EUROPEAN UNION MIXED AGREEMENTS IN INTERNATIONAL LAW UNDER THE STRESS OF BREXIT

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Since 1961, the EU and its predecessors have concluded many so-called mixed agreements with states outside of its community. On the EU side, such agreements are concluded both by the EU and by its Member States, acting jointly. This is a consequence of the principle of conferral, which sometimes limits EU capacity to act on the international stage. It also helps to clear up the evolving distribution of competencies between the EU and its Member States. If mixed agreements are consistent with the EU legal order, they constitute a peculiar and novel practice under general international law. Such agreements do not fit into any of the existing treaty law "categories", and the legal basis for the EU and its Member States' commitments under mixed agreements may appear problematic according to international law. Under EU law, the principles of pre-emption and sincere cooperation apply. However, Brexit has forced legal scholars to reconsider the issue under international law: what happens to a Member State's commitments under mixed agreements when it leaves the EU? According to international law, it should remain a party to such agreements, as a state bound by its international commitments. But how and under what conditions these agreements should be implemented remain open questions. We propose to investigate these legal issues with regard to the UK's commitments under mixed agreements in the context of Brexit.

Keywords: International Law of Treaties, Brexit, EU mixed agreements

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I. INTRODUCTION

Brexit is a journey into uncharted waters. Diplomats, political scientists, economists, and legal scholars have neither precedent nor an agreed theoretical framework for appraising and analysing the situation. Article 50 of the Treaty on European Union (TEU) makes it legally possible for a state to leave the European Union (EU); yet the rules applicable to the process and its legal consequences are far from detailed and precise. While most of the numerous studies on the implementation of article 50 TEU focus on the internal dimension (both for the EU and the United Kingdom (UK)) of the withdrawal agreement and on the trade and cooperation agreement between the EU and the UK,[1] only a few contributions to the academic debate analyse the external dimension of Brexit, namely its effect on already concluded EU

[1] See e.g. Hannes Hofmeister, 'Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 European Law Journal 589; Adam Lazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 European Law Review 523; Ramses A Wessel, 'You Can Check Out Any Time You Like, But Can You Really Leave? On "Brexit" And Leaving International Organizations' (2016) 13 International Organizations Law Review 197; Federico Fabbrini, *The Law and Politics of Brexit* (Oxford University Press 2017). For various blog posts on similar themes, see also e.g. 'Blog' (DCU Brexit Institute) <http://dcubrexitinstitute.eu/blog/> accessed 22 September 2021; 'LERU Brexit Seminars' (European Futures) <http://www.europeanfutures.ed.ac.uk/topics/leru-leuven-2017> accessed 22 September 2021.

agreements with almost all the countries in the world.[2] Further, most of these studies remain strongly influenced by EU legal scholarship, whereas the legal situation of the UK after Brexit will, as regards UK's rights and obligations towards other subjects of international law (including the EU and its Member States), be considered under international law. Naturally, applicable international law may include provisions of the exit agreement or of the Trade and Cooperation Agreement (TCA), which governs the relationship

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[2] Panos Koutrakos, 'Negotiating International Trade Treaties after Brexit' (2016) 41 European Law Review 475; Vaughne Miller, 'EU External Agreements: EU and UK Procedures' (28 March 2016) House of Commons Library Briefing Paper 7192 <https://researchbriefings.files.parliament.uk/documents/CBP-7192/CBP-7192.pdf> accessed 22 September 2021; Guillaume Van der Loo and Steven Blockmans, 'The Impact of Brexit on the EU's International Agreements' (CEPS, 15 July 2016) <https://www.ceps.eu/ceps-publications/impact-brexit-eus-international-agreements> accessed 22 September 2021; Panos Koutrakos, 'Brexit, European Economic Area (EEA) Membership, and Article 127 EEA' (Monckton, 2 December 2016) <https://www.monckton.com/brexit-european-economic-area-eea-membership-article-127-eea/> accessed 22 September 2021; Adam Lazowski and Ramses A Wessel, 'The External Dimension of Withdrawal from the European Union' (2017) 4 Revue des Affaires Européennes 623; Eleftheria Neframi, 'Brexit et les Accords Mixtes de l'Union Européenne' [2017] Annuaire Français de Droit Européen 360; Jed Odermatt, 'Brexit and International Law: Disentangling Legal Orders' (2017) 31 Emory International Law Review 1051; Robert G Volterra, 'The Impact of Brexit on the UK's Trade with Non/EU Member States Under the EU's Mixed Free Trade Agreements' (Oxford Business Law Blog, 7 May 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/05/brexit-negotiations-series-impact-brexit-uk%E2%80%99s-trade-non-eu-member> accessed 22 September 2021; Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States' (2018) 55 Common Market Law Review 101; Stefano Fella, 'UK Adoption of EU External Agreements after Brexit' (24 July 2018) House of Commons Library Briefing Paper 8370 <https://sipotra.it/wp-content/uploads/2018/07/UK-adoption-of-EU-external-agreements-after-Brexit.pdf> accessed 22 September 2021.

between UK and the EU post Brexit[3] unless otherwise provided by specific provisions of the withdrawal agreement.[4]

As regards UK legal rights and obligations stemming from treaties to which the EU is a party, two radically different situations arise after Brexit. The first concerns agreements concluded by the EU to which the UK is not also a party in its state capacity. International law provides that the UK's rights and obligations under such "EU-only agreements" shall be extinguished once the UK is no longer an EU Member State. Considering that Brexit has the effect of releasing the UK from most of the rights and obligations derived from either the TEU or the Treaty on the Functioning of the European Union (TFEU) and acknowledging that the UK was bound by these EU international agreements according to the provision of article 216(2) TFEU[5] – not applicable to the UK after Brexit – all treaties concluded by the EU alone are no longer supposed to have legal effect on the UK.

The second situation is much more complex and intriguing; it concerns the category of agreements, referred to by legal doctrine as "EU mixed agreements", to which not only the EU, but also each of its Member States, are jointly parties.[6] Member states of the EU are, according to international

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3 Agreement on the Withdrawal of the UK and Northern Ireland from the EU and the EAEC and the Political Declaration Setting Out the Framework for the Future relationship between the EU and the UK [2019] OJ C384 I/01 and I/02 (Withdrawal Agreement); Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part [2020] OJ L444 (TCA).

4 Different types of 'sunset clauses' for the separation period are envisaged in the withdrawal agreement with regard to citizens' rights, EU budget legislation, Irish border control and the protocol on UK army bases on Cyprus. Withdrawal Agreement (n 3), as published in OJ C384 I/01.

5 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 216(2) (TFEU) reads: 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'.

6 Albert Bleckmann, 'The Mixed Agreements of the EEC in Public International Law' in David O'Keeffe and Henry G. Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983) 155. See also Peter Olson, 'Mixity from the Outside: the Perspective of a Treaty Partner' in Christophe Hillion and Panos

law, bound by such mixed agreements both as EU Member States and as proper contracting parties. In our view, the dominant academic literature underestimates the outcome of Brexit on the UK and EU's international commitments with respect to third countries and each other under the regime of mixed agreements.[7] As we shall show, the legal situation regarding the UK's participation in such international treaties under international law after Brexit is far from clear.

All these questions could have remained purely theoretical if UK voters had not, on 23 June 2016, decided by an almost 52% majority to leave the EU.[8] The Brexit process has forced unsuspecting lawyers to reconsider this question in very practical terms and, most likely, under international law and not EU law. Further, the fact that some EU mixed agreements, such as the Agreement on the European Economic Area (EEA Agreement), confer rights on private legal subjects most likely means that the issue cannot be settled by political understandings between contracting parties. Instead, it must be settled legally to ensure that national judges will not reach discordant legal conclusions when seized by private actors claiming rights stemming from the UK's participation in mixed agreements. As in traditional film photography, where a developer is required to reveal the image captured on the film, Brexit was required to reveal some aspects of the true nature of the EU (understood in the broad sense, encompassing both EU institutions and the Member States).

Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 331-38.

7 This question is explored by some recent contributions dealing with the fate of mixed agreements under WTO Law. See e.g. Ines Willemyns and Marieke Koekkoek, 'The Legal Consequences of Brexit from an International Economic Law Perspective' (2017) Leuven Centre for Global Governance Studies Working Paper No. 188. See also Pavlos Eleftheriadis, 'How to Make a Transitional Brexit Arrangement' (Oxford Business Law Blog, 15 February 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/how-make-transitional-brexit-arrangement> accessed 1 October 2021; Odermatt (n 2); Wessel, 'Consequences' (n 2).

8 See 'EU Referendum Results' (BBC News) <https://www.bbc.com/news/politics/eu_referendum/results> accessed 1 October 2021.

In this article we will examine the legal status of the UK as regards its participation in mixed agreements, both before and after leaving the EU. To do so, we will discuss the provisions of both EU law and general international law relevant to the peculiar legal nature of EU mixed agreements. We are well aware that this type of agreement is not specifically dealt with by general international law. Nevertheless, even though the UK will no longer be bound by such agreements as an EU Member State after Brexit, we argue that it can, if it wishes to do so, remain party to any agreement it has ratified as a state party. We shall illustrate this complex legal situation with references to one specific EU mixed agreement, the EEA Agreement.[9]

II. EU Mixed Agreements between EU Law and International Law

From a legal point of view, the EU's singular status under international law is an already well-known and widely-held assumption.[10] Constituted as international organizations, the European Communities gradually but substantially emancipated themselves from their international origins to create 'a new legal order of international law',[11] to which the EU has succeeded.[12] When the Court of Justice of the European Union (CJEU) made this observation, however, it was referring to relationships within the

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9 The Agreement on the European Economic Area [1994] OJ L1/3 (EEA Agreement).

10 Case 26/62 *Van Gend en Loos* EU:C:1963:1; Case 6/64 *Costa v ENEL* EU:C:1964:66. See in particular Pierre Pescatore, *The Law of Integration. Emergence of a New Phenomenon in International Relations, based on the Experience of the European Communities* (Sijthoff 1974) 99. See also Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403; Charles Leben, 'A Propos de la Nature Juridique des Communautés Européennes' (1991) 14 Droits 61. On the other side, but very isolated, see Alain Pellet, 'The International Legal Bases of Community Law' (1994) 5 Collected Courses of the Academy of European Law 226. With regard mixed agreements, see Allan Rosas, 'Mixed Union – Mixed Agreements' in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998) 125.

11 *Van Gend en Loos* (n 10).

12 For the succession of the EU to the EC (which replaced the EEC according to the Maastricht Treaty), see Consolidated Version of the Treaty on European Union [2012] OJ C326, art 1(3) (TEU).

European Economic Community (EEC)[13] – between the EEC, its Member States and private persons – and not to relationships between the EEC and/or its Member States and the rest of the world, which, therefore, were assumed to remain under the realm of international law.[14]

As regards the EU's capacity to enter into international agreements, the CJEU, in its famous 1971 *ERTA* ruling, stated that the EEC's "external competence" (the capacity to conclude treaties) did not depend on competencies formally conferred by the Treaties to the EEC, but could result from the exercise of EEC competencies to develop domestic policies.[15] Since then, the distribution of competences between the EU and its Member States has become increasingly complex. The Maastricht Treaty added a new category of 'non-exclusive' competences that had an impact not only on the internal distribution of competencies, but also on the international capacity of the EU and its Member States.[16] Further, the renewed emphasis on the principle of conferral in article 4(1) TEU, introduced by the Lisbon Treaty, underlines the fact that the EEC lacks general competence to represent its Member States in international relations. The external competence of the EEC remains only sector-specific, and thus runs parallel to the competencies of its Member States.

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13 The EU only appeared in 1993, at which time it coexisted with the EEC (which was rebranded the EC in 1993). The EU succeeded and replaced the EC in 2009. See ibid art 1(3). For the sake of readability, we will refer to the EU, as well as to EU law, even if at points of its development it was formally the EEC or EC.

14 See e.g. Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, in which the Court states that the EEC is subject to the international law of treaties according to the VCLTs of 1969 and 1986, as it codified customary international law.

15 Case 22-70 *Commission v Council (ERTA)* EU:C:1971:32. For a very interesting contribution, see Robert Post, 'Constructing the European Polity: ERTA and the Open Skies Judgments' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 234.

16 Treaty on European Union (Maastricht Treaty) [1992] OJ C191/6, art G.5, inserting in the Treaty Establishing the European Economic Community (Treaty of Rome) a new art 3.B that introduced into EU law the concepts of subsidiarity and, even more significantly, non-exclusive competences, nowadays called 'shared competencies'. TFEU (n 5) arts 2(2), 4.

1. Origins and Rationale of EU Mixed Agreements According to EU Law

Very early in the history of the EEC, its Member States realized that neither they nor the EEC were fully competent to conclude complex international agreements. Thus emerged the practice of jointly concluding mixed agreements, with the EEC and its Member States together becoming parties on one side, across from one or more third parties on the other side. The EEC's very first mixed agreement was concluded with Greece in 1961 to establish a political and economic dialogue with a country in its immediate vicinity.[17] This was followed by identically structured agreements with Turkey[18] and the Associated African States and Madagascar (AASM).[19] This repeated practice led to the development of the doctrinal notion of 'mixed agreements' to describe the formal participation of both the EEC and its Member States as contracting parties.[20]

This legal category of 'mixed agreements' did not appear in the EEC Treaty and still does not appear in either the TFEU or the TEU. Only the Euratom Treaty contains, since 1957, a reference to a similar type of agreement.[21]

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17 Council Decision 61/106/EEC of 25 September 1961 on the Conclusion of the Agreement Establishing an Association between the European Economic Community and Greece [1963] OJ P26/293.

18 Agreement Establishing an Association between the European Economic Community and Turkey [1977] OJ L361/29.

19 Convention d'Association entre la Communauté Économique Européenne et les États Africains et Malgache Associés à Cette Communauté [1970] OJ L282/2 (no longer in force).

20 'Some clauses of the association agreement with Greece, AASM and Turkey relate to matters that are not covered by the EEC but by member states' competences. Thus, rather than concluding two agreements, one between the Six and the other contracting party and the other between the EEC and the same contracting party, each relating to matters falling within its respective competences, it was decided to negotiate only one treaty, a mixed agreement, signed at the same time by the EEC and the member states'. Michel Melchior, 'La Procédure de Conclusion des Accords Externes de la Communauté Économique Européenne' (1966) 2 Revue Belge de Droit International 202 (our translation). For one of the very first collected volumes on mixed agreements, see David O'Keeffe and Henry G. Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983).

21 Consolidated Version of the Treaty Establishing the European Atomic Energy Community [2012] OJ C327/01, art 102 reads: 'Agreements or contracts concluded

However, the absence of an explicit reference to this category of agreements did not prevent the EU and its Member States from concluding numerous mixed agreements[22] with the rest of the world.[23] Legally speaking, whether or not an agreement will be "mixed" depends essentially on the scope of competences it implicates. If the full range of competencies necessary for its conclusion have not been transferred to the EU, but only part of it, it will probably be a mixed agreement.[24]

The EU treaties explicitly state that international agreements concluded by the EU bind not only EU institutions, but Member States as well.[25] Still, mixed agreements go a step further than EU-only agreements, since both the EU and each of its Member States become directly and individually (but jointly) parties to the same international agreement. In practice, it is worth asking whether the balance of respective obligations of the EU and its Member States within a mixed agreement is not excessively delicate or even

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with a third State, an international organization or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws'.

22 For a typology of 'mixed agreements', see in particular Marc Maresceau, 'A Typology of Mixed Bilateral Agreements' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 11-30.

23 For the database of the EU Treaties Office, see 'Treaties Currently in Force' (EUR-Lex) <http://ec.europa.eu/world/agreements/default.home.do> accessed 1 October 2021.

24 See also Marise Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 European Constitutional Law Review 231. Regarding the debate on the 'optional' and 'mandatory' mixity after Opinion 2/15, see also e.g. Laurens Ankersmit, 'Opinion 2/15 and the Future of Mixity and ISDS' (European Law Blog, 18 May 2017) <http://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/> accessed 1 October 2021; Francesco Montanaro and Sophia Paulini 'United in Mixity? The Future of the EU Common Commercial Policy in Light of the CJEU's Recent Case Law' (EJIL: Talk!, 2 February 2018) <https://www.ejiltalk.org/united-in-mixity-the-future-of-the-eu-common-commercial-policy-in-light-of-the-cjeus-recent-case-law/> accessed 1 October 2021.

25 TFEU (n 5) art 216(2).

impracticable.[26] *Prima facie*, CJEU judges tend to consider the EU and its Member States as being jointly bound by a mixed agreement,[27] even though international law would bind both the EU and its member as genuine and distinct parties (except as otherwise provided in specific provisions of an agreement). Some authors even argue that most mixed agreements are bilateral in nature, as the EU and its Member States should be considered as unitary and indivisible.[28] Naturally, Brexit does not fit well with such an assertion and, according to international law, the UK, like any other EU Member State, concluded mixed agreements as a sovereign state acting within its own competences.

The CJEU also claims exclusive competence to interpret all the agreements concluded by the EU, including mixed agreements.[29] Such 'equivalent treatment', however, is only relevant under EU law, and even there the nature of Member States' commitments under mixed agreements is very unclear. While EU legal scholarship generally accepts that all EU Member States are parties alongside to mixed agreements the EU and has extensively analysed

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[26] In this sense, Joël Rideau writes: 'The question of controlling "mixed agreements" is delicate. By retaining the Court's questionable assimilation of agreements to acts of the institutions, the most coherent solution would be to distinguish in the "mixed agreement" what is within Community competence and controllable by the Court and what is not within its competence and consequently not controllable. The implementation of the solution linking the control power to the nature of competences could also give rise to thorny problems because of the consequences and the difficult divisibility of the fate of the agreement'. Joël Rideau, *Droit Institutionnel de l'Union Européenne* (6th edn, LGDJ 2010) 309 (our translation). See also the literature on the EU debatable practice of making the declaration of competence to mixed agreements, in particular Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 European Foreign Affairs Review 491.

[27] Case C-53/96 *Hermès* EU:C:1998:292; Joined Cases C-300/98 and C-392/98 *Dior e.a.* EU:C:2000:688; Case C-13/00 *Commission v Irlande* EU:C:2002:184; Case C-459/03 *Commission v Irlande (MOX)* EU:C:2006:345.

[28] Van der Loo and Blockmans (n 2); Wessel, 'Consequences' (n 2).

[29] TEU (n 12) art 19; TFEU (n 5) art 344.

the nature of such 'party' status,[30] the issue has not received nearly as much attention in the realm of international law. Therefore, even outside of the specific context caused by Brexit, mixed agreements may generate risks and legal uncertainty.

Notwithstanding all of this, as long as the UK was an EU Member State bound by EU law, the duty of sincere cooperation,[31] coupled with the principle of pre-emption,[32] allowed the EU and its Member States to fulfil their international commitments coherently regardless of the formal legal status of mixed agreements under EU or international law.[33] However, now that the post-Brexit UK no longer views its obligations under mixed agreements through the lens of EU law, international law has become the only relevant point of reference.

2. EU Mixed Agreements under International Law

The CJEU, through its case law, insists that the issue of the nature and extent of the respective engagements of the EU and its Member States in mixed agreements should be dealt with according to EU law and not under international law.[34] Its stated reason is that the issue of allocating competencies between the Member States and the EU is a question of interpretation of EU law, which falls under the exclusive competence of the CJEU.[35] From the perspective of the jurisdiction of a subject of international law, the CJEU's claim is perfectly consistent with the exclusion of the "federal principle" from international treaty law. Nonetheless, these understudied EU mixed agreements seem to generate situations quite at odds

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30 Odermatt (n 2) 1060. See also Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010).

31 TEU (n 12) art 4(3).

32 *Costa v ENEL* (n 10).

33 For more details, see Wessel, 'Consequences' (n 2) 109.

34 See e.g. Opinion 1/91 EU:C:1991:490 (on the EEA Agreement); *Commission v Ireland (MOX)* (n 27); Opinion 1/09 EU:C:2001:123 (on the creation of a unified patent litigation system); Opinion 2/12 EU:C:2014:2454 (on the agreement managing the accession of the EU to the ECHR); Opinion 2/15 EU:C:2017:376 (on the free trade agreement between the EU and the Republic of Singapore).

35 See Section II.3 below for a discussion of the relevant case law.

with international treaty law and the international law of responsibility, since none of these subfields of general international law consider the composite nature of the legal entities they regulate. Unfortunately, mixed agreements have rarely been thoroughly investigated from international treaty law perspective.[36]

As previously stated, the EU and its Member States have been concluding mixed agreements since 1961, and this practice has been widely accepted by other states, who did not shy away from signing such agreements. Interestingly, almost simultaneously, the International Law Commission (ILC) of the United Nations (UN), which had been endowed with the task of codifying international treaty law, decided after lengthy and complex debates in its 1962 session to abandon the reference in international treaty law to what had thus far been referred to as the 'federal principle' or 'federal clause'.[37] This principle describes the practice of some federal states of allowing both the federation and its constituent units to simultaneously enter agreements under international law. This practice seems to correspond to the EEC-EC-EU practice of concluding mixed agreements, which would have benefited from a 'federal clause' in international law.

The ILC's mandate to identify customary rules on the law of treaties led it to propose a text on the ability of states to enter international agreements, both as sovereign and independent states as well as Member States of a federal union or an international organization.[38] However, the decision was made to limit the purpose of what was to become the Vienna Convention on the Law of Treaties (VCLT) to the law of treaties between states, thus avoiding the

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36 As a remarkable exception, see the contribution by Joseph HH Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in David O'Keeffe and Henry G Schermers (n 20).

37 'Report of the International Law Commission covering the work of its Fourteenth Session, 24 April-29 June 1962, Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209)' [1962] II Yearbook of the International Law Commission 164.

38 For the discussion of this subject by the International Law Commission, see 'First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' UN Doc A/CN.4/144 (1962).

issues related to the member states of a federation or union of states.[39] As a consequence, the ILC did not examine whether a state's capacity to enter into treaties may vary according to the internal division of competences within a federation or due to its peculiar status as a member of an international organization. Instead, article 6 of the VCLT merely provides that '[e]very State possesses capacity to conclude treaties'.[40] This extremely concise rule will play a very central role in analysing UK commitments under mixed agreements post-Brexit. Despite some relevant EU legal doctrine considerations,[41] it has never been disputed that EU Member States remain states under international law, and therefore retain an unlimited 'capacity to conclude treaties'.

When the ILC continued its codification mission on the law of treaties by turning to treaties between states and international organizations or between international organizations,[42] it did not resurrect the federal clause with respect to international organizations and their member states. A draft version of the convention on treaties concluded by international organizations discussed during the ILC's sessions in 1982 contained a provision – article 36 bis – that essentially codified the EEC's standard

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39 In practice, the issue has been the subject of several contradictory decisions. As early as 1951, the Commission had considered it useful to limit its work to treaties between states, but the question was debated during the first session of the Diplomatic Conference held in Vienna in 1968. See Philippe Gautier, 'Commentary on Article 1 of the 1969 VCLT', in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011).

40 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 6 (VCLT).

41 Wessel, 'Consequences' (n 2).

42 The VCLT, which codified the already existing customary rules governing the law of treaties between states, was opened for signature within the UN in 1969. In 1986, a '[Vienna] Convention on the Law of Treaties between States and International Organizations or between International Organizations' was opened for signature, but it still has not entered into force. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) 1155 UNTS 331 (VCLTIO). The texts and structure of these two conventions are very similar. See Corten and Klein (n 39).

practice.[43] However, the desire to align the provisions of this new convention closely with the VCLT led to the ILC's members to renounce draft article 36 bis in favour of a similarly concise article 6 formula: '[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization'.[44] Notice that, despite the otherwise similar wording, international organizations are accorded capacity to conclude treaties only as 'governed by the rules of the organization', which suggests that they lack the general capacity recognized as inherent in statehood. Nonetheless, neither formulation refers to the specific case of mixed agreements where an international organization *and* its member states, on the one hand, and a third entity, on the other hand, bind themselves through a single treaty.[45] Nor are mixed agreements expressly excluded, however, provided they are allowed by the rules of the organization.[46]

In the absence of a provision like article 36 bis in the eventual Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO), which was signed in 1986 but never entered into force, international organizations are free to follow the same exclusive dualist logic applicable to states and conclude international agreements within their respective spheres of competencies. Thus, either the state or the international organization can commit itself through a treaty, but there is no place for mixed arrangements.

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43 Draft articles on the Law of Treaties between States and International Organizations or between International Organizations and comments [1982] II(2) Yearbook of the International Law Commission 44.

44 VCLTIO (n 42) art 6. For commentary on this article, see also Nicolas Levrat, 'Commentary on Article 6 of the 1986 Vienna Convention' in Corten and Klein (n 39) 183.

45 Rafael Leal-Arcas, 'The European Community and Mixed Agreements' (2001) 6 European Foreign Affairs Review 483, 502.

46 This reference to 'rules of the organization' is quite broad and is clearly not limited to the constitutive act or formal texts, but also includes practices or implicit competencies. For developments of this notion within the framework of Article 6 of the VCLTIO, see Levrat (n 44).

Mixed agreements do not seem to be addressed by international law of treaties as it has been codified by the ILC in the VCLT and the VCLTIO.[47]

We must also recall article 27 of the VCLT, which states: '[a]n international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.'[48] In other words, from the point of view of international law, which governs the legal effects of mixed agreements between the EU and its Member States on the one side, and a third party on the other, domestic provisions of the parties (in this case, the EU) are irrelevant when it comes to interpreting or mitigating the legal effect of obligations arising from an international treaty under international law.

The rules of international responsibility seem to offer slightly more leeway.[49] Under general international law, there can be no situation of common or shared responsibility between a federal state and its federated entities.[50] Only the federal state is a subject of international law. The same logic is not applicable for the division of responsibility between an international organization and its member states, since all are subjects of international law.[51] The 'draft articles on the responsibility of international organizations'

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47 See Daniel Turp and François Roch 'Commentary on Article 6 of the 1986 Vienna Convention' in Corten and Klein (n 39) 107.

48 VCLTIO (n 42) art 27(2). The principle is the same in the 1969 version, except that it refers to 'domestic law'.

49 The law of international responsibility is, like the law of treaties, mainly of a customary nature; however, unlike the law of treaties, the codification work of the ILC did not result in treaties. There is thus a set of 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (UN Doc A/56/10 (2001)) and a set of 'Draft Articles on the Responsibility of International Organizations' (A/66/10 (2011) para 87), the latter of which was adopted by the International Law Commission at its sixty-third session in 2011 and submitted to the General Assembly as part of its report on the work of that session.

50 This question has been raised and systematically rejected by the ICJ, in particular in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* [1988] ICJ Rep 12; *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466; and *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] IC Rep 12.

51 This issue of the division of responsibility between the EU and its Member States has been seen as one of the main problems that has led the CJEU to consider the

submitted by the ILC to the UN General Assembly in 2011, which represent the current state of codification of public international law in this area, assert that, in principle, a state member of an international organization is not responsible for implementing a convention concluded by that organization. Under international law, such a convention binds only the signatory organization, which is a separate legal subject from its member states. Any responsibility on the part of the member state would be subsidiary to that of the organization and derive from the "rules of the organization".[52]

While rules specific to the internal functioning of an organization are carved out,[53] which provides some leeway in the EU context,[54] this exception is, of course, of no use to the UK after Brexit. Therefore, from the perspective of international law, the question that needs to be answered, and which becomes especially acute after Brexit, is the following: when the UK, as a Member State of the EU, signed and ratified an EU mixed agreement with third parties, what commitments did it undertake as a subject of international law?

3. Is an EU Member State a Party, as Defined by International Law, to a Mixed Agreement?

This is, after all, the heart of the matter. Clearly, the issue of the definition of 'party' will play a crucial role regarding the UK's participation in mixed agreements after Brexit. Let us therefore examine two cases in which the CJEU or one of its Advocates General has had the occasion to address the

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participation of the EU – alongside its Member States – in the ECHR as not being in conformity with the spirit of the treaties on which the Union is founded. See Opinion 2/13 EU:C:2014:2454 (on the accession of the EU to the ECHR).

52 Draft Articles on the Responsibility of International Organizations (n 49) art 62.

53 Ibid art 64.

54 For a brilliant thesis providing a detailed analysis of the international responsibility of the EU, see Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016). See also Pieter Jan Kuijper, 'International Responsibility for EU Mixed Agreement' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 208-227.

issue of the legal meaning of 'contracting party' status with regard to mixed agreements.

The first version of the EEA Agreement was submitted to the CJEU according to the opinion procedure now enshrined in article 218(11) TFEU.[55] In this first version of the EEA Agreement, the contracting parties agreed to establish one single Court of the European Economic Area, competent to interpret the provisions of the treaty. In its Opinion 1/91, the CJEU stated:

> As the Court of the European Economic Area has jurisdiction in relation to the interpretation and application of the agreement, it may be called upon to interpret the expression 'Contracting Parties'. As far as the Community is concerned, that expression covers the Community and the Member States, or the Community, or the Member States. Consequently, that court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement. To confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty. Under Article 87 of the ECSC Treaty and Article 219 of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein.[56]

The Court of Justice was thus very reluctant to let any international judicial body other than itself interpret the expression 'contracting party' (and for this reason struck down the proposed agreement as incompatible with EC law), as it regards the issue of distribution of competences between the EU and its Member States. In interpreting 'contracting party' status for the EU and/or its Member States, this proposed judicial body responsible for the dispute settlement within the EEA Agreement would been competent to adjudicate on the distribution of competences between the EU and its Member States, a purely EU law issue.

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55 TFEU (n 5) art 218(11).

56 Opinion 1/91 (n 34). In this Opinion, the court stated that the EEA Agreement as it was first drafted, and especially the jurisdiction it established, was not consistent with the treaties.

We infer from this position that the CJEU was well aware that 'contracting party' may be given a different meaning under EU law and international law – particularly when it concerns the legal status of an EU Member State's participation in a mixed agreement. Thus, for the CJEU it was very clear that, since EU Member States' participation in mixed agreements must be settled in accordance with the internal distribution of competences, no jurisdiction other than the CJEU could be allowed to interpret the expression 'contracting party' as regards the EU and its Member States.

More recently, and again from the standpoint of EU Law, Advocate General Sharpston argued in her opinion on European Union-Singapore Free Trade Agreement for clear distinctions between the EU and Member States in terms of their status as parties to mixed agreements:

> If an international agreement is signed by both the European Union and its constituent Member States, both the European Union and the Member States are, as a matter of international law, parties to that agreement [...]. Finally, where an international agreement is signed by both the European Union and its Member States, each Member State remains free under international law to terminate that agreement in accordance with whatever is the appropriate termination procedure under the agreement. *Its participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the European Union (and the fact that the European Union may have played the leading role in negotiating the agreement is, for these purposes, irrelevant)*. If the Member State were to do so, however, the effect of Article 216(2) TFEU will be that — as a matter of EU law — it continues to be bound by the areas of the agreement concluded under EU competence (because it is an EU Member State) unless and until the European Union terminates the agreement. The ability to act independently as an actor under international law reflects the continuing international competence of the Member State; the fact that the Member State remains partially bound by the agreement even if, acting under international law, it terminates it reflects not international law but EU law.[57]

It is thus clear, both from the point of view of EU law and international law, that the participation of EU Member States in EU mixed agreements is distinct from EU participation. In the same measure as a Member State could, according to Advocate General Sharpston, withdraw individually from

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[57] Opinion 2/15 EU:C:2016:992, Opinion of AG Sharpston paras 76-77 (emphasis added).

a mixed agreement but remain bound through article 216(2) TFEU, an EU member State leaving the EU should, without specific provision or action on its part, remain bound by the agreement as a state party, even if it is no longer bound by article 216(2) TFEU.[58]

III. How Does Brexit Affect the UK's Participation in EU Mixed Agreements?

Ramses Wessel has argued that

> with regard to mixed agreements, different considerations indeed apply to bilateral and multilateral agreements. In the case of bilateral agreements (between the EU/Member, States and third party), the UK would cease to be a party, but this will not happen automatically. [...] In the case of multilateral agreements (between the EU, the Member States and a (large) number of other States), the UK could perhaps remain a party.[59]

We disagree with this analysis and offer different opinion. We argue that, after Brexit, the UK, as a party to mixed agreements, will remain bound by its legal commitments towards other parties, as other parties, if they so decide, will remain legally bound towards the UK. EU law, and in particular article 50 TEU, contains no rule capable of resolving this legal issue. Furthermore, as the UK is no longer subject to the jurisdiction of the CJEU, its participation in international agreements is governed only by general international law, except in situations that implicate specific multilateral regimes, such as WTO law, to which both the EU and the UK are parties.[60]

Without challenging the distinction between bilateral and multilateral mixed agreements under EU law,[61] we simply argue that this distinction, based on EU-law categories, does not bear upon the international law of treaties. Furthermore, the EU does not follow consistent criteria in deciding whether

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58 Van der Loo and Blockmans (n 2), arguing that, '[c]ontrary to EU-only agreements, the UK is a contracting party to the agreement for the mixed elements of the agreement and these termination and denunciation clauses are applicable'.

59 Wessel, 'Consequences' (n 2) 123-124.

60 See references in n 7.

61 The nature of a mixed agreement is usually defined in accordance with the definition of the 'parties' to the agreement. See Wessel, 'Consequences' (n 2) 123.

to conclude international agreements as mixed agreements or EU-only agreements. [62] We therefore suggest giving special attention to the formulation of the "party" status to an agreement. This implies that each mixed agreement should be analysed on a case-by-case basis in accordance with its own provisions and the rules of international law.[63] In this way, EU law would remain relevant to the determination of the effects of mixed agreements for the post-Brexit UK as a complementary means of interpretation, an aspect of the 'circumstances of conclusion' of the agreement relevant to interpretation pursuant to article 32 VCLT.[64]

1. Does General International Law Offer Any Solution?

Under international law, once a treaty enters into force, its parties (states or international organizations) are bound by its provisions according to the principle *pacta sunt servanda*. Therefore, the UK, whether member of the EU or not, remains bound by the international commitments it undertook under its own name. Nonetheless, this situation of continued participation by a former EU Member State to a mixed agreement to which it became a party

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62 The issue of 'mandatory' or 'facultative' mixity (or 'incomplete' or 'partial' mixity) has been discussed in legal scholarship. See e.g. Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 183-184; Guillaume Van der Loo and Ramses A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 Common Market Law Review 735. For the legal debate on 'facultative' mixity after Opinion 2/15, see references in n 24.

63 For example, the Cotonou agreement, which is an EU mixed agreement passed with 76 African, Caribbean, and Pacific countries (collectively, ACP) in 2000, is set to expire on 30 November 2021, the date of publication of this article (having been extended beyond its initial expiration date in 2020). A new agreement has been negotiated and accepted on 15 April 2021. It has been presented to 79 member States of OACPS and the EU Member States for approval. 'Post-Cotonou Negotiations on New EU/Africa-Caribbean-Pacific Partnership Agreement Concluded' (European Commission, 15 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1552> accessed 28 November 2021. The UK should not be bound by this or any other eventual successor agreement because it was concluded when the UK was no longer a Member State of the EU.

64 VCLT (n 40) art 32.

as an EU Member State is so novel that general international law does not give a clear-cut answer.[65]

What remains clear is that no rule of general international law can be found to justify the automatic termination of the UK's commitments as a party to EU mixed agreements. Article 42 of the VCLT clearly shows the international community concern for guaranteeing respect for treaty commitments by subjects of international law and strictly limiting the possibility of withdrawal, which is permitted only (1) in accordance with the provisions of a particular treaty, (2) pursuant to a termination right recognized in the VCLT, or (3) with the (implicit or explicit) consent of all parties. We can dispense with any issue as to the formal succession to treaties after Brexit, since the UK as a state is already a party to EU mixed agreements and will remain so after Brexit, not as a successor to the EU, but as a state party to the original treaty since its date of ratification in accordance with its domestic procedural rules.

None of the grounds for the termination or suspension of the application of a treaty listed in the VCLT can properly be invoked in this context.[66] The most likely argument would be that Brexit constitutes a 'fundamental change of circumstances' as countenanced by article 62 VCLT.[67] However, this justification may only be invoked by the party seeking to terminate or suspend its treaty commitments. Thus, it could only be invoked by the UK and could not be invoked against the UK by another party to the treaty. It is also worded in restrictive terms; among other conditions, it can only apply where 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'. This issue would therefore need to be dealt with on a case-by-case basis, depending on the specific provisions of the relevant mixed agreement and the conditions for its implementation. One could argue, as regards the EEA Agreement for example, that the UK's continued implementation of this after Brexit would tend towards preserving the status quo as regards the UK's relationship with

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65 See Magdalena Ličková, 'European Exceptionalism in International Law' (2008) 19 European Journal of International Law 463, 490, in which the author argues that a supranational exception should enter 'the theatre of international life'.

66 VCLT (n 40) art 42-64.

67 Ibid art 62.

the other parties to that treaty – far from a 'radical transformation of the extent of UK's obligations' under that treaty. Finally, attempts to invoke this provision have so far not met with success before international jurisdictions.[68]

If mixed agreements could be considered bilateral agreements, with the 'EU and its Member States' representing a single party to the agreement, then EU Member States, despite signing and ratifying mixed agreements alongside the EU, would not be bound by the resulting treaty commitments under international law. However, in our view, this approach is incompatible with both international law and EU law. As regards the former, the only plausible explanation for considering mixed agreements to be bilateral in nature, despite having at least 30 contracting parties, would be that EU Member States, by virtue of their membership in the EU, have lost the capacity to validly conclude treaties with third parties under international law! Under the unitary logic of international treaty law, if you do not possess such capacity, you are not a state.

In terms of EU law, considering the EU and its Member States as a single party to a mixed agreement would amount to an utter disregard for the principle of conferral as stated at article 4(1) TEU, since it would mean the EU (and its Member States) enter such international agreement as a single subject of international law. As we have shown, international law does not accommodate composite entities, so the relevant party to the agreement would be the EU. This means that the EU would be acting on the international plane in a manner that exceeds the competencies attributed to it by the Member States. In short, the Member States' decision to ratify a mixed agreement would be tantamount to a transfer of new competencies to the EU, in obvious derogation of articles 4 and 48 TEU.[69] This is why, according to our analysis, EU mixed agreements can only be considered as multilateral agreements under international law.

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68 See *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7.

69 Opinion C-2/94 EU:C:1996:149 (on the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

2. Could the Problem Be Solved by the Withdrawal Agreement or the TCA?

Of course, all parties to a mixed agreement can agree on the withdrawal of the UK from that treaty and simply amend the treaty accordingly. Article 54(b) of the VCLT provides that the termination of a treaty or the withdrawal of a party may take place at any time by consent of all the parties after consultation with the other contracting parties.[70] Such a solution was undertaken considering the UK's participation in the EEA Agreement, which included the preparation and signature of an agreement between the United Kingdom and the European Free Trade Association (EFTA) states.[71] The mere fact that such an agreement was needed confirms that the UK's withdrawal from the EU does not imply an automatic withdrawal from other international agreements to which it is a contracting party. The formal condition of article 54 of the VCLT is not met, since there are two distinct agreements at play: one dealing with the withdrawal of the UK from the EU, and the other with the UK's separation from the EEA, whose parties include the EFTA states. Nonetheless, it seems to us that such solution should be deemed acceptable as regards the requirement of unanimous consent embedded in article 54 of the VCLT. Again, though, the fact that such arrangements have been made confirms, in our view, our main hypothesis that the UK, as a state under international law, must be considered as party in its own right to EU mixed agreements – in this case, the EEA.

The picture becomes even more complicated when we consider mixed agreements involving third parties beyond the EU and EFTA. Even if Brexit agreements were to settle the UK's status under EU mixed agreements as regards the EU, its Member States, and the EFTA states, the consent of other third parties would be needed for such an arrangement to produce its full legal effect. According to article 34 of the VCLT, '[a] treaty does not create either

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70 VCLT (n 40) art 54(b).

71 Agreement on Arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland Following the Withdrawal of the United Kingdom from the European Union, the EEA Agreement and Other Agreements Applicable between the United Kingdom and the EEA EFTA States by Virtue of the United Kingdom's Membership of the European Union (adopted 28 January 2020) <https://www.gov.uk/government/news/uk-and-eea-efta-states-sign-separation-agreement> accessed 5 October 2021 (Separation Agreement).

obligations or rights for a third State without its consent'.[72] Therefore, neither the withdrawal agreement of the UK from the EU nor the TCA between the EU and the UK can create or alter rights or obligations towards third parties to EU mixed agreements without the consent of the third states concerned.[73] In this connection, let us underline that the CJEU, in its judgment issued on 27 February 2018, explicitly referred to the provisions of article 34 of the VCLT as customary international law applicable to EU treaty practice.[74]

Therefore, it is clear that the rights of states that are parties to EU mixed agreements cannot be altered by a bilateral agreement between the EU and the UK. Under similar logic, it is indeed questionable whether the UK and the EU can use such means to settle their own bilateral relationship after Brexit.[75] Deciding by a provision in a withdrawal agreement or the TCA that the EU and the UK are not legally bound towards each other by a mixed agreement to which they both remain parties may affect the rights of other parties to the agreement. Further, article 41 of the VCLT narrowly restricts the conditions under which a multilateral treaty may be modified as between only certain parties. Even when these conditions are met, the VCLT guarantees the right of third parties and states that such modification, unless authorized by specific treaty provisions, is permissible only when it 'does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations'.[76] This would have to be assessed on a case-by-case basis for each mixed agreement.

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72 VCLT (n 40) art 34.

73 Separation Agreement (n 71).

74 Case C-104/16 P *Council v Front Polisario* EU:C:2016:973, paras 95, 132; Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* EU:C:2018:118, paras 62-63; Eva Kassoti, 'The ECJ and the Art of Treaty Interpretation: *Western Sahara Campaign UK*' (2019) 56 Common Market Law Review 209.

75 For the discussion on 'disconnection clauses', see Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 160-185.

76 VCLT (n 40) art 41(1)(b)(i).

3. Open Questions for International Lawyers after Brexit

Naturally, establishing that the UK, the EU, its Member States, and third parties remain legally bound by EU mixed agreements after Brexit does not mean that the implementation of the provisions of these treaties may not raise difficulties after Brexit.[77] Nevertheless, the validity of the legal commitments remains unaffected. As much as the relationship between the UK (as a non-EU state) and third parties to EU mixed agreements may lead to complexity and unexpected results, the relationship between the EU and the UK after Brexit, under the provisions of mixed agreements to which both will remain contracting parties, will likely yield the most complex legal issues and will require thorough analysis under EU law, general international law (especially the customary international law of treaties as codified by the VCLT and VCLTIO) and the specific provisions of each mixed agreement.

As an example of the type of legal difficulties that may be encountered, let us take a look at article 2(c) of the EEA Agreement, which states:

> The term 'Contracting Parties' means, concerning the Community and the EC member States, the Community and the EC member States, or the Community, *or the EC member States*. The meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of this Agreement and from the respective competences of the Community and the EC member States [...].[78]

Would that mean that, as a former EU Member State, the UK was only partially bound – depending on the wording of each provision of the agreement, as article 2(c) suggests – or should that sentence only be

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77 For example, as regards the old "association agreements" (e.g. Information sur la Date d'Entrée en Vigueur de l'Accord Créant une Association entre la Communauté Économique Européene et la Turquie [1964] OJ 217) or more recent "Stabilisation and Association Agreements" (e.g. Stabilisation and Association Agreement between the European Communities and their Member States, of the One Part, and the Republic of Montenegro, of the Other Part [2010] OJ L108/3), it would make little sense for the UK to continue monitoring these countries' accession processes to the EU, since it would no longer be of political or legal concern for the UK.

78 EEA Agreement (n 9) art 2(c).

considered relevant for EU Member States, such that it becomes irrelevant for the post-Brexit UK?

One could argue that, since the competencies transferred to the EEC (and then to the EU) by the accession agreement of 1972 and further treaty modifications are regained by the UK on the day of Brexit (with the exception of any specific provisions in bilateral agreements between the UK and the EU), the post-Brexit UK will possess the full capacities and competencies of a sovereign state under international law, allowing it to implement its commitments under the EEA Agreement. Accordingly, we believe that the reallocation of competences between the EU and the UK as a result of Brexit should not alter the respective commitments of the EU and the UK as contracting parties pursuant to article 2(c) of the EEA Agreement. Close monitoring of the parties' behaviour after Brexit, as well as effects produced on potential beneficiaries of this treaty such as private companies or individuals, will provide precious information for the validation or invalidation of our hypothesis.[79]

These complex legal issues can be envisaged as questions of interpretation of treaty provisions. Unfortunately, Article 31 VCLT, which codifies the basic principles of treaty interpretation, does not seem to be of much help. However, if the application of article 31's principles fails to offer a clear meaning to treaty provisions, or 'leads to a result which is manifestly absurd or unreasonable', article 32 VCLT allows recourse to 'supplementary means of interpretation', including 'the circumstances of the conclusion' of a treaty.[80] The UK's decision to conclude the EEA with EFTA countries was certainly linked to its EU membership. Is that enough, however, to support an interpretation of the treaty under which the UK's status as a party is conditional upon its continued membership in the EU? This is, in our view, beyond the scope of treaty interpretation.

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79 For arguments validating our hypothesis, see Ulrich G Schroeter and Heinrich Nemeczek, 'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area' (2016) 27 European Business Law Review 921. For contrary arguments, see Dora S Tynes and Elisabeth L Haugsdal, 'In, Out or In-between? The UK as a Contracting Party to the Agreement on the European Economic Area' (2016) 41 European Law Review 753.

80 VCLT (n 40) art 32.

If, contrary to our hypothesis, we consider that the UK was bound by the EEA Agreement solely in its former capacity as an EU Member State, within its competences at the time of concluding the mixed agreement,[81] then Brexit will require examination of issues relating to the 'separability of treaty provisions' under article 44 VCLT.[82] The conditions for separability are rather restrictive, making this option impracticable. Furthermore, the allocation of competencies between the EU and its Member States has evolved since the time of the conclusion of EEA Agreement in 199 and, as the CJEU has stated,[83] this is a question of EU law, not international law.

IV. Conclusion

The EU's practice of concluding mixed agreements alongside its Member States – all 29 legal subjects thus being parties to such agreements and accordingly bound in respect of one or more third parties as well as between themselves – has not been properly addressed under the rules of international law. This omission was exemplified by the refusal of the ILC and the international community to consider the EU's practice of concluding mixed agreements in the codification process that produced the VCLTIO.[84] Nevertheless, this practice exists and a very significant number of third states have accepted it through the conclusion of EU mixed agreements. Brexit reveals that this situation may be problematic from the point of view of international law, since this particular form of international agreement does not fit into any of the existing categories codified by general international law.

As long as an EU Member State remains an EU Member State, the problem may adequately be solved by EU law, which establishes a very clear hierarchical relationship between different kinds of legal norms within the EU legal order. EU mixed agreements are thus considered, from the perspective of EU Law, as some kind of secondary legislation binding upon its institutions and Member States. Legal issues regarding the respective obligations of the EU or its Member States under EU law do not affect

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81 TFEU (n 5) art 216(2).

82 VCLT (n 40) art 44.

83 Opinion 1/91 (n 34).

84 See references in n 42 and n 46.

commitments towards third parties. However, when a Member State leaves the EU, as in the case of the UK, the relationship between the EU and that state, as well as the relationship between that state and third state parties to mixed agreements, remains subject solely to international law. This complex situation was envisaged neither by the EU treaties nor by the rules of general international law. It reveals the very strange and original legal relationship that has been developed over time among the EU, its Member States and third parties through the medium of mixed agreements.

One seemingly convenient proposal would be to consider a Member State's participation in mixed agreements to cease the moment it leaves the EU since it acceded to such agreements by virtue of a status it no longer holds. As we have shown, however, this is legally and politically problematic. It would be unsustainable from the point of view of EU law, as it would vitiate the principle of conferral, as stated in articles 4 and 5 TEU.[85] By accepting that the EU signs and implements mixed agreements on their behalf Member States would *de facto* be transferring competencies to the EU, which otherwise authority to do so under the TEU and TFEU.[86] This hypothesis would contravene the quite extensive case-law of the CJEU under the article 218(11) TFEU opinion procedure, the very wording of which implies that the EU must possess the adequate competencies according to the Treaties before entering an international agreement (and not, as would be the case under this hypothesis, merely as a consequence of international agreement's entry into force).

As we have shown in this article, the apparently easy solution in which Brexit simply terminates the UK's participation in mixed agreements could only be achieved legally, under current international law, if EU Member States, as long as they retain such status, do not bind themselves through mixed agreements as subjects of international law (that is, as states). In other words, as long as they remain within the EU, Member States should not be considered sovereign states under international law! This is, in our opinion, evidently not the case since, if this logic was to be followed to its ultimate legal consequence, it would mean that the UK, by leaving the EU, would become a new subject of international law, whose existence would need to be

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85 TEU (n 12) arts 4-5.

86 See Opinion of AG Sharpston (n 57).

recognized by other states as a new sovereign state. It would also mean, among other dubious consequences, that remaining EU Member States would have to relinquish their membership in the UN, since article 4 of the Charter lists statehood as a requirement for UN member states.[87]

All these scenarios are fantasies – far from real legal situations. EU Member States are states under international law, and therefore bound by the treaties they sign and ratify. So how can we solve the legal question regarding the nature of the UK's participation in EU mixed agreements concluded before Brexit? The current legal frameworks, EU and international law, allow no clear answer to that question. What is certain, however, is that the EU and the UK will not be able to deal with the issue of the UK's participation in mixed agreements after Brexit on their own, since third party rights must also be taken into account. According to article 34 of the VCLT,[88] the consent of third states is required to alter their rights under mixed agreements in any way. It will thus be necessary to reconsider each and every mixed agreement on a case-by-case basis to determine the extent of UK's commitments as a state party. We cannot, for example, exclude the possibility that the UK will invoke article 61 VCLT based on the impossibility of performing its obligations under some treaties after Brexit. However, article 61 VCLT deals with the termination of a treaty, not the withdrawal of a party from a multilateral treaty, which again underlines the complexity of the legal issues at hand.

Thus, Brexit creates – beyond political chaos and economic turmoil – a very complex legal situation, not only as regards the future relationship between the UK and the EU beyond the TCA, but also as regards general rules of international law. We therefore conclude that solving these issues will either require significant new developments in EU practice (for example, moving away from mixed agreements) or the recognition of new categories for mixed agreements, both in EU law and international treaty law. This would most likely involve a reassessment of the relevance of the "federal principle", at

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87 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57.

88 VCLT (n 40) art 34.

least for the EU – understood in the broad sense, including its Member States – as an original, composite subject of international law.[89]

[89] For considerations on that specific issue, see Nicolas Levrat, 'The Theoretical Implications of Supranationality and Legitimacy in a Legal Perspective' in Mario Telo and Anne Weyembergh (eds), *The Supranational at Stake?* (Routledge 2019) 26-44.