submits that although Article 5 (9) omits the reference to reciprocal EU-Member State cooperation, Article 4 (3) TEU still applies, and such a duty can be said to exist regardless of its absence in the EEAS Council Decision.

⁷⁰ *Ibid.* at 3.

⁷¹ *Ibid.* at 4.

This seems to be a rather sensible arrangement, both as regards the bi-directionality of reporting and the lines of reporting via the EEAS or directly to the Commission. Asked about what these obligations mean in practice, EEAS Managing Director Leffler gave the example of discussions on the Rio+20 meeting in June 2012. Reporting there would go from the EU delegation in Brazil to DG CLIMA, DG ENV and DG TRADE in the Commission, to the 2 offices of the Commission and European Council Presidents, to the regional desk of the EEAS and to the local Member State representations. As in the previous subsection, the common sense (or optimistic) interpretation must be contrasted with the more sceptical perspective. One can indeed argue that setting up *ad hoc* lines of reporting, and a great degree of leeway must be accorded to individual EU delegations as regards reporting, as they must be able to take into account specific circumstances. However, since information is the bread and butter of coherent and effective policy-making, it is important to have a common, high standard of unified reporting between all relevant actors of EU diplomacy, and this is currently not yet the case. Indeed, it has been reported that policy reporting varied greatly in quality, and suffered from ‘ad hoc-ism’ depending on the Delegation at issue. Bicchi’s extensive empirical research of the period up to Autumn 2011 shows that in the first year of the EEAS’s existence ‘there has been disparity between delegations in the way that reports are drafted and shared, as some delegations are more inclusive and/or descriptive than others.’⁷² That is certainly undesirable in light of external delegations’ prime role in swiftly and effectively collecting and disseminating information on-the-ground. However, this is not something which could be solved by further teasing out the text in the EEAS-Commission Working Arrangement. Rather, it is a matter of management by the Heads of Delegations who ensure that reporting is in line with the common agreement in Brussels. According to Leffler, the challenge of political reporting is less one between the institutions themselves, but rather one between the EU delegations and the Member States. According to him, at present (February 2012) the Member States are mainly on the receiving end of EU delegations’ report, but share very little the other way. There is the hope and expectation that this will change, as Member States external representations come to trust and get used to their EU counterparts. One pilot project has been set up in Washington, to ensure greater cooperation in line with Article 5 (8) of the EEAS Council Decision: here political reports are uploaded through a shared intra-website, which can then be downloaded by the EU delegation and the local Member State representations.⁷³

⁷² F. Bicchi, ‘The European External Action Service: A Pivotal Actor in EU Foreign Policy Communications’, 7 *The Hague Journal of Diplomacy* (2012), at 90.

⁷³ C. Leffler, in response to a question posed by one of the authors on EEAS diplomatic reporting obligations, at the conference “Evaluating the Diplomatic System of the European Union”, Brussels, 28 February 2012.

4. DIPLOMATIC PROTECTION AND CONSULAR ASSISTANCE FOR 'EU NATIONALS' AND THE REALITY OF INTERNATIONAL LAW

An important role for diplomatic missions abroad as described in Article 3 (1) VCDR is to 'Protect the interests of the sending state and its nationals in the receiving state – within the limits permitted by international law'.⁷⁴ There is a strong basis in the Treaties for EU ambitions on this front. Articles 3 (5) TEU and 23 TFEU together provide the basis for diplomatic protection and consular assistance to EU citizens. Article 3 (5) TEU obliges the EU to protect the interests of its citizens abroad, and persons holding the nationality of a Member State are citizens of the Union (Article 20 (1) TFEU). However, Member States are divided on how far the ambitions implementing these provisions would reach. In its most long-term version, if the Union were to achieve full diplomatic maturity, its most far-reaching implication *might* be that the EU provides such protection as if they were 'nationals of the EU' for the purposes of international law. While Article 3 (5) TEU could accommodate that interpretation, the role explicitly foreseen in the EEAS Decision for diplomatic protection and consular assistance by the EU does not, and is merely supplementary: 'The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.'⁷⁵ While one may argue that consular assistance thus is not a competence of the EEAS or the Union delegations per se, a role of the delegations in this area seems obvious and was already foreseen by the Commission prior to the entry into force of the Lisbon Treaty.⁷⁶ At that point in time the Commission has been quite active in working together with the Member States in the protection of their citizens in crisis situations in third countries.⁷⁷ In March 2011, the Commission published a state-of-play on this issue, where it argued that 'the need of EU citizens for consular protection is expected to increase in the coming years.'⁷⁸ To support that argument the Commission first quoted Eurostat numbers which show a steep upwards trend in EU citizens travelling to third countries: from 80 million trips in 2005 to 90 million trips in 2008. The Commission also referred to major recent crises which affected a considerable number of EU citizens: Libya, Egypt and Bahrain after the uprisings in spring 2011, Japan after the earthquake in March 2011, or Iceland's volcanic ash cloud in spring 2010. In these circumstances, the Commission argued that 'it appears particularly relevant to further reinforce the effectiveness of the right of EU citizens to

⁷⁴ Art. 3(b) VCDR.

⁷⁵ Art. 5(10) of the EEAS Decision.

⁷⁶ See 'Effective consular protection in third countries: the contribution of the European Union', European Commission Action Plan 2007-2009, COM (2007) 767 final, at 10: "In the longer term, the Commission will also consider the possibility of obtaining the consent of third countries to allow the Union to exercise its protection through the Commission delegations".

⁷⁷ See 'Consular protection for EU citizens in third countries: State of play and way forward', Commission Communication, COM-2011, 23 March 2011, 149 final, section 2.3.

⁷⁸ *Ibid.*

be assisted in third countries for their different needs (e.g. practical support, health or transport). With public budgets under pressure, the European Union and the Member States need to foster cooperation to optimise the effective use of resources.⁷⁹ However, the EU Member States are deeply divided on how far EU ambitions reach in this area, and what is the end-point of 'optimisation of resources'? Some Member States have a strong interest for EU Delegations to develop a capacity for consular support for EU citizens, whereas others are clearly opposed to the EU taking such a role, since they see this as a purely national competence.⁸⁰ What is certain from the perspective of the EEAS is that if the Union wishes to pursue such a role for EU delegations abroad, significantly more financial and human resources will need to be allocated to the EU diplomatic service. The December 2011 EEAS evaluation report stated that 'it is difficult to see how this objective could reasonably be achieved "on a resource neutral basis" as required by the EEAS decision. It would certainly not be responsible to raise citizens' expectations about the services to be provided by EU delegations, beyond their capacity to deliver in such a sensitive area. And the existing expertise within the EEAS in this area is extremely limited. However, over the past year we have also seen that the EU Delegations can play an important role in the coordination of evacuations of citizens and that pragmatic solutions can be found on the ground.'

In keeping with the forward-looking nature of the article, we will examine the possibly most-far-reaching implications of EU citizenship. Namely, the ECJ has stated that this is a 'fundamental status' of nationals of the member states. We interpret that as meaning that for the purposes of diplomatic protection and/or consular assistance, EU citizens could be considered – if not now than in the medium or long term – as 'EU nationals'. On that basis we then investigate the extent to which international diplomatic law is currently capable of accommodating 'EU nationals', e.g. nationals of an IO rather than of a sovereign nation, in their diplomatic, or consular needs.

International law generally makes a distinction between consular assistance and diplomatic protection. Diplomatic protection 'consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' (Art. 1 of the 2006 Draft Articles on Diplomatic Protection). It is often considered to involve judicial proceedings, but protection of citizens may take different shapes, including the forceful protection by military missions.⁸¹ Interventions outside the judicial process on behalf of nationals (issuing passports, assisting in transnational marriages, etc.) are generally not regarded as constituting diplomatic

⁷⁹ *Ibid.*

⁸⁰ European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, at 7-8.

⁸¹ See for an example J. Larik, 'Operation Atalanta and the Protection of EU Citizens: *Civis Europaeus Unheeded?*', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-closer in the world? EU External Action after the Lisbon Treaty', *EUI Working Paper LAW 2011/10* 107-124, at 129-144.

protection but as falling under consular assistance.⁸² For EU citizens consular assistance is mostly what they seek whenever they are in a third country and in need of some administrative actions, both in peace time and in crisis situations.⁸³ Diplomatic protection may come up when they run into legal troubles and a governmental intervention is requested. Diplomatic asylum relates to situations in which third country nationals seek the protection of a foreign embassy. For the purpose of this paper it is not necessary to discuss the details of the distinction as we mainly aim to point to a general development, which indicates that the EU is increasingly involved in taking up these state functions.

We seem to be at the start of a new development, which calls for a reassessment of the applicability of existing rules. Is it at all possible for the EU to play a state-like role in these matters? With the entry into force of the Maastricht Treaty in 1993, a European Citizenship was created, and the European Court of Justice even hinted at the idea of European citizenship being the primary identity of the nationals of the Member States.⁸⁴ On the basis of Article 23 TFEU, EU citizens are entitled to protection by the diplomatic and consular authorities of all Member States, when his/her own country has no representation.⁸⁵ The experiences since 1993 are somewhat mixed. '[...] some States consider that very little has changed since the adoption of this provision, while others are more enthusiastic about it [...]'⁸⁶ This may be related to the somewhat ambiguous phrasing of Article 23, which regulates the protection of EU citizens by the diplomatic missions of other Member States. It has been noted that Article 23 merely reflects a non-discrimination clause as it basically states that protection is to be provided 'on the same conditions as the nationals of that state'. At the same time, the conclusion of international agreements is foreseen on the basis of which third states can accept protection and assistance by an EU Member State on behalf of nationals of another EU Member State. This practice has hardly been followed.⁸⁷ The fact is that, partly apart from the treaty provisions, the EU itself seems to be well on its way to further develop its capacities in the area of consular assistance. As an answer to the differences between the 27 national legal frameworks on consular and diplomatic protection, a common EU legal framework may be developed.⁸⁸ There

⁸² See A. Künzli, 'Exercising Diplomatic Protection The Fine Line Between Litigation, Demarches and Consular Assistance', *ZaöRV* (2006) 321-350.

⁸³ M. Lindström, 'EU Consular Protection in Crisis Situations', in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Berlin/Heidelberg: Springer, 2009, at 109-126.

⁸⁴ Case 184/99, *Grzelczyk* [2001] ECR I-6193. See more generally on European citizenship: J. Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, Cambridge: CUP, 2007.

⁸⁵ Art. 23 TFEU. Cf. also Art. 46 of the EU Charter.

⁸⁶ See A. Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', 60 *ICLQ* (2011) at 965-995.

⁸⁷ *Ibid.* at 269-270.

⁸⁸ The Commission hinted at new legislative measures in 'Consular protection for EU citizens in third countries: State of play and way forward', Commission Communication, COM(2011) 149 final, at 13, 23 March 2011. See also M. Moraru, 'The Protection of Citizens in the World: A legal Assessment of the EU Citizen's Right to Protection Abroad', in Larik and Moraru (eds.), 'Ever-

are good reasons to believe that this development may have consequences for the diplomatic services of the Member States and that traditional international law is being sidestepped.⁸⁹ In that sense, Article 23 itself already forms a good example of a deviation from general international law, as it provides for the right of EU citizens to diplomatic and consular protection of Member States other than the State of nationality in the territory of a third country.⁹⁰

Indeed, one of the key problems is that the relevant international rules depart from the notion of 'nationality', defined as 'the status of belonging to a state for certain purposes of international law'.⁹¹ Indeed, 'the criterion of nationality helps to recognise the entity that is both competent and accountable to act in the name of individuals vis-à-vis third countries'.⁹² Diplomatic protection is closely related to nationality as, in principle, states can only protect their own nationals. In a classic case in 1937, the Permanent Court of International Justice argued: "In taking up the case of one of its nationals [...] a State is in reality exercising its own right [...]. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection".⁹³ While, this may be true for diplomatic protection, it may be easier for states to cooperate in consular matters, which are generally of a more administrative nature. In general, however, it is clear that – irrespective of the invention of a 'European Citizenship' – a 'bond of nationality' is by definition absent in the relationship between the EU and its citizens. European citizenship is granted to the nationals of the Member States (Article 20 TFEU).

In the academic debates on the scope of Article 23 TFEU the point is often made that this provision not only provides a right to EU citizens to consular protection, but also to diplomatic protection. Public international law academics would argue that it is in particular this dimension that cannot be established by the EU unilaterally, given the non-existence of the concept of 'European nationality'. In their view the essential 'solid link' between the intervening state and the protected citizen is missing. It has, however, been argued that the ILC Draft Articles on Diplomatic Protection establish minimum standards under public international law which permits the States to go beyond these rules as long as they respect the condition of obtaining the express unanimous consent

Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10 107-124, at 118.

⁸⁹ Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', 60 *ICLQ* (2011) at. 965-995.

⁹⁰ P. Vigni, 'The Protection of EU Citizens: The Perspective of International Law', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10., at 92 and 101-102.

⁹¹ Cf. Art. 3 VCDR and Art. 5 VCCR.

⁹² P. Vigni, 'The Protection of EU Citizens: The Perspective of International Law', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10.

⁹³ *Panevezys-Saldutiskis Railway Case*, PCIJ Rep Series A/B No 76, at 16 (1934). Also in the *Nottebohm Case* (Second Phase) International Court of Justice Rep 4,22 (1955).

of all the States involved in the new model (both EU Member States and (at least implicitly also by) third states).⁹⁴

It is true that the general international rules apply 'in the absence of a special agreement' and obviously states can simply agree to allow for the protection by states of non-nationals. In any case, under international law, the consular protection of a citizen by another State requires the consent of the receiving State (Art. 8 VCCR: 'Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.'). Allowing the *European Union* to protect the nationals of its Member States would thus be a new step. As third states are not bound by EU law they will have to recognise European citizenship to allow the EU to protect or assist its citizens abroad.⁹⁵ The EU does not yet have competences in this area, but the Commission has been quite clear on its ambitions: '[i]n the longer term, the Commission will also consider the possibility of obtaining the consent of third countries to allow the Union to exercise its protection through the Commission delegations'.⁹⁶ Article 23 TFEU, which now only allows Member States to protect EU citizens with the nationality of another Member States, would then be a first step in a development towards the recognition of a role of the EU itself.⁹⁷ The current EEAS legal regime does not yet include this option and, obviously, any transfer of powers will depend on the consent of the Member States as well, as they may have good reasons to continue a bilateral representation. After all, essential elements of a relationship between a Member State and a third state may not be covered by the EU's competences or a special relationship may exist between an EU state and a third country, either due to historical ties and/or geographic location.⁹⁸ Nevertheless, one medium-sized Member State already openly discussed the possible benefits of a transfer of certain consular tasks to Union delegations.⁹⁹

⁹⁴ See M. Moraru, 'The Protection of Citizens in the World: A legal Assessment of the EU Citizen's Right to Protection Abroad', in Larik and Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper LAW 2011/10* 107-124, at 122.

⁹⁵ P. Vigni, 'Protection of EU Citizens: The Perspective of International Law', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper LAW 2011/10*, at 92.

⁹⁶ See 'Effective Consular Protection in Third Countries: The Contribution of the European Union', Commission Action Plan 2007-2009, COM (2007) 767 final, 5 December 2007, at 10. Cf. also M. Lindström 'EU Consular Protection in Crisis Situations', in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Berlin/Heidelberg: Springer, 2009, at 112.

⁹⁷ A. Ianniello Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services', *European Public Law* (2011) 91.

⁹⁸ C. Cusens, 'The EEAS vs. the National Embassies of EU Member States?' in Paul Quinn (ed.), *Making European Diplomacy Work: Can the EEAS Deliver?*, *College of Europe, EU Diplomacy Paper*, 8/2011, at 12.

⁹⁹ See the report by the Netherlands Ministry for Foreign Affairs, 'Nota modernisering Nederlandse diplomatie' 8 April 2011, at 10 and 18; available at <<http://www.rijksoverheid.nl/documenten-en-publicaties/notas/2011/04/08/nota-modernisering-nederlandse-diplomatie.html>>.

It is difficult to come up with cases in which the EU itself would have a reason to protect EU citizens abroad. The Commission mentions the case in which EU citizens are not represented and may be in need of a 'portal' for further assistance.¹⁰⁰ Another situation may be when the protection of an EU citizen is required on the basis of an agreement that was concluded between the EU and a third state.¹⁰¹ One may expect the Union delegations to play a role in these situations in the future, but the extent to which the delegations can actually take up diplomatic and consular tasks ultimately depends on agreements that are to be concluded with the third countries. It has been noted that Member States will most probably not be too eager to hand over powers in this area to the EEAS. Yet, the European integration process has its own dynamic and Member States are also known to be pragmatic; coordination by the Union delegations and a foreseen harmonisation of the diverging rules on the protection of nationals¹⁰² may gradually lead to an increased role for the delegations in practice.

A final note concerns nationals of third states seeking diplomatic asylum by a Union delegation. Where diplomatic and consular protection is aimed at a state's own nationals, diplomatic asylum may be requested by third country nationals in need of immediate protection. With the coming of age of the EU delegations and their visible presence all around the world in crisis situations, the question of whether the EU is allowed to grant diplomatic asylum becomes more apparent.

5. CONCLUSION: REALISTIC AMBITIONS OR DIPLOMATIC DREAMS?

The main aim of this paper was to confront the diplomatic ambitions of the EEAS with the reality of EU and international law. Treaty provisions as well as policy documents and statements of EU officials reveal a development in the direction of a strengthened role for the EU itself as a diplomatic actor. The establishment of the EEAS is often mentioned as a new and crucial phase in this development and ever more frequently one comes across terms like 'EU Ambassador' or 'EU Embassy'. While Member States have a natural tendency to underline their sovereignty in international diplomatic relations, EU officials may point to necessary changes in the longer run. Thus, one Head of Delegation argued: 'In the long term, delegations should represent and in a way also substitute Member States' embassies. There would be greater efficiency, power, credibility and authoritativeness. We really come to the core of the Member States' sovereignty. There is strong opposition, which is normal. This is why

¹⁰⁰ *Ibid.* section 3.3.2.

¹⁰¹ A case in point was Case C-293/95 *Odigitra AAE v Council and Commission* [1996] ECR I-06129.

¹⁰² As was announced in 'Consular protection for EU citizens in third countries: State of play and way forward', Commission Communication, COM(2011) 149 final. See also M. Moraru, 'The Protection of Citizens in the World: A legal Assessment of the EU Citizen's Right to Protection Abroad', in Larik and Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper LAW 2011/10* 107-124.

European foreign policy is fragmented, inefficient and weak: the EU is an economic giant and a political dwarf, but we can hope that things will evolve in a significant way even in this field.¹⁰³

Our findings underline a tension between the EU's diplomatic ambitions and EU and international law as it stands. In the first section we examined the EU's new structures from an internal perspective, and our conclusions are necessarily mixed. On the one hand, there is no doubt that in the new EU institutional landscape dividing lines remain firmly in place. Divisions within the wider 'RELEX family' in Brussels, as well divisions between the Member States and the Union itself, are visible in different echelons of EU external diplomacy. In our submission, the previous picture points that intra-EU structures are certainly not yet final, but that the working arrangements do point to 'holistic' thinking implying cooperation and reciprocity. Turf wars may exist intra-institutionally, but they seem minor in comparison to the deep schism between the EU and its Member States. Thus, as far as diplomatic ambitions and diplomatic dreams, we find that within the institutions, EU delegations as one-stop-shops for 'EU diplomacy' encompassing the EU institutions only is a dream on its way to be realized with the usual bumps and bruises. However, 'EU diplomacy' as also encompassing the Member States, seems rather far off, as was illustrated by the UK stance in relation to the International Civil Aviation Organisation.

The next section focused rather on International diplomatic law, which regulates the diplomatic relations between states and international organizations simply do not fit into the existing legal regimes. Whereas in the area of diplomatic representation we have seen a pragmatic acceptance of a 'contracting in' strategy by the EU (allowing for instance for Heads of Delegations to be accepted alongside states Embassies), the diplomatic and consular protection of citizens is too much related to the notion of 'nationality'. As one author noted: '[...] EU citizenship has not yet acquired the status of nationality (or of a similarly solid link) at international level, so as to justify the intervention of any Member State for the protection of any EU citizen, regardless of his/her nationality. One cannot deny that, in recent years, there seems to be a development of the idea that a solid link may also exist between an EU citizen and his/her Member State of residence. However, international law does not seem to have recognized the legitimacy of these new developments occurring within the EU legal system.'¹⁰⁴

The practical implication is that third states will have to accept that the EU acts on behalf of its citizens. At the same time, the EU Member States do not seem to be willing to give up their traditional competences in his area: 'consular protection is an area of Member State competence and Member State

¹⁰³ C. Carta, *op.cit.*, at 115.

¹⁰⁴ P. Vigni, 'The Protection of EU Citizens: The Perspective of International Law', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper LAW 2011/10*, at 102.

competence solely'.¹⁰⁵ As a consequence, '[r]ather than a zero-sum relationship, Member States and the EU as a collective foreign policy actor may operate along-side, across and in tandem with one another'.¹⁰⁶ While this may form a solution for the short term, the EU's ambitions seem to go beyond a mere coordinating role. International law does not *per se* block a further development of the EEAS (and its Delegations) in the area of diplomatic and consular protection, but further steps will not only have to be accepted by the EU Member States, but obviously also by third states (on the basis of bilateral agreements). We believe that in the years to come a pragmatic acceptance of a new role of the EU will have an impact on the interpretation and perhaps even on the nature of international diplomatic law as primarily inter-state law.

¹⁰⁵ M. Lindström, 'EU Consular Protection in Crisis Situations', in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Berlin/Heidelberg: Springer, 2009, at 122.

¹⁰⁶ J. Bátora and B. Hocking, 'Bilateral Diplomacy in the European Union: Towards 'post-modern' patterns?', *Discussion Papers in Diplomacy*, The Hague: Clingendael Institute 2008, at 6.

EU EXTERNAL REPRESENTATION AND THE INTERNATIONAL LAW COMMISSION: AN INCREASINGLY SIGNIFICANT INTERNATIONAL ROLE FOR THE EUROPEAN UNION?

Scarlett McArdle and Paul James Cardwell

1. INTRODUCTION

The desire on the part of the EU to establish itself as an international actor stretches back to the very early days of the European integration process.¹ In economic terms, the international role of the Union has always been significant, not least because of the effect of its internal policies – particularly towards the completion of the Single Market – on the outside world. It was only later that the Union began to explore the possibilities for a ‘political’ foreign policy at the European level: firstly through the development of European Political Cooperation (EPC) and most notably the establishment of the Common Foreign and Security Policy (CFSP) in the Treaty on European Union (1992). Recent changes brought about by the Treaty of Lisbon have attempted to improve coherency in the Union’s external policies, which are not restricted to the CFSP and external trade policies (particularly the Common Commercial Policy) but which have diversified across a great number of policy fields. The Treaties now contain, for example, general provisions on external action of the Union, thus creating a general basis for such external action, as well as further provisions on cooperation and coherency on international actions between the Union and Member States.² Needless to say, the Member States have resisted the pooling of sovereignty in the field of political external representation to a much larger extent than many other dimensions of European integration. While the external economic activities of the Union were widely accepted from early on, early attempts to develop cooperation in the field of defence and foreign policy quickly faltered.³

The contribution of the EU to the development of international law remains, however, rather paradoxical. As an actor, the EU arguably has more power and influence than most States around the world. It is the world’s most developed regional integration entity. It is also, however, a creature of international law and following the basic and original idea of an international organisation – most notably the UN organs – it relies on its Member States to represent it. The development on modern international law, as well as the UN system, pre-

¹ Arts 21, 34 and 35 Treaty of the European Union.

² Arts.21, 34 and 35 Treaty of the European Union.

³ Arts.206-207 Treaty on the Functioning of the European Union; Case 8/75 *Hauptzollamt Bremerhaven v Massey Fergusson GmbH* [1973] ECR 897 at para.4; Opinion 1/75 (*re OECD Local Cost Standard*) [1975] ECR 1355; P. Koutrakos, *EU International Relations Law* Oxford: Hart, 2006, 383-387.

dated the European integration process by only a few years, but the anchoring of the international system of the Westphalian order of States appears at time to be set in stone.

This paper examines the external representation of the European Union within a specific body of the UN, namely the International Law Commission (ILC). This is one of the longest established bodies of the United Nations. It was created by a General Assembly Resolution in 1947⁴ and the first article of its founding Statute accompanying the Resolution states that it 'shall have for its object the promotion of the progressive development of international law and its codification'. The ILC has followed the traditional concept of international law and only included States as significant actors. This paper examines the work of the ILC – and the extent to which the EU has succeeded in representing itself in its own right – through the prism of the development of international law on responsibility of international organisations. The ILC began its project on the responsibility of international organisations in 2002, before the conclusion and implementation of Lisbon, and concluded it in August 2011, after the changes of Lisbon came into force.

The paper uses the example of the ILC's project on responsibility to argue, firstly, that the EU (by which in this context primarily means the Commission) is evolving to possess a separate role and identity to exert at the international level and, secondly, that this is a role that is progressively being taken more seriously by actors and institutions which have traditionally been resistant to the influence of non-State actors. This paper considers the long-term development of the external representation of the EU. The paper examines a particular provision of the work of the ILC, namely the *lex specialis* principle and how and why this principle was incorporated. It uses the reports of the Special Rapporteur and the Drafting Committee to consider the reasons behind the inclusion of this principle, and any changes to it. It also looks at the comments of the European Commission on the work of the ILC generally, as well as this provision in particular. While Lisbon, and the new mechanisms it has created, will should enable more effective external representation, the incremental changes in the EU's representation are brought the fore here.

The paper begins with a brief examination of the ILC and its work. It then undertakes an examination of the key *lex specialis* provision within the project of the ILC, and the contributions made by the EU and its Member States. As this is a project that focuses upon the way in which the EU represented itself prior to the changes brought in by the Lisbon Treaty, the paper concludes with some thoughts on how the changes brought about by Lisbon may change and improve the ability of the EU to pursue an autonomous role at the international level. In the concluding section, the paper argues that the EU has moved beyond an existence as a close coalition of States and continues to progress towards as an independent actor. Although this may suggest either a replacement of the role of the Member States in international arenas, or the emergence of rivalries and incoherence between the Member States and the EU, it is

⁴ United Nations General Assembly, *Resolution: Establishment of an International Law Commission*, A/RES/174 (II) of 21 November 1947.

contended here that a 'middle way' has been found. Although the views of the EU as an independent actor and the Member States may on occasion differ, the latter are (at least in general sense) supportive of the progression towards the EU becoming more significant as an international actor. In the area surrounding the ILC, at least, there has been a general acceptance of the EU voicing its opinions and in contributing to and helping to shape the development of international legal principles.

2. THE INTERNATIONAL LAW COMMISSION'S PROJECT ON THE RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

The International Law Commission (ILC) is one of the longest established bodies within the UN system. It was established by a Resolution of the General Assembly in 1947 and held its first session in 1949.⁵ Much of international law originally had to be sought out in the form of customary principles. A number of ad hoc attempts at codification were made in the nineteenth century through the holding of conferences.⁶ This was relatively limited, however, and while there was some attempt at codification made under the League of Nations, there was nothing comprehensive.⁷ In the early days of the ILC's work, account had to be taken of (generally) unwritten principles which had developed over time, according to State practice accompanied by *opinion juris*, a concept meaning that the practice is believed to be law. The establishment of the ILC thus signified a break from the past by a desire to work towards a codified, comprehensive version of law applying between States. The establishment of the ILC drew on the various previous attempts at codification of principles, which had occurred in isolation at different congresses and conferences.⁸

One of the key challenges facing the ILC was that of establishing rules on international legal responsibility. This is a topic which had been on the agenda of an early attempt at codification with the Conference of the League of Nations in 1930, but proved too sensitive.⁹ The establishment of the ILC saw a revival of the questions surrounding this topic and it was included on the initial list of fourteen subjects for codification, adopted at the ILC's first session in 1949.¹⁰

⁵ United Nations General Assembly, *Resolution: Establishment of an International Law Commission*, A/RES/174 (II) of 21 November 1947; Report of the International Law Commission on the work of its first Session, 12 April 1949, Official Records of the General Assembly, Fourth Session, Supplement No. 10, Extract from the Yearbook of the International Law Commission 1949, vol.I.

⁶ UN Documents on the Development and Codification of International Law, Supplement to the *American Journal of International Law* Vol.41, No.8, Oct.1947, 32-49.

⁷ *Ibid*, 49-61.

⁸ United Nations Documents concerning the Development and Codification of International Law, Supplement to *American Journal of International Law*, 41(4), October 1947; Final Act of the International Peace Conference. *The Hague*, 29 July 1899; Final Act of the Second Peace Conference, *The Hague*, 18 October 1907.

⁹ A. Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts', in J. Crawford, A. Pellet and S. Olleson (eds.) *The Law of International Responsibility*, Oxford: Oxford University Press, 2010, at 75.

¹⁰ Report of the International Law Commission on the work of its first Session, 12 April 1949, Official Records of the General Assembly, Fourth Session, Supplement No. 10, Extract from the

Initial considerations of the area did not really begin until 1955 and continued through five Special Rapporteurs until 1996 when a first draft of articles was adopted.¹¹ Finally on 31 May 2001 a second, and final, reading of 59 draft articles took place and the ILC adopted the complete set of 59 draft articles on the 'Responsibility of States for Internationally Wrongful Acts'.¹² Unsurprisingly, the focus of the ILC's work remained on the responsibility of States as the primary actors at the international level.¹³ The ILC may have made reference to the idea of the responsibility of international organisations within the articles on State responsibility, but it was clear that this was not to be addressed in any detail. States were the actors with which the ILC was concerned. After completing of a set of principles in relation to States, the ILC turned to other international actors that require consideration in this area; international organisations. The growth in the powers and activities of international organisations had led to concerns about potential breaches of international law and the ILC began considering how principles of responsibility might, and how they could, apply to such entities.¹⁴ It is this project which forms the basis of the research in this paper.

A significant aspect to the work of the ILC on this project has been the involvement of international organisations in the drafting process. While many EU Member States are often involved in voicing opinions on topics of international law, it is less common for organisations to be involved within such an archetypal 'traditional' international body. Yet, in 2002, the ILC recommended that the Secretariat approach international organisations for their contributions on the topic being considered.¹⁵ Consequently, letters were sent to various international organisations between September and October 2003 asking for their comments and materials that related to the topic.

This interaction and involvement of organisations continued throughout the work of the ILC, until the final comments were received in early 2011, shortly before the draft articles were adopted by the ILC on second reading in August 2011 (Draft Articles on the Responsibility of International Organisations (DARIO)).¹⁶ The articles detail the basic requirement for responsibility as being

Yearbook of the International Law Commission 1949, vol.I, para. 16, at 281.

¹¹ Report of the International Law Commission to the General Assembly covering the work of its seventh session, 2 May-8 July 1955, Doc. A/2934, para.33, at 42; UN Doc.A/CN.4/L.528/Add.3; Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996) A/51/10, at 57-73.

¹² International Law Commission Report of the Fifty-third Session 2001, Doc. A/56/10, paras. 69-71, at 25; United Nations General Assembly, *Resolution: Responsibility of States for internationally Wrongful Acts*, RES/56/83 of 28 January 2002.

¹³ Art. 57 Articles on the Responsibility of States for Internationally Wrongful Acts.

¹⁴ Report of the International Law Commission on the work of its fifty-second session 2000, Annex 'Syllabuses on Topics Recommended for Inclusion in the Long-Term Programme of work of the Commission, at 135-136; Report of the Working Group, International Law Commission Report of the Fifty-Fourth Session (2002) Doc.A/57/10, at 228-236.

¹⁵ Report of the Working Group, International Law Commission Report of the Fifty-Fourth Session (2002) Doc.A/57/10, at para.488, 236.

¹⁶ 'Comments and Observations by Governments and International Organizations', 14 February 2011, A/CN.4/637; Draft Articles on the Responsibility of International Organizations, with commentaries, Yearbook of the International Law Commission, 2011, vol. II, part two.

the existence of an internationally wrongful act that consists of a breach of international law that can be attributed, or traced, to the responsible entity. Many of the articles elaborate upon these basic ideas and start to consider the interaction between an organisation and its members, as this can often be complex and mean that the principles of attribution and breach are not so straightforward. The draft articles also elaborate upon these basic principles, looking at the scope of these principles, as well as the consequences of a finding of responsibility, as well as the circumstances that would preclude any wrongful actions. It is the interaction between the ILC and the European Commission on behalf of the EU, as well as the involvement of Member States of the EU that forms the basis of the discussion in this paper.

It will be clear from the timing of the ILC's work that the involvement of the EU in this project was carried out, largely, before Lisbon came into force. While the changes brought about by Lisbon seek to pursue a greater role for the EU at an international level, this project is testament to the way in which the EU was already developing ways in which to pursue an international role in areas traditionally reserved for States only. The Legal Service of the European Commission has been primarily responsible for providing comments to the ILC on behalf of the EU. In addition, the EU Delegation to the UN has made a number of statements to the Sixth Committee of the General Assembly.¹⁷ The General Assembly is the main deliberative organ of the UN and the discussions it has and the mandates that follow largely drive the work of the UN. This committee of the General Assembly is where legal questions are discussed and allows all UN members to have representation. To make comments to this committee is to contribute to the shaping and development of international law.

It is perhaps significant to note that the submitted comments were identified as originating from the European Commission, and not from the European Community or the European Union. This may perhaps say something about the growth of the role of the European Commission within the realms of the Union more than about the impact of the comments on the work on the ILC. More relevant for the impact of such comments on the work of the ILC is the limitations that the Commission seemed to impose on its own comments. Such comments were limited to areas of action that could be considered as previously falling under the remit of the European Community; the European Commission made no comments on any areas such as foreign, security or defence policy. This is obviously a limitation within the comments and the consideration of the impact of the comments on the work of the ILC and as representing the EU as a whole. The timing of the project was such, however, that the majority of the work was completed prior to Lisbon coming into force when a division between Community and Union still existed and the mandate of the Commission in Union matters was limited. The impact of such comments would always have had limitations unless the project had continued for a period of time following Lisbon coming into force. The impact of the comments given by the

¹⁷ EU Presidency Statement- Report of the ILC: Responsibility of International Organizations, PRES06-284EN, EU Statement- United Nations 6th Committee: Report of the International Law Commission on Responsibility of International Organisations, EUUN11-120EN, 24/10/2011.

European Commission will be considered, with some thoughts in the final section on how this may change in the future or the wider impact that may be felt.

The following section seeks to consider the ways in which the EU has voiced its comments alongside those of its Member States and how such comments were received within the ILC's project on the responsibility of international organisations.

3. THE IMPACT OF THE EU ON THE DEVELOPMENT OF THE *LEX SPECIALIS* PROVISION

From the very beginning of its work the ILC sought to develop a set of principles that were closely modelled on those developed in the project that produced the Articles on the Responsibility of States for Internationally Wrongful Acts.¹⁸ This has precipitated one of the strongest critiques of the DARIO; that they failed to take account of the different nature of organisations compared to States and the diversity of organisations.¹⁹ This is a critique that arose early on in the work of the ILC on the responsibility of international organisations and does not ever seem to have been fully addressed. This has been, furthermore, the dominant critique throughout the comments made on the work of the ILC by the European Commission on behalf of the European Union.²⁰

From its very first comments, which were among some of the first received by the ILC in 2003, until its final contributions made in early 2011, the European Commission continually emphasised the *sui generis* nature of the EU as a specific kind of international organisation.²¹ While the comments made by the Legal Service of the Commission demonstrate a clear commitment to the ILC's project, and an acceptance that these are legal principles that could have a significant impact upon the EU, this was accompanied by a desire for the unique nature of the EU to be recognised. There was a clear acceptance of the general principles and ideas underpinning international responsibility. This was always accompanied, however, by the argument of the European Commission for a special rule of attribution that would be better able to respond to the internal nature of the Union.

¹⁸ International Law Commission Report of the fifty-fifth session (2003) A/58/10, para. 44, at 30.

¹⁹ E. Paasivirta and P-J Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organizations', 36 *Netherlands Yearbook of International Law* (2005) p.169; N. Blokker, 'Preparing articles on Responsibility of International Organizations: Does the International Law Commission take International Organizations seriously? A mid-term review', in J. Klabbers and A. Wallendahl (eds.) *Research Handbook on the Law of international Organizations*, Cheltenham: Edward Elgar, 2011, p.313, at, p.337.

²⁰ *Responsibility of International Organizations Comments and Observations Received from international organizations*, 25 June 2004, A/CN.4/545, 'Comments of the European Commission', p.5; *Responsibility of International Organizations Comments and Observations Received from international organizations*, 14 February 2011, A/CN.4/637, 'Comments of the European Commission', pp.7-8.

²¹ *Ibid.*

Much of this insistence on individual treatment commensurate with the *sui generis* nature of the EU was focused around the question of attribution.²² This principle forms one of the basic requirements for the finding of responsibility. While one requirement is the existence of a breach of international law, there is a second foundational principle that the breach must be 'attributed' to the responsible actor;²³ namely that the action can be traced to them. When considering an organisation, the question as to what actions are those of the organisation and which are those of a Member State goes to the core of the organisation. While the actions and identity of a State is relatively well established at the international level, the label 'international organisation' does little to explain the powers and capabilities of that entity. The internal nature of an organisation can be understood as a sub-system and it is this internal order that establishes the powers of an organisation as well as any division in these powers between the organisation and its members.²⁴ As such, the complexity surrounding the question of attribution is unsurprising; it may not be so straightforward as to trace an action to the organisation or a Member State. The complex make up of the EU and the interaction between the EU and its members raises even more questions. The Union often relies on its Member States to implement obligations to which it has agreed, even in areas of exclusive competence, leading to the question of who is actually responsible for various actions.²⁵ There is also, however, a horizontal aspect to the relationship between the Union and the Member States, with the area of shared competence, where both the Union and Member States may be parties, separately, to the same international obligation.²⁶ There is a constant interaction and interdependence between the Union and its Member States in pursuit of a greater international role and this complex interaction is not easily understood. The result is confusion with any attempt to determine who precisely is responsible for any particular action.

At the beginning of its comments, the EU focused upon incorporating reference to the rules of the organisation within the principles on attribution of conduct.²⁷ The Commission argued that the complex relations between an organisation and its Member States, in particular that between the EU and its Member States, warranted reference to the rules of the organisation. As it is

²² Chapter II, 'Attribution of Conduct to an International Organization' Draft Articles on the Responsibility of International Organizations, *Yearbook of the International Law Commission, vol. II, Part Two* (2011); Comments of the European Commission 'Comments and Observations Received from international organizations', 25 June 2004, A/CN.4/545, at 13; Comments of the European Commission, 'Comments and Observations by Governments and International Organizations', 12 May 2005, A/CN.4/556, at 5-6.

²³ Art. 4 DARIO

²⁴ C. Brölmann, *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties*, Oxford: Hart, 2007, 27-29

²⁵ P.J. Kuijper and E. Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' 1 *International Organizations Law Review* (2004) at 123-132.

²⁶ *Ibid* at 116-123.

²⁷ Comments of the European Commission 'Comments and Observations Received from international organizations', 25 June 2004, A/CN.4/545, at 13.

the rules of the organisation that establish how obligations are divided between an organisation and its members, they must be referred to in order to establish whether a breach is that of the organisation or of one, or indeed several, Member States.²⁸ Before responsibility can be established, it must be clear whose obligation was in fact the subject of the breach. This can surely only be done by reference to the rules of the organisation, as it is only these rules which determine to whom different obligations belong. The European Commission consistently sought to claim a link between apportionment of obligations and the division of responsibility. It has argued that there must be a determination of the apportionment of obligations before any consideration of attribution can take place. If the breach in question was not in fact a breach of an obligation of the organisation, then there can be no attribution of conduct, nor yet any responsibility.²⁹ The European Commission is clear in this argument that the rules of the organisation must play a key role in determining the question of attribution, but also the question of apportionment of obligations. The latter question is, in fact, the primary concern and must be addressed prior to any consideration of attribution.³⁰

With the division of competence between the EU and its Member States being so fluid and developmental – especially given the context of the ongoing processes of Treaty reform within the EU during the 2000s – the European Commission has argued that reference to the internal rules of the organisation are crucial for addressing attribution.³¹ It has also put forward three possible solutions to the question of attribution.³² These are, firstly, a special rule of attribution so that the actions of organs of Member States can be attributed to organisations. An example of this with the EU is with the tariff agreements contracted between the EU and third States. It is not organs of the EU that are charged with implementing these, but rather the customs authorities of Member States. The European Commission considers this to show a ‘separation between responsibility and attribution’.³³ With the traditional idea of attribution, actions would be attributed to the Member States, when the responsibility should really lie at the EU level. The second possibility was the implementation of special rules of responsibility to enable responsibility to be placed with the organisation, even if the prime actors in the breach of the organisations obligation were the organs of Member States.³⁴ The final option put forward was a special exemption or savings clause for the EU, which was, in fact, least favoured by the European Commission.³⁵ It seemingly did not want to go too far in its attempts to recognise the individuality of the EU. It was clear that this

²⁸ Comments of the European Commission ‘Comments and Observations Received from international organizations’, 25 June 2004, A/CN.4/545, at 13.

²⁹ *Ibid.* at 13–14.

³⁰ *Ibid.* at 14.

³¹ *Ibid.* at 13.

³² Comments of the European Commission, ‘Comments and Observations by Governments and International Organizations’, 12 May 2005, A/CN.4/556, at 6.

³³ *Ibid.* at 6.

³⁴ *Ibid.* at 6.

³⁵ *Ibid.* at 5.

would not be recognised and perhaps would detract from the growing desire of the EU to pursue a role within an 'effective multilateral' international community. The ILC was originally not keen to establish such an exemption clause. The Special Rapporteur considered that it would be possible to draft a general rule attributing actions that implemented binding acts of an organisation to that organisation.³⁶ While the ILC was, furthermore, not sure on the existence of a special rule of attribution,³⁷ the idea of a general *lex specialis* provision was first voiced within the reports of the Special Rapporteur in 2007, before being incorporated into the draft articles in 2009. The *lex specialis* provision is contained with Article 64 of DARIO and states:

'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.'

The principle is modelled on article 55 of the articles on the Responsibility of States for Internationally Wrongful Acts and is designed so that continued reference to 'special rules' throughout the articles is not necessary.³⁸ It basically follows the international law maxim *lex specialis derogat legi generali* which considers that where more specialised legal provisions exist, they will take precedence over general legal principles.³⁹

The inclusion of this principle is able to show two significant developments in the external identity of the EU. The first of which is the way in which the opinions of the EU on this show a distinct view on behalf of the European Union and move away from any consideration of the EU simply voicing the opinions of a collection of States. The second of these developments is the influence that the comments of the EU had. These are comments that were distinctly those of the EU, and furthermore, they were responded to, showing an actual influence of the EU in the development of international law. The following section explores this claim in more detail.

4. THE ILC AND *LEX SPECIALIS*: A RESULT OF EU OPINION?

The *lex specialis* principle within the work on the responsibility of international organisations is actually relatively new. The first mention of this idea arose in the fifth report of the Special Rapporteur, Giorgio Gaja, in 2007. He recognised

³⁶ Seventh Report on the Responsibility of international Organisations by Giorgio Gaja, Special Rapporteur, A/CN.4/610, at 12.

³⁷ Seventh Report on the Responsibility of international Organisations by Giorgio Gaja, Special Rapporteur, A/CN.4/610, at 38-39.

³⁸ Commentary to Draft Article 64 Draft Articles on the Responsibility of International Organizations, para. 7, *Yearbook of the International Law Commission 2011, vol. II, Part Two*.

³⁹ Fifth Report on Responsibility of International Organizations 2007, A/CN.4/583, para. 7, at 4.

the continued critique of the articles being made in comments, such as those from the European Commission, but also more generally in academic literature, that they did not sufficiently consider the variety of international organisations.⁴⁰ Gaja reasoned, however, that the fact that not all articles would be relevant and apply to all organisations did not preclude these general provisions from being included in the draft. It was not necessary that *all* articles would have to apply to *all* organisations. He did consider, however, that particular features of certain organisations might affect the application of certain rules.⁴¹ Gaja considered there to clearly exist special rules in certain situations that warranted the ability to make reference to them and deviate from the general regime being drafted by the ILC.⁴² The Rapporteur considered that the inclusion of reference to the possibility of specialised rules in this *lex specialis* provision would respond to the critique that the draft articles take insufficient account of the variety of organisations.⁴³

Only one real change to this article was made by the ILC Drafting Committee from its first inclusion to the final set of articles adopted on second reading by the ILC. This change was to replace the phrase 'such as the rules of the organization' with that of 'including the rules of the organisation'.⁴⁴ The reasoning behind this proposal furthermore reinforces the reasons behind its original inclusion' to emphasise the diversity of organisations and the need to apply the articles in a flexible way.⁴⁵ It was felt by the Drafting Committee that there needed to be a greater emphasis on the specific characteristics of each organisation and so a greater reference on the rules of the organisation as forming a substantial part of the potential *lex specialis* that this article refers to.⁴⁶

It is clear to see from Gaja's statements that the very reason for the inclusion of this principle was that of the peculiarities of different international organisations needing to be taken into account. The arguments made from 2004 onwards

⁴⁰ Fifth Report on Responsibility of International Organizations 2007, A/CN.4/583, para. 7, at 4, See Comments of the European Commission 'Comments and Observations Received from international organizations', 25 June 2004, A/CN.4/545, at 5; 'Comments of the International Monetary Fund', at 7; N. Blokker, 'Preparing articles on Responsibility of International Organizations: Does the International Law Commission take International Organizations seriously? A mid-term review', in J. Klabbers and A. Wallendahl (eds.) *Research Handbook on the Law of international Organizations*, Cheltenham: Edward Elgar, 2011, at 321; See also P-J Kuijper, 'Introduction to the symposium on Responsibility of International Organizations and of (Member) states: Attributed or Direct Responsibility or Both?' 7 *International Organizations Law Review* (2010) p.9; N. Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations' 7 *International Organizations Law Review* (2010) p.35; A. Reinisch 'Aid or Assistance and Direction and Control between states and International Organizations in the Commission of Internationally Wrongful Acts' 7 *International Organizations Law Review* (2010) p.63

⁴¹ Fifth Report on Responsibility of International Organizations 2007, A/CN.4/583, para. 7, at 4.

⁴² *Ibid.* para. 7, at 4.

⁴³ *Ibid.* para.7, at 4.

⁴⁴ Statement of Drafting Committee, Statement of the Chairman of the Drafting Committee Mr. Marcelo Vázquez-Bermúdez, 6 July 2009, at 6.

⁴⁵ *Ibid.* at 7.

⁴⁶ *Ibid.* at 7.

by the European Commission seem to precipitate the reasoning of the ILC. The Commission has been claiming the importance of the rules of the organisation, in particular in the area of attribution since its very first involvement in the ILC project. The Special Rapporteur seemed to almost respond to this by his inclusion of the *lex specialis* principle. It has been included to address the difficulty of there existing such a variety of organisations. While this certainly has not satisfied the EU in all of its claims, it has begun to incorporate the references to the rules of the organisations. From the final comments made by the European Commission on these articles, it appears as if it considers that even this provision does not completely address the issues of the 'different' nature of the EU:

'For now the European Union remains unconvinced that the draft articles and the commentaries thereto adequately reflect the diversity of international organizations. Several draft articles appear either inadequate or even inapplicable to regional integration organization such as the European Union, even when account is taken of some of the nuances now set out in the commentaries. [...]

In view of these comments the European Commission considers that the International Law Commission should give further thought as to whether the draft articles and the commentaries, as they stand now, are apt for adoption by the Commission on second reading or whether further discussion and work is needed.⁴⁷

While the Commission seems to consider that these articles have not gone far enough, the development of a greater inclusion and focus on the rules of the organisation has gone some way towards recognising the individual nature of the EU. It was not the special rule on attribution requested by the European Commission but it was recognition of some differences. With the inclusion of the *lex specialis* principle, and its focus on the rules of the organisation, this moves towards recognising the individuality of the EU, without openly allowing or accepting individual exceptions for the EU. If any such rule were to exist and be codified this would perhaps remove the Union from such an international system of responsibility.

The EU was not the only proponent of this critique, but it was certainly at the forefront of the contributors. While the critique came up in other comments and academic contributions, none were as strong or as focused as those from the EU. The need to recognise the unique nature of the EU goes to the core of every comment made by the European Commission on behalf of the EU. The commentary to article 64, furthermore, focuses entirely on the EU as an example. While the EU was not the only organisation to support the inclusion of this article, the ILC chose to focus entirely upon the EU in the commentary. The ILC considers it impossible to identify all potential rules that may be incorporated under this category of *lex specialis* and so uses the example of the potential existence of a special rule on attribution to the European Union of

⁴⁷ Comments of the European Commission, Comments and observations received from international Organizations, 14 February 2011, Doc. A.CN.4/637, at 8.

conduct of Member States when implementing binding acts of the Union.⁴⁸ The potential existence of this special rule is a question that has continually arisen since this question of responsibility began.⁴⁹ It has become a complex question, which is certainly not settled. There are a number of different factors that complicate the matter, not least the changing and fluid competences of the European Union and its Member States.

The overall approach of the ILC has been to mirror the articles on those developed in relation to States and to, at certain points, attempt to come up with certain exceptions, such as this *lex specialis* provision. The way in which the ILC has incorporated so many references to the rules of the organisation, as the European Commission has been claiming that it should include, shows a reaction to these comments. The inclusion of the EU's comments in the final draft of the articles – and the initial instigation of a project on responsibility of non-State actors – perhaps demonstrates a growing respect towards the EU as a global actor. At the very least, it shows a recognition that the EU is able to voice opinions in its own right and is gaining an identity that is greater than simply a grouping of States.

5. THE EU AS MORE THAN THE SUM OF ITS MEMBER STATE-PARTS?

The Commission and its Legal Service made the various contributions of the EU towards the work of the ILC. From an institutional perspective, and considering the mechanisms available prior to those brought in by Lisbon, it is interesting that it was this part of the EU that took on representing this external identity of the Union here. While in some areas, for example with various actions under the Common Foreign and Security Policy, it has been the Presidency, High Representative or the Council that has taken on voicing the opinion of the EU, here it was the one institution that could be said to be acting solely on behalf of the Union. The actions of the Commission could not be mistaken to be those of the Member States as a collective, but will be those of the Union. In this sense, the external representation by the Commission of the EU as a whole resembles the role the Commission had in terms of the delegations of the Commission in third countries (before Lisbon) – cooperation with Member States, but certainly not acting under mandates from them.

⁴⁸ Commentary to Draft Article 64 Draft Articles on the Responsibility of International Organizations, para.1, *Yearbook of the International Law Commission, vol. II, Part Two*, (2011).

⁴⁹ E. Paasivirta and P. J. Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organizations', 36 *Netherlands Yearbook of International Law* (2005) at 169; F. Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' 21 *European Journal of International Law* (2010) at 723; S. Talmon 'Responsibility of International Organizations: Does the European Community require Special Treatment?' in M. Ragazzi (ed.) *International Responsibility Today*, Leiden: Brill, 2005, at 405.

Comments were made by fourteen States in total, of which eight are Member States of the EU.⁵⁰ Thus, even though only some EU Member States submitted comments, there was more involvement from EU members than from non-members in the process. This inevitably leads to the question as to whether there is any synergy between the comments made by the Commission and the EU Member States. First and foremost, it can be said that no such conflict between the comments of the Member States of the European Union and those of the Commission can really be seen. Member States have not been seen to openly critique the position of the Commission. This is not to say that there has been complete agreement and that all comments between the Union and its Members have been the same or come to the same conclusions. It is significant, however, that there has been no critique from either side of the position from the other side and also that even where differences of opinion have arisen, these differences have been possible without conflict arising. This reinforces the nature of the role of the EU in this arena as that of the Union alone; the Member States will not openly conflict or interfere with the views put across because they are the views of a separate international actor and the Member States is able to voice their own opinions on matters.

This can be seen, for example, with the Belgian comments on the last draft of the *lex specialis* principle. Belgium considered this principle to be too broad and capable of opening up too widely the possibility of organisations evading any responsibility and “as it stands [it] could render the draft articles entirely pointless.”⁵¹ This is in contrast to the opinion of the Commission, which is generally supportive of the principle. The Commission considers that the articles are insufficient in considering the situations of the EU and of similar entities that may be termed regional economic integration organisations.⁵² As such the *lex specialis* principle is seen as “particularly important [...] to explicitly allow for the hypothesis that not all of [the draft articles] can be applied to regional (economic) integration organisations.”⁵³ It appears that while some States, including Belgium, see this provision as too broad and needing to be deleted or at the very least limited in scope, the European Commission views this as a compromise and not one that truly goes far enough in addressing the issues that arise with the EU.

The comments of the Commission, in fact, consider this principle to be a way in which the individual characteristics of organisations, but most particularly the unique nature of the EU can be taken into account. While this is a difference in opinion between the EU and one of its Member States, there has been no conflict or fallout from this. Both are able to express these views, as

⁵⁰ EU Member States: Portugal, Belgium, Germany, Austria, Czech Republic, Netherlands, Italy and Poland; Other States: Cuba, El Salvador, Republic of Korea, Mexico, Switzerland, Democratic Republic of the Congo.

⁵¹ Belgium comments, Comments and Observations received from Governments, 14 February 2011, Doc. A/CN.4/636, at 41.

⁵² Comments of the European Commission, Comments and observations received from international Organizations, 14 February 2011, Doc. A.CN.4/637, at 38.

⁵³ Comments of the European Commission, Comments and observations received from international Organizations, 14 February 2011, Doc. A.CN.4/637, at 38.

equal participants within this drafting process. This may not show coordination between the EU and its Member States, but it does show something just as significant; the growth of the EU beyond a collection of Member States capable of expressing its own distinct views.

There does also, however, exist coordination between the EU and some of its Member States. The comments on this principle from Germany are generally supportive of the principles in terms similar to those used by the Commission. Germany considered the draft articles adopted on first position to 'fall short of fully reflecting' the fact that 'the relationship between an international organization and its Member States is [...] exclusively governed by the internal rules of that organization.'⁵⁴ Germany views the inclusion of the *lex specialis* as a way of enabling 'interpretation on a case-by-case basis' to compensate for the lack of understanding of the importance played by the relationship between an organisation and its Member States.⁵⁵ Germany also makes reference to these ideas in comments on other articles. Germany considers the relationship between an organisation between an organisation and its members to be so fundamentally different to that between States as, while the latter is governed by general international law, the former, 'is created by [the members'] wilful act'.⁵⁶ Germany goes as far as to consider there to be 'simply no room to resort to general international law, apart from specific indications to the contrary',⁵⁷ as any questions surrounding breaches of members' obligations towards the organisation are solely an internal question for that organisation:

'It is hence for an organization's members to stipulate and precisely define the relationship between them and the newly created international legal entity, including the legal powers an international organization may resort to, should one of its members breach an existing obligation vis-à-vis the organization.'⁵⁸

Germany seems to be aligning its opinions here with those considered by the European Commission both in terms of the general importance of the internal relationship of the organisation, as well as the importance of the *lex specialis* provision in responding to this issue. There is support for the EU voicing its own distinct voice but these comments from Germany also show support and coordination from a Member State of the EU for the approach taken by the EU towards these issues.

6. POST-LISBON EVOLUTION?

The European Commission has clearly managed to carve a significant role for itself within the project of the ILC. It has done so by utilising the institutions and

⁵⁴ Germany comments, Comments and Observations received from Governments, 14th February 2011, Doc. A/CN.4/636, at 41.

⁵⁵ *Ibid.* at 41.

⁵⁶ *Ibid.* at 22.

⁵⁷ *Ibid.* at 22.

⁵⁸ *Ibid.* at 22.

mechanisms already in existence prior to Lisbon to pursue this external representative role on behalf of the EU. The work of the ILC was not completed until after the implementation of Lisbon, though the contributions of the EU remained largely unaffected by any of the changes. Even the interventions made to the 6th Committee of the UN General Assembly have remained largely the same in terms of content. A difference can be seen in who such comments are attributed to, with pre-Lisbon there being 'European Community Statements' or 'EU Presidency Statements' and after Lisbon there being only 'EU Statements' but the content in these statements is consistent. An interesting aspect to the statements made before this body is perhaps the final 'EU Statement' being made by the Principal Legal Advisor to the Commission. Despite having established a number of new mechanisms and institutions for the purpose of external action, the Commission Legal Service retained the capacity to make statements and has retained a significant role in the EU Delegation at the UN. The question does remain as to how the changes brought in by Lisbon may affect such a role.

With one of the main aims behind Lisbon being the promotion of a greater global identity for the EU,⁵⁹ the growth of the role of the European Commission has begun the move towards this increased international role. The EU has developed a role for itself distinct from its Member States in the ILC's project on responsibility and the very fact that there was a need to consider the responsibility of international organisations demonstrates the importance of legal consequences resulting from the EU's external activities. The question of the relationship between the EU and its Member States is one that goes to the core of the difficulty of the external representation of the EU; the complexity of the interaction between the EU and its Member States. The EU seemed to achieve this impact by acting through existing institutions that could be viewed as distinctly 'European', namely the Commission and the EU Delegation to the UN (which was part of the Commission prior to the establishment of the European External Action Service).

The changes brought in by Lisbon have the potential to have a significant impact on the external identity of the Union and enable it to set itself apart from its Member States. There are three main ways in which such a potential impact arises; the establishing of a 'single' European Union with explicit legal personality, the new institutional roles that have been created and the greater development of obligations on Member States to cooperate and support Union external positions and policies. While all of these changes are potentially positive for the further progression of the Union, their actual impact is, as yet, uncertain and a number of challenges do still remain.

The creation of a single European Union with explicitly conferred legal personality (Article 47 TEU) has significant external impact. Prior to Lisbon, only the European Community had legal personality conferred upon it. While there does remain a simultaneous dependence on and independence from its Member States, the development of the EU into a single entity rather than a number

⁵⁹ Preamble, Art.3(5), Art.21 Treaty of the European Union.

of disparate ones does create a more certain identity. The definitive answer to the long debated question on the legal personality of the EU also shows it as an international actor and as capable of acting of its own accord without its Member States. The single legal personality allows the conclusion of international agreements under the name of the Union. It is debatable whether there are any formal, legal consequences of the change. What is clear, however, is that the new Article 47 will prevent the disjointed approach that arose on occasion. The most obvious example of this was in the relationship between the European Community and the (non-UN) international organisations which it was a member of, primarily the World Trade Organization. While it was clear what the involvement of the European Community was for a long time, the consequences for the European Union were for some time uncertain. Now that such a clear statement has been made on the part of the EU in terms of its international identity, there remain some questions about what this will truly mean in practical terms. It may raise a number of questions yet, as the existence of personality of the Union, while not controversial in its basic idea, does not affect the complex nature of the Union and the continued strong involvement of the Member States in the actions of the Union. It is now clear that the EU has the potential to act as an international legal person, if this was ever in question, but when actions will be considered to be those of the Union and when they will be those of the Member States is something that will remain a difficult subject.

Lisbon has furthered this theme of consistency and solidarity beyond the creation of a single legal entity and has strengthened many provisions previously within the Treaties to create a greater undertaking on Member States to coordinate their positions externally and to support the EU. There is, most visibly, an obligation to coordinate actions and positions within international organisations and conferences, as well as supporting the position of the Union in these forums.⁶⁰ Of course, the aim of this provision is to ensure consistency across the Union's actions and not only between the EU and the Member States. As well as this, there now also exists an obligation on Member States of consultation and 'convergence of [...] actions' in the area of foreign and security policy.⁶¹ Not only is the EU put forward as an entity capable of international action, but the greater obligations of Member States exist to promote a significant and coherent international actor. This is perhaps one of the most significant developments in pursuing an international role for the EU. A clear desire can be seen to gain a coherent international approach on the part of the EU and identify itself, and its policies, at the international level. The challenge that remains, however, is how this will work in practice. With clear examples of diverging approaches from Member States towards international crises, such as during the break-up of Yugoslavia and the conflict in Iraq, along with the sensitive nature of foreign policy, raises the question of politically, how such coherence can be achieved. It remains to be seen how much things will change

⁶⁰ Art. 34 Treaty of the European Union.

⁶¹ Art. 32 Treaty of the European Union.

through legal requirements on Member States to act consistently with European Union policy.

Article 3(5) TEU also now lists the development of international law as an objective of the Union. The work of the European Commission shows that this commitment began prior to Lisbon. Perhaps the inclusion of this with the Treaties shows this as action that will be increasingly pursued by the Union as a whole. It may have been the Commission under a limited mandate that involved itself in this project. With this increased commitment, it is arguable that perhaps a more comprehensive approach from the Union may be seen in the progressive development of international legal principles. This may be the signal of increased involvement of the EU within projects such as these. The Commission may have had some influence on principles here, but these were principles that had the potential to significantly impact upon the EU. It may be interesting to see how this obligation towards the development of international law is pursued by the EU. It may be, for example, that a broader approach is taken towards the areas over which it seeks to exert an influence. This may furthermore indicate a role for one of the newer institutional mechanisms that could be said to represent the Union as a whole. The actions of the European Commission here could be seen to have laid the foundations upon which this new obligation can now be pursued; the Commission has already paved a way towards influencing and enabling the development of international law.

On the institutional front, the introduction of the High Representative for Foreign Affairs and Security Policy, the 'permanent' President of the European Council and the European External Action Service (EEAS) enable actions to be seen as solely 'European' and create a clearer distinction between action of the Member States and that of the EU. These three new institutional aspects to the EU all contribute to one of the overriding aims of Lisbon; to create clarity and consistency in the global role of the EU. The various roles of the High Representative as Vice President of the Commission, Chair of the Foreign Affairs Council and representing the Union on matters of foreign and security policy pursue this by making a role that has responsibility for this idea of consistency across different areas of external relations. The EEAS has furthermore been created to assist and enable this role to be fulfilled sufficiently.

The Union has created entities that can clearly identify themselves internationally as acting on behalf of the EU and can work towards developing this as a significant role and one which is taken seriously by other international actors. These are institutions, however, that are unique to the Union and the precise capabilities of such actors are likely only to become clear after some experience. The role of such entities is uncertain, for example, as compared to the Commission and its Legal Service, and the role that it developed within the International Law Commission. The European Commission has gradually developed more involvement at the international level but the meaning of such a role, now that there are more dedicated international actors is unclear. With the role of the Commission being seen as quite limited in its remit throughout the project on responsibility, the newly unified Union will perhaps opt for these new dedicated international actors to develop the role of the Union. The role

of the Commission was limited throughout this work to comments only on the previously Community aspect of the Union's action. These new actors represent a newly unified external identity and would be capable of responding on behalf of the EU as a whole. It will be interesting to see what role these new institutions will take on in areas such as interaction with the ILC as compared to the Commission. Perhaps they may be able to pursue the influence of the Union further. It may have more significance, however, for the internal dynamics of the EU in terms of who represents the Union and acts as its voice internationally.

Overall the changes brought in by Lisbon are positive in moving the development of the EU's external legal identity further forward. While the work of the EU within the ILC shows that it was clearly able to garner a role for itself and represent itself internationally, with certain limitations this was only able to go so far. Much of what has been discussed in this paper is, inevitably, based on speculation and interpretation on the influence exerted by the Commission. It is clear that it was able to have some impact, which in itself is significant. This was an influence that was limited, however, and it was always going to be within the limited remit of the Commission and also the limited perspective of the ILC on this project. Perhaps the changes brought in by Lisbon may show some significant steps in pushing this potential for such an international role further forward. It has not taken radical initial steps in this area, however, it has continued work that began a long time ago. Ultimately, the changes brought in by Lisbon have sought to progress the external role of the Union, but they have not changed the unique nature of the EU and the interaction that exists between the Union and its Member States. If anything, the new institutional arrangements and the increased international commitments have created an even more complex arrangement.

Ultimately Lisbon has not fundamentally changed the nature of the EU and the continued involvement of its Member States. The continued importance of the State and the way in which international entities are structured and designed around states, means that in spite of the continued push of the Union towards increased international representation, this is restricted. Ultimately, this is not a development of the Union towards the existence of a State. The changes brought in by Lisbon push the EU towards an increased international identity but not without raising further complex questions in terms of its competence, role and relationship with its Member States. The continued role of Member States with the Union means that the new ideas brought in by Lisbon are not entirely straightforward. The new institutional arrangements, for example, do not necessarily result in a clear and distinct external identity for the Union.

7. CONCLUSION

While the changes brought in by Lisbon will certainly assist in promoting the EU as a global actor, it is argued that the way in which this is really being achieved is from developments that have been much longer-standing. Statements made by the European Commission providing genuine impact upon the

development of an area of 'pure' international law gives some hint as to the potential of the EU as an autonomous actor. The development of the EU as a global actor in its own right, distinct from its Member States, has been developing since the early 1990s. Generally speaking, international organisations and their relationships with Member States have a complex idea of autonomy if the organisation involves a supranational element. This is certainly the case for the EU.

Despite the changes made at Lisbon which point to a greater capacity of the EU to be an international actor in its own right, the way in which the EU acts at the international level will continue to have a strong link to its Member States. On the substance of the ILC's project itself – that of responsibility - the question will continually arise as to whether X or Y action is that of the organisation or of the Member State(s). The contribution of the EU to the work of the ILC has affected the ILC's work and should be regarded as a success on the part of the EU's external identity, as well as a necessary pre-cursor to any developments in external activities where responsibility is likely to be an important consideration. One should not be surprised that the contributions by Member States may on occasion differ from those submitted by the Commission on behalf of the EU, since after all, the formation of an EU external identity does not depend on the full and unanimous agreement of all the Member States on specific issues. It is highly unlikely that the Member States would all come to one view (whether on the responsibility of international organisations or another issue entirely) with the EU and its institutions holding an opposing view. Therefore, it appears that a 'middle way' exists: though the views of the EU as an independent actor and the Member States may on occasion differ, the latter are (at least in general sense) supportive of the progression towards the EU becoming more significant as an international actor. In the area surrounding the ILC, at least, there has been a general acceptance of the EU voicing its opinions and in beginning to contribute to and help to shape the development of international legal principles.

EU EXTERNAL REPRESENTATION IN CONTEXT: ACCESSION TO THE ECHR AS THE FINAL STEP TOWARDS MUTUAL RECOGNITION

Christina Eckes*

1. INTRODUCTION

The European Union (EU)'s accession to the European Convention on Human Rights (ECHR) is the most topical example of participation by the EU in an international legal system. Accession to the ECHR will have largely the same effects as membership in an international organisation. More significantly, the EU will become subject to legally binding judicial decisions of the European Court of Human Rights (ECtHR) and it will participate in the statutory bodies of the Council of Europe (Parliamentary Assembly; Committee of Ministers) when they act under the Convention. Both the EU judge in the ECtHR and the EU's participation in the Council of Europe are a form of external representation of the EU.

The EU's accession to the ECHR has been subject of discussion since the 1970s.¹ This discussion culminated in 1994 with the Court of Justice terminating all accession attempts under the old Treaty framework.² The main reason for the Court of Justice giving a negative opinion was that the Court wanted to preserve the autonomy of the EU legal order and its own exclusive jurisdiction over EU law. The situation changed fundamentally on 1 December 2009 with the entry into force of the Lisbon Treaty. Accession has now become possible under EU law. Indeed, it has even become an obligation.³ The negotiation and drafting of the draft accession agreement between July 2010 and June 2011 is an example of coordinated representation of the EU. Choosing representatives on the basis of expertise rather than political affiliation allowed the Union to act externally more unified than could have been expected in the light of the internal political discrepancies.

Yet, many questions remain open. In what way do the two legal regimes have to be adapted to make the EU's accession legally possible and workable in practice? In what way is the EU's position – as it is set out in the draft accession agreement – different from the other Contracting Parties? What are the reasons for the EU's *primus inter pares* position under the Convention and

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¹ See e.g. European Commission, *Memorandum on the accession of the European communities to the Convention for the protection of human rights and fundamental freedoms*, COM (79) 210 final, 2 May 1979, 4 April 1979, Bulletin of the European Communities, supp. 2/79.

² Opinion 2/94 *ECHR Accession* [1996] ECR I-1759.

³ Art. 6(2) TEU 'The Union shall accede...' and Protocol 8. See also on the side of the ECHR: Art. 59(2) ECHR as amended by Protocol 14.

within the Council of Europe? What might be the consequences? How might the relationship between the Court of Justice and the ECtHR change?

2. SETTING THE SCENE: THE *STATUS QUO*

2.1. The Council of Europe, the EU, and the ECHR

Originating in the same post-World War II period, the legal systems developed by Council of Europe and the EU are fundamentally different. The former, by contrast with the latter, has not taken the path of integration but operates on the basis of diplomacy. The Council of Europe's production of norms takes place through the adoption of multilateral international conventions, which cannot be seen as secondary law, but are an expression of the will of the Contracting Parties under international law.

This has not been an impediment for cooperation. These links between the Council of Europe and the EU have progressively been institutionalized.⁴ Coordination between their respective activities has consistently increased.⁵ More and more conventions adopted under the auspices of the Council of Europe are open to the EU.⁶ Yet, this does not in all instances mean that the EU actually becomes a signatory.⁷ The ECHR is the most prominent and topical example of (planned) EU participation in a convention agreed under the auspices of the Council of Europe. It might have had a somewhat slow start after its entering into force in 1953,⁸ but with introduction of the ECtHR and the growing acceptance of individual petition, it developed into *the key legal instrument* of the more than 200 conventions drafted by the Council of Europe.⁹ All 47 Contracting Parties of the Council of Europe are Contracting Parties to the ECHR. Indeed, the ECHR has had a tremendous influence on the development of human rights protection in Europe, including within the EU.

⁴ *E.g.* the Liaison Office of the Council of Europe with the European Union; the head of the European Union delegation to the Council of Europe participates (without voting rights) in all meetings of the Committee of Ministers. See also the reference in now Art. 220 TFEU, which has been in the Founding Treaties since the inception of the EU.

⁵ See a webpage dedicated to the cooperation between the CoE and the EU, available at <http://www.coe.int/t/der/eu_EN.asp>.

⁶ The Complete list of the Council of Europe's treaties gives an overview of all Council of Europe conventions open to the EU, available at <<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>>; indicated in the column 'U'. Notice also the tremendous increase in recent years: 17 of 135 conventions or additional protocols signed between 1949 and 1989 are open to the EU. 34 of 76 conventions or additional protocols signed between 1990 and 2011 are open to the EU.

⁷ Critical: E. Cornu, 'Impact of Council of Europe standards on the European Union', in R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press / Springer forthcoming).

⁸ L. Scheek, 'Diplomatic Intrusions, Dialogues, and Fragile Equilibria: The European court as a Constitutional Actor of the EU', in J. Christoffersen and M. R. Madsen (eds.), *The European court of Human Rights between Law and Politics* (Oxford: Oxford University Press 2011).

⁹ See full list of conventions, available at <<http://conventions.coe.int>>.

At its inception, human rights were the EU's Achilles heel. As is well-known, they had no place in the original Treaties and it took until the early 1970 for the Court of Justice to seriously address this constitutional weakness, and arguably it did so only under pressure from national Constitutional Court.¹⁰ Milestones were the Court of Justice's case law in cases such as *Internationale Handelsgesellschaft* and *Carpenter*,¹¹ as well as the adoption of a codified catalogue of human rights: the Charter of Fundamental Rights. The ECHR has played a great role in this dimension of the EU's constitutionalisation. However, difference should be made between the direct legal impact of the ECHR, before and after accession, and the indirect impact that it has had for a long time on the development of the EU's own human rights standards that originate from a variety of sources.¹² Repeatedly the point has been made that accession to the EU requires states to become Contracting Parties to the ECHR.¹³ However, while in practice this might be true, the EU accession criteria (so-called Copenhagen criteria) do not specifically refer to the ECHR but only to 'human rights' in general. Accession to the ECHR is neither a formal requirement for EU membership, nor does the Commission base its assessment of the state's compliance with human rights on the compliance with the ECHR as the primary indicator. Bruno de Witte and Gabriel Toggenburg point to two possible reasons.¹⁴ First, the Strasbourg enforcement mechanism is not capable of guaranteeing the necessary compliance with human rights, due to the increasing backlog of pending cases and due to the defective implementation of judgments.¹⁵ Second, the substantive scope of the ECHR is too narrow. It is drafted in the spirit of the 1950s, the dynamic interpretation of the ECtHR could only do so much to incorporate social and societal changes. However, as is well known, the Court had acknowledged the special significance of the Convention long before a reference to the ECHR was incorporated into the Treaties.¹⁶ In many cases the Court of Justice uses both general principles of EU law and the ECHR to support its argument.¹⁷ More recently the Court has even

¹⁰ L. Scheek, *supra* note 8.

¹¹ E. Spaventa, 'From Gebhard to Carpenter: Towards a (non-)Economic European Constitution', 41 *Common Market Law Review* (2004) 743.

¹² Most illustrative is probably the reference in Art. 6(3) TEU.

¹³ See e.g.: Committee on Legal Affairs and Human Rights, *The accession of the European Union/European Community to the European Convention on Human Rights*, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Doc. 11533, 18 March 2008, available at <<http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71249/20100324ATT71249EN.pdf>>.

¹⁴ B. de Witte and G. Toggenburg, 'Human Rights and Membership of the EU', in S. Peers and A. Ward (eds.), *The EU Charter of Fundamental Rights* (Oxford: Hart Publishing 2004), pp. 246-273, at 266 et seq.

¹⁵ See on the legitimacy challenges of the Court because of its increasing inability to provide individual remedies: J. Christoffersen, 'Individual and Constitutional Justice: Can the Dynamics of ECHR Adjudication be Reversed?', in J. Christoffersen and M. R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press 2011).

¹⁶ See the classics: Case 4/73 *Nold* [1974] ECR 491; Case 222/84 *Johnston* [1986] ECR 1651, para. 18.

¹⁷ Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-112/00 *Schmidberger* [2003] ECR I-5659.

dropped its earlier 'general principles' or 'source of inspiration' approach. It has started to refer directly to the rights guaranteed under the ECHR.¹⁸

EU accession to the ECHR will place the EU on the same footing as the other Contracting Parties, which are all States. In this regard, it recognizes the particularities of the EU as an integration organisation. This will change the formal influence of the Convention on EU law and in this regard it will be an illustrative example of the influence that international adjudicative bodies may have on the EU legal order. The EU will directly be bound under international law by the ECHR and its interpretation by the ECtHR. At the same time, it demonstrates the implications that EU accession can have for the functioning of a convention regime and its enforcement mechanism (the ECtHR).

2.2. The Court of Justice and Its Concern with Judicial Autonomy

For many years, the Court of Justice has been careful to protect the autonomy of the EU legal order in general and its monopoly of judicial interpretation of EU law in particular. The Court's concern with its own autonomy vis-à-vis the judicial authority of other courts or tribunals has become particularly apparent in its external relations law.¹⁹ It started with Opinion 1/76 on the European Laying-up Fund for Inland Waterway Vessels,²⁰ and the Court of Justice has returned to the autonomy of the EU judiciary several times: in Opinion 1/91 on the European Economic Area (EEA),²¹ in Opinion 2/94 on the accession of the Community to the ECHR,²² and in Opinion 1/00 on the European Common Aviation Area,²³ as well as in the case of *Mox Plant*.²⁴ These cases have been examined in much detail in the literature.²⁵ It is therefore sufficient to limit the discussion to few remarks about the most recent case on autonomy. In Opinion 1/09, on the creation of a unified patent litigation system,²⁶ the autonomy of the EU legal order, and in particular of the EU judiciary, was the decisive argu-

¹⁸ Case C-413/99 *Baumbast* [2002] ECR I-7091, para. 72; Carpenter, *ibid.* at para. 41–42; Case C-200/02 *Kunqian Catherine Zhu Chen* [2004] ECR I-9925, para. 16.

¹⁹ The Court of Justice has also strongly defended the EU's autonomy and its own judicial monopoly internally vis-à-vis the Member States, but this discussion would lead beyond the scope of the present paper.

²⁰ Opinion 1/76 *re draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741. In this case, the CoJ rejected the establishment of a fund tribunal consisting of six of its own judges. It expressed concern about the possibility of conflict of jurisdiction in the event of two parallel preliminary ruling procedures on the interpretation of the agreement (one before the fund tribunal and one before the CoJ) and on the impartiality of those judges that sit on both judicial bodies.

²¹ Opinion 1/91 *re EEA* [1991] ECR I-6079.

²² Opinion 2/94 *re Accession to the ECHR* [1996] ECR I-1759.

²³ Opinion 1/00 *re ECAA* [2002] ECR I-3493, paras. 21, 23 and 26.

²⁴ Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.

²⁵ See most recently: R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press / Springer *forthcoming*); in particular the chapter by J. W. van Rossem, 'The Autonomy of EU Law: More is Less?'

²⁶ Opinion 1/09, *re Unified Patent Litigation System*, 8 March 2011, see in particular paras. 73–89.

ment to declare the draft agreement in question incompatible with EU law. The Court of Justice's main concern in this case was that the newly established European and Community Patents Court would take over powers of the Member States, including making references to the Court of Justice under Article 267 TFEU in disputes concerning European and Community patents.²⁷ Hence, the case concerned not only the role of the Court of Justice but also to the EU law functions of the courts of the Member States. It also demonstrated that the Court of Justice continues to attach great importance to the autonomy of the EU's judicial system. In the EEA Opinion in 1991, the Court confirmed as a matter of principle that the EU can be a party to an international agreement that sets up a judicial disputes mechanism and that the Court of Justice would be bound by that judicial mechanism's interpretation of the international agreement.²⁸ For the present discussion two points are of importance: First, the Court of Justice has not so far accepted the *legal authority* of any external judicial mechanism to interpret EU law.²⁹ Second, the greatest obstacle appears to have been the fear that the tasks or authority of the EU Courts or of the courts of the Member States when exercising a function under EU law might be influenced. In the past, this has been either because another judicial mechanism might be placed in the position to give *binding* rulings on issues of EU law³⁰ or because the judicial cooperation between the EU Courts and the courts of its Member States might be influenced.³¹

In recent years, the autonomy of domestic structures has come further under pressure with the increasing quantity and quality (impact) of cross-border activities in a globalized world. International human rights regimes are seen as having a particularly far-reaching impact on the autonomy (sovereignty if you will) of States.³² The same will be true for the EU after it has acceded to the ECHR as party on the same footing as States. Furthermore, the ECHR is exceptional amongst international human rights regimes. It has developed into a 'constitutional instrument of European public order'.³³ Yet, the EU's accession

²⁷ *Ibid.*, paras. 80-81.

²⁸ See *supra* note 21, paras. 39-40: The EU's 'capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions'.

²⁹ The WTO Dispute Settlement Mechanism has given interpretations of EU law for the purpose of reviewing EU law as to its conformity with WTO law. This is an example of what international courts call 'treatment of national law as facts'. It does not concern the question of ultimate authority. Further as is well known, the Court of Justice holds WTO law and decisions of the Dispute Settlement Mechanism at arm length by not considering them directly effective. See for both: C. Eckes, 'The European Court of Justice and (Quasi-) Judicial Bodies of International Organisations', in R. A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press / Springer forthcoming).

³⁰ *Ibid.*, at 33-36.

³¹ See *supra* note 26.

³² C.M. Wotopka and K. Tsutsui, 'Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001', 23 *Sociological Forum* (2008) 4, 724 et seq.

³³ See: ECtHR, *Loizidou v. Turkey* (Preliminary Objections), ECHR (1995) Series A. No. 310, para. 75; ECtHR, *Bosphorus Airways v. Ireland*, ECHR (2005), Appl. No. 45036/98; ECtHR,

to the ECHR might be the first time for the Court of Justice to accept the binding internal force of the decisions of an external judicial authority.

2.3. Strasbourg Case-Law and the European Union

Even before the EU's accession, the judicial bodies of the Convention, the Commission and the Court, have been concerned with EU law numerous times. They have always applied general rules of successive treaty accession. This means in principle that in the event of a conflict the later treaty prevails (Articles 30, 42 and 59 Vienna Convention on the Law of Treaties (VCLT)). Purely chronologically, the ECHR would be the first treaty for the EU Member States and the EU Treaties would be successive treaties. However, states remain responsible under the first treaty if the later treaty is concluded between different parties ('*res inter alias acta*'; Article 30(4)(b) VCLT). This appears to be the approach of the ECtHR to EU law since it continues to hold the EU Member States responsible under the ECHR.³⁴ The Strasbourg bodies have also stated repeatedly that in conformity with general international law, no action could be brought against the Union (at the time: the Communities) because it was not a party to the Convention.³⁵

The ECtHR deals implicitly or explicitly with EU law more often than one would expect. In several cases, it scrutinized EU law in surprising detail.³⁶ To give the gist of the relevant case-law of the ECtHR: pre-EU-accession Member States retain responsibility for their acts, including those adopted within the context of EU law, but acts adopted by the EU institutions proper fall outside of the *ratione personae* of the Convention. For instance, Member States remain responsible for primary EU law as the consequences of a treaty, in the adoption of which they have been involved.³⁷ Yet, the ECtHR has not so far imposed a sanction on the EU Member States collectively because they remain responsible for the international organization to which they have delegated authority, even though it has dealt with a number of cases in which such collective responsibility was alleged.³⁸ It is further possible to bring an application against a (particular) Member State for implementing EU law, irrespective of whether that state had any margin of discretion.³⁹ If the state had no margin of discre-

Behrami & Behrami v. France, ECHR (2007), Appl. No. 71412/01; ECtHR, *Saramati v. France, Germany and Norway* (GC), ECHR (2007), Appl. Nr. 78166/01, para. 145.

³⁴ Commission, *Mr X and Mrs X v Federal Republic of Germany*, ECHR (1958), Appl. No. 235/56, Yearbook 2, at 256; Commission, *Austria v. Italy*, ECHR (1961), Appl. No. 788/60, Yearbook 4, at 116.

³⁵ Commission, *Confédération Française Démocratique du Travail v. the European Communities*, alternatively: their Member States a) jointly and b) severally, Appl. No. 8030/77.

³⁶ C. Eckes, *supra* note 29.

³⁷ ECtHR, *Matthews v. the United Kingdom*, ECHR (1999), Appl. No. 24833/94.

³⁸ ECtHR, *Soc Guérin Automobiles v 15 EU Member States*, ECHR (2000), Appl. No. 51717/99; ECtHR, *Segi ea and Gestoras Pro Amnestia v 15 EU Member States*, ECHR (2002), Appl. No. 6422/02; ECtHR, *Senator Lines v 15 EU Member States*, ECHR (2004), Appl. No. 56672/00.

³⁹ Wide margin of discretion: ECtHR, *Cantoni v. France*, ECHR (1996), Appl. No. 17862/91 – on the merits: no violation; see however: Commission, *Etienne Tête v. France*, ECHR (1987),

tion, a rebuttable presumption of equivalent protection applies which leads the ECtHR to exercise full judicial review only if the protection under EU law proved to be ‘manifestly deficient’ in the individual case (the *Bosphorus* presumption⁴⁰). The present situation does not exclude gaps where the act is an act of the EU rather than its Member States – be it the implementation or adoption of secondary EU law. A case in point is *Connolly*, which concerned the application of an employee of the European Commission, who challenged a disciplinary procedure that had resulted in the suspension of the applicant from work.⁴¹ The ECtHR rejected the admissibility *ratione personae* because it could not establish a link between the ‘supranational act’ and the Contracting Parties.

The decision of whether a Member State can be held responsible for an act of the EU or whether the act exclusively falls within the internal sphere of the EU and cannot therefore be attributed to the Member States, requires consideration of the power division between the EU and its Member States, including the internal workings of the EU. Even at present (pre-accession), the ECtHR regularly gives judgments that are relevant for the EU.⁴² To substantiate this point, it is sufficient to look at 2011 only. The Court gave four rulings which (might have at least) potentially required an interpretation of EU law. First, the case of *Pietro Pianese*⁴³ could have led to a ruling on the lawfulness of the European Arrest Warrant (EAW). The applicant had argued before the Strasbourg Court that his arrest and detention under this EU law instrument was unlawful. However, the case was declared inadmissible under Article 35 ECHR because it was out of time and manifestly ill-founded. Second, in the well-discussed case of *MSS*,⁴⁴ the Strasbourg Court found *inter alia* that Belgium had violated the Convention by acting in compliance with rules of EU asylum law (*Dublin II* Regulation⁴⁵). Belgium had sent an Afghan asylum seeker back to Greece, where he had first entered the EU. This was *in line* with the rules of the *Dublin II* system. However, EU law did not *require* Belgium to act this way.⁴⁶ Hence, even though the *MSS* ruling questioned the blind mutual trust on which the EU asylum law is built (see e.g. the presumption that all EU Member States

Appl. No. 11123/84 – manifestly ill-founded. No margin of discretion: *Bosphorus Airways v. Ireland*, *supra* note 33; see similarly: *Commission, M & Co. v. Federal Republic of Germany*, ECHR (1990), Appl. No. 13258/87.

⁴⁰ *Bosphorus Airways v. Ireland*, *supra* note 33; this presumption was subsequently successfully applied, e.g. in ECtHR, *Biret v 15 EU Member States*, ECHR (2008), Appl. No. 13762/04.

⁴¹ ECtHR, *Connolly vs Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and UK*, ECHR (2008), Appl. No. 73274/01 (available in French only). See similarly: ECtHR, *Boivin v 34 Member States of the Council of Europe*, ECHR (2008), Appl. No. 73250/01.

⁴² See for more examples before 2011: C. Eckes, *supra* note 29.

⁴³ ECtHR, *Pietro Pianese v. Italy and the Netherlands*, ECHR (2011), Appl. No. 14929/08.

⁴⁴ ECtHR, *M.S.S. v. Belgium and Greece*, ECHR (2011), Appl. No. 30696/09. Numerous cases that raise similar allegations are pending before the court.

⁴⁵ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1.

⁴⁶ See the general ‘first entry’ rule in Art. 3(1) Council Regulation (EC) No 343/2003, *ibid.*, and the possibility for Belgium to derogate from that rule and take charge of the application in Art. 3(2) Council Regulation (EC) No 343/2003, *ibid.*

are safe⁴⁷), it did not entail a judgment that the *Dublin II* system as such is unlawful. Third, in the case of *Karoussiotis*⁴⁸ the European Commission had started infringement proceedings against Portugal before the case reached Strasbourg. This raised a new legal question of admissibility: Do EU infringement proceedings constitute 'another procedure of international investigation or settlement' within the meaning of Article 35(2)b ECHR and therefore make the application inadmissible? The Court answered in the negative and found the application admissible. On the merits however, it did not find a violation. Fourth, the case of *Ullens de Schooten and Rezabek*⁴⁹ concerned the refusal to refer a preliminary question to the Court of Justice. The Strasbourg Court ruled that both the Belgian Conseil d'Etat and the Belgian Court de Cassation had given reasons for their refusal. It found that, in this light and having regard to the proceedings as a whole, there had been no violation of the applicants' right to a fair hearing under Article 6(1) ECHR. All these cases raised or potentially raised (first case) legal questions that require the Strasbourg Court to consider issues of EU law proper. Can the refusal to refer to the Court of Justice amount to a violation of Article 6(1) ECHR? What is the nature of the infringement procedures conducted by the European Commission? How much discretion do Member States have to assess whether the asylum procedures of another Member State are in compliance with the ECHR? Are the procedures foreseen in the EAW Framework Directive lawful? The question addressed in the following section is how will this situation change with the EU's accession.

3. REFORM AND ACCESSION: HOW DO THE TWO INFLUENCE EACH OTHER?

3.1. Accession Negotiations and the Implications of the Draft Agreement in Strasbourg

The Lisbon Treaty, on the side of the EU, and Protocol 14, on the side of the ECHR, have paved the way for the EU's accession – at least on a formal institutional level. There are still many steps to take on this way until actual accession. Official talks on the EU's accession to the ECHR started on 7 July 2010. On the side of the Council of Europe, its Steering Committee for Human Rights (CDDH) negotiated with the Commission the necessary legal steps for the EU's accession to the ECHR. The working group that was set up to negotiate accession met 8 times between July 2010 and June 2011. It was composed of Commission representatives and of delegates of 14 member states of the ECHR, 7 of which were EU Member States. Observers from the Committee of Legal Advisers on Public International Law (CADHI) and from the registry of

⁴⁷ Ibid., recital 2.

⁴⁸ ECtHR, *Karoussiotis v. Portugal*, ECHR (2011), Appl. No. 23205/08.

⁴⁹ ECtHR, *Ullens de Schooten and Rezabek v. Belgium*, ECHR (2011), Appl. No. 3989/07 and 38353/07.

the ECtHR were present.⁵⁰ The delegates were chosen because of their personal expertise and did not necessarily represent the position of their country.⁵¹ The working group further consulted civil society and kept the CDDH informed. The Commission representative kept both the European Parliament and the Council informed.⁵² In several ways, the process bears similarities with the convention method in Article 48(3) TEU, which is an attempt to combine political representation with expertise, while allowing for consultation with civil society. The objective could be summarized as: 'less bargaining more deliberation'.⁵³ Three draft texts were agreed in June 2011: the draft accession agreement together with its explanatory report and the draft amendment to the rules of the Committee of Ministers for the supervision of the execution of judgments of the ECtHR.⁵⁴ The Parliamentary Assembly of the Council of Europe and the two European Courts, the ECtHR and the Court of Justice, will give opinions on the three draft instruments for accession before they are adopted by the Committee of Ministers.⁵⁵ Finally even though the Court of Justice was involved in the negotiations, it might still be formally asked under Article 218(11) TFEU to give an opinion on the compatibility of the final agreement with EU law.

On a substantive level, the draft accession agreement sets out amendments to certain provisions of the Convention necessary to accommodate the EU's accession. In many ways, the EU has been *primus inter pares* for many years, even without being a party to the Convention. It enjoys a privileged position at least since the establishment of the presumption of equivalent protection in *Bosphorus*,⁵⁶ which limits review of acts of the Member States implementing EU law to cases, where human rights protection at the EU level was manifestly deficient. In other words, in the common case the ECtHR does not review the compliance with the Convention of EU Member States' acts implementing

⁵⁰ See list of participants of the working meetings of the working group, e.g. Annex I of CDDH (2010) 05 and 010, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CD-DH-UE_meetings_en.asp>.

⁵¹ J. Králová, 'Comments on the Draft Agreement on the Accession of the European Union to the Convention For The Protection Of Human Rights And Fundamental Freedoms', 2 *Czech Yearbook of Public & Private International Law* (2011) 127.

⁵² The Council was informed through its Working Party on Fundamental Rights, Civil Rights and Free Movement of Persons. See Commission mandate of 4 June 2010 (press release available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf>).

⁵³ A. Maurer, 'Less Bargaining – More Deliberation: The Convention Method for Enhancing EU Democracy', 1 *Internationale Politik und Gesellschaft/International Politics and Society* (2003).

⁵⁴ Council of Europe, *Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights*, CDDH-UE(2011)16, 19 July 2011, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp>.

⁵⁵ See a summary of the process, available at <<http://www.coe.int/portal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention>>. See also the 'discussion document' published by the Court of Justice, May 2010 and Joint communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, January 2011, available at <http://curia.europa.eu/jcms/jcms/P_64268/>.

⁵⁶ *Bosphorus Airways v. Ireland*, *supra* note 33.

EU law. The accession agreement recognises the EU's special position and in a different way codifies and institutionalises it.

The first technical legal specificity of the accession agreement is that it modifies the Convention in order to make the EU's accession possible (amendment of Article 59(2) ECHR), while the EU will become a Contracting Party at the moment the agreement enters into force.⁵⁷ This is unusual in the context of the Convention, where accession of a new member has not so far required amending the Convention. Hence, so far amendments and accessions have taken place separately. In this regard, the accession agreement bears technical legal similarities with the accession agreements of (then member) states to the EU.⁵⁸

The Court of Justice's judicial autonomy and indeed even monopoly to interpret EU law, discussed in Section One, were a central concern in the negotiation of the draft agreement.⁵⁹ Accommodating this concern required supplementary interpretative provisions and changes to the procedure before the Strasbourg Court.⁶⁰ The core threat of EU accession for the Court of Justice's judicial autonomy to interpret EU law emanates from two situations: first, the ECtHR might determine who is the right respondent in any given case; and second, the ECtHR might attribute responsibility to and apportion responsibility between the EU and its Member States. In both events, the ECtHR would simply not be able to fully disregard the power division between the EU and its Member States – both in law and in practice.

Attribution of conduct to a Contracting Party is a requirement for finding a violation. The question as to whether an act is the act of the EU or of the Member State(s) goes to the core of EU law. It raises intricate questions of EU law and practice. The particular importance of attribution in the context of EU law can also be seen in the Commission's comments to the International Law Commission (ILC) during the course of drawing up of the Draft Articles on the Responsibility of International Organisations (DARIO)⁶¹ and in the Commentary to DARIO as adopted in August 2011, which refer to the potential existence of

⁵⁷ J. Králová, *supra* note 51, at 131.

⁵⁸ See e.g. for the last enlargement: the Accession Treaty with Bulgaria and Romania, *OJ* 2005 L 157/11.

⁵⁹ T. Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order', 48 *Common Market Law Review* (2011) 1025. See also X. Groussot, T. Lock and Laurent Pech, 'EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011', Foundation Robert Schuman, *Policy Paper European Issues* n°218 (2011), available at <http://www.robert-schuman.eu/doc/questions_europe/qe-218-en.pdf>.

⁶⁰ Most prominently, the co-respondent mechanism was introduced: see *supra* note 58, Art. 3; see para. 54 of the explanatory report to the agreement. See also the explanatory report to Protocol 14, para. 101.

⁶¹ United Nations, Chapter II, 'Attribution of Conduct to an International Organization. Draft Articles on the Responsibility of International Organizations', *Yearbook of the International Law Commission 2011*, Vol. II, Part Two; UN General Assembly, 'Responsibility of international organizations. Comments and Observations Received from international organizations', A/CN.4/545, 25 June 2004, at 13; UN General Assembly, 'Responsibility of international organizations. Comments and observations received from Governments and international organizations', A/CN.4/556, 12 May 2005, 5-6.

a special rule on attribution to the EU of conduct of its Member States when implementing binding acts of the EU.⁶² In the common case, the Member States are in charge of implementing and applying EU legislation. This is for instance the case where national customs authorities implement tariff agreements concluded by the EU. It raises intricate questions of whether this act should be attributed to the Member States (traditional view of public international law) or the EU (which is in actual fact responsible for the substance of the measure).

The complex and dynamic task division between the EU and its Member States could lead the ECtHR to offer an interpretation of substantive EU law binding on the Court of Justice.⁶³ This would challenge the judicial monopoly of the Court of Justice. After accession, both the EU and its Member States are bound under international law by the ECtHR's rulings to which they were parties. The binding force extends to the Court of Justice as an institution of the EU.

The co-respondent mechanism is aimed to avoid this situation. It will 'allow the EU to become a co-respondent to proceedings instituted against one or more of its Member States and, similarly, to allow the EU Member States to become co-respondents to proceedings instituted against the EU.'⁶⁴ The co-respondent mechanism permits the ECtHR to refrain from determining who is the correct respondent or how responsibility should be apportioned. Indeed, it declares joint responsibility of the respondent and co-respondent to be the common case. This is clearly expressed in the explanatory report stating: 'Should the Court find [a] violation, it is expected that it would ordinarily do so jointly against the respondent and the co-respondent(s)'.⁶⁵ The respondent and the co-respondent(s) may further make joint submissions to the Court that responsibility for any given alleged violation should be attributed only to one of them.⁶⁶ This will for most cases unburden the Strasbourg Court from the task of assessing the distribution of competences between the EU and its Member States. However, it does not exclude that the ECtHR *may* choose to apportion responsibility in the individual case, which will require it also to consider attribution. Furthermore, while no High Contracting Party may be *compelled* to become a co-respondent, the Strasbourg Court *may* terminate the participation of the co-respondent.⁶⁷ Both actions of the ECtHR imply a prior decision on how the responsibility should be apportioned or attributed. Hence, the co-respondent mechanism tries to strike a balance between *not* limiting the *formal competences* of the ECtHR but determining how these competences are usually exercised in practice. In any event, in view to the rather cautious approach of the Strasbourg Court in the past it can be expected that the Strasbourg Court

⁶² See: Commentary to Draft Art. 64, *ibid.*, para. 1.

⁶³ See more in detail on the co-respondent mechanism and autonomy: C. Eckes, *supra* note 29.

⁶⁴ Draft revised Explanatory report to draft Agreement on the Accession of the European Union to the European Convention on Human Rights, *supra* note 54, at 11, para. 31.

⁶⁵ *Ibid.*, para. 54.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, paras. 47 and 51.

will not meddle with the complex and dynamic division of powers between the EU and its Member States⁶⁸ where this is not absolutely necessary.

The criteria that should be met for the co-respondent mechanism to come into play are set out in the accession agreement.⁶⁹ The explanations to the accession agreement specifically state the expectation that the co-respondent mechanism will only come into play in very few cases.⁷⁰ Indeed, the view was expressed that there were only three recent cases which 'certainly required the application of the co-respondent mechanism', *i.e.* *Matthews, Bosphorus*, and *Nederlandse Kokkelvisserij*.⁷¹ In the light of the above discussion of the ECtHR's decisions concerning in one way or another EU law, this might appear as a bolt from the blue. However, the expressed expectation is formulated very carefully by stating: 'certainly required' the co-respondent mechanism. This does not exclude that the number of cases in which the mechanism is actually applied will be much greater. Also, the three cases listed are cases in which the Member States had no discretion when implementing EU law. This might be the textbook case where the compatibility of EU law with the Convention is called into question. At the same time, other constellations are conceivable and Article 3(2) of the accession agreement does not exclude participation of the EU in cases where the Member State had discretion.⁷²

Further, if the Court of Justice was not previously involved in a case, in which the EU becomes a co-respondent, the ECtHR may stay the proceedings and give the Court of Justice the opportunity to scrutinise compliance with the Convention. Similar arrangements have earlier been made under the second Agreement on the European Economic Area⁷³ and under the Agreements Establishing the European Common Aviation Area.⁷⁴ It places the Court of Justice in the privileged position of being asked for an interpretation before the ECtHR gives its ruling. The Court's opinion is likely to have an impact on the legal discourse in Strasbourg. It might even frame the further discussion, since parties are invited to submit their observations after the Court of Justice has given its opinion on the case⁷⁵ and will most likely follow in their arguments the Court's approach. On the one hand, these special privileges given to the Court of Justice might surprise in the light of the continuous and high level of human rights protection exercised by authoritative constitutional courts in other High Contracting Parties. No national constitutional court is given the privilege to rule on the compliance of national law with the Convention before the Strasbourg Court gives its judgment. On the other hand, the prior involvement mechanism

⁶⁸ See critical already in 1997: J. Weiler, 'The Division of Competences in the European Union', European Parliament Directorate General for Research, *Working Paper Political Series W-26* (1997), available at <<http://aei.pitt.edu/4907/1/4907.pdf>>.

⁶⁹ See *supra* note 58, Art. 3(2).

⁷⁰ J. Weiler, *supra* note 68, para. 44 and footnote 18 on p. 17.

⁷¹ *Ibid.* *Matthews v. the United Kingdom*, *supra* note n 37; *Bosphorus Airways v. Ireland*, n 33 above; ECtHR, *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v. the Netherlands*, ECHR (2009), Appl. No. 13645/05.

⁷² Art. 3(2) refers 'notably' to the case of no discretion, but is not limited to it.

⁷³ Accepted by the Court of Justice in Opinion 1/92, *re EEA II* [1992] ECR I-2821.

⁷⁴ See *supra* note 23.

⁷⁵ See *supra* note 58, Art. 3(6).

institutionalizes the particular confidence that the ECtHR has in the EU legal order and that it expressed already in *Bosphorus*.

This particular confidence should not only be seen as a necessary consequence of the Court of Justice's concern with its judicial autonomy. It is not *only* a necessary concession for EU accession. There are also substantive considerations in favour, concerning the particularities of the EU legal order and the judicial power in the EU. First of all, the largest share of EU law is implemented or applied by national authorities. This means that it requires national support and involvement in order to become effective. Even though it should be added that criteria for triggering the co-respondent mechanism, and hence the possibility of involving the Court of Justice prior to giving a ruling, require that the implementing Member State had no discretion under EU law.⁷⁶ Secondly, the classic division of tasks between the legislating EU and implementing Member State can also result in a situation where EU law is implicitly or explicitly challenged in Strasbourg in the context of an alleged violation through a national act of implementation before any Court at the EU level has been consulted. National constitutional courts by contrast, even though they often do not need to be consulted to meet the requirement of exhausting all national remedies, will have to rely on the decisions of ordinary national courts on the matter. This is an even stronger argument for involving a court at the EU level before ruling on the compliance of EU law with the Convention. At the same time, the fact that the Court of Justice is called in if it has not previously been involved implies that the Luxembourg Court's involvement could still fix it. However, it will force the Court of Justice to deliver in the individual case. It will not be able to rest on a general presumption of equivalent protection.⁷⁷

Two institutional issues have raised concerns with High Contracting Parties that are not Member States of the EU. The first is the EU judge and the second is the EU's participation in the Council of Europe statutory organs whenever they exercise functions under the Convention. Article 20 ECHR stipulates that each High Contracting Party of the ECHR should have one judge. The EU judge will have equal status to the other judges. She will participate in cases just as the other judges, not only in those, in which the EU acts as a (co-)respondent. She will be elected, like the other judges, from a list of three candidates by the Parliamentary Assembly. Exclusively for the purpose of electing judges, the European Parliament will send a number of MEPs equal to the number of delegates from the largest countries to participate in the Parliamentary Assembly. From the perspective of the ECtHR, it will be the first time that two judges have the same nationality, since it can be expected that the EU judge will have the nationality of one of the EU Member States. Articles 20 and 22 ECHR provide for a number of judges equal to the number of Contracting

⁷⁶ J. Weiler, *supra* note 68, para. 42: '[...] if it appears that the alleged violation [...] calls into question the compatibility of a provision of [...] EU law with the Convention [...]. This would be the case, for instance, if an alleged violation could only have been avoided by a Member State disregarding an obligation under EU law [...]'].

⁷⁷ See below the discussion of *Bosphorus* after accession (in the section on 'Implications for the Union and its Court of Justice', p. 23).

Parties, with one judge elected by Parliamentary Assembly 'with respect to' each Contracting Party. There is hence no nationality requirement.⁷⁸ The nomination will probably be similar to the nomination procedure of judges at the Court of Justice, where nationality is not an explicit requirement.⁷⁹ One could even argue that nationality is not meant to play a role,⁸⁰ but that judges are meant to be chosen on the basis of their independence and qualifications.⁸¹ In practice however, no judge has ever been appointed to the Court of Justice who was not a national of an EU Member State.

The EU is not a state and it will not become a party to the Council of Europe. This concerns the Committee of Ministers when it supervises the execution of judgments and the terms of friendly-settlements in accordance with Articles 39 and 46 ECHR, as well as the Parliamentary Assembly of the Council of Europe when it elects the ECtHR judges pursuant to Article 22 ECHR. On the one hand, the EU's participation in the statutory organs of the Council of Europe is necessary to the extent that they exercise functions under the Convention in order to ensure the EU participation on an equal footing with the other Contracting Parties of the Convention. On the other hand, opening the statutory organs to the EU will for the first time allow participation of an international law actor that is not a member of the of the Council of Europe. This in itself requires an unprecedented institutional adaptation. Non-EU Member States demonstrate great hesitations to allow EU participation in the statutory and, if you will political, organs of the Council of Europe. The potential problem of 'block voting' was raised by representatives of civil society⁸² and by non-EU Member States.⁸³ It was feared that the EU and its Member States (in total 28 out of 48 Parties) might be able to jeopardize the supervising of the execution of judgments (Article 46 ECHR) by taking a co-ordinated position in the event of a vote. Indeed, the rules of the Committee of Ministers for the supervision of the execution of judgments (and of the terms of friendly settlements) had to be adapted to ensure that the exercise of combined votes by the EU and its Member States does not affect the effective functioning of the Committee of Ministers.⁸⁴

⁷⁸ Liechtenstein has appointed Mark Villiger, a Swiss national as the judge with respect to Liechtenstein.

⁷⁹ Art. 19(2) of the TEU provides that the Court of Justice 'shall consist of one judge from each Member State'. This does not require that this judge must have the nationality of that Member State. See also the appointment criteria and procedure in Arts. 253-255 TFEU.

⁸⁰ Art. 18(4) of Protocol No 3 on the statute of the Court of Justice of the European Union, OJ 2010 C 83/210: 'A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.'

⁸¹ See Arts. 253(1) and 254(2) TFEU.

⁸² Council of Europe, *Meeting report on the 8th working meeting 20 to 24 June 2011*, CDDH-UE(2011)15, 24 June 2011, item 2 at para. 4, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_MeetingReports/CDDH-UE_2011_15_RAP_en.pdf>.

⁸³ Council of Europe, *Draft revised Explanatory report to the draft Agreement on the Accession of the European Union to the European Convention on Human Rights*, CDDH-UE(2011)11, 15 June 2011, para. 68, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/CDDH-UE_2011_11%20exp%20report_en.pdf>.

⁸⁴ *Ibid.*, para. 71.

Another remaining (technical) issue, even after formal accession, remains that the EU may make reservations, declarations and derogations under the Convention when it accedes to the ECHR.⁸⁵ The Convention is not *one* comprehensive list of human rights. It consists of multiple protocols⁸⁶ that need to be separately ratified. Contracting Parties to the ECHR, including EU Member States, have chosen not to be bound by particular provisions (reservations).⁸⁷ The accession agreement aims at placing the EU on the same footing as the other Contracting Parties. It foresees accession of the EU to the Convention as amended by Protocols 11 and 14 (as well as the accession agreement itself) and to Protocols 1 and 6.⁸⁸ All EU Member States have ratified the latter two protocols. The other Protocols (4, 7, 12 and 13) are open to the EU, which can ratify them through a unilateral act, which would most likely require unanimity in the Council.⁸⁹ The EU's reservations will determine the scope of protection under the Convention for the whole realm of EU law, including for the Member States when acting within that realm, be it by implementing EU law or even by derogating from EU law.

3.2. Implications for the Member States

This section will examine the implications that the EU's accession to the ECHR might have for the EU Member States. It should be read against the growing resistance in several Member States towards international human rights instruments and the constraints that they place on the national legislator.⁹⁰

The EU's external actions have an immediate impact on its Member States' legal position. A classic example is mixity.⁹¹ Even though under international law Member States' obligations are the same irrespective of whether they are

⁸⁵ See *supra* note 58, para. 27.

⁸⁶ On 1 October 2011, fifteen protocols were open for signature. Protocol 1 (property; education; elections); Protocol 4 (civil imprisonment, free movement, expulsion); Protocol 6 (restriction of death penalty); Protocol 7 (crime and family); Protocol 12 (discrimination); Protocol 13 (complete abolition of death penalty) and of course on procedural issues Protocol 14 (entered into force on 1 June 2010) as well as Protocol 11 (entered into force on 1 November 1998).

⁸⁷ Art. 57 ECHR; see also on the necessary clarity of reservations: ECtHR, *Bellos v Switzerland* (1988) 10 EHRR 466. For a valid reservation see: ECtHR, *Jecius v Lithuania* (2002) 35 EHRR 16. For a list of all declarations and reservations by all Contracting Parties see <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=06/06/2011&CL=ENG&VL=1>>.

⁸⁸ See *supra* note 58, Art. 1(1).

⁸⁹ Compare procedure under Art. 218(10) TFEU.

⁹⁰ L. Scheek, *supra* note 8; UK: Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009, available at <<http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009>>; see also in the press: N. Watt, '28,000 prisoners will have right to vote', *The Guardian*, 5 January 2011, available at <<http://www.guardian.co.uk>>; D. Blaney, 'In Britain the rule of law is – and should remain – paramount', *Mail Online*, 10 February 2012, available at <<http://www.dailymail.co.uk>>. NL: T. Spijkerboer, 'Het Hof in Strasbourg blijft cruciaal', *NRC Handelsblad*, 31 January 2012.

⁹¹ C. Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the "Duty of Cooperation"', in C. Hillion and P. Koutrakos, *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford: Hart Publishing 2010), pp. 87-115.

the only Contracting Parties or whether the EU is equally a party to the international agreement the EU's participation has implications for the Member States' obligations under EU law.⁹² Mixed agreements in combination with the duty of sincere cooperation, codified in Article 4(3) TEU, can severely limit the Member States' room for manoeuvre, including on the international plane.⁹³ Even if international actors are held to act in good faith⁹⁴ there is no equivalent to the principle of sincere cooperation under Article 4(3) TEU.⁹⁵ The latter is seen as transforming 'the status of sovereign States into that of Member States of the European Union.'⁹⁶ Agreements that the EU concludes as mixed agreements bind Member States in the same way as agreements concluded by the Union only (Article 216(2) TFEU). They become part of the EU legal order and enjoy primacy over national law. The Union further has an interest to hold Member States to account under EU law for mixed agreements in their entirety.⁹⁷

Mixity is effectively also what will happen when the EU accedes the ECHR. Article 218(8) TFEU stipulates that EU accession requires ratification by all Member States. In the light of the fact that all Contracting Parties to the ECHR also have to ratify an accession treaty⁹⁸ and that all EU Member States are Contracting Parties to the ECHR – and indeed that it could be argued that being party to the ECHR has *de facto* become an accession requirement – this provision appears to add little in terms of practical value. An interesting question is here how the duty of sincere cooperation will come into play. Is it applicable to the requirement of ratification under Article 218(8) TFEU? Could it also be applicable to the ratification of the accession agreement of the Member States as Contracting Parties of the ECHR? In essence, the question is: could the duty of sincere cooperation oblige the EU Member States, which have put the accession requirement into the Treaties to make EU accession possible, i.e. oblige them to ratify the accession agreements.

The case of *Kramer* might offer some inspiration on this issue.⁹⁹ It concerned the North-East Atlantic Fisheries Convention, which is an international agreement protecting fish stocks in the North-East Atlantic Ocean. In the light of the Treaties, the Accession Act and secondary EU law, the Court found the EU [then Community] to possess the internal powers to take measures for the preservation of the biological resources of the sea. In line with its earlier case

⁹² Ibid.

⁹³ E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations', 47 *Common Market Law Review* (2010) 323.

⁹⁴ Good faith is seen as 'perhaps the most important general principle, underpinning many international legal rules' (M. Shaw, *International Law* (Cambridge: Cambridge University Press 2003), at 97).

⁹⁵ E. Neframi, *supra* note 93.

⁹⁶ E. Neframi, *supra* note 93, at 323.

⁹⁷ See e.g.: Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943, paras. 13-19; Case C-239/03 *Commission v France (Etang de Berre)* [2004] ECR I-9325, paras. 29-30. Both discussed at: E. Neframi, *supra* note 93, at 333.

⁹⁸ Art. 59 ECHR.

⁹⁹ Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279.

law on implied powers,¹⁰⁰ this led the Court to point out that the Member States were under a duty, together with the EU institutions, to use all political and legal means at their disposal in order to ensure participation of the EU [then Community] in the Convention and other agreements covering the same subject matter.¹⁰¹ Another case interesting to consider is *Commission v Council*, in which Court annulled in part the Council declaration of accession of the European Atomic Energy Community (EAEC or Euratom) to the Nuclear Safety Convention because it did not detail the full scope of the EAEC's competencies in the field, which was required by the Convention.¹⁰² The Court found that the Convention covered fields that fell – at least in part – within the competencies of Euratom and annulled the Council's declaration so far. In both cases, accession of the then Community and of Euratom and the duties of the Council and the Member States depended on the extent of the Community and Euratom's powers. In the case of ECHR, this should be the EU's competence for the protection of human rights. The EU's powers to protect human rights have attracted much attention before and since the adoption of the Charter of Fundamental Rights with its horizontal clauses in Articles 51-4.¹⁰³ However irrespective of the precise scope of the EU's competencies to ensure human rights protection vis-à-vis its Member States, accession to the ECHR is since the Treaty of Lisbon not only *within the powers* of the EU but has become an *obligation*. This obligation is addressed to the Union as a whole.¹⁰⁴ This has direct implications for both the EU institutions and the Member States – for the latter at least in combination with the duty of sincere cooperation in Article 4(3) TEU.

Accession of the EU to the ECHR and its resulting participation in the bodies of the Council of Europe further raises questions as regards the exercise of voting rights. Member States might be obliged by the duty of sincere cooperation to coordinate their votes regarding cases in which the EU is a respondent.¹⁰⁵ The most relevant case offering some inspiration on these questions is probably *Commission v. Council* on participation in the Food and Agriculture Organisation (FAO).¹⁰⁶ This case concerned the voting rights on an agreement negotiated within the FAO.¹⁰⁷ There was no dispute on the substantive position of the EU and its Member States; they had actually coordinated a common position throughout the negotiations. The Court's ruling in the FAO case (*Commission v. Council*) indicates how the Union and its Member States can organ-

¹⁰⁰ See in particular: Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

¹⁰¹ *Ibid.*, paras. 44-45.

¹⁰² Case C-29/99 *Commission v. Council* [2002] ECR I-11221.

¹⁰³ See e.g.: R. A. García, 'The General Provisions of the Charter of Fundamental Rights of the European Union', 4 *Jean Monnet Working Paper* (2002).

¹⁰⁴ See *supra* note 3.

¹⁰⁵ This is acknowledged in Art. 8(2) of the accession agreement.

¹⁰⁶ See Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469. See also J. Heliskoski, 'Internal Struggle for International Presence: The Exercise of Voting Rights Within the FAO', in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London: Sweet & Maxwell 2000), at 79-99.

¹⁰⁷ An agreement to promote compliance with international conservation and management measures by vessels fishing on the high seas.

ise representation in an international organisation. The Council and the Commission had concluded an inter-institutional agreement that regulated the exercise of voting rights within FAO. In the particular case, the agreement was found to be binding on the EU institutions. It is important to notice that the Court deduced the binding force of this agreement from the *intention* of the parties and from the *duty of sincere cooperation*.¹⁰⁸ It ruled that from the specific terms of the agreement that the parties had *intended* to make the agreement a binding commitment and that it was a specific expression and fulfilment of the duty of cooperation. For these reasons, the Court also enforced the arrangement. The duty of cooperation could even require the institutions to enter into a binding arrangement on the exercise of voting rights in the Committee of Ministers or in the Parliamentary Assembly when it is dealing with issues related to the EU's position under the Convention.¹⁰⁹ This might also explain the fear of non-EU Member States that the EU and its Member States might resort to block voting. As discussed above, the rules of the Committee of Ministers were adopted to ensure the continuous effective functioning even if the Member States are under an EU law obligation to coordinate their votes.

On a final note, it is important to stress that any comments about the specific scope of the duty of sincere cooperation of the Member States after the EU's accession to the ECHR cannot be more than speculation. The Court's interpretation of the content of the duty of cooperation has very much been dependent on the context and circumstances of the individual case.¹¹⁰ However, what is certain is that the EU's accession to the ECHR is susceptible of entailing different and further-going duties for the Member States under EU law than the Member States' own participation entails under international law.

3.3. Implications for the Union and its Court of Justice

Rather than making the EU more of a 'human rights organization'¹¹¹ comparable to the ECHR, accession will place the EU in a position similar to the other Contracting Parties, which are all states. Hence, the EU is accepted to join on equal footing with all state parties an international instrument as important in reach and influence as the Convention. This in itself is a success for the EU, confirming – as do many interactions with international organisations and third countries – its particularity as an *integration* organisation.

Pre-accession the EU is not itself directly bound by the Convention, either under international law or under EU law. However, not only has the Court of Justice given great consideration to the Convention, but also the EU Treaties

¹⁰⁸ Commission v Council (FAO), *supra* note 106, paras. 49-50. See on the relevance on intention: T. Beukers, *Law, Practice and Convention in the Constitution of the European Union*, doctoral thesis, defended on 21 April 2011, at 212 and 242.

¹⁰⁹ With regard to the supervision of the execution of judgments of the ECtHR this might of course be less relevant.

¹¹⁰ C. Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"', 2 *CLEER Working Papers* (2009), p. 8 et seq.

¹¹¹ A. Rosas, 'Is the EU a Human Rights Organisation?', 1 *CLEER Working Papers* (2011).

and the Charter of Fundamental Rights all three include references to the Convention.¹¹² The Charter – after much discussion¹¹³ – also specifically refers to the case law of the ECtHR. In the light of Article 6(3) TEU in particular, it would be contrary to EU law to disregard the Convention. At the same time, ‘giving due account to’ and being legally bound by the provisions of the ECHR, as authoritatively interpreted by the ECtHR, remains an important legal difference. This was demonstrated most impressively by the Court of Justice’s *Kadi* ruling.¹¹⁴ Even though before 2008 the Court had in settled case-law given due account to UN Security Council Resolutions¹¹⁵ it chose to rely on the fact that the EU is not a member of the UN and is therefore not directly bound by its Charter or its Security Council Resolutions.¹¹⁶ However, some¹¹⁷ made a comparison between the Court of Justice’s ruling in the case of *Kadi* and the US Supreme Court’s ruling in the case of *Medellin*.¹¹⁸ This comparison appears misguided. In *Kadi*, the Court of Justice rejected within the domestic legal order the binding force of a resolution – arguably even an *ultra vires* decision – adopted by the Security Council, a *political organ* to impose far-reaching human rights *restrictions* on a list of identified individuals. Additionally, the EU was not itself bound even under international law since it is not a member of the UN. In *Medellin*, the US Supreme Court rejected the binding force of a ruling of the International Court of Justice, a *judicial organ*, that could indeed have led to a higher level of human rights *protection* if it had been applied by the US Supreme Court. In the relationship between the Court of Justice and the ECtHR the situation is much closer to *Medellin*. If in a hypothetical case the Court of Justice rejected the binding force of a ruling of the ECtHR that would offer the individual better protection than EU law, the same outrage as the one expressed with regard to *Medellin* would be justified – particularly post-accession!

After accession the ECtHR’s decisions will be formally binding on the Union as a matter of international law. This could in an extreme case result in a finding of non-compliance if the Court of Justice rejects an interpretation of the ECtHR of internal matters of EU law. However, it seems that in most cases it will be possible to reconcile an interpretative difference in a way that does not result in non-compliance. Yet, reconciliation will become slightly more difficult as the Union will logically have to lose its *Bosphorus* privilege – presumption of equivalent protection. *Bosphorus* set out a *general* presumption of equivalent protection. This general presumption cannot be applied to a *particular* opinion that the Court of Justice has given under the prior involvement procedure. After receiving the Court of Justice’s opinion, the Strasbourg Court will scrutinise

¹¹² See Arts. 6(2) and (3) TEU, Arts. 218(6)(a)(ii) and (8) TFEU; Arts. 1 and 2 of Protocol 8 and Protocol 24. Arts. 52(3) and 53 of the Charter of Fundamental Rights.

¹¹³ L. Scheek, *supra* note 8, at 172.

¹¹⁴ Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351.

¹¹⁵ See e.g.: Case C-84/95 *Bosphorus* [1996] ECR I-3953; Case C-124/95 *Centro-Com* [1997] ECR I-81.

¹¹⁶ *Kadi and Al Barakaat*, *supra* note 114, para. 294: ‘special importance’ not ‘binding force’.

¹¹⁷ See before all: G. de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’, 51 *Harvard International Law Journal* (2010).

¹¹⁸ US Supreme Court (2008) *Medellin v. Texas*, 552 U.S. 491.

and rule whether the Convention has been breached. It can only find the specific opinion either correct (offering equivalent protection; no violation) or incorrect (misinterpreting the Convention; violation). It cannot hide behind general considerations of the human rights protection in the EU legal order.

Further, the risk of divergent case law of the ECtHR and the Court of Justice that lead to differences of interpretation between the ECHR and the Charter of Fundamental Rights is often raised as a source of conflict. The latter is since 1 December 2009 the binding catalogue of human rights in the EU legal order.¹¹⁹ It is enforceable before the Court of Justice, even though there is no direct procedure for individual complaints. The potential for a significant conflict in practice appears low. First, the Charter was drawn up with an eye on potential conflicts and with the intention to avoid them. This becomes probably most apparent in the general provisions. Article 52(3) of the Charter links the rights under the Charter to the rights under the Convention. Article 53 specifically excludes that the Charter might be interpreted more restrictively than the Convention. Additionally, the Charter also substantively assimilates part of the evolutions brought about by the ECtHR's case law. Second and even more importantly, the Court has demonstrated a great level of deference towards each other. It is true that even after accession, the Court of Justice will still have to determine the binding force and status of the ECtHR's rulings within the EU legal order. As with other international law, the reception of the ECHR and the rulings of the ECtHR in the domestic legal order are determined by domestic law, i.e. the EU Treaties. So far however, the two Courts have shown great respect for each other's decisions.¹²⁰ The ECtHR has had regard to 'specific characteristics of the Union and the Union law'.¹²¹ In the case of *Bosphorus*, it went as far as establishing the presumption that the protection of human rights under the EU law is equivalent to the protection under the Convention, if no manifest deficiency is shown in the individual case. This presumption applies to situations where the ECtHR has jurisdiction because there are national measures implementing EU law but the Member State did not have any discretion. The draft agreement equally recognises the 'specific legal order' of the EU.¹²² Yet, while the rules on the side of the ECtHR appear to be fairly detailed there are no guidelines for the Court of Justice how to deal with decisions of the ECtHR. Protocol 8 annexed to the Lisbon Treaty only stipulates that accession may affect neither the competence division between the Union and its Member States (Article 2) nor the exclusive jurisdiction of the Court of Justice (Article 3). However, whatever the exact status that the Court of Justice will give rulings of the ECtHR after accession it is difficult to see in practice how

¹¹⁹ Art. 6(1) TEU. See also: European Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM (2010) 573/4, Brussels, 19 October 2010.

¹²⁰ Both have repeatedly referred to each other's case law, see e.g.: ECtHR, *Goodwin v UK*, ECHR (2002), Appl. No. 28957/95. One case stands out in which, it could be argued, the Court of Justice departed from the position of the ECtHR: Case C-17/98 *Emesa Sugar* [2000] ECR I-665.

¹²¹ Art. 1 of Protocol 8 relating to Art. 6 (2) TEU dealing with the accession of the Union to the ECHR.

¹²² Final paragraph of the preamble of the draft agreement, see *supra* note 58.

the Court of Justice could in a ‘Union of law’¹²³ follow an argument or give a ruling that openly clashes with the protection of human rights given by the ECtHR. This would be problematic both before accession and after accession and irrespective of whether the EU is a party to the case. At the same time, the *Rechtfertigungsdefizit*¹²⁴ would be much lower if the Court does not accept the ECtHR’s position on competence matters of internal EU law that has no substantive impact on human rights protection. In conclusion, the risk of a potential conflicting interpretation of the ECHR and the Charter would not increase through accession. With the particular mechanism agreed (co-respondent and prior involvement mechanisms) it will be lower than at present. Pre-accession it is conceivable that a national court delivers a decision based on a preliminary ruling of the Court of Justice and that this decision (after national remedies have been exhausted) is taken to the ECtHR which might decide that the country has violated the ECHR. The ECtHR’s ruling on the case could entail the conclusion that the preliminary ruling of the Court of Justice conflicts with the ECHR.

The procedural arrangements in Strasbourg as they were agreed under the draft accession agreement may have implications for EU constitutional law. The compatibility of both primary and secondary EU law can be challenged in Strasbourg¹²⁵ and the co-respondent mechanism applies both.¹²⁶ Yet, an alleged violation of the Convention through primary EU law raises particular problems. The co-respondent mechanism governs and is limited to the relationship between the EU and its Member States. This means that Member States can only become co-respondent in an application alleging a Convention violation through primary EU law if the application is (also) directed against the EU.¹²⁷ They cannot join if only (one or several) Member States are respondent(s). This might not have particular implications for the Convention and its enforcement mechanism but it does have particular implications for the power division between the EU institutions and the Member States. Within the context of EU constitutional law, the fact that the EU may join as a co-respondent and even the Court of Justice may be called upon when primary EU law is at stake will strengthen the position of the EU institutions vis-à-vis the Member States as the founding mothers of the EU Treaties. The Treaty amendment procedure under Article 48 TEU only foresees limited involvement of the EU institutions at the preparatory stage. The European Council is given the most important role. All Treaty amendments need to be agreed by the representative of the Member States.¹²⁸ As to the Court, the Court of Justice’s mandate extends only

¹²³ The EU is committed to the rule of law: see Art. 2 TEU on values; for case law see e.g. Case 294/83 *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339, para. 23; Case 314/85 *Foto-Frost* [1987] ECR 4199, para. 16; Case C-314/91 *Weber v Parliament* [1993] ECR I-1093, para. 8.

¹²⁴ ‘Justification deficit’ – this term is borrowed from: J. Habermas, *Legitimationsprobleme im Spätkapitalismus* (Frankfurt am Main: Suhrkamp 1973).

¹²⁵ See *supra* note 58, comments on Art. 2 at para. 28.

¹²⁶ *Ibid.*, at 17, para. 42.

¹²⁷ *Ibid.*, at 17, para. 43.

¹²⁸ Art. 48(4) TEU.

to 'ensure that in the interpretation and application of the Treaties the law is observed'.¹²⁹ The Court does not under EU law have the power to assess the lawfulness of primary law.¹³⁰ However, this is precisely what will be at stake in Strasbourg if the EU Treaties allegedly stand in conflict with the Convention. Considering that the Court of Justice has elevated in *Kadi* human rights (together with other core principles of EU law) as the 'very foundations' to a layer of constitutional law that ranks above 'ordinary' EU primary law¹³¹ a breach of the ECHR would logically make the EU Treaties unlawful under EU law. This is of course a rather theoretical construction.

On a final note and on a more particular area, problems could arise from the lack of jurisdiction under the Common Foreign and Security Policy (CFSP). This evaluation is different from the decision of the EU institutions to exclude the European External Action Service from the negotiations because it was argued that accession does not affect CFSP. CFSP is a policy area in which, even after Lisbon, the Court of Justice does not have the power to give preliminary rulings and can receive direct actions for review of legality (not interpretation) only as far as they are directed against a very specific measure, namely CFSP decisions providing for restrictive measures against natural or legal persons within the meaning of Article 215(2) TFEU.¹³² This lack of jurisdiction of the Court of Justice could potentially raise problems if a case is brought to the ECtHR, which is not unlikely. First, the EU is carrying out multiple peace keeping missions under the CFSP that could lead to potential complaints before the ECtHR. This is implicitly confirmed by the ECtHR's case law on peace keeping missions, where the EU was not involved.¹³³ Second, CFSP decisions providing for restrictive measures against individuals could give rise to questions of interpretation relating to an alleged breach of human rights that the Court of Justice cannot receive. *Segi*¹³⁴ is here the case in point. In this case the ECtHR was asked to rule on a CFSP listing of *Segi* as a terrorist suspect. Because the applicant had not been targeted with operational measures (asset freezing) but had only been listed as a terrorist suspect, the ECtHR did not find a violation. Yet, this could be different in any new case. One could further think of different scenarios in which a case concerning individual sanctions could reach the Court of Justice. For instance, the interpretation of 'the funds and other financial assets or economic resources'¹³⁵ or whether these funds actually belong to the listed person, similar to the case of *M*.¹³⁶ The Court of Justice's interpretation could then in turn be taken to the ECtHR. Third, as to date, sanc-

¹²⁹ Art. 19 TEU.

¹³⁰ See e.g. Art. 267 TFEU: '*interpretation* of the Treaties' and '*validity* and interpretation of acts of the institutions'.

¹³¹ *Kadi* and *Al Barakaat*, *supra* note 114, para. 304.

¹³² See Art. 275 TFEU.

¹³³ The best example for this is a *Behrami*-type situation. See: *Behrami & Behrami v. France*, *supra* note 33.

¹³⁴ *Segi* *et al* and *Gestoras Pro Amnestia v 15 EU Member States*, *supra* note 38.

¹³⁵ See Art. 2 of the Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ 2001 L 344/93.

¹³⁶ Case C-340/08 *M and Others* [2010] ECR I-3913. This is a case concerning the question of whether the subsistence allowance of a spouse of the listed person was covered.

tions adopted under Article 215(2) TFEU are still based on a pre-Lisbon common position that is governed by pre-Lisbon rules and remains consequently outside of the Court's reach. Fourth, if counter-terrorist sanctions against individuals have taught us anything it is that the EU institutions are willing to interpret their Treaty powers creatively to adopt whatever measure they deem necessary. Hence, CFSP measures of the future could impact on the rights of individuals in ways that we cannot predict today. However particularly in the area of CFSP, EU accession to the ECHR could, from the perspective of the individual, make all the difference between having access to justice or not, since actions of the EU will no longer fall outside the personal scope of the Strasbourg Court's jurisdiction.¹³⁷

4. A STATE-LIKE PLAYER WITH SUPER-STATE-LIKE INFLUENCE: WHAT ARE THE IMPLICATIONS?

The EU's accession to the ECHR is illustrative of the great influence that the EU can have on international legal regimes. Accession required fundamental adaptation (reform if you will) of the Convention and its enforcement mechanism and the need for this adaptation has been recognized and accepted by third countries not only in Protocol 14 but also in the negotiation of the accession agreement. The creation of the co-respondent mechanism and the possibility of involving the Court of Justice in a case pending in Strasbourg are unprecedented. Further, as a more extended consequence it brought changes to the institutional set up of the Council of Europe by allowing the EU as a non-member to participate in its statutory bodies for Convention related activities. At the same time, EU accession will not leave the EU legal order unaffected either. Despite the fact that the ECHR and the rulings of the ECtHR already play an important role in the EU legal order, being legally bound and submitting to the authority of the ECtHR will bring the legal effects of the Convention fully home. The self-created 'arm length of appreciation' that the Court of Justice developed through its case law of taking inspiration from the ECHR for the general principles of EU law will come to an end.

The EU will become a party to the Convention 'on equal footing with the other Contracting Parties'. At the same time, the EU and, in particular its Court of Justice have been given an exceptional position within the Convention system. This reflects the concerns about the Court of Justice's judicial autonomy, expressed in Article 2 of Protocol 8: 'accession of the Union shall not affect the competences of the Union or the powers of its institutions'. From the perspective of the EU, this *primus inter pares* position appears the best solution. Having all the duties of states, but more rights and influence – both during the negotiations and before the Strasbourg Court. This special position is certainly a consequence of the EU's own particularity as an integration organisation (rather than a state). One could either argue that it results from the state dominated nature of international law that is unable to account for a creature as the EU or – if one takes this traditional perspective oneself – one could

¹³⁷ See: Behrami & Behrami v. France, *supra* note 33.

argue it is a result of the '(constitutional?) weakness of the EU'. In the negotiations that led to the draft accession agreement, the Union demonstrated unity of representation. This can be seen as a success. However, the draft accession agreement is of course only the first step. The ratification process will be the next test of the Member States' uniform position on the issue of the EU's accession to the ECHR. At the same time, too much unity might also be perceived as a threat by the other Contracting Parties to the ECHR, which have expressed their concerns about block voting in the Council of Europe.

Yet, Article 2 of Protocol 8 has a second sentence, which should not be forgotten either: 'nothing therein [in the accession agreement] affects the situation of Member States in relation to the European Convention [...]'. The EU's accession to the ECHR cannot fully be appreciated in isolation. It will institutionalize the cooperation between two big players in the multi-layered and compound structures of human rights protection in Europe. However, it would be wrong to think that these are the only two big players and that they are not dependent on the support of national power structures. Resistance towards external human rights constraints has flared up in several EU Member States. The EU could play an important role in lobbying for human rights beyond national boundaries without curtailing democratic self-determination to inexistence. However, it should be careful not to bite off more than it can chew.

A deeper inquiry into the arguments for and against external human rights protection and hence a uniform standard in Europe would go beyond the scope of the present paper. It suffices to say that human rights are a highly sensitive issue. The question of which public authority – the national, EU or EC(t)HR – may decide the applicable standard is not easily decided. Human rights protection differs, both between Member States and between Member States and the EU. Further, human rights are closely interlinked with identity – be it national or European, solidarity, the feeling of belonging, self-determination and ultimately with sovereignty.¹³⁸ Furthermore, the question of who has the authority to determine the appropriate standard is not new but has possibly moved more into the centre of attention. The Court of Justice has more recently demonstrated greater sensitivity towards the national standard of human rights protection¹³⁹ than in the early years.¹⁴⁰ Also, the German Constitutional Court has stressed the limit of European integration in particularly human rights sensitive policy areas.¹⁴¹ Furthermore, the Treaty of Lisbon has strengthened the concept of subsidiarity and 'national identities'.¹⁴² Human rights might be the test of how 'united in diversity' the European Union should be.

¹³⁸ In favour of some form of European identity: J.J.H. Weiler, *The Constitution of Europe "Do the New Clothes have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press 1999). Stressing the central role of nationality: D. Miller, *On Nationality* (Oxford: Clarendon Press 1995); D. Miller, *Citizenship and National Identity* (Cambridge (Mass.): Polity Press 2000).

¹³⁹ Case C-112/00 *Eugen Schmidberger v Austria* [2003] ECR I-5659; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* [2004] ECR I-9609.

¹⁴⁰ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁴¹ GFCC, *Lisbon Treaty judgment*, Decision of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09.

¹⁴² Preamble of the TEU and Art. 4(2) TEU.

THE EU'S EXTERNAL REPRESENTATION AT THE G20 AND THE G20'S IMPACT ON THE EUROPEAN UNION

Jan Wouters, Sven Van Kerckhoven and Jed Odermatt

1. INTRODUCTION

This contribution seeks to address the relationship between the most prominent regional organization, the European Union (EU), and the most intriguing 'global club', the G20. Both entities mark, in their own very different ways, a changing world order in which states are cooperating ever more closely in order to tackle transnational challenges. Both bodies are also undergoing significant change. Since the 2008 global financial crisis, the G20 has been elevated to become the principal body in which issues such as global financial reform are discussed. The EU has also entered into a new 'post-Lisbon' era in which it seeks to play a greater role on the global stage, and to have a greater influence within international bodies. The economic crisis facing Europe has also highlighted the need for coordinated, global responses. The relationship between the G20 and the EU sheds light on the changing roles of both these bodies. The present contribution discusses this ever-developing relationship, with particular attention on how the EU and G20 have responded to the global financial crisis.

The first set of questions deals with the representation of the EU at the G20 meetings. Some EU Member States had a firm place at the cradle of the G7, the predecessor of the current G20. France, Germany, the United Kingdom and Italy were original members of the group. The European Communities (later EU) were first represented in the G7 meeting in London in 1977. In all respects (except for the hosting of a summit) the EU has been a full member of the G7/G8 and its successor the G20. The EU's membership in the G20 is a unique situation, as it is the only non-state member of the club. Interestingly, the EU's G20 membership amplifies the voices of the Member States already at the table, as they also have the strongest voice in drafting the EU's position for G20 meetings. The question arises to what extent smaller EU Member States, being excluded from direct participation in G20 meetings, have a say on the EU position at the G20. Furthermore, the 'double' representation of the four aforementioned EU Member States enables them to a certain extent to bypass the European decision-making process. In order to solve this, EU Member States increasingly coordinate before a G20 summit, but have no control over the behaviour of their peers during such a summit. Contrary to this, there is no coordination in advance of G7/G8 meetings. The question arises here to what extent the EU's basic treaties, as most recently amended by the Lisbon Treaty, prescribe such coordination.

The second part deals with the relationship between the G20 and the EU. The G20 process and its decisions have a strong influence on decisions taken at the European level. The EU has been one of the best students of the G20 class in following up on G20 decisions. This allows the EU to move faster internally: when a regulatory issue is elevated to the G20 level and agreed there, opposition from EU Member States is often made much more difficult. The EU and the G20 thus have the potential to further each other's agendas. Coordinating the response to the crisis through the G20 and its associated bodies (e.g. the Financial Stability Board) has often benefited the EU, which has been able to successfully put its proposals on the G20's agenda. The EU also implements many of the commitments made at the G20, which further enhances its voice within that body. The present contribution examines both sides of this interaction.

2. EU REPRESENTATION AT THE G20

Since the financial crisis of 2008, the G20 has emerged as the premier forum for international economic cooperation.¹ Since then, it has increasingly evolved into a key global playmaker.² This however has not always sat well with the traditional organizations to which the G20 delegates assignments. In relation to the OECD, for example, the G20 bypassed the OECD formal decision-making process when it drafted its grey list on tax havens.³ The question we seek to address here is how the relationship between the G20 as a global 'club' and the EU as the most prominent regional organization has evolved. In particular, we address whether both organizations are rather complementary or rivals and how exactly these organizations have influenced each other.

Let us first look at the representation of the EU at the G20. European interests are represented both directly through the EU's membership of the G20 and, to a certain extent, indirectly through the membership of some of its Member States. The UK, France, Germany, Italy are full members while Spain and the Netherlands have been regularly invited to G20 meetings. The EU is the sole non-state actor which received a seat at the table of the twenty 'most significant economies'.⁴ The EU is both over- and under-represented in the

¹ G20 Leaders *Pittsburgh Summit Declaration* 24-25 September 2009, para. 50.

² J. Wouters, S. Sterckx and T. Corthaut, 'The International Financial Crisis, Global Financial Governance and the European Union', in A. Antoniadis, R. Schuetze, E. Spaventa (eds.), *The European Union and Global Emergencies: Law and Policy Analysis*, Oxford: Hart Publishing (2011), 141, at 147. However, some authors already argue that the G20 has served its purpose and should be replaced, see J. Vestergaard and R.H. Wade, 'The G20 has Served its Purpose and Should be Replaced', 2(2) *Journal of Globalization and Development* (2012) at 18; J.A. Ocampo and J.E. Stiglitz, 'From the G20 to a Global Economic Coordination Council,' 2(2) *Journal of Globalization and Development* (2012) at 16.

³ See J. Wouters and S. Van Kerckhoven, 'The OECD and the G20: an Ever Closer Relationship?' 43(2) *George Washington International Law Review* (2011) at 345.

⁴ G20, 'The Group of Twenty: a History' (2008) Retrieved at <http://www.g20.utoronto.ca/docs/g20history.pdf>.

G20. On the one hand, it only has a total population of around 500 million⁵ of a worldwide population over 7 billion, making up around 7% of worldwide population. In the G20 however this 7% of worldwide population takes up 25% of the seats (observers not included). In terms of economic power, the inclusion of 20 significant economies does not mean that the 20 biggest economies have been included. Other than the European Union, which is the biggest worldwide economy, the other EU G20 members are ranked highly as well (Germany 6th, the United Kingdom 9th, France 10th, and Italy 11th). But Spain (13th), Iran (18th) and Taiwan (20th) are not G20 members, their places are taken by Argentina (22th), Saudi Arabia (24th) and South Africa (26th).⁶ Moreover, other EU countries such as Poland (21st) and the Netherlands (23rd) closely follow. Hence, it is safe to state that in terms of *economic* power, the EU is probably not over-represented.⁷ This stands in contrast with the G7/8 meetings where EU Member States have at least a 50% share of membership (or up to 57% for the G7 meetings).

The G20 meets both on the Leaders level and on the level of Finance ministers and Central Bank Governors. At the Leaders level, both the President of the European Commission and the President of the European Council (currently Mr. Barroso and Mr. Van Rompuy⁸) attend the G20 Leaders meeting. For the meeting of Finance Ministers and Central Bank Governors, the Commissioner for Economic and Monetary Affairs, the rotating Council presidency and the Head of the European Central Bank represent the EU (currently Mr. Rehn, Mr. Bjarne Corydon and Mr. Draghi).

The largest European countries, which are also the most powerful within the EU's decision-making, are the only EU Member States directly represented at the G20. This could lead to a perverse side-effect. When these countries cannot get their preferred policies within the European Council, they may try to push through their policies independently at the G20 level. The European G20 members, for example, already agreed upon lowering the number of Executive Directors at the IMF, a decision which has caused some uproar in the smaller Member States, which are expected to lose their seats.⁹ Still, it has to be noted that this generally seems less likely as the preferred policies often diverge much more at the G20 level than they do at the European level.

⁵ Eurostat, available at: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1>. The latest number is 502,486,499.

⁶ <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (2011 est.)

⁷ This is however less easy to state bearing in mind that both Spain and the Netherlands have been invited regularly to G20 meetings.

⁸ For a more elaborate discussion on how they distribute the tasks, see P. Debaere, 'The Output and Input Dimension of the European Representation in the G20,' 63(2) *Studia Diplomatica*, (2010) 141 at 148-149.

⁹ J. Wouters and S. Van Kerckhoven, 'Europe and the International Monetary Fund: current complexity and future directions', in K.E. Jorgensen and K. Laatikainen (eds.) *Handbook on the EU and International Institutions: Performance, Policy, Power* (London: Routledge, forthcoming).

The inclusion of both the EU and four other European Member States in the G20 gives the EU a rather strong voice and serious leverage to push for its preferred actions at the global level. However, the EU is also challenged by the large number of Europeans around the table.¹⁰ If the Europeans find common ground, the repetition of the same message might irritate other G20 members. And when the EU and the Member States fail to find common ground, the European voice gets lost.¹¹ The next section will deal with the EU's agenda-setting behaviour and coordination between the Member States in more detail.

3. THE RELATIONSHIP BETWEEN THE EU AND THE G20

3.1. European agenda-setting in advance of G20 meetings

The European representation at the G20 thus consists of both EU Member States and the EU as full members. In order to be able to push for a real European agenda, coordination between the different Member States will be necessary. From an EU point of view, the G20 is often perceived as a venue where the EU can try to persuade other countries to follow its own (internal) agenda.¹² This section deals with the coordination and the drafting of a European agenda prior to the G20 meetings.

The coordination procedure in advance of G20 meetings is not formally laid down in the EU treaties,¹³ but discussion takes place in advance of the G20 meetings at Council and European Council level. Coordination efforts in advance of the G20 Leaders meetings have taken place ever since the beginning of the financial crisis. The first G20 meeting took place in Washington on 15 November 2008. In advance of this meeting, the European Council agreed on the principles for the reform of the international financial system and the approach the EU would take at the G20.¹⁴

The second G20 meeting in April 2009 in London was more thoroughly prepared. In February, the European members of the G20, representatives of Spain, the Netherlands and Luxembourg (for other Eurozone countries), representatives of the Commission and the ECB, and the President of the Council (at that time Mr. Topolánek) gathered informally in Berlin. They discussed

¹⁰ Other than the WTO, this is the general case for the European representation in other international organizations, such as for example the IMF, J. Wouters and S. Van Kerckhoven, *Ibid.*

¹¹ P. Debaere *supra* note 8 at 141.

¹² J. Wouters and S. Van Kerckhoven, 'The EU's Internal and External Regulatory Actions after the Outbreak of the 2008 Financial Crisis,' 8(5) *European Company Law* (2011) at 201.

¹³ However, TEU Art. 34, para. 1 lays down the general principle of coordination of Member States' action within international organisations and at international conferences. TEU Art. 34, para.2 imposes more specific obligations for international organisations and international conferences – like the G20 – where not all the Member States participate. Nonetheless, the question to what extent this Article is applicable to the G20 remains open, as it is part of the Treaty Chapter on the EU's common foreign and security policy (CFSP).

¹⁴ European Commission, 'Economic Crisis in Europe: Causes, Consequences and Responses,' 7 *European Economy* (2009) at 57.

aligning their positions in advance of the G20 meeting. In particular they agreed upon a stricter supervision of the International Monetary Fund, more thorough regulation of the financial markets, including 'tax havens', and unification of procedures for international rating agencies.¹⁵ Their common positions were further elaborated during the meeting of the European Council on 19/20 March 2009, resulting in the 'agreed language' with a view to the G20 summit in London. The European Council laid down that the EU and its Member States should as general objectives lead international action necessary to (i) promote a swift return to sustainable economic growth; (ii) strengthen the ability to manage and prevent crises at the global level; (iii) better regulate financial markets; and (iv) support developing countries in responding to the effects of the crisis.¹⁶ Moreover, the Council and the Commission were called upon to ensure appropriate follow-up to the Summit.¹⁷ The major issues on which the EU was able to have its agreed language included in the G20 final declaration are: the substantial increase in IMF,¹⁸ MDB¹⁹ and trade finance²⁰ resources, fiscal stimulus and expansion,²¹ credit markets,²² IMF surveillance,²³ strengthening financial cooperation, supervision and regulation,²⁴ IMF reform,²⁵ resisting protectionism²⁶ and commitment to the MDGs.²⁷ In short, the agenda of the EU laid down in the agreed language, was almost perfectly reflected in the G20 declaration. Only the EU's desire to find consensus on and adopt a Global Charter for Sustainable Economic activity was not laid out at the G20 meeting, where it was still considered as an on-going process.²⁸ The biggest development of this summit was the transformation of the Financial Stability Forum into the Financial Stability Board (FSB). The FSB monitors the international and

¹⁵ Meeting of the European members of the G20 group in Berlin, 23 Feb. 2009, http://europa.eu-un.org/articles/en/article_8511_en.htm.

¹⁶ European Council Presidency *Annex 1: Agreed Language with a view to the G20 Summit in London* 19/20 March 2009. 7880/1/09. Brussels 29 April 2009.

¹⁷ European Council Presidency *Conclusions 19/20 March 2009*. 7880/1/09. Brussels 29 April 2009, para. 22.

¹⁸ G20 Leaders *London Summit Declaration*, 2/4/2009, para. 5, 17; European Council Presidency, *supra* note 17, para. viii.

¹⁹ G20 Leaders *supra* note 18 para. 5, 17; European Council Presidency *supra* note 18 para xxiv.

²⁰ G20 Leaders *supra* note 18 para. 5, 9; European Council Presidency *supra* note 17 para. v.

²¹ G20 Leaders *supra* note 18 para. 6, 11; European Council Presidency *supra* note 17 para. i, ii, iii.

²² G20 Leaders *supra* note 18, para. 8; European Council Presidency *supra* note 17 para. ii.

²³ G20 Leaders *supra* note 18 para.12; European Council Presidency *supra* note 17 para. vii.

²⁴ G20 Leaders *supra* note 18 para. 13, 14; European Council Presidency *supra* note 17 para xi and xii, xvii.

²⁵ G20 Leaders *supra* note 18 para.20, European Council Presidency *supra* note 17. The EU only talked about the IMF, while the G20 included the World bank reform.

²⁶ G20 Leaders *supra* note 18 para 22, 23; European Council Presidency *supra* note 17 para iv.

²⁷ G20 Leaders *supra* note 18 para 25; European Council Presidency *supra* note 17 para xxii.

²⁸ G20 Leaders *supra* note 18 para 21; European Council Presidency *supra* note 17 para x.

national implementation of G20 policies. The EU, which itself was working on establishing the ESFS,²⁹ applauded this development.³⁰

The European Council subsequently called upon the Council and the Commission to prepare the Pittsburgh 2009 G20 meeting thoroughly³¹ ahead of its informal meeting on 17 September 2009. This informal meeting resulted in 'agreed language' for the Pittsburgh G20 summit. The main objectives for the EU were (i) achieving a sustainable recovery; (ii) prioritizing jobs; (iii) swiftly implementing the commitments for financial markets; (iv) promoting responsible remuneration practices in the financial sector; (v), strengthening international financial institutions; (vi) strengthening recovery in the world's poorest countries; (vii) sharing the effort on climate finance; and (viii) promoting energy security.³²

At the G20 meeting in Pittsburgh (24-25 September 2009), the G20 agreed upon the following points within the agreed language of the EU: strong policy responses were maintained but exit strategies would be prepared,³³ a framework for strong, sustainable and balanced growth was launched,³⁴ responsible remuneration practices had to be promoted,³⁵ governance of the global financial architecture³⁶ energy market transparency,³⁷ fighting protectionism and bringing the Doha round to a conclusion,³⁸ an attempt to reach agreement at the

²⁹ In order to establish the EFSF, the following was agreed: The regulations and directives adopted by the European Parliament and the Council on 24 November 2010 were: Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (O.J. 2010 L331/1); Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (O.J. 2010 L331/12); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) (O.J. 2010 L331/48); Regulation No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) (O.J. 2010 L331/84); Directive 2010/78/EU amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (O.J. 2010 L 331/120). See also Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (O.J. 2010 L331/162).

³⁰ G20 Leaders *supra* note 18 para.15; European Council Presidency *supra* note 16 para. xi,xii, xv, xvi, xiii, xvii, xix, xviii, xx.

³¹ European Council Presidency Conclusions 18/19 June 2009, Brussels, 10 July 2009.

³² Informal Meeting of EU Heads of State or Government. Brussels 17 September 2009.

³³ G20 Leaders *supra* note 1 para. 10, 14; Informal Meeting *supra* note 32 para 2.

³⁴ G20 Leaders *supra* note 1 para. 3; Informal Meeting *supra* note 32 para 3.

³⁵ G20 Leaders *supra* note 1 para. 16, 17, Annex para 13.; Informal Meeting *supra* note 32 para 15, 16.

³⁶ G20 Leaders *supra* note 1 para. 18,20 and 21; Informal Meeting *supra* note 32 para 17 (500 billion USD NAB also in G20 outcome), 18.

³⁷ G20 Leaders *supra* note 1 para. 26; Informal Meeting *supra* note 32 para. 29.

³⁸ G20 Leaders *supra* note 1 para. 27, 28; Annex to the G20 Declaration, *A Framework for Strong, Sustainable and Balanced Growth*, para 48-49; Informal Meeting *supra* note 32 para. 4.

Copenhagen COP,³⁹ increase and harmonize accounting standards,⁴⁰ prioritizing jobs⁴¹ and increased regulation and supervision of financial markets.⁴²

However, this time the G20 adopted broad and vague statements on most points, particularly compared to the well-worked out European agreed language. Although the G20 decided to take necessary steps to reduce the development gap, it did not refer to ODA or did not adopt the 'Everything but Arms' initiative as it was agreed upon within the EU.⁴³ The same holds true for climate change, for which the EU had drafted substantial objectives which were not incorporated in the G20 decision.⁴⁴ The G20 did not formally adopt the Basel II framework (as desired by the EU) but referred the matter to the meeting of finance ministers and central bank governors.⁴⁵ On the other hand, the G20 elaborated very extensively on strengthening support for the most vulnerable, which had received far less attention in the EU agreed language.⁴⁶

The conclusion from the 2009 Pittsburgh meeting is that the EU was still able to put all its agreed language on the table and managed to get agreement on the broad principles but not always on the exact concrete objectives, as proven by the failure of officially adopting 'Everything but Arms', Basel II or concrete measures to combat climate change. The European Council afterwards still welcomed the outcome of the G20 Pittsburgh meeting and called for thorough preparation in advance of future G20 meetings.⁴⁷ Moreover, the European Council emphasised that, 'in the context of the framework for strong, sustainable and balanced growth, the IMF and the G20 will have to take fully into account the institutional economic policy set-up of the European Union and the euro area as a whole' and again called upon 'the Council and the Commission to ensure thorough preparation by the European Union of future G20 meetings.'⁴⁸

The next G20 meeting took place in Toronto in June 2010. In March of that year the European Council had identified as focal points for this meeting to ensure a global level playing field regarding financial regulation and supervision⁴⁹ and to address climate change.⁵⁰ In June, the European Council identified agreed language with a main focus on ensuring coordination and internationally consistent measures to the crisis. In particular, it insisted on

³⁹ G20 Leaders *supra* note 1 para. 29; Annex to the G20 Declaration *supra* note 38 para. 22.

⁴⁰ G20 Leaders *supra* note 1; Annex to the G20 Declaration *supra* note 38 para. 12.

⁴¹ Annex to the G20 Declaration *supra* note 38; Informal Meeting *supra* note 32 para. 5-7.

⁴² Annex to the G20 Declaration *supra* note 38 para. 10-15; Informal Meeting *supra* note 32

⁴³ Annex to the G20 Declaration *supra* note 38 para 22, 23; Informal Meeting *supra* note 32 para 20, 21.

⁴⁴ Informal Meeting *supra* note 32 para. 23-26.

⁴⁵ Annex to the G20 Declaration *supra* note 38 para. 13; Informal Meeting *supra* note 32 para. 11.

⁴⁶ Annex to the G20 Declaration *supra* note 39 para. 34-42, Informal Meeting *supra* note 32 para. 20,21.

⁴⁷ European Council Presidency Conclusions 29/30 October 2009, Brussels, 1/10/2009, para. 32

⁴⁸ *Ibid.* para. 32.

⁴⁹ European Council Conclusions 25/26 March 2010, Brussels 26/3/ 2010, para. 6.

⁵⁰ *Ibid.* para 13d.

introducing systems for levies and taxes on financial institutions and on exploring and developing a global financial transaction tax.⁵¹ EU Member States generally favour a so-called Tobin tax, but fear that other major economies would take advantage of the introduction of such a tax in the EU to the detriment of the European economy. The G20 has the potential to solve this issue and align all major economies. Other than this focal point, the EU pointed to the need for coordinated exit strategies, and a reaffirmed commitment regarding the reform of the financial system and IMF governance.⁵² The Toronto Summit consisted of a thorough evaluation of the progress and implementation of the measures agreed upon in earlier summits. The G20 reiterated its support for the Framework for Strong, Sustainable and Balanced Growth, continued its focus on financial sector reform and the reform of the governance of international institutions, and supported the fight against protectionism and promotion of development.⁵³ The EU once more was rather successful.⁵⁴ However, the global tax on financial transactions and the focus on exit strategies failed to attract agreement.

At its meeting in September 2010, the European Council stressed the importance of maintaining strong momentum in the area of financial reform. In this respect, the recent agreement between the European Parliament and the Council on the financial supervision package and the completion of the reform of the regulatory framework by the end of 2011 were expected to strengthen the EU's hand. The European Council further pointed out the need to conclude the WTO Doha negotiations and implement the Framework for Strong, Sustainable and Balanced Growth. It further stressed the need of coordinating positions.⁵⁵

In preparation of the G20 Summit in Seoul, the European Council met on 28-29 October 2010. It decided that the G20 should send a strong signal regarding the implementation of the measures agreed in the Framework for Strong, Sustainable and Balanced Growth. Particular attention should be devoted to rebalancing world growth, confirmation of the Basel Agreement, and to inject momentum in the Doha negotiations.⁵⁶ The European Council further called for the implementation of the decision of the G20 Ministerial Meeting of 23 October 2010 on the reform of the IMF.⁵⁷ Last, it decided that further work on the levies and taxes on financial institutions was needed and coordination between different levy schemes was needed as to avoid double-charging.⁵⁸ At the Seoul Summit, the G20 decided to implement the governance reform at

⁵¹ European Council Conclusions 17 June 2010, Brussels, 17/6/2010, para. 17.

⁵² European Council *supra* note 51 para. 18.

⁵³ G20 Leaders Toronto Summit Final Declaration, 27 June 2010.

⁵⁴ Statement by European Commission President Barroso and European Council President Van Rompuy following the G20 Summit in Toronto (26-27 June 2010) MEMO/10/278.

⁵⁵ European Council Conclusions 16 September 2010, para. 7a.; Annex 1 to the Conclusions: Internal Arrangements to improve the European Union's external policy, para. D.

⁵⁶ European Council Conclusions 28/29 October 2010, para. 4. Brussels 30/11/2010.

⁵⁷ *Ibid.* para. 5

⁵⁸ *Ibid.* para. 6

the IMF,⁵⁹ strengthen financial safety nets and supervision,⁶⁰ bring the Doha round to a successful conclusion,⁶¹ tackle corruption,⁶² and avoid competitive currency devaluations.⁶³ Special attention was devoted to developing countries, and in particular the Least Developed (LDCs) among them.⁶⁴ The G20 further made progress on the Mutual Assessment Process (MAP) of the Framework for Strong Sustainable and Balanced Growth⁶⁵ and launched the Seoul Action Plan with a particular focus on (i) monetary and exchange rate policies; (ii) trade and development policies; (iii) fiscal policies; (iv) financial reforms; and (v) structural reforms.

The EU had a less decisive influence on the agenda. The whole drafting of financial safety nets was not part of the EU deliberations beforehand, but was together with development the big novelty of the Seoul Summit. Significant attention was nonetheless devoted to the Basel Committee, much to the liking of the EU which had already put this point on the agenda several times.⁶⁶ Hence, many of the agenda points of the EU were once more reflected in the G20 decision. However, several non-EU issues made it to the agenda as well and the G20 once more remained silent upon the introduction of a global tax on financial institutions.

The European Council stated in its conclusions of 4 February 2011 that the EU will cooperate with third countries in order to address the volatility of energy prices and will take this work forward within the G20.⁶⁷ This was already a major talking point on the G20 agenda.⁶⁸ This commitment was reiterated at the next European Council meeting, in light of the disaster at Fukushima.⁶⁹ Presidents Van Rompuy and Barroso shared their ideas in advance of the European Council meeting. They called 'for a renewed collective G20 spirit' and considered as EU priorities (i) restoring growth and tackling global imbalance; (ii) making progress on implementing financial market reform; (iii) making the international monetary system more resilient; (iv) boosting trade as the most effective way to support global growth; (v) ensuring food security and promote the G20 development agenda; (vi) continue addressing corruption and

⁵⁹ Ibid. para. 6; G20 Leaders Seoul Summit Document 11/12 November 2010, paras 14-17.

⁶⁰ European Council Conclusions, *supra* note 57 para. 6; G20 Leaders *supra* note 60 para. 19-26.

⁶¹ G20 Leaders Seoul Summit Leaders' Declaration 12 November 2010, para 4; G20 Leaders *supra* note 60 para. 7, 42-45.

⁶² G20 Leaders *supra* note 63 para. 13; G20 Leaders *supra* note 60 para. 39, 69-71 and Annex II: G20 Anti-Corruption Action Plan: G20 Agenda for Action on Combating Corruption, Promoting Market Integrity, and Supporting a Clean Business Environment.

⁶³ G20 Leaders *supra* note 63 para. 9; G20 Leaders *supra* note 60 para. 6.

⁶⁴ G20 Leaders *supra* note 63 para. 5,9,15; G20 Leaders *supra* note 60 para 7,44-54 and Annex 1: Seoul Development Consensus for Shared Growth, Annex II: Multi-Year Action Plan on Development.

⁶⁵ G20 Leaders *supra* note 60 para. 9; G20 Leaders *supra* note 60 para. 1-3, 11; see Policy Commitments by G20 Members.

⁶⁶ G20 Leaders *supra* note 60 para. 27- 33.

⁶⁷ European Council Conclusions 4 February 2011, Brussels 8/3/2011, para. 14.

⁶⁸ G20 Leaders *supra* note 60 para. 61-63.

⁶⁹ European Council Conclusions 24-25 March 2011, Brussels 20/4/2011, para. 31.

energy and climate challenges; and (vii) improving global governance.⁷⁰ Moreover, they referred to the proposal for a financial transaction tax⁷¹ and expressed their conviction that ‘a similar approach among G20 partners can help us all meet global challenges. We will therefore strongly support further discussions by the G20 in this field.’ The preparation and objectives for the next G20 summit were laid down during the European Council meeting of 23 October 2011. The EU once more reiterated that the G20 should work to ensure strong, sustainable and balanced growth.⁷² Specific progress was needed on the reform of the international monetary system by reinforcing coordination, supervision and crisis management, strengthen the regulation and supervision of the financial sector (implementation of Basel II, II-5, III, reform of OTC derivatives, and remuneration principles), tackling volatility of commodity prices, promote sustainable and inclusive growth (implement G20 Development Agenda), resist protectionism and provide momentum into the Doha round, and combat climate change (by mobilizing sources for climate change finance).⁷³

During the G20 Cannes summit of November 2011 (the first one to take place in Europe), special attention was devoted to the Eurozone crisis.⁷⁴ The G20 agreed on an Action Plan for Growth and Jobs. The G20 decided to continue to work towards a more stable and resilient international monetary system, which was also an important point on the EU agenda.⁷⁵ The G20 further agreed to reform of the financial sector.⁷⁶ Agreement was further reached to address commodity price volatility,⁷⁷ improving energy markets,⁷⁸ combat climate change,⁷⁹ avoid protectionism,⁸⁰ address the challenges of development,⁸¹ intensify the fight against corruption,⁸² and to reform global governance for the

⁷⁰ Joint letter of President Van Rompuy and President Barroso on the G20 Summit in Cannes, EUCO 93/11, 7 October 2011.

⁷¹ Common Rules for a Financial Transaction Tax – Frequently Asked Questions, MEMO/11/640, Brussels, 28 September 2011, retrieved at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/640; Financial Transaction Tax: Making the financial sector pay its fair share, IP/11/1085, retrieved at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1085&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁷² European Council Conclusions 23 October 2011, Brussels 30/11/2011, para. 11.

⁷³ *Ibid.* para. 12.

⁷⁴ G20 Leaders Cannes Summit Declaration, paras 2, 11.

⁷⁵ G20 Leaders *Ibid.* paras 9-21. Compare European Council Conclusions, *supra* note 72 paras 8-11.

⁷⁶ G20 Leaders *supra* note 74 paras 22-39. Compare European Council Conclusions, *supra* note 72, paras 12-17.

⁷⁷ G20 Leaders *supra* note 74 para. 40-51. Compare European Council Conclusions, *supra* note 72, paras 18-19.

⁷⁸ G20 Leaders *supra* note 74 para. 52-57. Compare European Council Conclusions, *supra* note 72, para 20.

⁷⁹ G20 Leaders *supra* note 74 para. 58-64. Compare European Council Conclusions, *supra* note 72, para 21.

⁸⁰ G20 Leaders *supra* note 74 para. 65-68. Compare European Council Conclusions, *supra* note 72, paras 22-24.

⁸¹ G20 Leaders *supra* note 74, paras 69-84. Compare European Council Conclusions, *supra* note 72, paras 25-28.

⁸² G20 Leaders, *supra* note 74, para. 85-89. Compare European Council Conclusions, *supra* note 72, para 29.

21st century.⁸³ The Cannes Summit looked hence very rewarding from a European viewpoint, as the issues on the European agenda were all addressed during the Summit. Even the Basel accords were explicitly called upon.⁸⁴ Still, the list of policy commitments especially targeted the European Union and the Euro area to address the deficiencies displayed as the Eurocrisis emerged.⁸⁵ Moreover, the global financial tax once again failed to be agreed upon.⁸⁶ However, the G20 'acknowledge[s] the initiatives in some of our countries to tax the financial sector for various purposes, including a financial transaction tax, inter alia to support development.'⁸⁷ French President Sarkozy, however, pledged to continue pursuing this initiative.⁸⁸

Summarizing, the EU has so far been able to influence the G20 agenda in a fairly satisfactory way. However, it has regularly failed to get specific objectives adopted (such as a global tax on financial institutions and the 'Everything but Arms' initiative) and has also witnessed some issues being included in the agenda which were not part of the European agenda, such as currency wars and global financial safety nets. The next part examines how decisions taken within the G20 impact the EU level.

3.2. Impact of G20 decisions on EU legislation

One area in which the G20 has been considerably influential is the field of financial regulation. The problems flowing from a global financial system, especially the risks created by integrated financial markets, require responses at the global level, a fact which has been recognised by the EU since the outbreak of the financial crisis.⁸⁹ This need for a global response to the crisis is reflected not only in European positions within the G20, but also in the EU's implementation of commitments made within the G20 framework. Additionally, by aligning itself with global rules, the EU makes its own response more effective.⁹⁰ Moreover, the EU legislature continually refers to G20 commitments in EU legislation and policy documents, demonstrating that it takes these commitments seriously. In some fields, such as banking regulation, the EU has been a forerunner. In other fields, such as regulation of OTC derivatives, the EU has lagged behind other G20 members in fulfilling its commitments.

⁸³ G20 Leaders, *supra* note 74, paras 90-94. Compare European Council Conclusions, *supra* note 72, paras 30-32.

⁸⁴ G20 Leaders, *supra* note 74, para. 23.

⁸⁵ G20 Cannes Policy Commitments as annexed to the Cannes Action Plan for Growth and Jobs, 4 November 2011, available at <http://www.g20.utoronto.ca/2011/2011-cannes-action-111104-en.html>.

⁸⁶ Reuters, 4/11/2011, <http://www.reuters.com/article/2011/11/04/g20-tax-idUSN1E7A302520111104>

⁸⁷ G20 Leaders *supra* note 74 para. 28.

⁸⁸ Reuters, *supra* note 86.

⁸⁹ European Commission, *supra* note 14 at 1; Communication from the Commission: *From Financial Crisis to Recovery: A European Framework for Action* (OJ 2010 C76/28), Brussels, 29.10.2008 COM(2008) 706 final.

⁹⁰ European Commission, *ibid.* at 78.

European Systemic Risk Board

The European Systemic Risk Board (ESRB) was established⁹¹ in 2010 to help mitigate systemic risks to financial stability by providing macro-prudential regulation and supervision at the EU level. The ESRB was a recommendation of the *de Larosière Report* which stated that the EU ‘must work with [its] partners to converge towards high global standards, through the IMF, FSF, the Basel committee and G20 processes.’⁹² One of the goals of the ESRB, as outlined in its preamble, is to contribute ‘towards implementing the recommendations of the IMF, the FSB and the Bank for International Settlements (BIS) to the G-20.’⁹³ The ESRB is to cooperate with the IMF and FSB, which are also tasked with mitigating systemic risks.

OTC and commodity derivatives markets

The G20 Cannes Final Declaration stated that ‘Reforming the over the counter derivatives markets is crucial to build a more resilient financial system. All standardized over-the-counter derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate, and centrally cleared, by the end of 2012.’⁹⁴ The topic of OTC derivatives has been a central concern of the G20 since 2008, especially since the lack of regulation in this field is seen as one of the key problems that caused the financial crisis.⁹⁵ The need for greater transparency and standardization in OTC derivatives was also a key recommendation of the *de Larosière Report*.⁹⁶

On 15 September 2010, two years after the collapse of Lehman Brothers, the European Commission proposed a regulation on OTC derivatives,⁹⁷ which it said is ‘fully in line with the EU’s G20 commitments’⁹⁸ and has been inspired by the G20 leader’s commitment to ‘improve transparency and regulatory oversight of over-the-counter derivatives in an internationally consistent and non-discriminatory way.’⁹⁹ Furthermore the Commission added:

⁹¹ Regulation 1092/2010/EU of the European Parliament and of the Council of 24/11/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1.

⁹² Report of The High-Level Group of Financial Supervision in the EU Chaired by Jacques de Larosière, Brussels, 25 February 2009, at 3.

⁹³ Regulation 1092/2010/EU of the European Parliament and of the Council of 24/11/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1, Preamble, Recital 8.

⁹⁴ G20 Leaders *supra* note 76.

⁹⁵ G.F. Peery, *The Post-Reform Guide to Derivatives and Futures*, (Wiley Finance 2012) at 18; J.E Stiglitz, *Freefall: America, Free Markets and the Sinking of the World Economy*, (Norton W.W, 2010).

⁹⁶ Report of The High-Level Group of Financial Supervision in the EU Chaired by Jacques de Larosière, Brussels, 25 February 2009, Recommendation 8.

⁹⁷ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories* (2010).

⁹⁸ European Commission, *Making derivatives markets in Europe safer and more transparent*, Brussels, 15 September 2010. Press Release.

⁹⁹ European Commission *supra* note 97 Explanatory Memorandum, p. 2.

'The European Commission has also gained valuable information by participating in various international fora, in particular the OTC Derivatives Regulators Group and the Basel Committee's Risk Management and Modeling Group. The Commission has recently also gained observer status on the steering committee of the joint CPSS-IOSCO9 working group that is currently reviewing the recommendations for CCPs and preparing recommendations for trade repositories. In addition, the Commission has engaged in frequent dialogue with non-EU authorities, in particular US authorities (the CFTC, the SEC10, the Federal Reserve Bank of New York and the Federal Reserve Board and the US Congress) and is co-chairing a work stream of the Financial Stability Board (FSB) focusing on addressing the challenges related to the implementation of the reporting, clearing and trading obligations agreed at G20 level.'¹⁰⁰

On 9 February 2012 the European Parliament and Council came to an agreement on new rules regulating OTC derivatives¹⁰¹ and on 29 March 2012 the European Parliament approved the proposed regulation with amendments.¹⁰² This Regulation is seen as the EU's equivalent to the US Dodd-Frank Act, and a major step in Europe's implementation of the G20 reform agenda.¹⁰³ On 20 October 2011 the European Commission tabled proposals to revise the Markets in Financial Instruments Directive (MiFID). The proposal is in response to the goals set out by the G20 in Pittsburgh, including 'the need to improve the transparency and oversight of less regulated markets – including derivatives markets'¹⁰⁴ and the goal of ensuring that standardised OTC derivative contracts be cleared through central counterparties (CCP) by the end of 2012. Technical standards are to be developed by European Supervisory Authorities (ESAs) and adopted by the Commission before 30 September 2012.¹⁰⁵

Bank capital and liquidity standards

In their Declaration at the Pittsburgh Summit G20 Leaders 'commit[ted] to developing by end-2010 internationally agreed rules to improve both the quantity and quality of bank capital and to discourage excessive leverage. These rules will be phased in as financial conditions improve and economic recovery is assured, with the aim of implementation by end-2012.' On 20 July 2011 the Commission adopted a proposal to strengthen the regulation of the banking

¹⁰⁰ European Commission *supra* note 97 Explanatory Memorandum, p. 4.

¹⁰¹ European Parliament, '*EP-Council deal on rules for a safe and transparent derivatives market*', 9 February 2012. Press Release.

¹⁰² European Parliament legislative resolution of 29 March 2012 on the proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (COM(2010)0484 – C7-0265/2010 – 2010/0250(COD)).

¹⁰³ Financial Times, '*EU agrees deal on derivatives overhaul*', 9 February 2012. <http://www.ft.com/intl/cms/s/0/8f08ee20-5350-11e1-aafd-00144feabdc0.html#axzz1lybR0OXF>. Accessed 9 February 2012.

¹⁰⁴ European Commission, '*New rules for more efficient, resilient and transparent financial markets in Europe*', Brussels, 20/10/2011. Press Release

¹⁰⁵ See Press Release, '*Regulation on Over-the-Counter Derivatives and Market infrastructures – Frequently Asked Questions*', 29 March 2012. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/232>.

sector.¹⁰⁶ The Commission states that this proposal ‘translates in Europe international standards on bank capital agreed at the G20 level (most commonly known as the Basel III agreement). Europe will be leading on this matter, applying these rules to more than 8000 banks, amounting for 53% of global assets.’¹⁰⁷ So far, however, the CRD, one of the most significant – and also politically sensitive – regulatory measures proposed since the financial crisis, is moving very slowly through the legislative process. On 2 May 2012 an ECOFIN meeting which sought to come to an agreement on new rules failed to find a compromise solution. The United Kingdom has been critical of the Commission proposal, and wants greater flexibility given to national regulators.

Systemically important financial institutions (SIFIs)

At Cannes, G20 Leaders pledged that they were ‘determined to make sure that no financial firm is “too big to fail” and that taxpayers should not bear the costs of resolution.’ G20 Leaders at Pittsburgh committed to act together to ‘[...] create more powerful tools to hold large global firms to account for the risks they take’¹⁰⁸ and to ‘develop resolution tools and frameworks for the effective resolution of financial groups to help mitigate the disruption of financial institution failures and reduce moral hazard in the future.’¹⁰⁹ “Too big to fail” institutions, or Systematically Important Financial Institutions (SIFIs) are seen as another area of reform needed to adequately respond to the crisis, and one that requires co-ordinated reforms in different states. On 4 November 2011 the FSB delivered a set of ‘Policy Measures to Address Systemically Important Financial Institutions’ at the request of the G20. In response to these developments, the European Commission is developing an EU-wide crisis management framework¹¹⁰ to address SIFIs. This work has been done in connection with the work on SIFIs by the Committee on Payment and Settlement Systems (CPSS) and IOSCO. The Commission is set to present legislative proposals and states that they ‘will be accompanied by an impact assessment, and will complete the Commission’s implementation of the principal G20 reforms in the area of financial regulation.’¹¹¹ As yet, the Commission has not formally adopted a legislative

¹⁰⁶ European Commission, Proposal for a Directive of the European Parliament and the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, COM (2011) 453.

¹⁰⁷ European Commission, *Commission wants stronger and more responsible banks in Europe*, 20 July 2011. Press Release.

¹⁰⁸ G20 Leaders *supra* note 1 para. 13.

¹⁰⁹ *Ibid.*

¹¹⁰ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee, the Committee of the Regions and the European Central Bank, An EU Framework for Crisis Management in the Financial Sector, Brussels, 20.10.2010: “The Commission is helping to shape the work of the FSB and the G20, and is also closely monitoring other international developments.” p.3.

¹¹¹ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee, the Committee of the Regions and the European Central

proposal, but has issued a consultation document¹¹² and discussion paper on the technical aspects for a European framework for bank recovery and resolution. According to these papers, the Commission seeks to establish a harmonized regime for the rescue of banks and financial institutions in EU Member States, rather than creating an overarching regulatory body.

Hedge Funds

The commitment to reform of hedge funds made at the G20's Toronto meeting was referred to in the Directive on Alternative Investment Funds Managers (AIFM):¹¹³

'G20 Leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of hedge funds in an internationally consistent and non-discriminatory way.'

The Directive also incorporates principles of the IOSCO *Hedge Funds Oversight* report of 2009, which supported a globally consistent approach. Although they are not considered to have been an immediate cause of the crisis, the regulation and oversight of hedge funds has been a topic raised in G20 discussions. The European Commission President stated that '[the] directive – which coincides with the G20 Summit meeting in Seoul – is another example of how the EU is leading the way in implementing our G20 commitments.'¹¹⁴

Credit Rating Agencies

The 2009 Regulation on Credit Rating Agencies¹¹⁵ was influenced by international commitments to regulate credit rating agencies, also seen as one of the causes of the global financial crisis. The Regulation, which oversees the registration and supervision of credit rating agencies, states that 'Credit rating agencies should, on a voluntary basis, apply the Code of Conduct Fundamentals for credit rating agencies issued by the International Organisation of Securities Commissions (IOSCO Code)' and is broadly based on the Code of Conduct.¹¹⁶

Bank, *An EU Framework for Crisis Management in the Financial Sector*, Brussels, 20.10.2010, p. 3.

¹¹² European Commission, DG Internal Market and Services, Working Document, *Technical Details of a Possible EU Framework for Bank Recover and Resolution*, 6 January 2011.

¹¹³ Directive 2011/61/EU of the European Parliament and the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2010] OJ L171/1.

¹¹⁴ European Commission statement at the occasion of the European Parliament vote on the directive on hedge funds and private equity, MEMO/10/573, 11 November, 2010.

¹¹⁵ Regulation 1060/2009/EC of the European Parliament and the Council of 16 September 2009 on credit rating agencies [2009] OJ L302/1.

¹¹⁶ Code of Conduct Fundamentals for credit rating agencies issued by the International Organisation of Securities Commissions (IOSCO Code).

4. CONCLUSION

The relationship between the EU and the G20 is both symbiotic and problematic. The EU is rather well represented at the G20, and the European coordination in advance of the G20 summits has also proven to be very fruitful. Generally, the EU has been able to put its 'agreed language' on the G20 agenda. However, in some cases, such as a global tax on financial institutions, the G20 did not agree upon the practicalities as they were casted by the EU. Along with influencing the outcomes of G20 meetings, the EU has also managed to implement many of the commitments it made within the G20, especially in the field of financial regulation. The EU sees these issues as closely interlinked.¹¹⁷ By being a forerunner in certain areas of financial reform, and by implementing G20 commitments, the EU's position within the G20 is strengthened, allowing it to have greater influence in future meetings. In some fields, such as creating greater oversight mechanisms, the EU has moved quickly to implement reforms. It is also noteworthy that the EU consistently refers to the G20 commitments in the preambular language of its legislation and policy documents as well as in media statements. This reflects the fact that the EU takes seriously the commitments made at G20 summits.

Nonetheless, there is also a more problematic side to the relationship. There is no policy nor legal basis regarding the European external representation at the G20, as it is the case in the post-Lisbon era with many other international organizations. Consequently, EU Member States at the G20 could still deviate from the 'agreed language' and represent their national interests. Moreover, the stronger EU Member States also have a seat at the G20 table and could hence override smaller EU Member States, which are not only deprived of direct influence at the G20 but as well are less powerful in coming to the 'agreed language'. Some Member States also fear that the G20 might push the EU to move too fast in terms of financial legislation.¹¹⁸ Another question relates to the role of the European Parliament. Although the Parliament has generally supported the EU's positions at the G20, particularly in areas such as pushing for a global financial tax,¹¹⁹ there has been criticism that the institution has been side-lined in the debates.¹²⁰ This feeds into wider criticisms concerning the democratic representation of the G20, which is making decisions with far-reach-

¹¹⁷ European Commission, Communication From the Commission to the European Parliament, The Council, The European Economic and Social Committee and the European Central Bank, Regulating Financial Services for Sustainable Growth, Brussels, COM(2010) 301, 26 June 2010.

¹¹⁸ C. Stoltenberg; B. Crutchfield George; K.A. Lacey and M. Cuthbert, 'The Past Decade of Regulatory Change in the US and EU Capital Market Regimes: An Evolution from National Interests toward International Harmonization with Emerging G-20 Leadership,' 29(2) *Berkeley Journal of International Law*, 577 (2011) at 644.

¹¹⁹ European Parliament resolution of 8 March 2011 on innovative financing at global and European level (2010/2105(INI)) 8 March 2011. The Parliament 'calls on the G20 leaders to speed up the negotiations for an agreement on the minimum common elements of a global FTT and to provide guidance on the desired future of these various kinds of taxation.'

¹²⁰ European Parliament, 'Parliaments must be involved in G20 decision-making, says Othmar Karas' 27 February 2012. Press Release.

ing consequences, and the desire for the Parliament to play a greater role in global affairs.

Both the EU and G20 are interesting bodies in the international arena. The G20 is not a classical international organization like those referred to in Article 220 TFEU¹²¹ and the Lisbon Treaty gives little guidance on the EU's relationship with such bodies. Moreover, the EU is not a state, and this creates problems for bodies such as the G20 in which the EU sits alongside its Member States in a club which is, with the exception of the EU, solely composed of nation states. Nevertheless, the financial crisis and the need for a global response have thrust a great number of issues on the agenda of both these organizations. In many ways the relationship between the two is symbiotic: the EU relies on the G20 to push forward with its agenda on the international stage while it uses G20 commitments to push through its domestic legislative agenda. At the same time, for reasons discussed above, the relationship entails many existing and potential problems. Further research on this inter-organizational dynamic, particularly in fields outside financial regulation, will undoubtedly uncover much more of this complex relationship.

¹²¹ Treaty on the Functioning of the European Union, Article 220(1): '1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.'

