



ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

**ADVISORY REPORT
ON EUROPEAN UNION EXTERNAL ACTION
AND INTERNATIONAL LAW
(TRANSLATION)**

**ADVISORY REPORT NO. 24
THE HAGUE
MAY 2014**

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Request for advice on EU external action, dated 18 December 2012

Declarations of competence in practice

Members of the Advisory Committee on Issues of Public International Law

List of abbreviations

CAVV	Advisory Committee on Issues of Public International Law
EC	European Community
ECHR	European Convention on Human Rights
EMU	Economic and Monetary Union
EU	European Union
Euratom	European Atomic Energy Community
FAO	Food and Agriculture Organisation of the United Nations
ILC	International Law Commission
ILO	International Labour Organisation
RIO/REIO	Regional Integration Organisation / Regional Economic Integration Organisation
Stb	Dutch Bulletin of Acts and Decrees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Trb	Dutch Treaty Series
UN	United Nations
UNCLOS	UN Convention on the Law of the Sea
UNESCO	UN Educational, Scientific and Cultural Organisation
VCLT	Vienna Convention on the Law of Treaties
WCO	World Customs Organisation
WTO	World Trade Organisation

Preface

On 18 December 2012 the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law to prepare an advisory report on the external action of the EU and international law. A key question raised in the request was:

‘What frameworks does international law provide for international action by the EU in being or becoming a party to treaties, including treaties establishing international organisations?’

According to the request for advice, a matter of relevance in this connection is:

‘the extent to which non-EU-member states are bound under international law by the distribution of competences agreed between the EU and its member states.’

The request therefore concerns the international law frameworks that govern the external action of the EU and the *external consequences* of the distribution of competences between the EU and the member states, not the actual distribution of competences itself.

The external action of the EU has greatly intensified over the years. Although there is now an extensive practice covering such matters as the conclusion of treaties by the Union and representation in international organisations, it is very diverse. In many respects, as a far-reaching collaboration of sovereign states playing a major role on the world stage, the EU is a trailblazer and has no comparable peers. This advisory report must therefore navigate uncharted waters, since the consequences of how the EU acts externally have in many respects not yet crystallised under international law.

The group formed within the CAVV to draft the report consisted of Dr C.M. Brölmann (coordinator), Professor P.J. Kuijper (who agreed to be coopted on to the CAVV as a temporary member for the purposes of this report), Professor J.G. Lammers, Professor R.A. Wessel and Dr A.G. Oude Elferink.

The drafting group decided to answer the questions raised in the request for advice in a different order to that in which they were put. The report starts with a summary of the answers to the questions raised in the request.

The CAVV discussed the draft advisory report for the last time at a plenary meeting on 14 April 2014, and the final text was adopted on 12 May 2014.

EXTERNAL ACTION OF THE EUROPEAN UNION AND INTERNATIONAL LAW

Summary¹

Are there general rules or principles of international law that must be observed if the EU wishes to become party to a treaty, particularly a founding treaty, and, once the EU is party to a treaty, during the term of that treaty?

The basic criterion is that the general rules of international law, in particular those of treaty law, must be observed. It follows first of all that it must be possible under the founding treaty in question for the EU to become a party. Moreover, the relevant founding treaty determines the rules to be observed in other respects both by the EU and by other contracting states and organisations.

Often a declaration concerning the distribution of competences between the EU and its member states is requested. What is the legal effect of such a declaration, both in relations between the EU and its member states and with respect to third states?

And, in view of the static nature of a declaration of competence, how should the changing nature of relations within the EU be dealt with in international law?

The declarations of competence relate to the internal distribution of competences between the EU and its member states within the EU's institutional structure. The general rule is that states and organisations may not invoke their internal law as a justification for their failure to perform a treaty obligation (see article 27 of both Vienna Conventions on the Law of Treaties of 1969 and 1986²).

The first question to be addressed is whether the distribution of competences between the EU and its member states qualifies as 'internal law' for the purposes of international law. The CAVV considers that, as the law stands at present, the answer, in principle, is yes. However, in certain circumstances the disclosure of the

¹ The questions raised in the request for advice are dealt with in a different order to ensure the coherence of the answers.

² Vienna Convention on the Law of Treaties of 1969, Vienna, 23 May 1969, *Trb.* 1985-79 ('VCLT 1969'); Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 1986, Vienna, 21 March 1986, *Trb.* 1987-136 ('VCLT 1986').

distribution of competences may to some extent create an obligation for third states to take account of the distribution of competences on the basis of the principle of good faith.

A specific way in which the distribution of competences between the EU and its member states is disclosed is the so-called declaration of competence in the case of mixed agreements, which are issued in certain cases by the Union. This is almost always based on a treaty provision requiring such a declaration. In principle, declarations of competence as such do not qualify as an instrument of international law or a formal source of international law obligations. However, they may have a normative effect in international law because third states can be deemed, on the basis of the principle of good faith, to have taken cognizance and account of the content of the declaration.

This is of particular relevance when third states (or organisations) wish to hold the EU or its member states responsible for the performance of their obligations. The basic criterion in international law is that each treaty party is bound by all obligations of the treaty. Declarations of competence may change this to a certain extent: the principle of good faith means that a third state wishing to secure performance of an obligation must initially hold the party to account which it knows (or should know) is competent under internal EU law.

The principle of good faith relates to (international) legal relations as such. The obligations resulting from good faith therefore apply not only to third states but also to the EU, which is deemed to have a duty to ensure that third states are not left in the dark about who is responsible within the EU framework. Nor are third states bound by the obligation of good faith in cases where, as quite often happens, the distribution of EU competences in a given field changes but the relevant declaration of competence is not modified to reflect this: in such a situation they cannot be expected to be aware (or fully aware) of the distribution of competences under the EU's institutional arrangements. On the contrary, third states are entitled to rely on the declaration of competence previously issued (unless they could and should reasonably have known, on other grounds, of the change in the distribution of competences).

It is sometimes argued that in the absence of a declaration of competence (or in cases where a declaration is 'outdated') third states have a duty, under the principle of good faith, to ascertain who is initially accountable (the organisation or the member states). The argument is based on the fact that other parties are becoming increasingly familiar with the external action of the EU and with the Treaty of Lisbon,³ which contains a clear distribution of competences, including those relating to external relations. However, the CAVV notes that international law practice has not yet crystallised on this subject, let alone given rise to an international law obligation. It seems more likely, therefore, that the principle of good faith legally protects the expectations of third states.

The UN Convention on the Law of the Sea (UNCLOS)⁴ contains an arrangement under which both the EU and its member states will be jointly and severally liable if they fail to provide information in good time about who has responsibility for any specific matter. The CAVV regards this as an adequate provision, which could usefully be adopted in other multilateral treaties as well. Moreover, such an arrangement means that declarations of competence are unnecessary.⁵

To what extent do such rules and principles apply to the status of the EU and its representation (including speaking rights) in international organisations?

What international frameworks determine who should speak on behalf of the EU?

International law has no general rules governing representation in international organisations. These organisations themselves have the power to determine rules on this subject. Where the EU is an actor (i.e. a member or observer) in an international organisation, representation is governed by the rules of the organisation concerned. In practice, however, the complex distribution of competences between the EU and its member states means that the EU is a special case.

³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *Trb.* 2008-11.

⁴ Montego Bay, 10 December 1982, *Trb.* 1984-55.

⁵ Nonetheless, UNCLOS does require such a declaration; Annex IX, article 4.

Who is entitled to speak on behalf of the Union is determined primarily by EU law. Those who are eligible to speak (member states or organs of the Union) should be authorised accordingly so that they can obtain speaking rights in the international organisation in question. This implies that an EU spokesperson (a representative of the EU institutions or of the member states) must be recognised as such by the organisation concerned.

How can compliance with the relevant international law rules and principles best be ensured?

In cases in which both the EU and its member states participate in an international organisation or treaty regime, agreements will have to be made both between the EU and its member states and with the organisation and the other members about participation in negotiations and speaking rights. For the EU and its member states it is worthwhile acting as far as possible as a unit, in order to fulfil internal requirements concerning consistency in EU foreign policy and to achieve maximum effectiveness.

For other states and international organisations it must in any event be clear when the EU is speaking on the basis of its own competences, when it is speaking wholly or partly on behalf the member states, and when the member states are speaking on behalf of the EU.

1. Introduction

Request for advice

In his letter of 18 December 2012 the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken*, CAVV) to prepare an advisory report on the external action of the EU and international law (Annexe I). The request for an advisory report was made in response to the entry into force of the Treaty of Lisbon (the Lisbon Treaty) and the resulting changes to the external representation of the EU. A key question in the request was:

‘What frameworks does international law provide for international action by the EU in being or becoming a party to treaties and conventions, including conventions establishing international organisations?’

According to the request for advice, a matter of relevance in this connection is:

‘to what extent non-member countries of the EU are bound under international law by the distribution of competences agreed between the EU and its member states.’

The request therefore concerns the international law frameworks that govern the external action of the EU and the *external consequences* of the distribution of competences between the EU and its member states, not the actual distribution of competences itself.

Background

In the 55 years since its inception, the EU has played an ever greater role on the world stage. This has been due partly to the ever greater powers conferred on it by the member states and partly to the fact that increasing global interdependence means that in many policy fields in which the EU formerly acted mainly ‘internally’ it now has to act ‘externally’ as well.

As a direct consequence, the EU is becoming a party to existing treaties, is itself initiating more and more new treaties and is playing an active part in a large number of international organisations. In these organisations the EU often acts alongside the member states if they too are members. This raises questions about the distribution of competences within

the institutional framework of the EU and external representation on behalf of the EU. This also raises questions not only for third states⁶ but also for EU member states themselves about the external consequences of the distribution of competences between the EU and its member states: who is responsible or – ultimately – legally liable for failure to perform obligations and to what extent should other states feel bound by the agreements within the EU about the distribution of competences?

Moreover, each international organisation has different rules governing its membership and functioning. These rules seldom coincide with those made within the EU on the distribution of competences. For example, the work of the Arctic Council (to which three EU member states belong) to a large extent affects EU competences in the fields of transport and the environment, but despite attempts by the EU to obtain permanent observer status it has so far only been granted ad hoc observer status. And although the United Nations recently granted enhanced observer status to the EU, it is not yet receptive to the idea of membership for organisations such as the EU.

The often complex *internal* arrangements about the division of competences between the EU and its member states must be implemented *externally* during treaty negotiations or in the decision-making procedures of international organisations, which are not usually geared to the participation of a non-state entity such as the EU. In practice, this tends to create uncertainty not only among representatives of third states but also among the participants on the EU side. Often the time and energy that must be devoted by the latter to mutual coordination frustrates effective EU action on the actual subject at issue in the meeting or negotiations; this EU coordination (or, rather, the dissension necessitating coordination) frequently causes irritation among third states.

An important aim of the Lisbon Treaty was to enhance the Union's independent external representation. In procedural terms it has achieved this, since it has established new structures, including the European External Action Service (EEAS). Understandably, however, the Lisbon Treaty was drafted from an EU perspective, without taking account of the changing context of the international organisations in which an important part of the EU's external action takes place. In many organisations, particularly those working in fields which under EU law do not fall within an exclusive EU competence, the issues and

⁶ In this advisory report the term 'third states' refers to states that are not members of the EU (and not to states that are not party to a treaty or convention).

problems raised here therefore re-occur constantly. In addition, each new EU treaty encourages the member states and the institutions to raise and test or retest certain legal positions, if necessary before the Court of Justice.⁷

Structure of the report

This report deals first with the nature of the EU as an actor in matters of international law, the various forms of treaty relationships entered into by the EU and the role of good faith in international law (chapter 2). It then goes on to address the five questions raised in the request for advice. The questions are dealt with in a different order from that in which they are raised in the request, in order to ensure the mutual coherence of the answers. Chapter 3 contains some key points of the report as a whole in answer to questions 1 and 4. Chapter 4 addresses questions 2 and 5 together (concerning representation and speaking rights). And, finally, chapter 5 answers question 3 (ensuring compliance with international law rules and principles). The report also considers the current state of public international law,⁸ international treaty practice and their interaction.⁹

⁷ See, for example, Case C-137/12, *European Commission v. Council of the European Union*, concerning the legal basis for the decision on the signing by the EU of the European Convention on the legal protection of services based on, or consisting of, conditional access, concluded in the Council of Europe on 24 January 2001. A very recent example is Case C-73/14, *Council of the European Union v. European Commission*, in which the Council requested annulment of the Commission's decision of 29 November 2013 to submit a 'Written statement by the European Commission on behalf of the European Union' to the International Tribunal for the Law of the Sea in Case 21 (request for an advisory opinion on illegal fishing activities). The Council has raised two pleas in law in support of its claim for annulment. First, the Council argues that the Commission's decision infringed the principle of distribution of competences within the EU. It submits in this connection that the positions expressed on behalf of the Union in proceedings before the International Tribunal for the Law of the Sea should have been established by the Council in accordance with article 218 (9) TFEU. Second, the Council maintains that by undertaking the course of action leading to the adoption of the decision, the Commission infringed the principle of sincere cooperation enshrined in article 13 (2) TFEU.

⁸ The terms international law and public international law are used interchangeably in this report.

⁹ This report also takes account of the European law framework, which is, however, treated as a given.

2. The EU as actor in matters of international law

2.1 International legal personality of the EU

Article 1 of the Treaty on European Union (TEU)¹⁰ provides that the Union 'shall replace and succeed the European Community'. Since the entry into force of the Lisbon Treaty the distinction between the European Community (EC) and the European Union (EU) has thus ceased to exist and there is instead a single legal entity. Under article 47 TEU this entity has legal personality, which is taken to mean both internal legal personality (within the member states) and external (international) legal personality. This enables the EU to enter into legal relations with third states and other international organisations if they have recognised it as an international legal person. Often such recognition takes place implicitly through the conclusion of agreements with the EU, which is something almost all countries in the world have done.

As successor to the European Community and accepted as such by third states, the European Union has replaced the EC both as party to the treaties and agreements previously concluded by the EC and in international organisations of which the EC was a member or in which it had observer status. This has put an end to the academic debate on the EU's legal status. For a long time it had not been clear to everyone whether the European Union (as distinct from the European Community) had independent status or whether it was more in the nature of a framework for cooperation between the member states. Politically too the choice was sensitive. The idea is, after all, that an entity which has international legal personality can operate more independently in relation to other states and organisations.

This sensitivity is apparent from Declaration 24 annexed to the Final Act to the Lisbon Treaty: 'The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the member states in the Treaties.'¹¹ Explicit reference to this principle of the 'conferral of powers' by the member states on the EU is made in article 5 TEU. The question of *when* the Union can act with or on behalf of the member states in treaty negotiations and in international organisations remains important in a legal

¹⁰ Maastricht, 7 February 1992 / Lisbon, 13 December 2007, *Trb.* 2008-53 (consolidated version: *OJ* 2012/C 326/01).

¹¹ *OJ* 2010, C 83/335.

as well as a political sense.¹² An internal EU document of October 2011 that lays down rules on the delivery of statements in multilateral organisations¹³ stipulates that account must be taken of the distribution of competences whenever a statement is made.

2.2 Classification of the EU under international law

In international law the EU is treated as an 'international organisation'. The EU itself also categorises its external action in this way. However, the general legal category of international organisation does not entirely do justice to the EU's special characteristics and far-reaching autonomy as an international legal order with substantial external competences. This is one reason why it is sometimes also described as a *sui generis* organisation. Although the special nature of the EU has been accepted, the implications under international law are not always clear. The evolution of international law and international practice in response to the external action of the Union and other organisations of a similar nature is still in full swing. Consequently, this advisory report has to navigate uncharted waters.

An important development in international law practice as a consequence of the existence of international organisations such as the EU is the inclusion of specific provisions in multilateral (founding) treaties on so-called regional economic integration organisations or regional integration organisations (REIO/RIOs). Article 44 of the UN Convention on the Rights of Persons with Disabilities¹⁴ defines this term as follows:

“Regional integration organisation” shall mean an organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.’

Special status is conferred on REIO/RIOs in a number of treaties. For example, the Convention on the Rights of Persons with Disabilities contains special accession requirements and voting conditions for RIOs in article 44. Another example is the

¹² This was recently underlined in the 'discussion' between the Council and the Commission about the legal basis for and composition of the EU negotiating team for a new UN instrument on mercury. See, for example, Geert de Braere, 'Mercury Rising: the European Union and the International Negotiations for a Globally Binding Instrument on Mercury', (2012) 37:5 *European Law Review*, pp. 640-655.

¹³ EU Statements in multilateral organisations - General Arrangements, Council of the European Union, 24 October 2011. For more on this subject see chapter 5.

¹⁴ New York, 13 December 2006, *Trb.* 2007-169.

Constitution of the United Nations Food and Agriculture Organisation (FAO).¹⁵ An important aspect of the special accession conditions is often the obligation to make clear in what field the RIO/REIO is competent to act together with or in the place of the constituent member states – the declaration of competence (see section 3.4.3 et al. below).

A more detailed and much more far-reaching approach has been adopted in the arrangements concerning the EU's accession to the ECHR, about which agreement was reached between negotiators of the member states of the Council of Europe and the European Commission in April 2013 (and which have been recorded in a draft agreement).¹⁶ Article 1 (3) of this draft agreement provides that the European Union will enter into obligations with regard only to:

‘acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf.’

Article 1 (4) then provides that acts or measures of EU member states may be *attributed* only to the member state concerned, even if the act or measure occurs when the member state is implementing the legislation or decisions of the European Union. However, this does not preclude the joint liability of the EU.

2.3 Various forms of treaty relationships entered into by the EU

In the treaty law and practice of the EU a distinction is made between ‘mixed agreements’ (treaties to which the Union and its member states are parties) and ‘exclusive EU agreements’ (treaties to which only the EU is a party, and not the member states). Also important is the distinction between bilateral and multilateral treaties.

Bilateral treaties are treaties between the EU, possibly together with its member states, on the one hand and a state, group of states or international organisation on the other.¹⁷ In

¹⁵ Quebec, 16 October 1945, Stb. I 77 (below: Constitution of the FAO). Article II (9) provides in what cases a REIO may participate in meetings. Article II (10) deals with the voting rights of REIOs.

¹⁶ The draft agreement can be consulted on the Council of Europe's website as part of the report of the Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the accession of the European Union to the European Convention on Human Rights. See: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/471\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/471(2013)008rev2_EN.pdf).

¹⁷ Treaties concluded by the EU (and possibly the member states) with a group of states may be formally classified as multilateral. However, as treaties of this kind can be said to have ‘two’ sides

such cases EU law decides who becomes a party: in the case of a treaty that concerns only fields in which the Union has exclusive competence, the Union may become a party without the member states. Examples are agreements that relate solely to commercial policy or fisheries. In these 'exclusive EU agreements' it is perfectly clear to the other party or parties who is responsible (and possibly legally liable). Where there are shared competences, a 'mixed agreement' is concluded. Association agreements as referred to in article 217 of the Treaty on the Functioning of the European Union (TFEU)¹⁸ are almost always of this category. The fact that the EU, owing to its distribution of competences, is often unable to participate in international agreements other than as an overall entity consisting of organisation and member states is now generally recognised in international law practice. Nonetheless, in these bilateral mixed agreements it may still be unclear to other parties whether the EU or the member state is responsible, although these treaties (unlike multilateral agreements) have been drafted specifically with a view to the participation of the EU and its member states, which together act as though they are a single party. Such treaties do not therefore include declarations of competence.

By contrast, multilateral treaties do not have two clearly distinguishable sides. There are a number of parties, all of whom participate fully in the treaty. The text of the treaty is important in determining whether it is the member states, the EU or both that become a party to it. Many treaties make it possible only for states to be a party, even if the treaty covers fields in which the EU has exclusive competence. This is particularly true of treaties concluded before the EU (or its predecessors in law) obtained far-reaching powers in the relevant field.

Multilateral treaties can therefore be of three kinds. First, there is the uncommon situation of multilateral treaties to which the EU is a party but not the member states.¹⁹ Second, there are multilateral treaties to which the member states are party but not the EU, either because it has no competences in relation to the subject matter of the treaty or because accession is limited to states by the text of the treaty (in such cases the member states

('... of the one part, ... of the other part'), it has been decided that the EU's treaties with a single group of states should be classified as bilateral.

¹⁸ Rome, 25 March 1957 / Lisbon, 13 December 2007, *Trb* 2008-51 (consolidated version: *OJ* 2012, C 326/01).

¹⁹ An example is the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries of 24 October 1978 (*OJ* 1978, L 378). Another is the WTO's Government Procurement Agreement of 15 April 1994 (*Trb.* 1995-130, pp. 438-470).

must be authorised to act on behalf of the EU).²⁰ Finally, there are multilateral treaties to which both the EU and the member states are party,²¹ for example the Agreement establishing the World Trade Organisation (WTO)²² and the UN Convention on the Law of the Sea.²³

It is precisely in this last situation that questions often arise about the legal solidarity of the EU and its member states, each of which is, in principle, an independent party.²⁴ The main question in such cases is who is bound by what obligations and who is (initially) responsible for compliance. In this situation, a declaration of competence is often (but by no means always) submitted, in general because the relevant treaty requires this. However, what effect such a declaration of competence has under international law is not necessarily clear and, moreover, the distribution of competences within the EU is liable to change whereas the declarations themselves are seldom modified.

2.4 External consequences of internal distribution of competences

Where competences are shared within the EU and the treaty is therefore classified as mixed for the purposes of international law, it is in any event apparent for non-EU-member states that the competences are shared. A declaration of competence can also indicate how competences are distributed, although multilateral conventions that require such a declaration seldom attach clear consequences to it. An exception is the UN Convention on the Law of the Sea, as Annex IX specifies the conditions on which international organisations can become signatories, the legal consequences of the mandatory declaration of competence and how performance and liability should be regulated.

Moreover, the distribution of competences tends to change over time, which means that a declaration of competence is no more than a snapshot. It should be noted, however, that

²⁰ Examples are the conventions of the International Labour Organisation.

²¹ Or some but not all of the EU member states.

²² Marrakech, 15 April 1994, *Trb.* 1995-130.

²³ It should be noted that the subjects dealt with by the WTO and the conventions under its umbrella come almost entirely within the exclusive competence of the EU, whereas both the EU and the member states have substantial competences in relation to the subject matter of the UN Convention on the Law of the Sea.

²⁴ In the case of the UN Convention on the Law of the Sea international organisations such as the EU may be signatories if the majority of their member states are also signatories (see article 2 of Annex IX to the Convention).

the EU Court of Justice has imposed a strict duty on the institutions of the EU to cooperate in maintaining its external unity,²⁵ which can be relevant, for example, in issues of liability.

The general question is therefore whether third states and other international organisations can justifiably argue that since the European Union is an independent party they are not affected by the distribution of competences between the organisation and its member states (if there is a declaration of competence the problem shifts to what consequences should be attached to this distribution). At present there is no clear rule in international law requiring third states to treat the EU either as an 'open structure' (and thus to take account of its internal arrangements) or as a 'closed structure'. This creates uncertainty about whether the EU, the member states or both are responsible and, ultimately, legally liable in the event of a failure to perform obligations. This is dealt with in more detail in sections 3.4, 3.5 and 3.6 below.

2.5 The principle of good faith in international law

In the absence of a general rule of this kind, the principle of good faith plays a central role in this advisory report. Most national legal systems recognise such a principle. In international law good faith is generally treated as one of the general principles referred to in the list of sources in article 38 (1) of the Statute of the International Court of Justice.²⁶ Good faith forms the basis of international law doctrines such as *pacta sunt servanda*, estoppel²⁷ and acquiescence.²⁸ As a principle, good faith also serves as a guide for the application of rules and the implementation of international legal obligations of states and non-state legal actors such as international organisations.²⁹ The principle of good faith has

²⁵ See the judgment in Case C-246/07, *European Commission v. Sweden* (the PFOS case), of the Court of Justice (Grand Chamber) of 20 April 2010. This judgment has in fact drawn criticism, as is apparent from the commentaries of member states and in works of legal scholarship.

²⁶ San Francisco, 26 June 1945, *Trb.* 1987-114.

²⁷ If an act or omission of a state appears to be evidence of a position or undertaking by that state on which another state has placed reliance, the former state cannot simply go back on that position or undertaking to the detriment of the other state. The principle of estoppel also means that a state loses the right to protest against the act (or omission) of another state if the latter is entitled to assume through the passage of time that the former has consented to the act (or omission).

²⁸ Where a state commits an act that requires consent by another state and the latter acquiesces in it, this is treated as tacit consent.

²⁹ Steven Reinhold, 'Good Faith in International Law', (2013) 2 *UCL Journal of Law and Jurisprudence*, pp. 40-63; Bonn Research Paper on Public International Law No. 2/2013. Available through SSRN: <http://ssrn.com/abstract=2269746>.

been described by the International Court of Justice as '[o]ne of the basic principles governing the creation and performance of legal obligations.'³⁰

The principle governs (international) legal relationships as such and hence all parties to the same legal relationship. All states have a general duty to act in good faith in law, i.e. with pure motives. All states are also generally entitled to assume that a legal relationship is what it appears when viewed in good faith. In this way, the principle of good faith gives legal weight to the expectations of states about the acts of other states. Whether the 'viewed-in-good-faith' condition is fulfilled depends in turn on the specific circumstances and, for example, the duty of the one state to exercise due diligence and of the other state to provide information. How the application of the good faith principle works out in a specific case therefore depends on the context of the legal relationship in question and the legally relevant facts.

Against this background the five specific questions raised in the request for advice are addressed below. A distinction is sometimes made in this connection between treaties that establish international (intergovernmental) organisations and other treaties, as well as between the EU *becoming* a party and *being* a party during the term of a treaty.

³⁰ Nuclear Tests Case (*Australia v. France; New Zealand v. France*) [1974] ICJ Reports 253 at 268.

3. International law and the EU: the EU as party to treaties and declarations of competence

Are there general rules or principles of international law that must be observed if the EU wishes to become party to a treaty, particularly a founding treaty, and, once the EU is party to a treaty, during the term of that treaty?

Often a declaration concerning the distribution of competences between the EU and its member states is requested. What is the legal effect of such a declaration both in relations between the EU and its member states and in relation to third states?

And, in view of the static nature of a declaration of competence, how should the changing nature of relations within the EU be dealt with in international law?

3.1 General

The basic criterion is that the general rules of international law, in particular those of treaty law, should be observed. It follows first that under the founding treaty in question it must be possible for the EU to become a party. Moreover, the relevant founding treaty determines the rules to be observed in other respects by the EU and the other contracting states and organisations alike.

These rules and the resulting obligations should naturally be viewed in the light of general principles of international law. One of these is good faith, which can play a role, for example, in interpreting declarations of competence in international law (see section 3.4.3 et al.).

3.2 The EU as party to treaties

The EU's competence to enter into treaties

If the EU wishes to conclude an international agreement its international legal personality must in any event be recognised by third states. In EU law the international legal personality of the EU has been established³¹ and third states do not appear to be in any doubt about this. Similarly, the EU's capacity to conclude international agreements, reflecting its international legal personality, has now been generally accepted in

³¹ See section 2.1.

international law, as is evident from the many agreements concluded with the EU by almost all countries in the world.

Viewed from the perspective of EU law

The possibility of concluding international agreements has however been limited under EU law. The EU's substantive competence to enter into treaties is set out generally in article 216 TFEU. Under this general provision the EU is competent to conclude international agreements with third states or other international organisations:

1. when the EU treaties or juristic acts based on them make explicit provision for this;
2. when the conclusion of an international agreement is necessary in order to achieve one of the EU's objectives; or
3. when such an agreement is necessary in order to prevent internal EU rules from being affected or their scope being altered.

Many provisions of the EU treaties indeed state that the Union may enter into external, international agreements in the context of a primary internally oriented competence, but even where this is not the case the competence to conclude international agreements may therefore follow from the Union's objectives or from secondary legislation.

Under EU law, international agreements concluded by the Union are binding not only on the EU's institutions but also on the member states as part of the EU. It follows that, even where the EU alone is party to an agreement, the member states too are bound to act in accordance with the agreement. However, it should be noted – in anticipation of the section on the international law perspective – that they are not bound independently as party to the agreement under international law; they cannot therefore be held responsible by fellow contracting parties for their actions, much less held liable under international law. It is up to the EU to ensure that its member states perform the relevant obligations.

The procedure for the conclusion of international agreements by the EU is set out in article 218 TFEU. It is apparent from this procedure that the Council must authorise the opening of negotiations and nominate a negotiator to act on behalf of the Union. The European Commission (or, in the case of the common foreign and security policy, the High Representative) must submit recommendations to the Council for this purpose. A Council

decision is required for the ultimate signature and ratification of an international agreement on behalf of the Union.³² The Council takes the decision on signature by qualified majority, unless it concerns a field for which unanimity is also required internally. This unanimity requirement also applies to the association agreements concluded on the basis of article 217 TFEU and to agreements with candidate countries. Article 218 (6) provides in which cases the consent of the European Parliament is required and in what cases it need only be consulted.

The EU's competence to conclude international agreements also includes the right to become a party to the founding treaty of an international organisation and hence to accede to that organisation (e.g. the FAO or the WTO).

Viewed from the perspective of international law

Quite apart from the EU's general competence to conclude international agreements, the relevant agreement or founding treaty must, of course, permit the accession of international organisations (or specifically the EU) and not only states or certain states. For example, the UN Charter provides that membership of the UN is open only to 'all peace-loving *states*'.³³

A treaty that has been concluded by all parties of their free will is a binding agreement under international law. Whether and, if so, what treaty relations arise between the EU (and possibly its member states) on the one hand and third states on the other is determined by what is acceptable for all parties concerned and that which they wish to commit themselves to. The applicable legal framework is first of all treaty law. Treaty law as applicable to international organisations is based on customary law; the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 1986 (VCLT 1986) is regarded as a largely faithful representation of customary law. This is why this convention is regularly cited, even though it has not entered into force.³⁴ The majority of treaty law rules are alternatives: in so far as the rules do not constitute *jus cogens*, they may be departed from in individual treaties.

³² Cf. article 218 (5) and (6) TFEU.

³³ Article 4 of the UN Charter (emphasis added).

³⁴ To enter into force 35 states must have become party to the convention. At the time of writing, the convention has been ratified by 30 states, including 18 of the 28 EU member states. 12 international organisations have also become party to it. The EU itself is not a party.

If the treaty concerned provides for the possibility of the EU becoming a party, the text may contain a specific reference to the EU or a general reference, for example to the RIO/REIOs referred to above.³⁵ Or it may also be agreed between the parties at a later stage.³⁶ If the treaty creates a barrier, the terms of the treaty must be changed before the EU can become a party.³⁷ Some of these treaties, often older ones, cover areas in which the EU has subsequently acquired competences. In such cases performance by the member states is dependent on action by the EU, even if the EU is not a party.³⁸

If the EU qualifies as a 'negotiating organisation' (a category mentioned in article 2 (1)(e) VCLT 1986 on the use of terms) and has in that capacity been involved in drawing up and adopting the text of the treaty, the wording of the treaty will allow the Union to become a party. This certainly applies to the many 'bilateral' treaties negotiated and concluded by the EU alone or (more frequently) together with its member states with one or more third states or other organisations. Examples are the EU partnership and cooperation agreements (PCAs), the EU association agreements and the bilateral free trade agreements concluded by the EU in increasing numbers.³⁹

3.3 The EU as party to a founding treaty or as member of an international organisation

International organisations can become a party to treaties, and international law does not exclude international organisations from becoming members of other international organisations. The rule of treaty freedom referred to above also applies to the founding treaties of international organisations.⁴⁰

³⁵ Section 2.2.

³⁶ The treaty establishing the WTO explicitly mentions the European Communities as an 'original Member' (article XI). Naturally, the European Communities were not party to the agreement that was the first forerunner of the WTO, namely the 1947 General Agreement on Tariffs and Trade, which has, however, remained part of the WTO acquis.

³⁷ This also happens occasionally. For example, the ECHR (article 59) provided that only states could accede, until this was amended by Protocol No. 14 on 1 June 2010 by the addition of paragraph 2 to article 59.

³⁸ An example is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973.

³⁹ For a list of the free trade agreements, see the European Commission's memo of 3 December 2013, which can be consulted at http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf. According to the website of the EU Treaties Office at <http://ec.europa.eu/world/agreements>, the number of signed bilateral agreements currently totals 789.

⁴⁰ See the largely similar articles 5 of the VCLT of 1969 and 1986. The 1969 version reads: 'The present Convention applies to any treaty which is the constituent instrument of an international

In the context of a founding treaty, the perspective often shifts from treaty law to institutional law. In the case of the United Nations, for example, reference is made to being a 'member' of the organisation rather than a 'party' to the UN Charter. However, for the EU the legal result of, say, the above-mentioned article 4 of the UN Charter is the same: without a change to the text of the Charter the Union cannot accede either to the Charter or to the UN organisation.

3.4 Distribution of competences between the EU and its member states – international law implications

In conclusion, it is clear that no special rules or principles exist under general international law governing the accession of the EU to a treaty or founding treaty. In the rare cases in which the EU as a whole takes the place of its member states, this does not pose a problem. *Joint* action by the EU and its member states is also accepted in international law, but the manner in which this joint action is arranged in the founding treaty and the organs of the international organisation concerned is something that is regulated in each individual treaty. Although certain patterns are admittedly recognisable, there cannot be said to be clearly developed rules of positive international law which must be observed by states and international organisations in treaty practice.

3.4.1 Distribution of competences

The special situation leading to the government's request for advice is that the European Union shares competences with the member states (shared competences) in certain fields or has even taken over these competences entirely (exclusive competences). As a result, it now has an ever greater interest in acting as a fully-fledged legal partner in a number of fields. In these fields EU member states cannot act independently at international level.

Another factor is that this distribution of competences is not fixed, but tends to change over time as European legislation and case law evolve (for the legal status of declarations of competence see section 3.4.3 et al.). This plays a role, above all, where the EU is party to treaties that are of long duration and create 'regimes', such as a treaty establishing an international organisation or a set of environmental treaties. The EU's internal competence

organisation and to any treaty adopted within an international organisation *without prejudice to any relevant rules of the organisation.*' (Emphasis added).

may be exclusive or shared with the member states or may be absent entirely. As already noted above in relation to the various forms in which the EU enters into treaty relationships (section 2.3), the distribution of competences within the EU by no means always coincides with the structure of multilateral treaties (and the possibility for the EU to become a party or member).

3.4.2 International law implications of the distribution of competences

Treaty rules on matters such as accession, entry into force, amendment, application, and liability for failure to perform obligations apply equally to the EU and other international organisations or states which are party to a treaty, unless the text of the treaty provides otherwise. If the EU is party to a treaty (with or without its member states) the basic principle of international law is that the EU, like each of its member states, participates in the treaty on an equal footing with the other parties, subject to any specific derogations agreed in the treaty as regards the position of the EU and/or its member states. In practice, there will almost always be special arrangements of this kind if the EU and its member states wish to become members together (and, in the case of the member states, to remain members) of an international organisation.

Special arrangements in multilateral treaties may range from fairly brief to very detailed. Usually, treaties in which participation of the EU with its member states is permitted include a provision to the effect that, if the EU exercises its competences and performs its obligations in its own name, the member states may no longer exercise these rights individually. Another provision in some treaties is that the EU and its member states may not exercise their rights under the treaty simultaneously. For example, article 4 of Annex IX to the UN Convention on the Law of the Sea provides that member states of an international organisation may not exercise competences which they have transferred to it. Moreover, when it comes to the number of ratifications needed for the treaty to enter into force an expression of consent by an international organisation to be bound by a treaty may not always be counted in the same way as a similar expression of consent by a state (cases in point are the 1986 VCLT itself and the UN Convention on the Rights of Persons with Disabilities to which reference has been made above).⁴¹ The changing nature of the

⁴¹ Article 44 (3) of this Convention provides that ratifications of regional organisations are not counted when determining whether the requisite number of ratifications has been received for the entry into force.

distribution of competences between the Union and its member states is recognised and accepted in some treaty regimes and institutions such as the WTO; for example, although both the EU and its member states are full members of the WTO, the EU may act independently in WTO fields in which it has exclusive power (although, in doing so, it is required under EU law to act in constant consultation with a special committee of the EU Council of Ministers⁴² on which the member states are represented).

A distinction can also be made between the implications of the distribution of competences for responsibility for compliance with a treaty (binding nature) and the implications for the legal liability for failure to perform a treaty (breach). Aspects of liability for breach are dealt with below in section 3.5.2.

If the EU (rather than the member states) is party to a treaty and has exclusive competence in respect of the entire field covered by the treaty, the situation is clear under international law. The EU is bound to perform all the treaty obligations.

But what happens if the EU alone is party to a treaty but only has a shared competence under EU law in the field covered by the treaty? Sometimes the situation is clarified in the treaty itself by a provision to the effect that the organisation (in this case the EU) is deemed to guarantee performance of all the treaty obligations. An example of this is article 24 (2) of the Kyoto Protocol,⁴³ which provides as follows:

‘Any regional economic integration organisation which becomes a party to this Protocol without any of its member states being a party shall be bound by all the obligations under this Protocol. In the case of such organisations, one or more of whose member states is a party to this Protocol, the organisation and its member states shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organisation and the member states shall not be entitled to exercise rights under this Protocol concurrently.’

It must be assumed that in cases where the EU alone is party to a treaty and has not made a reservation that has been accepted by the other parties or if the other parties have not consented to partial performance of the treaty, it will be bound by all obligations under the treaty, even if it has only partial competence under EU law in the field covered by the

⁴² The Trade Policy Committee appointed pursuant to article 207 (3) TFEU.

⁴³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, *Trb.* 1999-110.

treaty. In view of the existing EU case law⁴⁴ on the principle of sincere cooperation, it is likely that in such cases the member states will have to ensure that the EU is able to perform all treaty obligations in relation to the other treaty parties (which are not EU member states). Under international law, however, the EU member states are not bound by the treaty; subject to strict conditions, they can at most be held to have secondary liability (see section 3.5.2 below).

Conversely, a situation may arise where a multilateral convention covering fields in which the EU has a shared or even an exclusive competence may limit accession to states. In such a case the EU may authorise the member states to act in its interests and exercise its competences (an example is the situation within the ILO). The member states will therefore have to guarantee compliance under international law with all treaty obligations, including those within the EU's field of competence. Even allowing for the duty of cooperation under EU law between the member states and the Union, this could be problematic for the member states, particularly where they rely on the EU institutions to perform certain legislative or executive acts. Under international law, however, responsibility for performance is clear.

At present, the contractual freedom under international law and the consequent institutional configuration of existing international organisations means that the EU has little if any access to membership of a multitude of organisations and other treaties having a light organisational structure. Altering this situation would require an enormous negotiating effort on the part of the EU institutions and the member states, even in cases where the Union's competences in the field covered by the treaty are clear. Understandably, the member states are often disinclined to undertake such an operation, as are the EU institutions in some cases, if the price almost invariably demanded by the other members of the organisation is clearly too high.

Almost *none* of the treaties that allow scope for the EU to become a party (whether or not alongside its member states) contain a special provision allowing for separate denunciation by the EU or its member states. An exception is the UN Convention on the Law of the Sea of 1982 (UNCLOS), as under article 8(c)(i) of Annex IX the EU may not

⁴⁴ On this point, see Eleftheria Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the field of EU External Relations', (2010) 47:2 *Common Market Law Review*, pp. 323–359.

denounce the convention if any of the member states are still party to it.⁴⁵ If none of the member states is still a party to UNCLOS, the EU has a duty under article 8(c)(ii) of Annex IX to denounce it. This prevents a situation occurring in which the EU (where the member states have all denounced the convention) or the sole remaining member states (where the EU and the other member states have denounced it) could be bound to perform their part of the obligations under the Convention (and held liable in the event of non-compliance), with the possible consequence that only part of the obligations under the Convention are performed.⁴⁶

Under treaty law (see article 27 of VCLT 1969 and 1986), a state or organisation that is party to a treaty may not invoke the provisions of its internal law or, as the case may be, its internal rules, as a justification for its failure to perform the treaty. If the distribution of competences between the EU and its member states is (or should be deemed to be) known to third states, it can no longer be treated as completely 'internal'.

It is sometimes argued that even where an existing distribution of competences is not explicitly disclosed, third states can sometimes still be deemed to be more aware of the distribution of competences between an RIO/REIO such as the EU and its member states than in the case of ordinary international organisations. According to this argument, where a treaty makes special provision for the EU's accession and the EU or its member states invoke the internal distribution of competences this could or should therefore have a certain legal force. The RIO/REIO structure has, after all, been chosen precisely in order to do justice to this complexity. However, treaty practice does not allow a clear conclusion

⁴⁵ The Treaty on the Functioning of the European Union (TFEU) contains no provision on the termination of treaties, either in article 218 on the conclusion of agreements or elsewhere. It may therefore be assumed that this should be done by means of an *actus contrarius*, i.e. by the same procedure that applies to the conclusion of agreements. This would mean that the provision on denunciation of the UN Convention on the Law of the Sea (UNCLOS) could have far-reaching consequences for the EU. A minority of member states that have been outvoted by a qualified majority of the Council, with the approval of the European Parliament, could, by remaining party to the convention, ensure that the EU also remains a party. This provision from Annex IX to UNCLOS, which in fact shows that at that time the EU legal order was regarded by third states as open to manipulation, would probably no longer be so readily accepted by the EU.

⁴⁶ See also the denunciation provision in the UN Convention against Corruption (article 70 (2)) and in the UN Convention against Transnational Organised Crime (article 40) and its two Protocols against the Smuggling of Migrants by Land, Sea and Air (article 24) and its two Protocols to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (article 19), which provide that a regional economic organisation (here the EU) will cease to be a party to the convention once all member states have denounced it.

to be drawn here. Nor has the argument that a special RIO/REIO clause presupposes greater knowledge on the part of co-contracting parties yet been tested by the courts.

This raises the question of what effect a *declaration* of competence in which the distribution of competences is made known externally has under international law.

3.4.3 *Declarations of competence*

Declarations of competence are regularly issued when the EU accedes to a multilateral treaty. The declarations, which vary from very general to very detailed, set out the distribution of competences between the EU and its member states in the fields covered by the international agreement at the moment of its conclusion. Declarations of competence (which should be distinguished from oral statements about competence made by the Union at the start of negotiations) are generally required by the multilateral treaty concerned. Bilateral treaties to which both the EU and its member states are parties generally do not have declarations of competence of this kind.

Although declarations of competence may provide some clarity to other contracting states, it is clear in practice that besides being fairly vague they have only a limited useful life owing to the changes in the distribution of competences over time. Changes in the distribution of competences are commonplace due to changes to the EU treaties, the adoption of new EU legislation or judgments of the EU Court of Justice. For example, the competence to conclude international investment agreements has largely become an exclusive EU competence as a result of the Lisbon Treaty, and it will be necessary to decide in the years ahead whether many hundreds of bilateral investment treaties concluded between EU member states and third states should be replaced by EU investment treaties.

In the case of mixed agreements where no declaration of competence has been issued, it must be assumed that under international law both the individual EU member states and the EU can be held jointly and severally liable for performance of all obligations in the agreement. It has been argued that in such cases other contracting states may possibly have left it to the EU and its member states to decide who is liable in each case, on condition that the EU and its member states jointly guarantee that all treaty obligations will be fulfilled. Here too, however, treaty practice is varied, and the prevailing view is that at present there is no general rule of international law requiring joint performance if the

agreement itself makes no provision for this (as regards liability for failure to perform see section 3.5.2 below).

Often, however, a multilateral treaty does require a declaration by the EU about the distribution of competences between itself and its member states.⁴⁷ The requirements specified by co-contracting parties for a declaration of competence differ from treaty to treaty. The declarations issued by the EU also differ widely in terms of content and specificity, depending on the nature and content of the duties and rights of the EU and/or the member states under the treaty concerned (see also section 3.4.5 and Annexe II).

3.4.4 International law classification of declarations of competence

This raises the question of how these declarations of competence should be classified in international law. The declarations relate to the internal distribution of competences between the EU and its member states. In principle, they do not therefore constitute an instrument of international law, i.e. a formal source of law in general international intercourse.⁴⁸ However, a declaration of competence can have a normative effect in international law because third states can be deemed, on the basis of the principle of good faith,⁴⁹ to have taken cognizance and account of the content of the declaration.

In such a case, the Union or the member states that invoke limited competence upon being held responsible by third states for performance of the entire agreement have a strong legal position, unlike situations in which there is no declaration of competence. However, if the distribution of competences between the Union and the member states changes but the declaration of competence is not amended, third states cannot be expected to be automatically and completely aware of this. If a third state holds the EU or one or more of the member states responsible for a matter in a field in which the competences have changed, it can be argued that responsibility for performance of these

⁴⁷ A list of 'Agreements with a declaration of competence by the EU' can be found on the website of the EU Treaties Office: <http://ec.europa.eu/world/agreements/viewCollection.do>.

⁴⁸ Within the EU, declarations of competence are often the subject of dispute and legal proceedings between the institutions. In Case C-29/99 (*Commission v. Council* concerning the declaration of competence to be issued upon the accession of Euratom to the Nuclear Safety Convention), the EU Court of Justice held that it followed from the duty of sincere cooperation between the institutions that the Council should enable the Commission to 'comply with international law' by issuing a complete declaration of competence as required by the convention. However, this judgment says nothing about the meaning or consequences of this declaration of competence in international law.

⁴⁹ See section 2.5 above.

provisions of the agreement lies with both the EU and the member states. In such a case, the undisclosed change in competences cannot be invoked against the third state.

Although the relevance of declarations of competence in international law cannot be denied in the light of the principles of good faith, their legal classification remains difficult. They could be viewed either in the context of article 17 VCLT 1986⁵⁰ or as a kind of reservation made by the EU and the member states.⁵¹ However, various objections can be raised to this line of reasoning. For example, reservations are made not in response to a demand or invitation by other contracting parties but on the initiative of the state making the reservation. In addition, after reservations have been made they may no longer be changed and may only be withdrawn, whether partially or otherwise.

Some treaties provide for declarations of competence to have effect under treaty law. For example, Annex IX to UNCLOS provides that international organisations may assume obligations only if they are in accordance with their competences (as specified in a declaration). This is elaborated in articles 4 and 5 of Annex IX, which understandably attach great weight to the updating of declarations of competence (article 5 (4)). Even more far-reaching (and more exceptional) are the provisions on the partially binding nature of obligations as referred to in the draft treaty on the accession of the European Union to the ECHR as referred to in section 2.2 above.

⁵⁰ This provision reads as follows:

1. Without prejudice to articles 19 to 23 [concerning reservations], the consent of a State or of an international organisation to be bound by part of a treaty is effective only if the treaty so permits, or if the contracting States and contracting organisations or, as the case may be, the contracting organisations so agree.

2. The consent of a State or of an international organisation to be bound by any treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions of the consent relates.

⁵¹ Article 2(d) of the Vienna Convention on the Law of Treaties of 1986 defines a reservation as follows:

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

According to this reasoning, a declaration that is required or allowed by the treaty concerned may be treated as a reservation permitted by the treaty, even if the treaty itself expressly prohibits every reservation.

3.4.5 *Variation of declarations of competence in practice*

In practice, declarations of competence vary greatly. Some refer, either at length or very briefly, to specific provisions in the EU acquis and the fact that this acquis and the distribution of competences are subject to change. By contrast, others refer to specific provisions of the treaty to which the EU is becoming a party, in respect of which exclusive or shared competence exists. And yet others merely state that the relevant information (and any changes) will be notified to an authority of the treaty concerned. Annexe II (declarations of competence in practice) gives a number of examples.

Often the treaty provides that essential or relevant changes to the distribution of competences should be notified by the EU in a declaration. Sometimes a treaty may require both the EU and its member states that are parties to the treaty to issue a declaration concerning the competences transferred to the EU.

The consequence of varying declarations that have been issued is that in each specific case it is necessary to examine again whether a third state can be deemed to be sufficiently informed about the distribution of EU competences.

3.4.6 *Disconnection or transparency clauses: an alternative for declarations of competence?*

In certain cases, provisions known as disconnection clauses have been included in multilateral treaties to which both the EU and the member states are party. These clauses were originally included in treaties to which the EU could not become a party. They provided that the EU member states that were parties to the treaty in question would apply Community law *inter se* and not the rules of the treaty, except where no Community law existed in the field covered by the treaty in question.⁵²

However, the function of clauses of this kind changed when treaties (mainly Council of Europe conventions) were later opened for accession by what was still at that time the

⁵² The function of the clause was to protect the member states under Community law from possible infringement proceedings brought by the Commission.

European Community, alongside its member states. In the case of mixed agreements this function could at most involve notifying the other parties that the treaty in question could not be applied as such between the member states, in so far as European implementing legislation relating to the field covered by the treaty was in force in the Union. The International Law Commission (ILC) subsequently gave some consideration to the clauses and the criticism of them.⁵³ It concluded that as long as the clauses had been freely negotiated between the parties, they were acceptable in terms of international law, mainly because it seemed that the disconnection clauses were intended to secure the further development of EU law without jeopardising the object and purpose of the treaty in question. The ILC added, however, that even if EU law were to change in the future it should remain in conformity with the treaty.

Ultimately, the discussions on this subject resulted in a new definition of disconnection clauses, which was agreed in the Council of Europe in 2005. This reads as follows:

‘Parties which are Members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community and European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.’

The point of such a clause in the case of a mixed treaty is unclear, especially if the treaty is accompanied by a declaration on the distribution of competences between the Union and the member states. Moreover, ‘transparency clause’ (a term also in use) would be a better name than ‘disconnection clause’ because there is absolutely no question of the EU and its member states wishing to repudiate their treaty obligations.⁵⁴ Accordingly, the only declarations still issued nowadays are unilateral, often in *addition* to a provision imposing an obligation on the EU to issue a declaration of competence. These unilateral declarations are along the following lines:

⁵³ In its report on the ‘Fragmentation of International Law’, UN doc. A/CN.4/L.682, paras. 219 and 289-294.

⁵⁴ See also Frank Hoffmeister, ‘The contribution of EU practice to international law’, in: Marise Cremona ed., *Developments in EU External Relations Law*, OUP Oxford 2008, 37-127, pp. 66-69.

'As regards Community competences described in the Declaration pursuant to Article xx of the Convention, the Community is bound by the Convention and will ensure its due implementation. It follows that the Member States of the Community which are parties to the Convention in their mutual relations apply the provisions of the Convention in accordance with the Community's internal rules and without prejudice to appropriate amendments being made to these rules.'⁵⁵

It may therefore be concluded that:

- a) disconnection clauses in the original sense of the term may still be useful where situations of the kind in which they were first used occur again;
- b) transparency clauses or, preferably, transparency declarations may serve a purpose if a mixed treaty does not contain a declaration of competence, as in the case of the conventions of the Council of Europe; in these circumstances, such clauses or declarations can indeed serve as an alternative to declarations of competence;
- c) transparency declarations are not especially necessary in the case of a mixed treaty if the EU and its member states are subject to an obligation to issue a declaration on the distribution of competences, but they may still serve a purpose in clarifying that the EU's member states will not apply the treaty in full in their mutual relations because EU implementing legislation will apply between them.

These conclusions broadly correspond with those of the committees of legal advisors on public international law of the EU and of the Council of Europe.⁵⁶

3.5 *Invalidity and liability*

3.5.1 *Invalidity*

A specific question concerns the consequences under international law of the conclusion of treaties by the EU in fields in which it has no competence.

⁵⁵ See, for example, the declaration with the UN Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Council Decision 2006/515, OJ 2006, L 201, p.15, Annex 2.

⁵⁶ See doc. CAHDI(2008) 1 rev.

It has already been noted in section 3.4.2 that article 27 VCLT 1969 and 1986 provides that a state or international organisation may not invoke the provisions of its internal law or, as the case may be, its internal rules as a justification for its failure to perform a treaty. Moreover, article 46 of the 1986 Convention⁵⁷ lays down the general rule that treaty law takes no account of the institutional structure of an international organisation in determining whether a treaty has been validly concluded. Treaty law does not, in principle, concern itself with the question of whether the EU can become a party to a treaty on the basis of internal EU law (see also article 6 of the 1986 Convention) or with the distribution of competences (and hence treaty obligations) between the EU and its member states. In view of the principle of good faith, the other contracting states and organisations are entitled to assume, in the absence of a declaration of competence (see above section 3.4.3 et al.), that the EU member states have full contractual competence to perform the acts in question.

If the EU becomes a party to a treaty without being (fully) competent to do so under EU law, it may not therefore invoke EU law to invalidate its expression of consent to be bound by the treaty and will nonetheless be bound under international law. The same applies to EU member states which independently become parties to a treaty in circumstances where this is not permitted by the distribution of competences within the EU (see article 46 (1) VCLT 1969 and 1986). It should also be noted that in international law practice in general a treaty party can never successfully invoke the exception in article 46 (no invalidation of consent *unless* the violation is manifest and concerns a rule of fundamental importance). Although this clearly creates a very high barrier for a state or organisation seeking to invalidate its own consent to be bound by a treaty by invoking its internal law or rules, it has in fact been fully accepted by the EU Court of Justice.⁵⁸

⁵⁷ [...] 2. An international organisation may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organisation regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organisation conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organisations and in good faith.'

⁵⁸ See, for example, the judgments of the EU Court of Justice in Case C-327/91, *French Republic v. Commission of the European Communities* and Cases C-317/04 and C-318/04, *European Parliament v. Council and Commission* (the PNR Case).

3.5.2 Liability

Another question that arises in this connection is whether, in cases where the EU and its member states are parties to a treaty, each of them is liable for any failure to perform provisions of the entire treaty, regardless of the distribution of competences between them.⁵⁹ Or are the member states and the EU bound by – and hence liable for – only that part of the treaty for which they are competent? If so, does this concern competence at the moment when the treaties are concluded or at the moment when the parties are held liable?

An example of a specific liability provision can be found in Annex IX to the UN Convention on the Law of the Sea (UNCLOS), under which the EU and its member states may be jointly and severally liable if they fail to provide information in good time about who has responsibility for any specific matter. This provision is regarded as effective by expert legal practitioners. It should be noted, incidentally, that such an arrangement makes it unnecessary to have detailed declarations of competence at the time of accession.

Another example cited above (sections 2.2 and 3.4.4) is article 1 (4), in combination with article 3, of the agreement on the accession of the EU to the ECHR.

The CAVV believes that the UNCLOS provision (albeit without a declaration of competence) would be an adequate solution. Indeed, in the interests of streamlining international intercourse, it might be a good thing if the EU and its member states were to try to secure the inclusion of such a provision in multilateral treaties to which they are (or wish to become) parties. This would then dispense with the need for declarations of competence (and their modification). In the event of a breach of an obligation, it could be

⁵⁹ This question is of particular relevance to the investment agreements yet to be concluded by the EU. As noted in section 3.4.3 above, the conclusion of investment protection agreements with third countries largely belongs to the exclusive competence of the EU under the Lisbon Treaty. An EU Regulation is currently being drawn up to arrange for the *internal* distribution of liability in the event that an investor from a third country files a claim with the EU and/or its member states under an investment agreement entered into by the EU. In addition, it will be necessary to consider whether and, if so, how the EU should regulate externally the internal division of liability in the agreements with third countries. Under the European Commission's current proposal (COM(2012) 335 final) the questions of both who (EU or member state) acts as respondent and who is financially liable are dependent on the subject matter of the dispute. Third states will want certainty that investors have some means of seeking redress. This means that an arrangement comparable to the UNCLOS liability provision mentioned below would appear to be an obvious solution, as is indeed provided for in the Commission's proposal which will have to be regulated by treaty).

left to the EU to inform third states about who can be held responsible (the EU or the member states). In other words, the EU would serve as a portal.

If no arrangements have been made, it must be assumed that liability for failure to perform a treaty (or a binding decision of an organisation) coincides with responsibility for performance (see also section 3.4.2 above). If the EU or the member states are obliged to perform all obligations in a treaty (irrespective of the internal distribution of competences) they will be correspondingly liable for any failure to perform.

It is evident from the case law of the EU Court of Justice that the EU and its member states will be assumed to be jointly (not jointly and severally) liable if the subject of international liability arises in connection with a (bilateral) mixed agreement without a distribution of competences. The Court of Justice treats the question of liability as clearly separate from the question of the internal distribution of any obligations to be performed.⁶⁰

There is also the question of the subsidiary liability of member states as a consequence of the EU's liability for a wrongful act, such as breach of a treaty obligation imputed only to the EU. This is unrelated to the duty of member states to perform treaty obligations. In international law the conclusion hitherto has been that there is no general rule on the subsidiary liability of member states. This was the view taken by the *Institut de Droit International* in 1995. And the same view was taken by the International Law Commission in 2011 in its draft articles on the responsibility of international organisations,⁶¹ particularly article 62. There is no standard obligation in general international law for member states to provide the organisation with funding to cover the costs of its legal liability, but under EU law such an obligation can be inferred from the duty of mutual cooperation to which the EU and its member states are subject.

3.6 In conclusion

⁶⁰ As regards *external* liability and its internal consequences, see Case C-316/91, *Parliament v. Council* (EDF), of 1994. There is a certain amount of case law on *internal* liability for breaches of treaties to which the EU is a party, even if the treaties are of a mixed nature. See, for example, Case C-13/00 (*Commission v. Ireland*) concerning the implementation of the core provisions of the Berne Convention following the conclusion of the TRIPS Agreement and Case C-239/03 (*Commission v. French Republic*) about discharges of sludge into the Etang de Berre in breach of the Convention for the protection of the Mediterranean Sea against pollution from land-based sources.

⁶¹ *Draft articles on the responsibility of international organisations*, 2011, *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two.

The practice by which treaties are concluded between the EU, member states and third states cannot yet be said to have resulted in general rules and principles of international law. This practice varies greatly, although it tends to concentrate on the same points, namely those relating to the distribution of competences between the EU and its member states. However, it is first and foremost treaty practice that is of great importance to legal practitioners in the EU institutions and the government ministries of the member states in their mutual relations.

If a treaty does not contain specific provisions on the distribution of competences, the general rules of treaty law will in any event apply. However, these are 'one-dimensional': they make no distinction between the EU and other treaty parties in that they take no account of institutional tiers *within* the EU or for that matter with administrative tiers within a federal state. In such cases it is also even more difficult for states or other organisations to determine with whom (organisation or member states) they have entered into the specific obligations of the treaty. It strengthens the traditional view of the distribution of competences within the EU as an 'internal matter' which is and need be of no immediate concern to other parties.

International law proceeds, after all, on the assumption that treaties are concluded by a simple legal entity and takes no account of constituent parts or institutional tiers. A one-dimensional approach of this kind to legal relationships can cause uncertainty and impediments in international dealings with complex international organisations such as the EU. The uncertainty is then due to the interaction between general international law and internal EU law. Having what is for outsiders a clear and, to a certain extent, fixed division of roles between the Union and its member states is of great importance. However, as the law stands at present, these issues cannot be entirely resolved by means of international law rules. Clarity will have to be achieved by agreements made with the EU on a case-by-case basis. Nor is it easy, given the many different kinds of international organisation, to distil any general guidelines about the assignment and distribution of competences from the practice of such organisations, which could ultimately provide a basis for general rules of international law. Attempts to achieve this, for example through codification, have been unsuccessful.

The EU's duty of openness / duty to provide information about internal arrangements

The only relevant rule of general international law as it stands at present is that international organisations have at most a duty to disclose their distribution of competences in areas in which they act externally. This requirement of disclosure, together with the burden of proof to which the organisation is subject, was raised back during the discussions held in the second stage of the process of codifying treaty law, and was also an element in the conclusions of the final report of the *Institut de Droit International* in 1995 on the subsidiary liability of member states for international organisations.

Good faith in international law and legal relations between the EU, member states and third states, in particular in the context of other international organisations

Another central factor here, and one in keeping with current legal thinking, is the role of good faith. Owing to the principle of good faith in international law, third states must be deemed to be aware of and make allowance for, in broad outline, the EU's internal distribution of competences. One of the arguments for this assumption is that virtually all states have concluded treaties with the EU and will in many cases have become aware of the EU's complexity through intensive dealings with it over a long period.

It seems fair to ask whether there are past or present developments that would limit the contractual freedom for the EU's treaty partners. The Lisbon Treaty has resulted in much greater external awareness of the distribution of competences between the Union and its member states, in particular in the field of its external relations (see articles 3-6 TEU). Indeed, it would seem hard for third states to maintain that they can still negotiate in good faith with individual EU member states with a view to concluding agreements about foreign policy topics such as the commercial policy and monetary policy of EMU. Nor, perhaps, is it in keeping with the principle of good faith under international law (or with the requirement of *internal* enhanced good faith in article 4 (3) TEU) to expect EU member states to be able to continue implementing obligations imposed on them by organs of international organisations in fields in respect of which third parties can easily establish on the basis of the Lisbon Treaty that they come with in the exclusive competence of the Union, either wholly or partially. These considerations could therefore qualify the traditional view of contractual freedom. An interpretation in keeping with the spirit of the article 46 (2) and (3) VCLT 1986 would seem appropriate here.

More particularly, where organisations such as the EU have a responsibility to provide clarity about their institutional structure, third states and other organisations have a responsibility to take due account of this information. And where third states cannot know – or be deemed to know – how competences are distributed between the EU and its member states, they cannot be expected to take account of this. International legal relations as such are governed by the principle of good faith. The obligations resulting from good faith therefore apply not only to third states but also to the EU, which is deemed to have a duty to ensure that third states are not left in the dark about the question of who is responsible within the EU framework. Nor are third states bound by the obligation of good faith in cases where, as quite often happens, the distribution of EU competences in a given field changes but the relevant declaration of competence is not modified to reflect this: in such a situation they cannot be expected to be aware (or fully aware) of the distribution of competences under the EU's institutional arrangements. On the contrary, third states acquire a right based on the very same principle of good faith: they are entitled to rely on the declaration of competence previously issued (unless they could and should reasonably have known on other grounds of the change in the distribution of competences).

The CAVV endorses this line of reasoning, but would point out that taking account of the distribution of competences within the EU can be easier for large states that have extensive legal support services than for small states that conclude a treaty with the EU.

The EU is understandably opposed to the idea of having very detailed declarations of competence. In its view, the aim of a declaration is to make clear to other treaty parties that it has sufficient competence to enter into a treaty and/or become a member of an organisation, but no more than that. After all, declarations are hardly ever modified when the distribution of competences changes, and any such modification would have major disadvantages owing to the effort that would be expended on renegotiation. As noted in section 3.4 above, the CAVV considers that the provision used in UNCLOS is an adequate solution.

4. Representation and speaking rights in international organisations

To what extent do such rules and principles apply to the status of the EU and its representation (including speaking rights) in international organisations?

What international frameworks decide who should speak on behalf of the EU?

4.1 General

International law has no general rules governing accession to and representation in international organisations. These organisations themselves have the power to determine rules on this subject. For the EU too, therefore, accession to and representation in international organisations is governed by the rules of the organisation concerned. In practice, however, the complex distribution of competences between the EU and its member states means that the EU is in a special position in the case of shared competences and multilateral treaties to which both the EU and its member states are party.

Who is entitled to speak on behalf of the Union is determined primarily by EU law.⁶² Those who are eligible to speak (member states or organs of the Union) should be authorised accordingly so that they can obtain speaking rights in the international organisation in question. This implies that an EU spokesperson (a representative of the EU institutions or of the member states) must be recognised as such by the organisation concerned. In cases where the member states act independently within a treaty regime or an international organisation in a clearly defined area of competence, it is only logical that they and not the EU should have the speaking rights (just as the reverse is true).

All of this is subject to the condition that the parameters are set by the treaty regime or the organisation within which the EU and the member states operate. Even where the EU has far-reaching competences in a given field, it will not be able to exercise them freely within an organisation or treaty regime if the founding treaty or institutional structure of the organisation makes no provision for this. The EU will therefore have to be represented by the member states (as, for example, in the International Labour Organisation) and/or make arrangements with the relevant organisation. An example of the latter is the EU's

⁶² See also Case C-25/94, *Commission v. Council*, in which the EU Court of Justice annulled a decision of the Council authorising the member states to speak on behalf of the EU in the UN Food and Agriculture Organisation (FAO) on the subject of a fishery agreement.

enhanced observer status in the General Assembly of the United Nations, which it obtained in 2011 (see also section 4.3 below).

As regards the EU's status in international organisations, a preliminary distinction can be made between membership and observer status.

4.2 The European Union as fully-fledged member of an international organisation

Where it is a fully-fledged member of an international organisation, the EU and, in most cases, its member states are members of equal standing and it depends on the subject matter of the agenda who may speak on their behalf. In the event of matters within the EU's exclusive competence (e.g. the great majority of WTO matters), the member states will leave the negotiations and speaking rights to the EU.

In such cases the EU participates in treaty organs and the meetings of the members of international organisations by virtue of its accession to the treaty or, as the case may be, its membership of the organisation. Most treaties contain no special provisions on the participation of the EU and its member states in treaty organs and the meetings of international organisations, save for a requirement that the competences of the EU and its member states, in particular the rights and above all the voting right, may not be exercised jointly. In practice, the picture is varied. Sometimes there is no complete clarity. For example, under the revised Statute of the Hague Conference on Private International Law of 1955 the subject of the EU's participation in the organs of the Hague Conference is not entirely clear (see also section 4.3 below).

Problems may arise where a treaty provides for the establishment of organs having limited membership. For example, the intergovernmental committee established under the 2005 UNESCO Cultural Diversity Convention⁶³ must consist of 18 persons elected on the basis of equitable geographical representation. However, according to article 23 (1) of the UNESCO Convention only 18 representatives of States Parties may be elected to the committee.

⁶³ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Paris, 20 October 2005, *Trb.* 2007-89.

Special provisions can also be found in the Constitution of the UN Food and Agriculture Organisation. Under article II.9 of the Constitution, the EU has the right to participate in matters within its competence in any meeting of the FAO, including any meeting of the Council or other body, other than bodies of restricted membership, in which any of its member states are entitled to participate. The EU is not eligible for election or designation to any such body. For example, under the FAO's General Rules, the Conference of the FAO may decide that the EU cannot participate in the Credentials Committee, the General Committee or any other body of the Conference dealing with the internal workings of the Conference (Rule XLIII (2)). Nor may the EU hold office in the Conference or the Council or any subsidiary body thereof (Rules XLIII(3) and XLIV). In addition, the EU may not participate in the Programme Committee, the Finance Committee or the Committee on Constitutional and Legal Matters (Rule XLVI).

Similar provisions can be found in the Rules of Procedure of the Codex Alimentarius Commission, established jointly by the FAO and the World Health Organisation (WHO). The EU may participate in matters within its competence in any meetings of the Commission or its subsidiary bodies in which any of its member states is entitled to participate (Rule II (2)), but is not eligible for election or designation, nor to hold office in the Commission or any subsidiary body. Moreover it may not participate in voting for any elective places in the Commission and its subsidiary bodies (Rule II (4)).

In 2005 the Energy Community⁶⁴ was established by the European Community on the one hand and a number of countries in Southern and Eastern Europe on the other. In its organs each party has, in principle, one vote (article 77), but for a given category of decisions a two-thirds majority of the votes cast is required, including a positive vote of what is now the European Union (article 83), and in the case of another category of decisions only the Contracting Parties are entitled to vote (article 80).

On 30 June 2007 the Council of the World Customs Organisation (WCO) decided to accept the request of the European Community to join the WCO as of 1 July 2007. The decision grants to the European Community rights and obligations on an interim basis 'akin to those enjoyed' by WCO members. Full accession will be possible only once an amendment to the Convention establishing a Customs Cooperation Council, allowing economic and customs unions to join, is ratified by the members of the WCO.

⁶⁴ The Energy Community Treaty, 25 October 2005, OJ 2006, L 198/18.

4.3 The European Union as observer or with some other non-member status

In cases where the EU has been unable to act as a treaty party or as a member of an international organisation, it has often obtained a position as observer to a treaty or international organisation. In such cases, the nature of the observer status is determined by the founding treaty and the rules of procedure. Depending on the rules of the organisation, the EU can then participate in negotiations on matters in respect of which it has exclusive or partial competence. In most cases, the EU will not have voting rights and the member states will have to represent the EU's position in those fields in which they are not fully competent under EU law.

Sometimes the EU has been able to strengthen its position. Reference has already been made to the fact that in May 2011 the UN General Assembly granted the EU, as the first non-state actor, the right to make interventions, exercise the right of reply and present oral proposals and amendments.⁶⁵ This enhanced observer status also enables the EU to have its communications relating to the sessions and work of the General Assembly and of meetings and conferences convened under the auspices of the Assembly circulated directly, and, last but not least, to be inscribed on the list of speakers among representatives of major groups and not, for example like the Arab League or the Red Cross, to speak only after all member states have spoken. However, even as a special observer the EU does not have the right to vote, co-sponsor draft resolutions or decisions or put forward candidates in the General Assembly.

The EU has also sometimes succeeded in strengthening its position in certain treaties or other international organisations by means of separate agreements, exchanges of letters or memorandums, as is evident from the negotiations in the WHO on the new International Health Regulations and from the negotiations in UNESCO on the Cultural Diversity Convention.

It should be noted, incidentally, that in cases where the EU is not a treaty party or member of an international organisation, this is not always due solely to external barriers. In some cases it may also be attributable to a lack of cooperation on the part of the EU member states, making it impossible to obtain Council authorisation for the EU's accession to a treaty or organisation.

⁶⁵ UN General Assembly Resolution of 10 May 2011, UN Doc. A/Res/65/276.

4.4 Right to vote

The right to vote, like all forms of participation and representation, is determined by the treaty regime or the organisation within which the EU participates and by any additional arrangements. Here too the practice is varied. In cases where the EU is a party and the member states are not (as in the case of some fishery organisations), either the EU has one vote or special voting procedures apply. When treaties to which both the EU and its member states are parties explicitly include a provision on the exercise of the right to vote, this invariably stipulates that the EU and the member states may not exercise the right simultaneously and that the EU may cast as many votes as there are member states that are party to the treaty or as these member states would be entitled to. Usually, therefore, the EU has 28 votes (and not 28+1), except in certain very specific cases.⁶⁶

In addition to the usual provision on the exercise of the voting right in article II (10) of the Constitution of the FAO, its General Rules also contain a provision that each member of the FAO has the right to request the EU or the member states to provide information as to which of them has competence in respect of any specific question. In addition, before any meeting of the FAO, the EU or the member states should indicate which of them has competence in respect of any specific question to be considered in the meeting and which of them will exercise the right to vote in respect of each particular agenda item. Where an agenda item covers both matters in respect of which the EU is competent and matters in respect of which the member states are competent, both the EU and its member states may participate in the discussions. However, in arriving at its decision, the meeting will take into account only the intervention of the party which has the right to vote (Rule XLII).

The Rules of Procedure of the Codex Alimentarius Commission referred to above (section 4.2) contain similar provisions (Rule II (5), (6) and (7)), the only difference being that the number of votes which the EU may cast depends on the number of member states present at the time the vote is taken (Rule II (3)).

Provisions similar to those of the FAO can be found in the (amended) 1949 Agreement for the Establishment of a General Fisheries Council for the Mediterranean (article II (5) and

⁶⁶ For example, in intellectual property conventions under which a separate European property right exists.

(6)). The declaration issued by the EU therefore indicates precisely for what agenda items it or its member states will exercise the right to vote.

5. Implementation of relevant international law rules and principles

How can compliance with the relevant international law rules and principles best be ensured?

In cases in which both the EU and its member states participate in an international organisation or treaty regime, agreements will have to be made both between the EU and its member states and with the organisation and the other members about participation in negotiations and speaking rights. For the EU and its member states it is worthwhile acting as far as possible as a unit, in order to fulfil internal requirements concerning consistency in EU foreign policy and to maximise effectiveness.

For other states and international organisations it must in any event be clear when the EU is speaking on the basis of its own competences, when it is speaking wholly or partly on behalf the member states and when the member states are speaking on behalf of the EU. An internal document from 2011⁶⁷ provides some guidelines, but reflects above all internal EU agreements (which are not in fact fully endorsed by all EU institutions).⁶⁸ This document contains the following rules:

- The EU can only make a statement in those cases where it is competent and there is a position which has been agreed in accordance with the relevant Treaty provisions.
- 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.
- Member States and EU actors will coordinate their action in international organisations to the fullest extent possible as set out in the Treaties.

⁶⁷ EU Statements in multilateral organisations - General Arrangements, Council of the European Union, 24 October 2011.

⁶⁸ The text therefore includes a disclaimer: 'The adoption and presentation of statements does not affect the distribution of competences or the allocation of powers between the institutions under the Treaties. Moreover, it does not affect the decision-making procedures for the adoption of EU positions by the Council as provided in the Treaties.' Compare, for example, in the more specific context of the FAO: European Commission, *Role of the EU in the Food and Agriculture Organisation (FAO): updated Declaration of Competences and new arrangements between Council and Commission on exercising membership rights*, COM(2013) 333 Final (29 May 2013).

- The EU actors and the Member States will ensure the fullest possible transparency by ensuring that there is adequate and timely prior consultation on statements reflecting EU positions to be made in multilateral organisations.
- Member States agree on a case by case basis whether and how to coordinate and be represented externally. The Member States may request EU actors or a Member State, notably the Member State holding the rotating Presidency of the Council, to do so on their behalf.
- Member States will seek to ensure and promote possibilities for the EU actors to deliver statements on behalf of the EU.
- Member States may complement statements made on behalf of the EU whilst respecting the principle of sincere cooperation.
- EU representation will be exercised from behind an EU nameplate unless prevented by the rules of procedure of the forum in question.
- EU actors will conduct local coordination and deliver statements on behalf of the EU unless prevented by the rules of procedure of the forum concerned (default setting). Where practical arrangements such as those at the World Trade Organisation, at the Food and Agricultural Organisation and in burden sharing exist for coordination and/or representation, such arrangements will be implemented for the preparation and delivery of the statement on behalf of the EU from behind the EU nameplate.'

As the gradual transfer of the member states' external competences to the EU continues (partly through the establishment of the European External Action Service (EEAS) and the transformation of the former missions of the European Commission into Union delegations), further streamlining of the implementation process is relevant. As international law allows much freedom here to the internal rules of international organisations and as many states participate in different organisations and, at the same time, the EU is here to stay as an autonomous international actor, the formulation of a number of basic rules on EU participation in the different arrangements could help to streamline international intercourse.

It must, after all, be clear at all times that every internal adjustment of tasks is also accepted (implicitly or explicitly) by the relevant international organisation. Obtaining acceptance of general basic rules as mentioned above by third states and organisations seems an ambitious objective. Greater uniformity in the arrangements between the EU and its member states about the positions adopted in various organisations and treaty regimes could, however, provide a basis for creating a practice which could in due course acquire a normative character within international law and at the same time serve as a guide for third states.

Annexe I

Request for an advisory report on EU external action, dated 18 December 2012

Professor M.M.T.A. Brus
Chair of the Advisory Committee on Issues of Public International Law
Postbus 20061
2500 EB The Hague

Date: 18 December 2012
Re: Request for an advisory report on EU external action and
international law

Dear Professor Brus,

Over a period of many years the European Union has actively participated in the international community, for example by acceding to conventions and joining international organisations. This action takes place within the framework of international law, for example the rules governing participation in international organisations. As the Treaty of Lisbon has led to changes in the way the EU is represented in international organisations these international law aspects need to be considered anew.

A key question here is what frameworks international law provides for international action by the EU in being or becoming party to treaties, including treaties establishing international organisations. It is important to determine the extent to which non-EU-member states are bound under international law by the distribution of competences agreed between the organisation and its member states.

I would therefore kindly request you to answer the following questions:

1. Are there general rules or principles of international law that must be observed if the EU wishes to become party to a treaty, particularly a founding treaty, and, once the EU is party to a treaty, during the term of that treaty?

2. To what extent do such rules and principles apply to the EU's status and its representation (including speaking rights) in international organisations?
3. How can compliance with the relevant international law rules and principles best be ensured?
4. Often a declaration concerning the distribution of competences between the EU and its member states is requested. What is the legal effect of such a declaration both in relations between the EU and its member states and in relation to third states? And, in view of the static nature of a declaration of competence, how should the changing nature of relations within the EU be dealt with in international law?
5. What international frameworks decide who should speak on behalf of the EU?

I look forward to receiving your advisory report, if possible, by 1 July 2013 at the latest.

Frans Timmermans
Minister of Foreign Affairs

Annexe II

Declarations of competence in practice

Declarations of competence in practice

Declarations with reference to EU law

Reference is made in a number of declarations of competence to specific provisions of the EU acquis. For example, the very detailed declaration issued upon the accession of the European Economic Community to the FAO's Constitution contains references to many ECSC, EEC, Euratom and EU Treaty articles and states that the competence of the European Community 'is, by its nature, subject to continuous change' and that the EC 'will make further declarations whenever the need arises'.

Another very detailed declaration was the one issued by the European Community in relation to the UN Convention on the Law of the Sea of 1982 and the Agreement concerning the application of Part XI of this Convention, which included an annexe listing at length Community decisions and treaties to which the Community was a party and on which the Community based its exclusive competence or competences shared with the member states.

The declaration issued by the European Community in relation to the Straddling Fish Stocks Agreement of 1995 sets out the competence of the Community only in very general terms. Another very cursory declaration is the one issued by the European Community in relation to the International Tropical Timber Agreement of 2006, in which the Community declares that it has exclusive competence with respect to trade matters and shared competence with the member states in environmental matters and in development cooperation. The same is true of the declaration in relation to the Convention on the Transboundary Effects of Industrial Accidents of 1992, which states in respect of just a few Council directives that they 'cover matters which are the subject of [the said Convention]' and that as regards the convention 'the Community and its Member States are responsible, within their respective spheres of competence'.

Declarations that refer to treaty provisions

Instead of referring to the EU acquis, a declaration sometimes refers mainly to specific provisions in a treaty in respect of which there is exclusive or shared competence, as in

the case of the Euratom declaration in respect of the Vienna Convention on Nuclear Safety of 1994 and the European Community declaration in relation to the UN Convention against Transnational Organised Crime.

Declarations with an undertaking to provide further information

In the case of some treaties the declaration no longer makes specific mention of Community decisions or treaties on which the competence of the EU is based, but instead gives an undertaking by the EU to provide this information to an authority of the relevant Convention and any changes to this information. See, for example, the declarations in relation to the Stockholm Convention of 2001, information to the Conference of the Parties, the Cartagena Protocol of 2000 and the Rotterdam Convention on the Prior Informed Consent Procedure of 2001.

Annexe III

Members of the Advisory Committee on Issues of Public International Law

Members of the Advisory Committee on Issues of Public International Law

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