The Status in EU Law of International Agreements Concluded by EU Member States

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Abstract

This Essay will, first, provide a general discussion on the status in Union law of agreements concluded by EU Member States. Second, brief discussions will follow on the specific nature of agreements concluded between the Member States inter se as well as on the special status of agreements concluded before the Member State concerned became a member of the Union. Third, the main part of this Essay will address different categories of agreements concluded by Member States in order to provide a more refined picture of the legal relevance of such agreements for Union law. The final Section will provide a summary and some basic conclusions.
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Allan Rosas *

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INTRODUCTION

The development of European integration has made the European Union ("EU" or "Union") an important subject of

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international law and treaty-making power. And yet, the twenty-seven EU Member States retain their state features and continue to conclude international agreements in their own name, sometimes with, and sometimes without, Union participation. The overall picture is quite complex, and sometimes bewildering. This should be seen against the general background of the ambiguous status of the EU itself, which displays the features of "cooperative federalism"¹ and "multilevel governance."²

To be sure, in the field of external relations and treaty-making powers, the entry into force of the Treaty of Lisbon on December 1, 2009,³ which amended the Treaty on European Union ("TEU")⁴ and replaced the Treaty Establishing the European Community ("EC Treaty")⁵ with the Treaty on the Functioning of the European Union ("TFEU"),⁶ has somewhat simplified matters. As the European Community has disappeared as a distinct entity, international agreements are henceforth concluded in the name of the EU.⁷ The picture remains complex, however, as not all agreements relevant to EU law are, even after December 1, 2009, concluded by the Union alone, but by the Union together with its Member States (so-called mixed agreements), or by the Member States without Union adherence. One should thus distinguish between the following three

¹. See generally ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW (2009).
⁴. Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/13 [hereinafter TEU post-Lisbon]. All references to the TEU in this Essay will be to the TEU, as amended by the Treaty of Lisbon. For the version of the TEU applicable before the entry into force of the Treaty of Lisbon on December 1, 2009, see Consolidated Version of the Treaty on European Union, 2006 O.J. C 321 E/5.
⁷. According to TEU Article 1, "[t]he Union shall replace and succeed the European Community" while TEU Article 47 spells out that "[t]he Union "shall have legal personality." TEU post-Lisbon, supra note 4, arts. 1, 47, 2010 O.J. C 85, at 16, 41. At the entry into force of the Treaty of Lisbon, third states and international organizations have been notified of the fact that as from December 1, 2009, the European Union ("EU" or "Union") will replace and succeed the European Community. See Council of the European Union, Doc. No. 16654/1/09 REV 1 (Nov. 27, 2009).
categories of international agreements: (1) agreements concluded by the EU; (2) agreements concluded by the EU and one or more of its Member States (mixed agreements); and (3) agreements concluded by one or more Member States.

The first type of agreement comes into play notably in situations of exclusive Union competence. According to TFEU Article 3(1), the “Union shall have exclusive competence” in the areas of, inter alia, “the conservation of marine biological resources under the common fisheries policy” and the “common commercial policy.” Moreover, according to Article 3(2) TFEU,

[the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.]

With respect to the latter provision, the so-called AETR-ERTA principle (Union exclusive competence in case of agreements that may affect common rules or alter their scope) is particularly relevant. All in all, the new competence rules of the TEU and the TFEU, introduced by the Treaty of Lisbon, as well as the expansion of Union legislation, will probably contribute to a gradual broadening of the areas belonging to Union exclusive competence.

On the other hand, the Union may authorize Member States to conclude an agreement falling within an area of its exclusive

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8. TFEU, supra note 6, art. 3(1), 2010 O.J. C 83, at 51.
9. Id. art. 3(2), at 51.
11. See, e.g., Allan Rosas, The Future of Mixture, in MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 367, 371 (Cristophe Hillion & Panos Koutrakos eds., 2010). In Commission v. Greece, Case C-45/07, [2009] E.C.R. I-701, Greece was condemned for having violated EU law by submitting to the International Maritime Organization ("IMO") a unilateral proposal relating to two maritime conventions binding on the Member States but not the Union. According to the Court, the proposal could have lead to the adoption of new IMO rules that in turn—under the AETR-ERTA principle, see supra note 10, and thus in the context of exclusive EU competence—would affect a Union legislative act. See also Christophe Hillion, Mixture and Coherence in EU External Relations: The Significance of the "Duty of Cooperation," in MIXED AGREEMENTS REVISITED, supra, at 87, 112–13.
competence. Many examples will be given below. Suffice it to note here that some Union legislative acts lay down a specific procedure for such authorizations. For instance, a regulation in 2004 concerned the conclusion of air service agreements between Member States and third countries.\textsuperscript{12} It was adopted as a consequence of a series of judgments of the Court of Justice of the European Union ("Court"), which found that parts of the so-called "Open Skies" agreements concluded by Member States with the United States fell within the area of Union exclusive competence.\textsuperscript{13} Other examples are provided by a regulation from 2009 "establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations,"\textsuperscript{14} a domain covered by the so-called Rome I and Rome II regulations,\textsuperscript{15} and a regulation from the same year establishing a similar procedure for such agreements concerning certain family law matters,\textsuperscript{16} in other words matters covered by the so-called Brussels II bis

\textsuperscript{12} Parliament and Council Regulation No. 847/2004 on the Negotiation and Implementation of Air Service Agreements between Member States and Third Countries, 2004 O.J. L 157/7 [hereinafter Air Services Agreement Regulation]; see FRANK S. BENYON, DIRECT INVESTMENT, NATIONAL CHAMPIONS AND EU TREATY FREEDOMS: FROM MAASTRICHT TO LISBON 103-04 (2010).


\textsuperscript{14} Parliament and Council Regulation No. 662/2009 Establishing a Procedure for the Negotiation and Conclusion of Agreements between Member States and Third Countries on Particular Matters Concerning the Law Applicable to Contractual and Non-Contractual Obligations, 2009 O.J. L 200/25 [hereinafter Contractual and Non-Contractual Obligations Regulation]; see BENYON, supra note 12, at 104.


regulation and a regulation relating to maintenance obligations.  

As far as mixed agreements are concerned (the second category mentioned above), they are most likely to be concluded in areas of shared competence. According to TFEU Article 4(1), the Union shall share competence with the Member States if a treaty confers on it a competence that does not relate to the areas of either exclusive competence or so-called supporting competence. Mixed agreements include not only a number of bilateral agreements between the EU and its Member States, on the one hand, and third states, on the other, but also many multilateral conventions concerning, inter alia, environmental matters. While many multilateral conventions continue to be closed to EU accession, there are some Council decisions, especially in the maritime field, that contain endeavor clauses obliging Member States to seek, “at the earliest opportunity,” amendments to such conventions with a view to allowing the Union to become a contracting party.

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18. TFEU, supra note 6, art. 4(1), 2010 O.J. C 83, at 51. According to TFEU Article 6, “the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States” in some areas (such as industry, culture, and education). Id. art. 6, at 52.  
20. See infra notes 34–35.  
Some mixed agreements are concluded by the EU and one or more, but not all, Member States ("incomplete mixity"). Such agreements may raise serious questions regarding the coverage of the treaty relations between the EU and the third-state parties to the agreement (for example, is the EU responsible for the fulfillment of the agreement in those Member States that have not adhered to the agreement in their own name?). More generally, mixed agreements present a number of problems with regard to the division of competence and responsibility between the Union and its Member States. According to settled case law, the duty of loyal cooperation, now expressed in TEU Article 4(3), also applies to the area of shared competence and mixed agreements. According to the Court, this duty flows from the requirement of unity in the international representation of the Union. In a recent case, a Member State was condemned for having submitted a unilateral proposal to modify an annex to a convention concluded by both the EU and its Member States, which violated the duty of cooperation.

Agreements concluded by the Union are binding upon both the Union institutions and its Member States. Such agreements, when concluded and entered into force, become integral parts of Union law and are directly applicable also in the Member States. Whether they also have direct effect (i.e., they may be invoked directly by private parties before courts and authorities) will

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22. See, e.g., Rosas, supra note 11, at 373.
25. TFEU, supra note 6, art. 216(2), 2010 O.J. C 83, at 144.
depend on the nature of the agreement and the individual provisions invoked.\textsuperscript{26} In the EU hierarchy of norms, agreements concluded by the Union are situated between primary law (such as the TEU and the TFEU) and legislative acts (such as regulations and directives).\textsuperscript{27} As all norms of EU law, they have primacy over the national laws of Member States.\textsuperscript{28} These observations apply, in principle, to mixed agreements as well, although it cannot be excluded that, insofar as it is possible to distinguish between a Union part and a Member State part of a mixed agreement, the latter part becomes more extraneous to Union law in the strict sense.\textsuperscript{29}

Agreements concluded by EU Member States but not by the Union are even more clearly extraneous to Union law. They form, in principle, part of the national law of the Member States that have concluded them. As will be developed below, however, this does not necessarily imply that such agreements are irrelevant from a Union law perspective. While the question of Union agreements, including mixed agreements, has been examined quite extensively in legal literature, much less attention has been paid to the possible relevance for Union law of agreements concluded by the Member States.\textsuperscript{30}

\textsuperscript{26} On the status and legal effects of international agreements concluded by the EU (before December 1, 2009, also by the European Community) see, e.g., PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 226–344 (2004); Allan Rosas, The European Court of Justice and Public International Law, in THE EUROPEANISATION OF INTERNATIONAL LAW: THE STATUS OF INTERNATIONAL LAW IN THE EU AND ITS MEMBER STATES 71, 74–79 (Jan Wouters et al. eds., 2008).


\textsuperscript{29} See, e.g., Merck Genéricos–Produtos Farmacêuticos v. Merck, Case C-431/05, [2007] E.C.R. I-7001 (declining to answer a question concerning the possible direct effect of a provision relating to patents in a mixed agreement, and holding that the substantive EU law relating to patents had not been sufficiently regulated in Union law to enable the Court to give a Union-wide ruling on this matter).

\textsuperscript{30} Leaving aside the questions of the interpretation of Article 351 TFEU, see infra Part III, and of the specific category of agreements concluded between the EU Member States inter se, see infra Part II, the question of the status of Member States’ agreements has been analyzed notably by Robert Schütze, EC Law and International Agreements of the
This Essay will, first, provide a general discussion on the status in Union law of agreements concluded by EU Member States. Second, brief discussions will follow on the specific nature of agreements concluded between the Member States inter se as well as on the special status of agreements concluded before the Member State concerned became a member of the Union. Third, the main part of this Essay will address different categories of agreements concluded by Member States in order to provide a more refined picture of the legal relevance of such agreements for Union law. The final Section will provide a summary and some basic conclusions.

I. AGREEMENTS CONCLUDED BY EU MEMBER STATES: GENERAL CONSIDERATIONS

There are four main reasons why some international agreements do not count the EU among their contracting parties. First, many agreements were concluded by Member States before they became EU members or before an EU competence in a particular area became clearly established. This category, which often overlaps with the fourth category mentioned below, includes the UN Charter and most constitutions establishing specialized UN agencies such as the International Maritime Organization ("IMO") and the International Labour Organisation ("ILO").

Second, the agreement may concern a matter that is still outside an EU competence. It is true, however, that with the development of Union law, including the entry into force of the Treaty of Lisbon, the listing of such matters is not easy.

Third, the EU Commission or the Council may prefer, for political or other non-legal reasons, not to conclude an agreement despite the existence of a Union competence to do so.
and, in the case of a multilateral convention, despite the existence in the agreement of a clause enabling an integration organization like the EU to become a contracting party. For instance, the EU has refrained from concluding some bilateral cooperation agreements with third states on the ground that the latter have refused to include in the agreement a so-called human rights clause requested by the EU.33

Fourth, a multilateral agreement may be closed to EU adherence by limiting the right to adhere to “states.” The agreement, in other words, does not contain a so-called REIO (regional economic integration organization) or RIO (regional integration organization) clause enabling an integration organization such as the EU to become a contracting party. This is an important reason why the EU still has not adhered to a number of international law-making conventions, including human rights conventions34 and conventions adopted under the auspices of most specialized UN agencies.35 The above-mentioned endeavor clauses contained in some Council decisions instructing the EU Member States to work for EU adherence clauses to be inserted into some maritime conventions36 have not had the desired effect, and in a Statement on Maritime Safety made by the Member States in 2008, they—


36. See supra note 21 and accompanying text.
and not the EU—make the "firm commitment" to express their consent to be bound by a number of such conventions.\textsuperscript{37}

EU primary law in many ways recognizes the right of Member States to conclude, or continue to adhere to, certain international agreements. Just to mention a few examples, Article 34(2) TEU refers to the Member States' participation in international organizations and conferences.\textsuperscript{38} Moreover, Articles 165(3), 166(3), 167(3), and 168(3) TFEU provide that not only the Union but also Member States shall foster cooperation with third countries and international organizations in the fields of education and sport, vocational training, culture, and public health, respectively.\textsuperscript{39} Finally, Articles 191(4), 209(2), 212(3), and 214(4) spell out that the competence of the Union to conclude agreements with third countries and international organizations in the fields of environmental protection, development cooperation, economic, financial, and technical cooperation, and humanitarian aid, respectively, are without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.\textsuperscript{40}

Also, EU legislative acts often refer to agreements that bind EU Member States rather than the EU itself. The situations discussed below include references that may have the effect of making an agreement concluded by Member States directly relevant to EU law. In some other cases, such references may simply exclude an agreement binding on Member States from the scope of application of EU law.\textsuperscript{41}


\textsuperscript{38} TEU, supra note 4, art. 34(2), 2010 O.J. C 83, at 35.

\textsuperscript{39} TFEU, supra note 6, arts. 165(3), 166(3), 167(3), 168(3), 2010 O.J. C 83, at 120–23.

\textsuperscript{40} TFEU, supra note 6, arts. 191(4), 209(2), 212(3), 214(4), 2010 O.J. C 83, at 133, 141–43.

\textsuperscript{41} An example is offered by a 2004 directive relating to environmental liability, which provides that the directive does not apply to environmental damage arising from an incident in respect of which liability or compensation falls within the scope of any of the international conventions listed in an annex to the directive if the relevant convention is in force in a given Member State. Parliament and Council Directive 2004/35/CE on Environmental Liability with Regard to the Prevention and Remedyng of Environmental Damage, art. 4(2), 2004 O.J. L 143/56, at 61 [hereinafter Environmental Liability Directive].
That said, many agreements concluded by EU Member States, without the EU’s participation as a contracting party, are to be considered extraneous to Union law in the strict sense and to be seen as part of the national law of the Member States in question. As they do not form part of the Union’s legal order, they are not governed by the Union law principles of primacy, direct applicability, and direct effect (which is not to say, of course, that they cannot be directly applicable to and have direct effect under the national legal order in question). 42

Nor can such agreements, as a rule, be given an authoritative interpretation by the Union courts in the context of preliminary ruling proceedings. As the Court has recently recalled, the Court “does not, in principle, have jurisdiction to interpret, in preliminary ruling proceedings, international agreements concluded between Member States and non-member countries.” 43 This does not prevent the Court, in the context of infringement actions, from assessing the meaning of an agreement binding on a Member State in the same way it can assess the meaning of other parts of national law to determine whether there has been a breach of Union law. 44

As agreements concluded by Member States form part of their national law, the agreements, as a general rule, have to yield to norms of Union law, be it primary law, international agreements concluded by the EU, or secondary legislation (the principle of primacy of Union law). From a purely public international law point of view, it may seem problematic that commitments entered into vis-à-vis third states cannot always be honored by an EU Member State. 45 One commentator has thus argued that “the choice for having Community law prevail is a

42. See Schütze, supra note 30, at 492; van Rossem, supra note 30, at 199–200. Contra KLABBERS, supra note 30 (offering a more critical analysis of the idea that agreements concluded by Member States are simply part of their national law).


45. See KLABBERS, supra note 30, at 115.
rather parochial one, which would not be tolerated if coming from a state. Surely, not even the United States could insist on fencing off its domestic law from international law without being subjected to severe critiques.”

It is submitted that this comparison is not a valid one. The Union is not fencing off its domestic law from international law binding on the Union but simply insisting that norms created by the Member States that the Union has not accepted, be they unilateral acts (national legislation) or international agreements, remain part of the national legal orders. This is the price to be paid for the supranational character of the EU, which constitutes a constitutional order rather than an international legal order in the classical sense. Seen from the perspective of the unity and efficacy of the Union legal order, it almost goes without saying that Union law cannot allow a Member State to derogate from its Union law obligations simply by concluding an agreement with one or more third states. According to the case law of the Court, even a national constitution will have to yield to conflicting norms of Union law.

That said, EU primary law contains a clear exception to the general principle that Union law prevails: by virtue of Article 351 TFEU, a Member State may be able to invoke an international agreement concluded by it before it became an EU member. When the European Economic Community was established, it was thought unreasonable for Community law to create an immediate obligation to disrespect agreements that the Member

46. *Id.* at 226.

47. See Schütze, *supra* note 30, at 432 (observing (rightly, it is believed) that the EU vision “does not automatically reject a monistic relationship between Community and international law. However, in order to protect the integrity of the Community legal order, a distinction is drawn between Community agreements and Member State agreements.”); see also van Rossem, *supra* note 30, at 200–02.

48. On the constitutional nature of the EU legal order, see, e.g., *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* (Armin von Bogdandy & Jürgen Bast eds., 2d ed. 2009); *Rosas & Armati, supra* note 2.

States had concluded before they had committed themselves to the new Community legal order.\footnote{50}

For reasons of clarity and legal security, it would be tempting to consider that all other agreements—in other words, agreements concluded \textit{after} the beginning of EU membership—would obey the normal rule (implying that they form part of national law only). Legal reality is somewhat more complex, however. One can distinguish between the following four situations:

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<td>Agreements concluded during EU membership</td>
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The following discussion will be especially relevant for category 3. As some important international agreements predate the establishment, on January 1, 1958, of the then European Economic Community,\footnote{51} and as many Member States have joined the EU fairly recently (three in 1995, ten in 2004, and two in 2007), it is also necessary to take into account some salient aspects of Article 351 TFEU and the regime it establishes for agreements concluded with third countries prior to EU membership (category 1). The specific problems related to agreements concluded between two or more EU Member States,\footnote{50. But another approach was adopted in Articles 105 and 106 of the Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter Euratom Treaty], which are based on a less generous acceptance of prior agreements concluded by Member States. \textit{See} Klabbers, \textit{supra} note 30, at 117.}

\footnote{51. To mention just a few examples, the UN Charter, \textit{supra} note 31, the constitutions of most specialized UN agencies, and the ECHR, \textit{supra} note 34. In most cases, these conventions were concluded by the six original Member States before January 1, 1958, i.e., before the entry into force of the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.}
without the participation of third countries (categories 2 and 4), can only be briefly mentioned here.\(^{52}\)

II. AGREEMENTS CONCLUDED BETWEEN THE EU MEMBER STATES INTER SE

Union primary law contains some explicit references to agreements to be concluded by the Member States \textit{inter se}. While Article 293 of the EC Treaty, which referred to negotiations between the Member States with a view, inter alia, to abolish double taxation within the Union, has been repealed by the Treaty of Lisbon,\(^{53}\) the TFEU still refers to the possibility of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg, and the Netherlands (Article 30 TFEU). While according to Title VI TEU, as it existed prior to the Treaty of Lisbon (the "third pillar" of the Union), the EU Council could establish conventions that the Member States could adopt on the basis of a Council recommendation in order to implement police and judicial cooperation in criminal matters, the Treaty of Lisbon repealed the third pillar, which is henceforth integrated into Title V of Part Three TFEU, implying a competence to adopt Union legislative acts.\(^{54}\)

Also, Union secondary legislation may refer to the possibility of agreements between the Member States. An example is provided by a provision in the regulation concerning jurisdiction and the recognition and enforcement of judgments in civil and

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\(^{53}\) On Article 293 of the EC Treaty see, e.g., KLABBERS, \textit{supra} note 30, at 207–08; Schütze, \textit{supra} note 30, at 416–20.

\(^{54}\) During a transitional period, however, the legal effects of the conventions and other third-pillar acts that were adopted before the entry into force of the Treaty of Lisbon may be preserved until those acts are repealed, annulled, or amended in implementation of the treaties as amended by the Treaty of Lisbon. \textit{See} 2010 Consolidated TEU & TFEU, Protocol on Transitional Provisions, arts. 9–10, 2010 O.J. C 83, at 325–26.
commercial matters ("Brussels I"). According to this provision, the regulation "shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments." While this provision would appear to give precedence to conventions concluded by Member States before the entry into force of the regulation, provided that they concern "particular matters," paragraph 2 of the same article instructs the application of the rule expressed in paragraph 1 "[w]ith a view to its uniform interpretation." In a recent judgment, the Court held, first, that the provision in question also relates to situations that are confined entirely within the EU and, second, that the application of specialized conventions binding on Member States "cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union" and that therefore their application is subject to certain conditions.

These examples concern agreements that become relevant for Union law, for instance, by virtue of an express reference in Union primary or secondary law. EU Member States may also conclude agreements outside the Union law framework that are designed to promote closer cooperation between them with a view to their subsequent conversion into Union legal acts. The Schengen Agreement on the gradual abolition of internal border controls of 1985, and the Prüm Convention of 2005 relating to increased cross-border cooperation as regards combating

55. Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 71, 2001 O.J. L 12/1, at 16 [hereinafter Brussels I Regulation]; see also Rome I Regulation, supra note 15, art. 25, at 15–16; Rome II Regulation, supra note 15, art. 28, at 47; Schütze, supra note 30, at 437.
terrorism, cross-border crime, and illegal migration\textsuperscript{61} are cases in point.

That said, agreements concluded between all Member States in particular run the risk of being considered as efforts to circumvent the Union’s legislative and other procedures established by the TEU and the TFEU. This is fairly obvious in areas of exclusive Union competence\textsuperscript{62} but may arise also in other contexts, notably in areas of shared competence where the principle of preemption prevails.\textsuperscript{63} Member States are also, in principle, prevented from amending the Union treaties through agreements \textit{inter se} that do not respect the treaties’ provisions concerning amendments thereto.\textsuperscript{64} Any agreement concluded by the Member States needs in any case to conform to with Union law.\textsuperscript{65}

In one respect, agreements concluded exclusively between EU Member States enjoy a weaker status than agreements concluded with third countries: according to settled case law, the former do \textit{not} fall under Article 351 TFEU concerning agreements concluded prior to EU membership.\textsuperscript{66} Article 351, in

\begin{footnotesize}
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\item\textsuperscript{61} Council of the European Union, Convention on the Stepping up of Cross-Border Cooperation, Particularly in Combating Terrorism, Cross-Border Crime and Illegal Migration, Council Doc. No. 10900/05 (July 7, 2005).
\item\textsuperscript{62} See \textit{AETR-ERTA}, Case 22/70, \textit{[1971]} E.C.R. 263, ¶¶ 70–77; Schütze, \textit{supra note} 30, at 412.
\item\textsuperscript{63} See TFEU, \textit{supra note} 6, art. 2(2), 2010 O.J. C 85, at 50 (noting that the Member States can, in areas of shared competence, exercise their competence only “to the extent that the Union has not exercised its competence”); \textit{c.f.} Parliament v. Council, Joined Cases C-181/91 & 248/91, \textit{[1993]} E.C.R. I-3685 (concerning a situation of so-called parallel competence); see also Schütze, \textit{supra note} 30, at 414–16.
\item\textsuperscript{64} See Defrenne v. Société anonyme belge de navigation aérienne Sabena, Case 43/75, \textit{[1976]} E.C.R. 455; Schütze, \textit{supra note} 30, at 414. The procedures for amending the treaties are laid down in Article 48 TEU, \textit{supra note} 6, art. 48, 2010 O.J. C 83, at 41–43.
\item\textsuperscript{65} See Rosas, \textit{supra note} 52, at 258. In \textit{Commission v. Germany}, Germany was prevented from relying on a bilateral agreement with Poland to justify reserving the advantages of the agreement to undertakings established in Germany. Case C-546/07, \textit{[2010]} E.C.R. I-__ (delivered Jan. 21, 2010) (not yet reported); \textit{see also BENYON, supra note} 12, at 107–08.
\end{enumerate}
\end{footnotesize}
fact, refers to agreements concluded between one or more Member States, on the one hand, and one or more third countries on the other. This means that agreements concluded by Member States inter se cannot be invoked to derogate from the principle of primacy of Union law. In this respect, there is thus no difference between such agreements concluded prior to (category 2) or after (category 4) EU membership.

According to the case law, this conclusion also applies to multilateral agreements that count third states among the contracting parties: Article 351 TFEU cannot be invoked in the relations between the Member State parties to the agreement. Many multilateral conventions, however, are of such a nature that a violation of a provision by one party will necessarily affect the enjoyment of all the other parties’ rights under the convention (including, as the case may be, non-EU states). Examples include human rights conventions as well as conventions that prohibit or restrict the production or stockpiling of certain substances, the impairment of the natural environment, or national sovereignty claims over common areas such as the high seas. In this case, an EU Member State may be entitled to invoke Article 351 TFEU in order to resist the application of a conflicting norm of EU law in the relations between the Member States by arguing that such application would amount to a violation of the convention, which would necessarily affect the rights of not only EU Member States but also third-state parties to the convention. This leads to a discussion of Article 351 TFEU more generally.


67. TFEU, supra note 6, art. 351, 2010 O.J. C 83, at 195.
69. See Rosas, supra note 52, at 260.
III. ARTICLE 351 TFEU

Article 351(1) TFEU allows a derogation from the principle of primacy of EU law but only in relation to agreements concluded prior to EU membership and, in principle, only to treaty relations between Member States and third states (category 1 above). According to settled case law, the purpose of the provision is to establish that the application of EU law does "not affect the duty of the Member State concerned to respect the rights of nonmember countries under a prior agreement and to perform its obligations thereunder." The Court has also recognized that Article 351(1) TFEU may allow derogations from not only Union's secondary law but also its primary law, such as provisions of the TEU and the TFEU. The Court has added that the provision would not achieve its purpose if it did not imply a duty on the part of the Union institutions not to impede the performance of the obligations of Member States that stem from a prior agreement. However, the purpose of this duty of Union institutions is to permit the Member State concerned to perform its obligations under the prior agreement and does not bind the Union vis-à-vis the non-member country in question.

In order to benefit from the derogation clause of Article 351(1) TFEU, the agreement must have established an obligation that the Member State concerned cannot honor if it applies a norm of EU law fully. In a recent Court case concerning proposals submitted by a Member State to modify two maritime IMO conventions, the Member State concerned argued that it could rely on the then Article 307 EC Treaty (now Article 351 TFEU) as it had become a member of the IMO before it joined the European Community. The Court did not accept this

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70. Schütze, supra note 30, at 391 (speaking of "suspended primacy").
73. See, e.g., Burgoa, [1980] E.R.C. I-2787, ¶ 9; Opinion of Advocate General Jääskinen, Commission v. Slovakia, Case C-264/09, E.C.R. I- (delivered Mar. 15, 2011) (not yet reported), ¶ 77. The Court thus has not accepted what Schütze, supra note 30, at 395, refers to as the "mortgage theory," according to which the Union would have become bound by such prior agreements binding on the Member States.
argument, noting that the Member State had not established that it was required to submit the contested proposal by virtue of the IMO's founding documents or legal instruments drawn up by the organization.\textsuperscript{74}

According to Article 351(3) TFEU, Member States, "in applying the agreements referred to in the first paragraph," shall take into account the fact that the advantages accorded under the treaties by each Member State form an integral part of the establishment of the Union and are "thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."\textsuperscript{75} This provision seems to establish an obligation to interpret, as far as possible, the agreements concluded with third countries in conformity with the Union law obligations of the Member State concerned.

Article 351 does not cover agreements concluded by Member States after they have become EU members, even if the Union had not, at the time of the conclusion of the agreement, adopted common rules. While this principle seems to have been recognized in Court case law,\textsuperscript{76} the original version of what is now Article 351 TFEU (ex Article 307 of the EC Treaty) was less clear on this point. The provision now refers explicitly to agreements concluded either "before 1 January 1958" or, for acceding states, "before the date of their accession" and thus does not seem to leave room for any margin of interpretation in this regard.

As the agreement needs to have been concluded prior to EU membership, amendments introduced subsequently cannot benefit from the rule in Article 351(1), unless it can be established that they are in implementation of an obligation already concluded before the Member State became an EU member. Such amendments may even lead to a reassessment of the prior agreement in its entirety, in which case the Member State concerned may be barred from invoking not only the amended provisions but also the provisions of the original


\textsuperscript{75} TFEU, supra note 6, art. 351, 2010 O.J.-C 83, at 195.

agreement that have been maintained and confirmed in the renegotiation process.\textsuperscript{77}

Article 351(2) TFEU requires the Member State or states concerned “to take all appropriate steps to eliminate the incompatibilities established.”\textsuperscript{78} This may under certain circumstances imply an obligation to withdraw from the agreement in question.\textsuperscript{79} However, if a multilateral convention allows withdrawal only at certain intervals (for instance, every ten years), Article 351(1) may allow a Member State to remain bound by the agreement until the next opportunity to withdraw.\textsuperscript{80} On the other hand, an obligation to take all appropriate steps to eliminate the incompatibilities between Union law and the agreement may also arise in situations where there is risk of a conflict between the agreement and a future norm of Union law, even though Article 351(2) refers to “incompatibilities established.”\textsuperscript{81} If the Member State concerned has not taken any steps to eliminate an incompatibility in accordance with the second paragraph of Article 351, it may at some point lose its right to invoke the first paragraph.\textsuperscript{82}

The preceding discussion has been based on the assumption that when the conditions of Article 351 are fulfilled, a Member State may, at least during a certain period, successfully invoke this provision in order to resist the application of a conflicting norm of Union law. However, in its famous judgment in \textit{Kadi v. Council}, which concerned the status in EU law of sanction

\textsuperscript{77} See the “Open Skies” judgments concerning infringement cases brought by the Commission against a number of Member States for having concluded bilateral air transport agreement with the United States, e.g., Commission v. Sweden, Case C-468/98, [2002] E.C.R. I-9575, ¶ 37. See \textit{supra} note 13 and accompanying text.

\textsuperscript{78} TFEU, \textit{supra} note 6, art. 351, 2010 O.J. C 83, at 195.


\textsuperscript{80} See \textit{Austria}, [2005] E.C.R. I-935, ¶ 63.

\textsuperscript{81} See Commission v. Austria, Case C-205/06 [2009] E.C.R. I-1301; Commission v. Finland, Case C-118/07, [2009] E.C.R. I-10,889; Commission v. Sweden, Case C-249/06, [2009] E.C.R. I-1335. These cases concerned bilateral investment agreements that were found to potentially jeopardize the implementation of future EU measures to restrict, on the basis of the then Articles 57, 59, and 60 of the EC Treaty (now Articles 64, 66, and 75 TFEU), movements of capital and payments between the Member States and third countries.

\textsuperscript{82} This seems to be the implicit consequence of the reasoning in \textit{Commission v. Austria}, [2005] E.C.R. I-935, ¶¶ 59–64.
decisions adopted by the UN Security Council, the Court held that the Union legal order contains some core constitutional principles that form part of the “very foundations” of that order, notably the protection of fundamental rights, and that Article 307 of the EC Treaty (now Article 351 TFEU) may “in no circumstances permit any challenge” to those core principles.\(^8\) Thus, Member States cannot invoke Article 351(1) TFEU in order to honor their obligations under the UN Charter, including binding decisions of the Security Council, if these obligations contravene basic fundamental rights and rule of law principles contained in the Union constitutional order.

**IV. OTHER AGREEMENTS CONCLUDED BY MEMBER STATES THAT MAY BE RELEVANT TO EU LAW**

The following discussion will be particularly relevant for agreements concluded by EU Member States with third countries (categories 1 and 3 above). That said, some of the hard- and soft-law effects of agreements concluded by EU Member States analyzed below may also arise from agreements concluded between the Member States inter se.

If the matter is approached in terms of the degree of legally binding force, one can observe a sliding scale ranging from agreements that become binding on not only the Member States but also the Union as such, to agreements that, at most, should or can be “taken into account” as tools of interpretation or as a bar to the full application of Union law. The following discussion will be structured as an attempt to grade different types of agreements moving from “more” to “less” binding instruments. These different scenarios can be seen as exceptions or caveats to the general rule that agreements concluded by EU Member States are nothing more than acts pertaining to their national law that do not enjoy more enhanced status than acts of national law in general (leaving aside here the possibility of Member States invoking Article 351 TFEU with respect to agreements concluded prior to EU membership).

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There is one category of agreements that, while the agreements contain norms of public international law that may also be binding on the Union, does not constitute a real exception: agreements that reflect general international law binding on the Union as a subject of international law. It is settled case law that the Union “must respect international law in the exercise of its powers.” The Court has recognized the binding force of customary international law particularly in the contexts of treaty law and the law of the sea. In this respect, the Court has held, inter alia, that some of the provisions of the Vienna Convention on the Law of Treaties of 1969 and of the 1958 Geneva Conventions on the Law of the Sea (to which the EU, in contrast to the 1982 Convention, did not become a contracting party) codify customary international law.

These situations do not constitute veritable exceptions to the rule that agreements concluded by the Member States do not become part of the Union legal order in itself. The Union is bound not by the written agreement but by general (customary) international law as reflected in the agreement. Nevertheless, the agreement, especially if it is a generally accepted convention of a “law-making” nature, may in such cases be of considerable relevance as an indicator of the content of general international law and may thus serve as an important source of reference for


the determination of an international customary norm binding on the Union.

A. Agreements that Become Binding on the Union through Succession

In *International Fruit*, the Court was asked to rule on the legal status of the General Agreement on Tariffs and Trade ("GATT 1947") under the Community legal order, in view of the fact that the Community at that time had not formally adhered to the GATT. The Court held that the provisions of GATT 1947 nevertheless had the effect of binding the Community. Principally two arguments were invoked in support of this ruling: First, the Community had assumed the powers previously exercised by the Member States in the area covered by GATT (trade in goods, which is part of the common commercial policy and thus an area of exclusive competence), and the Member States, by conferring those powers to the Community, had shown "their wish to bind it by the obligations entered into under [GATT]." Second, this transfer of powers had "been recognized by the other contracting parties."

The situation can be viewed as a form of *succession*: the Union replaces the Member States as the bearer of rights and obligation even if the agreement has not been formally concluded by the Union. Article 106 of the Treaty Establishing the European Atomic Energy Community (Euratom) even expresses a preference for such a scenario. That, with respect to other parts of Union law, the Court will not reach this conclusion lightly is borne out by the fact that the Court has come to the opposite conclusion on the International Convention for the

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91. Id. ¶ 16.

92. Euratom Treaty, supra note 50; see Klabbers, supra note 30, at 117.

The Court, in fact, seems to require a "full" transfer of powers previously exercised by the Member States in order for the Union to become directly bound by the agreement in question—in other words, the agreement concerns a subject area in which the Union has exclusive competence (e.g., common commercial policy, fisheries, the AETR-ERTA principle). Moreover, if the transfer of powers is to produce legal effects for third states as well, some kind of recognition seems to be required, in accordance with what the Court said in International Fruit.

B. Agreements that Are Integrated into the Union Legal Order through a Renvoi

There are also situations in which the provisions of an international agreement can be seen as part of the Union legal order, even if the EU has neither adhered to the agreement nor become internationally bound by it by way of succession:


97. See supra notes 8-10 and accompanying text (regarding the concept of exclusive competence).
situations in which Union legal acts refer to an international agreement (renvoi) in a way that shows a willingness on the part of the Union legislator to make some or all provisions of the agreement directly applicable in the Union legal order.

An example is offered by the European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (this is the agreement that gave rise to the AETR-ERTA principle). The Court has held that “the AETR Agreement forms part of Community law and that the Court has jurisdiction to interpret it.” The Court referred, inter alia, to the fact that the relevant EU regulation expressly provided that the agreement, instead of the rules of the regulation, “shall apply” to certain forms of international road transport operations. A similar reference to an international agreement to which the Union is not a contracting party, in this case the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), is found in a Union regulation of 1982. As a later regulation contains a weaker reference, stating that it shall apply “in compliance with” the objectives, principles, and provisions of CITES, the Court has refrained from ruling on whether the Court has jurisdiction to interpret CITES as such but has held that in any case CITES must be taken into account in the interpretation of the regulation.

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100. Id. ¶ 3; see Council Regulation 3820/85 on the Harmonization of Certain Social Legislation Relating to Road Transport, art. 2(2), 1985 O.J. L 370/1.
An example of a renvoi proper is offered by a regulation, passed in 2009, concerning the liability of carriers of passengers by sea in the event of accidents.105 This regulation, taking effect on January 1, 2012, at the latest, not only incorporates the main part of the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 1974,106 but also incorporates and makes binding parts of the IMO Reservation and Guidelines for the Implementation of the Athens Convention. This is thus an example of a Union legislative act incorporating not only an international agreement but also a soft law instrument.

To take an example where the renvoi to an international agreement is to be found not in an autonomous legislative act of the Union, but in an international agreement to which the Union itself has formally adhered: the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), which, as one of the WTO agreements, is binding on the Union (albeit as a mixed agreement), contains several references to other conventions on intellectual property rights (to which the Union has not adhered) in a way that integrates parts of these conventions into the TRIPS regime.107 Similar references are to be found, for instance, in Union legislation relating to the Union trademark.108

In these situations, the renvoi to an international agreement may serve to integrate some or all of the provisions of the agreement into the Union legal order so that the text of the agreement becomes applicable in this order, even if the EU is not

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a contracting party. Each case has to be analyzed on its own merits. Some references to international agreements may be of a "weaker" nature so that the provisions referred to do not become directly applicable but should rather be observed or at least taken into account in the application of Union acts.109

Even if certain provisions of the agreement do become applicable, this legal effect is produced by the Union’s autonomous legal act referring to the agreement and not by the agreement itself. The agreement simply provides an applicable text rather than assumes the same status as agreements concluded on behalf of the Union.

This also means that the renvoi does not produce legal effects with respect to third states (unless the situation can be construed as a case of succession in accordance with the International Fruit case law mentioned above). As the agreement becomes applicable through the Union’s legislative act, there does not seem to be a hierarchy between the agreement and the legislative act (it will be recalled that international agreements concluded by the Union prevail, in principle, over autonomous legislative acts).110

This would also mean that the legality of the legislative act cannot be reviewed in the light of the provisions of the agreement (even assuming that the relevant provisions of the agreement would be precise and unconditional enough to satisfy the requirements of direct effect).111 In Intertanko, the Court held that the validity of an EU directive on ship-source pollution could not be reviewed in the light of Marpol 73/78, even though some of its provisions referred to certain provisions of Marpol. The fact that the directive had the objective of incorporating certain rules set out in Marpol was not sufficient for it to compel the Court to review the directive’s legality in the light of the Convention.112

109. See infra Parts IV.D, IV.E.
110. See supra note 24 and accompanying text.
111. According to settled case law, direct effect of an international agreement binding upon the EU is a condition for reviewing the legality of a Union legislative act in the light of the agreement. See Intertanko, Case C-308/06, [2008] E.C.R. I-4057, ¶ 45 (confirming earlier case law); see also ROSAS & ARMATI, supra note 2, at 48-49, 69-72.
C. Agreements that Are Concluded by the Member States in the Interest of the Union

In the judgment relating to the AETR Agreement referred to above,\(^{113}\) the Court, in concluding that the agreement formed part of Union law, mentioned not only the fact that a Union legislative act provided that the agreement was to apply to certain international road transport operations, but also that the agreement had been brought into force in the Community by another legislative act,\(^{114}\) the preamble of which stated that in ratifying or acceding to the agreement, the Member States “acted in the interest and on behalf of the Community.” In the original AETR-ERTA judgment of 1971, the Court had accepted that the Member States, despite a transfer of powers to the Community in 1969, could conclude the agreement, as a considerable part of the international negotiations had taken place before 1969, and reopening the negotiations at such a late stage in order to enable the Community to become a contracting party would have caused considerable difficulties.\(^{115}\)

With respect to International Labour Organisation (“ILO”) conventions, the Court has again acknowledged that they are not open to EU adherence and that, accordingly, Union competence “may, if necessary, be exercised through the medium of the Member States acting jointly in the Community’s interest.”\(^{116}\)

While the right to conclude the agreements by the Member States was recognized by the Court in the cases referred to above, a practice later emerged whereby the EU Council adopts a decision expressly authorizing the Member States to conclude an agreement even if, under internal Union law, the agreement should be concluded by the Union, either alone (because it covers an area that belongs in its entirety to its exclusive

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\(^{114}\) Council Regulation 2829/77 on the Bringing into Force of the European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR), 1977 O.J. L 334/11.


competence) or together with the Member States (for instance, because only some of its provisions belong to an area of exclusive competence). This device has been used notably with respect to multilateral maritime agreements concluded under the auspices of the IMO and ILO—agreements that do not contain a clause enabling EU adherence and are thus open to states only.117

With respect to some of these conventions, the given reason for the need for a Council authorization was that some of their provisions affected Union law in the field of international procedural law and, to be more precise, concerned jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.118 Thus the Union’s exclusive competence in this field called for an explicit decision authorizing Member States to adhere, even if the Union apparently did not wish to exercise its competence with respect to the main substance of the conventions in question. As far as an ILO convention goes, the Council decision refers to Union competence concerning the coordination of social security schemes.119

Council decisions that authorize Member States to adhere to international agreements also exist in the nuclear field120 and in the area of international procedural law (private international law).121 Concerning air services agreements and, in the area of international procedural law, agreements affecting the Rome I or II Regulations122 or the Brussels II bis Regulation,123 the Council had adopted general framework regulations that establish a


118. Brussels I Regulation, supra note 55.

119. Maritime Labour Convention Decision, 2007 O.J. L 161/63 (referencing Article 42 of the EC Treaty (now Article 48 TFEU)).


122. Rome I Regulation, supra note 15; Rome II Regulation, supra note 15.

123. Brussels II bis, supra note 17.
certain procedure to follow if Member States intend to negotiate such agreements.\textsuperscript{124} It is remarkable that according to these regulations, it is the Commission, and not the Council, that is called upon to decide whether a Member State should be authorized to conclude a given agreement.

Some of these Council decisions authorize Member States' adherence “in the interest of the Community.” The original \textit{AETR/ERTA} judgment of the Court provided that the Member States could act “in the interest \textit{and on behalf of} the Community.”\textsuperscript{125} The more limited formula used in the recent Council decisions (“in the interest of” the Union) raises the question as to whether the decisions merely authorize Member States to derogate from the rules concerning Union competence or if they also imply a decision to make the conventions, or certain provisions of them, part of the Union’s legal order.\textsuperscript{126}

In a recent case, the Court noted the existence of a Council decision to authorize the Member States to sign, ratify, or accede to, in the interest of the Union, the 2003 supplementary protocol to the Oil Pollution Fund Convention\textsuperscript{127} but refrained from taking a stand on the legal effects of the Council decision, in view of the fact that it could not apply \textit{rationae temporis} to the facts at issue in the main proceedings.\textsuperscript{128}

The mere fact that the Council has authorized one or more Member States to adhere to an international instrument does not suffice to make that instrument part of the Union legal order, as the authorization does not necessarily entail a commitment on behalf of the Union to become bound by the substantive rules to which a Member States wishes to adhere.\textsuperscript{129} This observation seems particularly relevant with respect to the general framework

\textsuperscript{124} See, e.g., Air Services Agreement Regulation, \textit{supra} note 12; Contractual and Non-contractual Obligations Regulation, \textit{supra} note 14; \textit{supra} notes 12, 14-17, and accompanying text.
\textsuperscript{125} \textit{AETR/ERTA}, Case C-22/70, [1971] E.C.R. 263, ¶ 90 (emphasis added).
\textsuperscript{126} See \textsc{Riingbom}, \textit{supra} note 21, at 94, 124-25, 136-38.
\textsuperscript{127} Oil Pollution Fund Convention, \textit{supra} note 94; Protocol to Amend the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 2004 O.J. L 78/40.
\textsuperscript{128} \textit{Commune de Mesquer v. Total France}, Case C-188/07, [2008] E.C.R. 1-4501, ¶ 86; see \textsc{van Rossem}, \textit{supra} note 30, at 37.
\textsuperscript{129} See \textsc{Riingbom}, \textit{supra} note 21, at 137-39.
regulations relating to air service agreements and agreements in the area of international procedural law.\textsuperscript{130}

On the other hand, it is arguable that a decision to authorize all the Member States to adhere "in the interest of the Union" creates a presumption of acceptance of the instrument as part of the Union legal order, at least with respect to those provisions of the instrument that belong to the area of the Union’s exclusive competence and are thus deemed to have prompted Council authorization. This is particularly so if, as is the case with the Council authorizations mentioned above, they are based on Article 218 TFEU, which concerns the conclusion of agreements on behalf of the Union, and seem to imply, for the Member States, not only an authorization but also an obligation to adhere, or at least to seek to adhere, to the respective convention.\textsuperscript{131}

In this context, it is interesting to note that, on the basis of Article 218(11) TFEU, the Court has considered admissible a request for an opinion concerning an ILO convention that was not open to EU adherence but that covered areas belonging to Union competence.\textsuperscript{132} The Court, inter alia, referred to the fact that while the ILO constitution prevented the EU from becoming a contracting party, Union competence "may, if necessary, be

\textsuperscript{130} See supra note 124 and accompanying text.
\textsuperscript{131} See RINGBOM, supra note 21, at 94, 125. It should be added, however, that the timetable for Member States’ adherence established in the relevant Council decisions is not absolute. See Hague Convention Decision 2008, supra note 121, arts. 3–4, at 37; Slovenia Decision, supra note 120, art. 2, at 24; Maritime Labour Convention Decision, supra note 117, art. 2, at 64; Paris Convention Protocol Decision 2004, supra note 120, art. 2, at 54; Oil Fund Convention Decision, supra note 21, art. 2, at 23; Paris Convention Protocol Decision 2003, supra note 120, art. 2, at 31; Hague Convention Decision 2003, supra note 121, art. 3, at 2; HNS Convention Decision, supra note 21, art. 3, at 56; Bunkers Convention Decision, supra note 21, art. 3, at 8. As noted supra note 37, the Member States, in their Statement on Maritime Safety of November 19, 2008, have taken a “firm commitment” to adhere, no later than January 1, 2012 (and with respect to one convention, January 1, 2013), to a number of maritime conventions.

exercised through the medium of the Member States acting jointly in the Community interest.”

Insofar as the Council authorization can be considered to make the international agreement or some of its provisions part of the Union legal order, this legal effect seems to be of an *internal* nature only. The situation would resemble that of agreements that are incorporated through Union legal acts by virtue of an express *renvoi*. The Union would thus not become a contracting party vis-à-vis third states, which cannot become bound by a unilateral EU Council decision. This, together with the formula used by the Court in Opinion 1/91, may explain why recent Council practice refers only to the “interest of” the Community, omitting additional “on behalf of”: the agreement in question is not concluded on behalf of the Union vis-à-vis third states. This should also imply that, as was considered above to be the case for agreements incorporated into the Union legal order through a *renvoi*, there will be no hierarchy between the agreement and the secondary legislative act.

D. **Agreements that Should Be Observed in the Application of Union Law**

There is another category of agreements concluded by EU Member States that may play an important role in the application of Union law without forming an integral part of the Union’s legal order, at least strictly speaking. These agreements do not seem to be *directly applicable* (and hence seem to lack direct effect as well) in Union law, implying that no right or obligation could be based solely and directly on a provision of the agreement. A lack of direct effect would probably also have as a consequence that the validity of a Union legislative act could not be reviewed on the sole basis of such agreements as according to settled case law; such review presupposes that the agreement has direct effect. On the other hand, Union law seems to require that in the application of this law, the agreement in question be *observed* by the EU institutions and the Member States concerned.

134. See RINGBOM, supra note 21, at 137.
135. See supra note 111.
The clearest examples are offered by the European Convention on Human Rights ("ECHR") and other human rights conventions.\(^{136}\) As the Court, in 1996, had ruled that the Community lacked competence to become a contracting party to the ECHR,\(^{137}\) accession required a change of primary law (the treaties). This has been accomplished with the Treaty of Lisbon, which added a clause to Article 6 TEU stipulating that "the Union shall accede" to the ECHR. Such accession has not yet taken place. Independently of EU accession to the ECHR, fundamental rights at the Union level are principally based on two binding sources of law: the general principles of Union law and the EU Charter of Fundamental Rights ("Charter").\(^{138}\)

The Court recognized as early as 1969 that the general principles of Union law are the traditional source as far as fundamental rights are concerned.\(^{139}\) Since the 1970s, the Court has, in this context, made increasing use of the ECHR, holding that it has "special significance" in the determination of the general principles of Union law that are relevant from a fundamental rights perspective, and since the mid-1990s, it has cited individual judgments of the European Court of Human Rights as part of its reasoning.\(^{140}\)

The Charter, made part of binding primary law by the Treaty of Lisbon, makes numerous references to the ECHR as a source of both inspiration and reference. Particularly important is its Article 52(3), which provides that insofar as the Charter contains rights "which correspond" to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention."\(^{141}\) This does not imply that the ECHR becomes directly applicable in the above

\(^{136}\) See Klabbers, supra note 30, at 163; Schütze, supra note 30, at 399-402.


\(^{140}\) See Allan Rosas, Fundamental Rights in the Luxembourg and Strasbourg Courts, in THE EFTA COURT: TEN YEARS ON 163-75 (Carl Baudenbacher et al. eds., 2005); Allan Rosas, The European Union and Fundamental Rights/Human Rights, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 443, 457-59 (Catarina Krause & Martin Scheinin eds., 2009).

sense. The applicable rule in Union law is a given provision of the Charter. This is also underscored by the fact that Article 52(3) of the Charter adds that the obligation to give the same meaning and scope to the Charter provisions as to corresponding provisions of the European Convention shall not prevent Union law from providing more extensive protection.142

The status of the Geneva Convention of 1951 and its protocol of 1967 relating to the status of refugees,143 although less well-established, seems similar. This is because Article 78(1) TFEU provides that the Union policy on asylum, subsidiary protection, and temporary protection “must be in accordance with” the Geneva Convention and Protocol and other relevant treaties. Similar references to the Geneva Convention and protocol are to be found in secondary law (directives) relating to asylum policy.144

Regarding other human rights conventions, the Court has held, since Nold v. Commission, that “guidelines” that should be followed in the determination of fundamental rights as general principles of Union law include “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.”145 This broad formula could, in principle, include conventions to which not all Member States are contracting parties, although the Court usually cites only conventions that bind all Member States.146 Human rights instruments other than the ones mentioned above cited by the Court include the European Social Charter of 1961,147 the International Covenants of 1966,148 the Convention


on the Rights of the Child,\textsuperscript{149} and even the Universal Declaration of Human Rights.\textsuperscript{150}

There is also an obligation, in principle, to observe the UN Charter.\textsuperscript{151} Article 3(5) TEU provides that the Union, in its relations with the wider world, "shall contribute to, inter alia, the strict observance and the development of international law, including respect for the principles of the United Nations Charter."\textsuperscript{152} A similar reference to the Charter is to be found in Article 21 TEU.

On the other hand, the status in Union law of sanctions decided by the Security Council has become a contentious issue in the context of sanctions adopted against alleged terrorists. In \textit{Yusuf} and \textit{Kadi}, the then Court of First Instance (now the General Court) held that certain parts of the UN Charter are also binding on the Community. This led the Court of First Instance to decline judicial review of EU sanctions implementing binding UN sanctions (with the exception of controlling whether the UN sanctions infringed \textit{jus cogens} or peremptory international law).\textsuperscript{153}

This conclusion was overturned by the Court, which annulled the EU Council regulation in question on the grounds that it violated the appellants' right to an effective judicial remedy as well as their property rights.\textsuperscript{154} In this context, the Court refrained from declaring that the UN Charter is directly binding on the EU. The Court did observe, on the other hand, that its previous ruling, according to which the powers of the Union in the sphere of development cooperation must be exercised "in observance of the undertakings given in the


\textsuperscript{151} See generally KLABBERS, supra note 30, at 151–63; Schütze, supra note 30, at 402–06.

\textsuperscript{152} TEU-post-Lisbon, supra note 4, 2010 O.J. C 83, at 17.


context of the United Nations,” applied also to the sphere of the maintenance of international peace and security and that in drawing up sanction-implementing measures, the Union “is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation.”

It would seem that these dicta are based on the idea that while the UN Charter is not an integral part of the Union’s legal order stricto sensu, there is a general obligation to observe, in principle, the UN Charter in the application and interpretation of Union law. It is another question that the Court refused to grant immunity from judicial review, holding that if the UN Charter obligations were to be classified in the hierarchy of Union norms, they would have to yield to Union primary law, in particular to fundamental rights (as primary law, in the EU constitutional order, prevails over international agreements binding on the Union, while international agreements, in turn, prevail over Union secondary law).

In Intertanko, the Court held that Marpol 1973/78 should be taken into account in the interpretation of an EU directive, despite the fact that the convention is not directly binding on the EU and that the validity of the directive could not be reviewed in light of the convention. The directive in question also contained references to Marpol that may fall short of a renvoi in the strict sense but which make observance of certain provisions of Marpol a condition for considering that a discharge of polluting substances does not constitute an infringement of the directive.

Many other legislative acts in the maritime field contain similar references to international maritime conventions to which the EU has not adhered. To cite but two additional examples, a 2009 directive relating to port state control instructs the Member States, if the gross tonnage of a ship is less than 500, to “apply those requirements of a relevant Convention which are

155. Id. ¶¶ 292–93, 296.
156. See id. ¶¶ 305–09. On the hierarchy of norms in Union law, see ROSAS & ARMATI, supra note 2, at 41–53; see also supra text accompanying note 24.
159. See generally RINGBOM, supra note 21.
applicable,"\(^\text{160}\) while a directive relating to the insurance of ship owners for maritime claims provides that the amount of the insurance for each and every ship per incident "shall be equal to the relevant maximum amount for the limitation of liability as laid down in the 1996 Convention."\(^\text{161}\)

E. Agreements that Should Be Taken into Account in the Interpretation of Union Law

In *Intertanko*, at issue was the legality of an EU directive on ship-source pollution\(^\text{162}\) in light of Marpol 73/78 and the UN Convention on the Law of the Sea. As already noted above, the Court held that it could not review the legality of the directive in light of these two instruments as the UN convention lacked direct effect and as Marpol was not binding upon the Union. True, the directive made references to Marpol and some of its provisions even incorporated certain provisions of Marpol. But the Court held that the mere fact that the Directive had the objective of incorporating certain rules set out in Marpol was not sufficient for it to compel the Court to review the directive’s legality in the light of the convention.\(^\text{163}\)

In accordance with what was stated above,\(^\text{164}\) it is another matter that if a provision in an EU directive incorporates provisions of an international agreement (in other words, uses the legislative technique of a *renvoi* instead of simply repeating the full text of the agreement in the text of the directive), *that* part of the agreement (or to more precise, that part of the *text* of the agreement) should be applied in the Union legal order. As for the other parts, the Court, in *Intertanko*, added a requirement concerning Marpol, given the fact that all Member States were contracting parties and that the EU directive contained

\(^{160}\) Parliament and Council Directive 2009/16/EC on Port State Control, art. 3(2), 2009 O.J. L 131/57, at 62. Article 2 of the directive lists a number of conventions, including their protocols, concluded by the Member States, which are included in the notion of "conventions." Id. art. 2, at 61–62.


\(^{162}\) Ship-Source Pollution Directive, supra note 112.

\(^{163}\) See *Intertanko*, [2008] E.C.R. I-4057, ¶ 50; see also van Rossem, supra note 30, passim.

\(^{164}\) See supra Part IV.B.
references to Marpol. According to the Court, the customary principle of good faith, as well as the principle of loyal cooperation expressed in Article 10 of the EC Treaty (now Article 4(3) TEU), made it incumbent upon the Court to interpret the provisions of the relevant directive “taking account of Marpol 73/78.”

It is submitted that this dictum does not imply that Marpol in its entirety has become part of the Union legal order. The Convention is, in other words, not directly applicable and the requirement to take account of Marpol does not amount to a requirement of consistent interpretation (interprétation conforme) in the strict sense applying to directives and international agreements binding upon the Union. That said, “taking account of” may, in concrete situations, be difficult to distinguish from consistent interpretation stricto sensu.

The requirement of “taking account of” was not repeated in Commune de Mesquer, which concerned the interpretation of an EU directive relating to waste. As the waste in question, which consisted of heavy fuel oil accidentally spilled at sea following the shipwreck of the tanker *Erika*, mixed with water and sediment and washed up on the coast of France, the question arose as to the relevance of the Oil Pollution Liability Convention and the Oil Pollution Fund Convention, both of which are binding upon most EU Member States but not on the Union itself. As was already noted above, a Council decision authorizing the Member States to conclude the Supplementary Protocol of 2003 to the Fund Convention was not relevant as it was not applicable rationae temporis. The Court limited itself to observing that the Union was not bound by the two conventions, without any reference to the dictum in *Intertanko*.

166. On the principle of consistent interpretation (which, while not authorizing an interpretation *contra legem*, may nevertheless require an interpretation *praeter legem*) see, e.g., ROSAS & ARMATI, supra note 2, at 59–63.
169. *See supra* note 128 and accompanying text.
Why did the Court not state that the conventions should at least be taken into account in the interpretation of the waste directive? Two differences as compared to the situation in *Intertanko* come to mind: first, not all Member States were parties to the Oil Pollution Liability and Fund Conventions (a fact mentioned in the Court's judgment171) and, second, the waste directive contained no references to these or any other international conventions. In such a situation, the international agreements remain part of the national law of the Member States that are bound by them, and these agreements will have no direct relevance in the Union legal order (assuming that the agreements have been concluded by Member States after they became EU members).

F. Agreements that Authorize Member States to Apply an Agreement Instead of EU Law

Finally, it will be recalled that Union secondary law sometimes allows a derogation from the principle of primacy of Union law by authorizing Member States to apply, instead of Union law, an international agreement they concluded. One can then speak of a legislative extension of the principle contained in Article 351(1) TFEU considered above.172 In this case, the agreement does not enter into the Union legal order, and it is doubtful whether Union law should be interpreted in light of the agreement in question.

Some examples of such rules of derogation in Union law were already given above. They include provisions in the Brussels I Regulation (relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters),173 and regulations on the law applicable to contractual and non-contractual obligations (Rome I and Rome II).174 In this context, it can also be recalled that a directive on environmental liability

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171. See Commune de Mesquer, (2008) E.C.R. 1-4501, ¶ 85. But in a Statement on Maritime Safety of November 19, 2008, supra note 37, at 2, the EU Member States have made a commitment to express, no later than January 1, 2012, their consent to be bound by these conventions.
172. See Part III; see also Schütze, supra note 30, at 437.
173. See Brussels I Regulation, supra note 55, art. 71, at 16.
174. See Rome I Regulation, supra note 15, art. 25, at 15–16; see also Rome II Regulation, supra note 15, art. 28, at 47.
excludes from its field of application environmental damage arising from an incident in respect of which liability or compensation falls within the scope of any of the international liability convention listed in an annex to the directive.\footnote{175}{See Environmental Liability Directive, supra note 41, art. 4, at 61; see also supra note 41 and accompanying text.}

Reference was also already made above to a recent judgment of the Court in which the Court, in the context of the Brussels I Regulation No. 44/2001, held that the application of specialized conventions binding on Member States cannot compromise the principles that underlie the relevant area of Union law and that therefore their application is subject to certain conditions.\footnote{176}{See TNT Express Nederland v. AXA Versicherung, Case C-533/08, [2010] E.C.R. I (delivered May 4, 2010) (not yet reported), ¶ 49.} The scope and intensity of this caveat will probably depend on the specific nature of the relevant EU legislative act and on the wording and context of the provision referring to the continued relevance of agreements concluded by the Member States.

**CONCLUSION**

While the entry into force of the Lisbon Treaty\footnote{177}{See notably Article 207 TFEU, supra note 6, which for the first time includes trade in services, the commercial aspects of intellectual property, and foreign direct investment fully in the common commercial policy, listed in Article 3 TFEU among the areas of Union exclusive competence; and Article 216 TFEU, which broadens the scope for a (potential) Union competence to conclude international agreement, as compared with Article 300(1) of the EC Treaty, supra note 5.} and developments in case law\footnote{178}{On a fairly broad interpretation of the AETR-ERTA principle, according to which the Union shall have exclusive competence for the conclusion of all agreements that "may affect" common Union rules or alter their scope, see notably Opinion on Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, Opinion 1/03, [2006] E.C.R. I-1145 and Commission v. Greece, Case C-45/07, [2009] E.C.R. I-701; Commission v. Sweden, Case C-468/98, [2002] E.C.R. I-9575; and the other "Open Skies" judgments mentioned supra note 11 and accompanying text.} have further diminished the scope for agreements to be concluded by EU Member States rather than by the Union, such agreements will continue to exist and require legal analysis from an EU law perspective. Even if these agreements have not been concluded by the EU itself, they may in different ways have to be taken into account in the Union legal order. The conclusions reached above may be summed up as follows:

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\footnote{175}{See Environmental Liability Directive, supra note 41, art. 4, at 61; see also supra note 41 and accompanying text.}
\footnote{176}{See TNT Express Nederland v. AXA Versicherung, Case C-533/08, [2010] E.C.R. I (delivered May 4, 2010) (not yet reported), ¶ 49.}
\footnote{177}{See notably Article 207 TFEU, supra note 6, which for the first time includes trade in services, the commercial aspects of intellectual property, and foreign direct investment fully in the common commercial policy, listed in Article 3 TFEU among the areas of Union exclusive competence; and Article 216 TFEU, which broadens the scope for a (potential) Union competence to conclude international agreement, as compared with Article 300(1) of the EC Treaty, supra note 5.}
\footnote{178}{On a fairly broad interpretation of the AETR-ERTA principle, according to which the Union shall have exclusive competence for the conclusion of all agreements that "may affect" common Union rules or alter their scope, see notably Opinion on Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, Opinion 1/03, [2006] E.C.R. I-1145 and Commission v. Greece, Case C-45/07, [2009] E.C.R. I-701; Commission v. Sweden, Case C-468/98, [2002] E.C.R. I-9575; and the other "Open Skies" judgments mentioned supra note 11 and accompanying text.}
1. An agreement concluded by Member States may in certain exceptional situations become binding on the Union by way of succession, with legal effects also for third states (GATT 1947 being the only example accepted so far in case law). This situation is exceptional.

2. An agreement concluded by Member States may become incorporated into the Union legal order either through references in Union law (renvoi) or through a Council decision authorizing the Member States to conclude an agreement in the interest of the Union. Each case has to be analyzed on its own merits; a Council decision to authorize Member States to conclude an agreement does not necessarily amount to such incorporation. The mere fact that a provision of an agreement concluded by Member States becomes directly applicable in the Union legal order does not entail legal effects for third states nor does it seem to put the agreement above Union legislation in the hierarchy of Union norms.

3. An agreement concluded by Member States may, without becoming directly applicable, enjoy binding effect in the sense that it has to be observed in the application of Union law. This category seems particularly relevant with respect to human rights conventions, notably the ECHR, at least parts of the UN Charter, and to some extent, certain maritime conventions.

4. An agreement concluded by all Member States and mentioned in Union legislation may have to be “taken into account” in the interpretation of Union law, even if the reference to the agreement does not amount to full incorporation in accordance with point two above.

5. Any agreement concluded by Member States prior to EU membership may enable the Member States concerned to invoke the agreement, by way of derogation from the principle of primacy of Union law (Article 351(1) TFEU). Article 351(1) TFEU may not be invoked for an agreement that derogates from the core principles of the Union constitutional order nor is the provision applicable to agreements concluded solely by the Member States inter se. A violation of Article 351(2) TFEU (obligation to take all appropriate steps to eliminate incompatibilities between prior agreements and Union law) may at some point deprive the Member State concerned of the right to invoke Article 351(1).
6. Union legal acts may in some cases provide for an extension of the principle contained in Article 351(1) TFEU to special agreements concluded by Member States after they have become members of the EU. Such examples are to be found, inter alia, in the field of private international law (such as the Brussels I and Rome I and II regulations).

7. Other agreements concluded by Member States are part of their national law only and their relevance from a Union law perspective does not go beyond the possible relevance for Union law of their national legal orders in general.

As can be seen from this list, international agreements concluded by EU Member States but not by the Union itself raise a number of issues that cannot be squeezed into a single category. The situation is quite complex and points to different degrees of normative status under Union law. This Essay has brought out at least six categories of such agreements, the normative status of which goes beyond the status of the national law of the Member States in general. No doubt additional categories or sub-categories can be found. The subject certainly merits further analysis and discussion.