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The status of the European Union as a party to international agreements
A reflection on the practice of declarations of competence in the EU

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INTRODUCTION

1. Today, the European Union ('EU') is omnipresent in the daily life of every EU citizen. Its rules and regulations have shaped the way Europe has progressed these past decades, ranging from regulations regarding food and agriculture to instruments addressing the pressing environmental questions. The EU itself has equally undergone several profound transformations throughout the years, with the 2009 Lisbon Treaty as the conclusion, at least for the time being. One of the major breakthroughs was the fact that the Union was ascribed international legal personality. The EU has eagerly made use of its treaty-making power, concluding a host of international agreements with other subjects of international law. In the environmental field in particular, the EU has participated in numerous conventions to aid and drive forward the fight against climate change and to protect the environment in general. It is in this participation in multilateral agreements that a number of problems arise. One major issue came up in the situation where the agreements entered into by the Union also included all or some of its member States in their individual capacity among their contracting parties, also called mixed agreements.[1] If both the Union and its member States are contracting parties, the question rises who incurs responsibility for the obligations therein.

2. Thus, the issue of joint participation of the Union and its member States in international agreements merits study and is at the heart of this master's thesis. It is a topic that relates closely to the internal division of competences in the EU legal order. If the Union and its member States both have competences in a certain field that is covered by an international agreement, this results in the conclusion of a so-called mixed agreement. Mixed agreements constitute a technique that is threefold beneficial in the EU legal system, as they take into account three demands: the Union's need for autonomous action, the member States' need to participate fully in the treaty system and third parties' need for security in the treaty relationship.[2] Agreements that allow for the participation of an international organisation such as the EU often require for the organisation to declare the extent of its competences in its instrument of ratification or accession. These participation clauses thus introduce the requirement to issue a declaration of competences on the part of the EU. The Court of Justice of the European Union ('CJEU' or 'the Court' or 'the Court of Justice') has confirmed that when the EU intends to become a contracting party to an international agreement, "the Council must respect the conditions for accession" laid down by the

[1] J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, Leiden, Brill Nijhoff, 2001 ('Heliskoski, *Mixed Agreements*, 2001'), 1.
[2] Ibid., viii.

given convention.[3] Consequently, when an agreement includes a participation clause requiring a declaration of competences and the EU intends to join the agreements, it must report on the internal division of competences to the other contracting parties as a condition for participation. This reporting provides third States with legal certainty, as they gain the knowledge on who is responsible for the performance of the obligations in the international agreement. The practice of joint participation of the Union and its member States in international agreements has not only been firmly established in the legal order of the EU, but has equally won the approval of third States and international organisations. As such, the mixed procedure has been used since the 1960s in a wide field of policy areas ranging from commercial policy to protection of the environment, from development cooperation to the management and conservation of the resources of the sea.[4]

3. The United Nations Convention on the Law of the Sea ('UNCLOS') of 1982 is usually denoted as the very first large-scale international agreement containing the requirement to submit a declaration of competences when an international organisation wanted to join the convention. The European Communities ('EC') signed the UNCLOS already in 1984, mostly driven by the desire of the Community to participate in further negotiations on the Agreement Relating to the Implementation of Part XI of the UNCLOS of 10 December 1982.[5] What is relevant, however, is that it made an initial declaration of competences at the time of signature, setting out the relevant Union competences regarding the UNCLOS.[6] Once the negotiations on the Implementing Agreement had concluded, the Community issued in 1998 the final version of its declaration of competences parallel with the formal conclusion of the UNCLOS, marking the first declaration of competences in a multilateral mixed agreement.[7] However, further study shows that at least one earlier declaration of competences predates this final EC declaration made to UNCLOS. In 1987, a treaty was concluded between Germany and the European Economic Community ('EEC') on the one hand and Austria on the other regarding cooperation on management of water resources

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[3] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [68].
[4] Heliskoski, *Mixed Agreements*, 2001, 1 and fn. 6.
[5] See L. Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair" in M.W. Lodge and M.H. Nordquist (eds.), *Peaceful Order in the World's Oceans*, Leiden, Brill Nijhoff, 2014 ('Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair"'), 196.
[6] Bulletin of the European Communities, "Convention on the Law of the Sea: Competence of the European Communities with regard to matters governed by the Convention on the Law of the Sea", 12-1984, Vol. 17, 149.
[7] Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, L 179/129, 98/392/EC, ('Declaration of competences submitted to the UNCLOS'), Annex II.

in the Danube Basin.[8] In the Annex to the treaty, Germany and the EEC added a declaration specifying "the present areas of competence of the European Economic Community within the scope of the Agreement", including a list of 15 EC measures taken in the subject matter of the agreement, namely water management.[9] Thus, the text annexed to this treaty provided an early iteration of the practice of issuing declarations of competences, *in casu* in a bilateral (that is, the EEC and Germany vis-à-vis Austria) relationship. The declaration submitted by the EU when it adhered to the UNCLOS in 1998 was subsequently the first example of a declaration of competences used on the global multilateral stage, and is therefore an important primary document of EU law. Many other declarations have followed, establishing a practice by the Union that will be studied in this master's thesis. The mechanism of adopting declarations of competences was introduced to provide legal clarity to the other contracting parties of the international agreement to which the Union intended to become party.[10] This goes beyond mere responsibility, as the other contracting parties want to know beforehand who is voting (to avoid a double exercise of voting rights), who is implementing (to ensure compliance) and who is responsible for a breach of the agreement (even before an internationally wrongful act has been committed).[11] As is discussed in detail below, having this legal certainty about the identity of the responsible actor as well as on the scope of the competences was an essential consideration behind the inclusion of the requirement of issuing a declaration of competences in the system of the UNCLOS. Thus, declarations of competences are the answer of the European Union to these concerns, as the Union aims to communicate on the internal division of competences regarding matters covered by a mixed agreement.

4. However, these declarations are far from the perfect solution to the legal conundrum a mixed agreement causes. Much of its flaws are inherent in the nature of EU competences, as they are

[8] Vertrag zwischen der Bundesrepublik Deutschland und der Europäischen Wirtschaftsgemeinschaft einerseits und der Republik Österreich andererseits über die wasserwirtschaftliche Zusammenarbeit im Einzugsgebiet der Donau (1 Dezember 1987, Regensburg), as reproduced in OJ L 90/20, 5 April 1990.

Austria originally wished only to conclude this agreement with Germany, but since the latter, as a member of the EEC, had transferred certain competences relating to matters covered by this agreement to the Community, it was legally prevented from concluding an agreement without the participation of the Community. See also P. Fischer, G. Hafner and G. Loibl, "Aktuelle österreichische Praxis zum Völkerrecht/Recent Austrian practice in International Law", Austrian Journal of Public and International Law 1991, Vol 42, no. 4, 489-494.

[9] Ibid, Annex II and Annex. This practice of referring to legislative acts by the EU will later become a recurring theme in the practice of the Union regarding declarations of competences, see *infra* Chapter I.

[10] J. Heliskoski, "EU Declarations of Competence and International Responsibility" in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union – European and International Perspectives*, Oxford, Hart Publishing, 2013 ('Heliskoski, EU Declarations of Competence and International Responsibility, 2013'), 201-202.

[11] A.D. Casteleiro, "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", European Foreign Affairs Review 2012, Vol. 17, no. 4 ('Casteleiro, EU Declarations of Competence to Multilateral Agreements'), 492.

dynamic in nature and often leave room for interpretation, giving rise to much debate on the extent and scope of these competences. Declarations of competences thus externalise an essentially internal matter, namely the vertical division of power in the EU. This is in itself one of the most complex and debated issues in the law on the external relations of the EU, not only among scholars, but also among the EU institutions themselves.[12] Thus, declarations of competences involve some of the most sensitive topics in the EU legal order and bring about a number of issues as a result. For one, these declarations are often worded in a vague and open-ended manner, by no means fulfilling the concern of the other contracting partners for legal clarity. Moreover, the Union rarely updates its declarations, even though competences in the EU are not static in nature but continuously evolve over time. These issues in the relationship between the Union and the other contracting parties of the international agreement are studied in detail below.

5. Mixed agreements and declarations of competences equally give rise to friction within the EU legal order itself. While the EU institutions were at first rather reserved in their position regarding declarations of competences, both the Court of Justice and the Commission gradually warmed to the concept. The Court of Justice now accepts the added value of declarations of competences and has referred to them as "a useful reference base".[13] Similarly, the Commission has learned to recognise that third parties might require a declaration of competence from the EU as a condition for the Union to be able to conclude an agreement, and it relies on them when pleading in front of the Court in Luxembourg.[14] Notwithstanding this receptive attitude, declarations of competences provoke a lot of discussion. Given that they touch upon the internal division of competences between the Union and its member States, disagreements between the institutions and the member States about the scope and content of the Union or member State competence are prevalent. Moreover, the general duty of cooperation between the Union institutions is equally highly relevant in the field of declarations of competences. These issues are all discussed in this master's thesis.

[12] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 492.
[13] C-459/03, *Commission v. Ireland* ('MOX Plant'), 30 May 2006, ECR I-04635, [109].
[14] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 492.

METHODOLOGY

§1. Relevance

6. This master's thesis aims to reflect on the practice of using declarations of competences in the external practice of the European Union. Most recently, the Union formally concluded the Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ('BBNJ Agreement') and simultaneously issued a declaration of competences in order to comply with the conditions for an international organisation to participate, as laid down in the agreement.[15] Thus, the EU continues its practice of adopting declarations of competences when it enters into mixed agreements. This master's thesis provides an overview of the concept of a declaration of competences and reflects on their use by way of a comparison between the early declaration made in the context of the UNCLOS and the most recent one under the BBNJ Agreement.

7. **RESEARCH QUESTIONS** – This master's thesis aims to answer the following research questions:

   - *What are the main characteristics of declarations of competences of the European Union?*
   - *How does the wording and content of recent declarations of competences compare to their earlier counterparts?*
   - *Has the European Union ever revised its declarations of competences to accommodate changes in the division of competences?*
   - *What are the biggest issues in the Union's practice of declarations of competences?*

§2. Structure

8. This master's thesis is structured around four main chapters. Chapter I first provides the necessary background to the topic, including an overview of the system of competences in the EU and an introduction to the concept of mixed agreements. It also examines the main characteristics of declarations of competences and how they have found their way into the practice of the EU. Thus, Chapter I aims to contextualise the concept of declarations of competence in the legal system of the EU.

[15] Declaration of Competence of the European Union made in accordance with Article 67(2) of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 19 July 2024, 2024/1832 ('Declaration of competences submitted to the BBNJ Agreement').

9. Secondly, in Chapter II a number of declarations of competences are analysed in detail, with a focus on the declarations made to the UNCLOS and the recent BBNJ Agreement. Other declarations are studied as well, which allows for some reflections as to the evolution of the EU practice regarding the declarations of competences.

10. Subsequently, Chapter III addresses the internal consequences of the practice of declarations of competence in the EU legal order. Here, the position of the EU institutions regarding declarations of competences is studied, as well as possible friction between the institutions. Other concepts that are analysed include the duty of sincere cooperation and the obligation to ensure unity in the external representation of the Union.

11. Lastly, Chapter IV aims to evaluate the EU practice of declarations of competences through the years. It highlights some key issues that have shone through in the research of the entire master's thesis. This Chapter for instance studies the lack of specificity of declarations of competence and the lack of updated declarations. Finally, a last subsection reflects on the positive elements that declarations of competences have added to the EU legal order.

CHAPTER I: SITUATING THE RESEARCH – RELEVANT CONCEPTS OF EUROPEAN UNION LAW

12. Before getting into the core of the research, it is appropriate to provide an overview of the relevant concepts in European Union law regarding declarations of competence. This introductory part of the master's thesis provides the necessary background on the functioning of competences in the EU,[16] on the concept of mixed agreements, and on the concept of a declaration of competences in general.

§1. The functioning of competences in the European Union

13. The Lisbon Treaty clarifies the division of competences between the European Union and its member States. Article 5 of the Treaty on the European Union ('TEU') holds that the principle of conferral governs the Union's competences.[17] This means that the Union only has powers where a specific competence is expressly conferred on it by the EU Treaties, the other competences remain with the member States.[18] While this may leave one with the feeling the EU is limited in its field of influence, in practice, the Union is active in almost every area. In that respect, the Treaty on the Functioning of the European Union ('TFEU') establishes the scope, delimitations, conditions and exceptions relating to the exercise of those competences.[19] As an exception, the Common Foreign and Security Policy ('CFSP') is regulated in the TEU. The different forms of competences in the EU can be classified as follows: exclusive competences; shared competences; support, coordination or supplement competences; and specific common policies and related competences.

14. **Exclusive competences** are areas where "only the Union may legislate and adopt legally binding acts".[20] These competences have been irreversibly transferred by the member States to the Union. As such, member States may only act if explicitly so empowered by the Union or when implementing measures adopted by the Union.[21] These areas of exclusive competence are listed

[16] Naturally this is but an overview of the complex field of EU competences, with a focus on those relevant for the research in this thesis. For a more in-depth study of the division of competences in the EU, see for instance T. Konstadinides, *Division of powers in European Union law: the delimitation of internal competence between the EU an the member states*, Wolters Kluwer, 2009, xiv + 333 p.
[17] Treaty on European Union, 2016, OJ C 202/1 ('TEU'), Article 5(1)(2).
[18] The Court of Justice concisely grasped the essence of the principle of conferral in *Opinion 2/*94: "the [Union] is to act within the limits of the powers conferred upon it", see Court of Justice, *Opinion 2/94 (Accession to the ECHR)*, 28 March 1996, ECR I-1759, [23].
[19] See Treaty on the Functioning of the European Union, OJ C 202/1 ('TFEU'), Article 1(1).
[20] TFEU, Article 2(1).
[21] K. Lenaerts, P. Van Nuffel and T. Corthaut (eds.), *EU Constitutional Law*, Oxford, Oxford University Press, 2021 ('Lenaerts et. al, EU Constitutional Law'), 94-95.

in Article 3 TFEU and include the customs union, the monetary policy regarding the euro countries, the conservation of marine biological resources under the common fisheries policy, and the common commercial policy. Importantly, the Union equally has exclusive competence to conclude international agreements when their conclusion is provided for in an EU legislative act or is necessary to enable the Union to exercise its internal competences, or in so far as the agreement may affect common rules or alter their scope.[22] This second paragraph in Article 3 TFEU is a result of the *ERTA* case, which established the corresponding ERTA doctrine in EU law, also known as the implied external powers doctrine.[23]

15. A concise overview of the treaty-making competence of the European Union is appropriate here. Under Article 47 TFEU, the EU has international legal personality, which confirms its treaty-making power. Article 216 TFEU gives the EU the authority "to conclude an agreement with one or more third countries or international organisations" and identifies four situations in which the EU can do so.[24] The first one, in line with the constitutional principle of conferral, is where the Treaties so provide. The Treaties have adopted a sectoral approach regarding this first treaty-making power, as there is no one legal basis for the EU to conduct its international relations. Rather, the Treaties confer on the EU the competence to act externally in regard of a number of policy areas, with the relevant legal bases scattered throughout the Treaties.[25] The other situations in Article 216 include the so-called external flexibility clause (*i.e.* where the conclusion of the agreement is necessary to achieve the objectives of the Treaties); where it is provided for in a legally binding Union act; or lastly where it is likely to affect common rules or alter their scope (*i.e.* the ERTA implied powers doctrine).[26] Furthermore, international agreements are usually negotiated by the Commission on behalf of the EU following an elaborate procedure set out in Article 218 TFEU.[27]

[22] TFEU, Article 3(2).
[23] C-22/70, *Commission v Council, European Agreement on Road Transport (ERTA/AETR)*, 31 March 1971 ('ERTA case'). See for a detailed study of the ERTA doctrine, P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 75-132; M. Kuisma and J. Larik, "The Continuing Contestation of ERTA Conferral, Effectiveness and the Member States' Participation in Mixed Agreements", in N. Levrat, Y. Kaspiarovich, C. Kaddous and R.A. Wessel (eds.), *The EU and its Member States' Joint Participation in International Agreements*, London, Hart, 2022, 43-58.
[24] TFEU, Article 216.
[25] A.D. Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control*, Cambridge, Cambridge University Press, 2016, ('Casteleiro, *The International Responsibility of the European Union*, 2016'), 16-24.
[26] TFEU, Article 216.
[27] See Lenaerts et. al, *EU Constitutional Law*, 605-608.

16. **Shared competences** are defined in the TFEU as areas where "the Union and the Member States may legislate and adopt legally binding acts".[28] Article 4(2) TFEU contains a non-exhaustive list of the most important competences the Union shares with the member States. These include for instance the internal market, social policy, the environment, transport, energy, etc. The principle of pre-emption governs shared competences, which means that the member States shall exercise their competence only to the extent that the Union has not exercised its competence in the particular field.[29] In the context of this master's thesis, shared competences are especially relevant as they often result in mixed agreements and a corresponding declaration of competences.

17. Next, the Union has acquired several **supporting competences**. The Treaties provide the Union in certain areas with the competence to "support, coordination or supplement the actions of the member States, without thereby superseding their competence in these areas".[30] These areas are listed in Article 6 TFEU and include the protection and improvement of human health; industry; culture; tourism; education, vocational training, youth, and sport; civil protection; and administrative cooperation.[31] In this area of competence, the pre-emption principle is not applicable, as Union measures may not restrict the regulating power of the member States in the areas concerned, or entail harmonisation of member States' laws or regulations.[32] However, member States themselves must of course respect the principles of sincere cooperation and primacy of Union law and may thus not adopt measures that endanger the uniform application of the Union acts.[33]

18. Lastly, the Treaties provide for a number of **specific common policies and competences**.[34] This is an ad hoc form of competence, whereby member States for instance coordinate their economic and employment policies in the so-called European Semester.

19. In conclusion, and for the purpose of this master's thesis, the concept of 'competences' refers to either the member States competences, or the Union's legal authority to act pursuant to the conferred competences in the provisions of the EU Treaties.

[28] TFEU, Article 2(2).
[29] TFEU, Article 2(2).
[30] TFEU, Article 2(5).
[31] TFEU, Article 6.
[32] TFEU, Article 2(5); Lenaerts et. al, *EU Constitutional Law*, 98.
[33] Lenaerts et. al, *EU Constitutional Law*, 98.
[34] See Article 2(3) TFEU, and further guidance in Article 5 TFEU.

§2. Mixed agreements in the European Union

20. The external action of the European Union frequently involves interests of the both the Union and its member States and therefore is likely to take the form of a mixed agreement.[35] Mixed agreements are agreements where both the Union and the member States are parties because the subject matter of the agreement falls partly within the competence of both. A mixed agreement can be bilateral or multilateral. The definition provided by SCHERMERS grasps the essence of a mixed agreement nicely: "A mixed agreement is any treaty to which an international organization, some or all of its Member States and one or more third State are parties and for the execution of which neither the organization nor its Member States have full competence".[36] As regards the EU, both the member States and the Union agree to be bound by the mixed agreement, but importantly, the third party equally accepts *both* the Union and its member States as contracting parties. It is in this relationship that declarations of competences will prove essential, as the third party needs to have certainty regarding the division of competences pertaining to the specific agreement. This is important in order to be able to answer questions of responsibility in case of non-compliance with the obligations in the mixed agreement.

21. Given the complexity of EU competences and mixed agreements, close cooperation is required between the member States and the EU institutions.[37] This means for instance that member States and the Union institutions have to coordinate their positions in international negotiations.[38] The importance of this aspect of external action of the EU cannot be overstated, as the Union's influence on the international stage hinges on its ability to negotiate with third States as a single entity. This is further discussed below.

§3. The concept of declarations of competences in the practice of the European Union

A. Origin and introduction to core issues

22. A declaration of competences is a statement the Union makes to comply with the conditions established in the participation clause of an international agreement to which the EU and its member States intend to become parties.[39] Often, multilateral international agreements allow for

[35] For an in-depth study of mixed agreements, see C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 2010.
[36] H.G. Schermers, "A Typology of Mixed Agreements" in D. O'Keeffe and H.G. Schermers (eds.), *Mixed Agreements*, Kluwer, Deventer, 1983, 25-26.
[37] D. Van Eeckhoutte and T. Corthaut, "The Participation of the EU and its Member States in Multilateral Environmental Negotiations post Lisbon", YEL 2017, Vol. 36, No. 1, 749-809.
[38] Ibid., 769.
[39] Casteleiro, *The International Responsibility of the European Union*, 2016, 112-113.

participation of regional (economic) integration organisations (often abbreviated as 'REIO') but require of these organisations to submit a declaration of competence as a condition for signature. In these declarations, the international organisation must indicate which competences in the specific agreement are in the sphere of competence of either the organisation or its member States. Such declarations in the EU are usually adopted as an annex to the decision of the Council concerning the conclusion of the agreement on behalf of the EU and then submitted at the depositary of the agreement.[40]

23. The use of declarations of competence is necessitated by the fundamental principles of transparency and sincere cooperation in the EU.[41] The allocation of competences between the Union and its member States in the field of external relations constitutes *in se* a purely internal matter, at least as far as the Union is concerned. However, EU competences are not static, as they change dynamically over time following changes in the EU legal system. As a result, other contracting parties to a mixed agreement could be left guessing as to which of either the Union or its member States is assuming the international obligations flowing from a given agreement. Therefore, third States negotiating a mixed agreement have required the EU (as the quintessential example of a 'regional economic integration organisation') to deposit a declaration setting out the situation regarding the internal division of competences. This condition for accession is an obligation of international law.[42] Thus, when the Council authorises the Commission to accede to an agreement, it must adopt a declaration of competences as the principle of sincere cooperation requires the Council to enable the Commission to comply with international law.[43]

24. Another question regarding the conclusion of international agreements by the EU or its participation therein is whether the Union can be a party without any of its member States being a contracting party to the given agreement.[44] Given the changing nature of competences in the EU, third parties have sometimes made the conclusion of an international agreement on the part of the Union conditional upon it equally being signed by the member States. For example, in the

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[40] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 190.
[41] K. Lenaerts, P. Van Nuffel and T. Corthaut (eds.), *EU Constitutional Law*, Oxford, Oxford University Press, 2021, 374.
[42] See for instance C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [68].

> "When it approves accession to an international convention (…), the Council must respect the conditions for accession laid down by that convention, since an accession decision which did not comply with those conditions would be in breach of the Community's obligations from the moment it entered into force."

[43] C-29/99, *Commission v Council*, 10 December 2002, [67-71].
[44] This is however not the focus of this master's thesis. See for instance P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 183 *et seq*.

case of the UNCLOS, the majority of the member States had to accede thereto before the Community could accede.[45]

B. Characteristics of a declaration of competence

1. Participation clauses and the standard of specification required

25. Declarations of competences are designed to comply with the conditions laid down in a participation clause of an international agreement to which the EU and its member States intend to become parties. As such, no cases exist of the EU (or any other international organisation) issuing a declaration of competence without the international agreement expressly requiring it to do so.[46] In general, the participation clauses in agreements requiring a declaration of competence do not include detailed arrangements on what such declarations should contain or look like. Nevertheless, the majority of these participation clauses in practice consist of a standard formula. This is for instance demonstrated by Article 13(3) of the 1988 Vienna Convention for the Protection of the Ozone Layer, which reads as follows:

> "3. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in [paragraph 1] shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence."[47]

26. Most conventions that contain a participation clause use identical phrasing as this extract.[48] These examples also show the fact that participation clauses have been regularly used in multilateral

[45] United Nations Convention of 10 December 1982 on the Law of the Sea, OJ 1998, L 179/113, Annex IX, Articles 2 and 3.
[46] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 494.
[47] Vienna Convention for the Protection of the Ozone Layer (1988), 1513 UNTS 293, Article 13(3).
[48] See for instance (but not exhaustively): Convention on the protection and use of transboundary watercourses and international lakes (1992), 1936 UNTS 269, Article 25(4); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), 2161 UNTS 447 ('Aarhus Convention'), Article 19(5); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ('Basel Convention') (1989), 1673 UNTS 57, Article 27(3); Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (2023), ('BBNJ Agreement'), Article 67(2); Convention on Biological Diversity (1992), 1760 UNTS 79, Article 34(3); Convention on the Transboundary Effects of Industrial Accidents (1992), 2105 UNTS 457, Article 29(4); Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade ('Rotterdam Convention') (2004), 2244 UNTS 337, Article 25(3); Stockholm Convention on Persistent Organic Pollutants (2001), 2256 UNTS 119, Article 25(3); UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), Article 25(3); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994), 1954 UNTS 3, Article 34(3); Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), 2303 UNTS 162, Article 24(3).

conventions concerning issues related to International Environmental Law.[49] Moreover, other conventions such as the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions ('UNESCO Convention on the Cultural Diversity') might not use the literal standard phrasing, but are in substance identical.[50] Similarly, the combined Articles II(5) and II(7) of the Constitution of the Food and Agriculture Organisation ('FAO') entail the exact same obligations for international organisations willing to join.[51] All of these participation clauses thus require the regional economic integration organisation to declare the extent of their competences regarding the specific convention, as well as notifying any substantial modifications thereto. Incidentally, ever since the UNCLOS, participation clauses use the phrasing 'regional economic integration organisation' rather than a more general designation such as 'international organisation' or the specific name of a given international organisation such as the EU.[52] Article 1 of Annex IX of the UNCLOS describes the meaning of 'international organisation' in respect of the Convention, namely "an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by the Convention, including the competence to enter into treaties in respect of those matters".[53] While this provision provides a definition, it simultaneously clarifies the two essential components: the organisation must have obtained competence with respect to matters under the Convention, apart from the more general requirement of treaty making power in that field.[54] LIJNZAAD has pointed out that this provision has clearly been drafted with the European Community in mind, given the requirement of the transfer of competence.[55]

27. Subsequent participation clauses have all followed this pattern laid out for EU participation in international agreements. Moreover, the standard phrasing of participation clauses demonstrates the lack of any specific requirements as to the form or content of declarations of competences. The analysis in Chapter II of declarations of competence issued by the EU will show that in practice, the declarations rarely meet the appropriate standard.

28. Common sense dictates that a specific and precise declaration of competences is more appropriate than a general and imprecise one. It can therefore be assumed that a declaration ought to be

[49] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 494.
[50] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2440 UNTS 311, Article 27(3)(c).
[51] Constitution of the United Nations Food and Agriculture Organization (1945), Article II(5).
[52] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 494.
[53] UNCLOS, Annex IX, Article 1.
[54] Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair", 186-207.
[55] Ibid., 191.

sufficiently precise and informative in order to provide the third parties to the agreement with legal certainty. In that respect, the Court held that "Article 30(4)(iii) of the Convention [on Nuclear Safety] must, in the interest of the other contracting parties, be interpreted to mean that the declaration of competences under that provision must be complete".[56] The Council is thus under the obligation to attach a complete declaration of competences to its decision approving accession to an agreement.[57] The Court emphasised the fact that declarations of competences are made in the interest of the third party, who is entitled to legal certainty and predictability. Therefore, a sufficiently specific declaration of competence is required. This is also reflected in the negotiations of the amendments to the Constitution of the Food and Agriculture Organisation ('FAO'), which were held to enable the accession of the EEC to the FAO. There, the Council of the FAO repeatedly insisted that the competences of an organisation intending to join the FAO would have to be defined in "a very specific and complete manner" by means of "a statement of competence as detailed as possible".[58] The Council equally emphasised that FAO members need to be able to know at any time whether competence lies with the regional organisation or with its member States.[59] Another illustration of the assumption that the declarations ought to be sufficiently precise and informative can be found in the drafting history of Annex IX to the UNCLOS. At the Third Conference on the Law of the Sea, it was proposed that international organisations that become contracting parties to the UNCLOS should be placed under the obligation to inform the other parties regarding their competences "with indication of the specific provisions of [the] Convention which are affected".[60] As such, under this proposal, the declaration ought to make reference to *specific* provisions of the UNCLOS. This proposal was made by the Group of 77 and aimed to accommodate the fear that the declarations might not always be accurate and might mislead third States, since the transfers of competences in the past were not necessarily based upon the provisions of the UNCLOS.[61] However, the EEC strongly opposed this

[56] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [70].
[57] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [71].
[58] Report of the Council of the FAO, Ninety-eight Session, 19 to 30 November 1990, CL 98/REP, [238].

> "238. With respect to the competence of any regional economic integration organization, it was underlined that this would have to [be] defined in a very precise and complete manner. In particular a statement of competence as detailed as possible would need to be prepared, listing the areas in which full competence had been transferred, areas in which competence was shared. Moreover, mechanisms would have to be devised so that Member Nations would be able to know at any time whether competence on any given matter laid with the regional economic integration organization or its Member States."

[59] Report of the Council of the FAO, Ninety-eight Session, 19 to 30 November 1990, CL 98/REP, [238].
[60] Informal Proposal by the Group 77, 25 March 1981, as reproduced in R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, vol. XII, Dobbs Ferry, Oceana, 1987, 342.
[61] Report of the President on the question of participation in the convention, 26 March 1982, Third United Nations Conference on the Law of the Sea, 1973-82, Vol. XVI, Documents of the Conference, Eleventh Session, A/CONF.62/L.86, [11]. See also Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 201.

requirement to specify the provisions affected by the competences, and therefore it was dropped from the text of Annex IX.[62] Article 5(1) now only requires "a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organisation by its Member States". Nevertheless, the proposal does show the concerns that the other contracting parties voiced regarding the content of the declaration of competences. Thus, in the drafting process of both these major international agreements that were including the possibility for international organisations to participate, such participation was conditioned upon a declaration of competences that would be sufficiently specific. This condition featured prominently in these negotiations, no doubt with the interests of the other contracting parties in mind, as having legal clarity was an essential consideration behind the inclusion of the requirement of issuing a declaration of competence in the system of the UNCLOS in the first place.[63]

29. Moreover, the Court of Justice has in its case law maintained that the Union must provide a clear picture of the extent and nature of its competences. This is demonstrated by the findings of the CJEU in the *Rotterdam Convention* judgement.[64] In a dispute concerning the appropriate legal basis, the Court annulled Regulation 304/2003 implementing the Rotterdam Convention,[65] on the ground that this regulation should also have been based on what is now Article 207 TFEU, along with the chosen environmental legal basis. In its reasoning, the Court indicated that by its choice of legal basis, the Union projects the nature of its competence to third parties. As such, the Union "is also giving indications to the other parties to the Convention both with regard to the extent of [Union] competence in relation to that Convention (…) and with regard to the division of competences between the Community and its Member States".[66] This finding clearly shows that the Court of Justice keeps the interests of third States in high regard, especially concerning the areas of competence in a convention concluded with third parties. In the same case, the Court seems to suggest that more attention should be paid to the uncertainty that third parties often face when dealing with both the Union and its member States in the context of multilateral international agreements.[67]

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[62] Report of the President on the question of participation in the convention, 26 March 1982, Third United Nations Conference on the Law of the Sea, 1973-82, Vol. XVI, Documents of the Conference, Eleventh Session, A/CONF.62/L.86, [11].
[63] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 201-202.
[64] C-94/03, *Commission v Council ('Rotterdam Convention')*, 10 January 2006, ECR I-22.
[65] Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade (2004), 2244 UNTS 337.
[66] C-94/03, *Commission v Council*, 10 January 2006, ECR I-22, [55].
[67] P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 65-66.

30. Some participation clauses establish subsidiary mechanisms to ensure the declaration of competences fulfils the need of legal certainty and stability by giving a clear answer to the question of the division of competences. For instance, Article 5(1) of Annex IX of the UNCLOS contains the participation clause,[68] but the drafters added a subsidiary incentive to ensure compliance with this obligation. Article 6 of Annex IX stipulates that any State party to the UNCLOS may request an international organisation or its member States for information as to who has responsibility in respect of any specific matter. If the organisation and its member States fail to provide this clarification on the division of competences, they will be subjected to joint and several liability.[69] As CASTELEIRO has pointed out, this subsidiary mechanism is a good way to encourage the organisation and its member States to clearly report on the distribution of competences.[70] If the Union would then fail to comply with this provision, the uncertainty as to who incurs responsibility for the implementation of provisions of the UNCLOS results in the joint liability of the EU and its member States.[71] Incidentally, Article 5(2) of Annex IX of the UNCLOS mirrors the participation clause of the first paragraph. It contains a parallel obligation for member States of an organisation who joined the UNCLOS, who are thus equally obliged to make a declaration specifying the matters governed by the UNCLOS in respect of which competence has been transferred to the organisation. Thus, the mechanism devised under the UNCLOS requires clarity from both the Union and its member States, by way of informing the depository and other States parties on the division of competences between them.

31. Moreover, some international agreements include a presumption of member State competence. This is a mechanism aimed to function as a guarantee for the fulfilment of the requirement of specificity regarding the reported division of competences. An example is found in Article 5(3) of Annex IX of the UNCLOS, which states that contracting parties which are member States of an international organisation that is also participating in the UNCLOS shall be presumed to have competence over all matters governed by the UNCLOS in respect of areas of competence which have not been specifically declared, notified or communicated by those States.[72] Other examples

[68] United Nations Convention on the Law of the Sea (1982), 1833 UNTS 3, Annex IX, Article 5(1).

> "1. The instrument of formal confirmation or of accession of an international organisation shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organisation by its member States which are Parties to this Convention."

[69] United Nations Convention on the Law of the Sea (1982), 1833 UNTS 3, Annex IX, Article 6(1)(2).

[70] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 495.

[71] For the interpretation of the liability regime in Article 6 of Annex IX, see ITLOS, Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, Case No. 21, 2 April 2015, ITLOS Reports 2015, 4, [168] *et seq*.

[72] Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation

are plenty, including the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[73]

32. In conclusion, participation clauses themselves do not contain any requirement as to the content or specificity of declarations of competences. However, both the Court of Justice in its case law as well as the Union's treaty partners in negotiations and treaty provisions have made clear that a certain standard of specificity must be upheld in order to provide the other contracting partners with legal certainty.

2. Common features of EU declarations of competences

33. It is clear by now that while a certain degree of clarity and completeness ought to be provided, participation clauses themselves allow for a lot of leeway concerning the contents of a declaration of competences. Nevertheless, the EU has developed a standard practice over the years, resulting in a basic structure of the vast majority of declarations. This will equally shine through in the case studies provided in Chapter II.

34. Firstly, declarations often start by broadly pointing to the existence of an EU competence in the given subject matter. This is merely a general statement, indicating the fact that the Union and its member States can act in the field of the given international agreement. For example, the first sentence of the declaration made in the context of the Convention on Biological Diversity states that "[i]n accordance with the relevant provisions of the [TFEU, the Union] alongside its Member States has competence to take actions aiming at the protection of the environment".[74] Thus, if no competences are declared by the Union, the member States are presumed to be responsible for the fulfilment of the corresponding obligations of the Convention on Biological Diversity.

35. Secondly, declarations often continue by linking the subject matter of the international agreement to prior EU action. For instance, the declaration can acknowledge the existence of a field of EU competence on general subject matters like environmental protection or trade in goods.[75] In such cases, the language used is again very general and open-ended. Another approach in this context consists of referring to existing EU secondary legislation on issues covered by the international

of Part XI thereof, L 179/129, 98/392/EC, ('Declaration of competences submitted to the UNCLOS'), Annex II, Article 5(3).

[73] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2440 UNTS 311, Article 27(3)(d).

[74] Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity, 93/626/EEC, L 309/19, Annex B.

[75] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 495-496.

agreement in question. Examples are aplenty, the previously mentioned declaration annexed to the Convention on Biological Diversity referring to a number of legislative acts previously adopted by the Union in the fields governed by the Cartagena Protocol.[76] However, the wording of such lists makes clear that these are to be regarded as merely illustrative of the scope and extent of the Union's competence.[77] They are exemplative in nature and must be assessed on a case-by-case basis in light of the circumstances and legal basis of each instrument of legislation, and as such don't provide for much legal certainty. For example, concerning the list of EU legislation featuring in the declaration submitted to the UNCLOS, the declaration clarifies that: "The extent of Community competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules (…)".[78] This practice of referring to existing EU legislation complicates matters profoundly, as the result is that the scope and nature of the Union competence must then be construed not only by referring to the listed secondary legislation, but also to the principles governing the existence and nature of the Union's implied external competence as they were formed in the ERTA doctrine.[79] HELISKOSKI therefore questions the Court of Justice when it denoted the list of EU legal acts in the declaration of competences to the UNCLOS as a "useful reference base"[80] to determine the scope of the Union's competence in the areas covered by the UNCLOS.[81] This author agrees, as these references to EU legislation may be informative to a degree, yet in order to really grasp the meaning and interaction of those legislative acts the EU's treaty partners would require a profound understanding of EU law on a level comparable to that of skilled European lawyers. And, as OLSON points out, even then uncertainties remain, because even highly knowledgeable European lawyers may disagree about the content of the law.[82] Another similar method used by some declarations consists of referring more broadly to legal acts of the Union in general. This is best demonstrated with an example, provided by the declaration submitted in the context of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, which provides that "The European Community is responsible for the performance of

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[76] Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity, 93/626/EEC, L 309/19, Annex B.

The declaration reads: "In relation to the matters covered by the Convention, the Community has adopted several legal instruments, both as part of its environment policy and in the framework of other sectoral policies, the most relevant of which are listed below: (…)"

[77] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 203.

[78] Declaration of competences submitted to the UNCLOS, Annex II.

[79] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 203-204.

[80] C-459/03, *Commission v. Ireland* ('MOX Plant'), 30 May 2006, ECR I-04635, [109].

[81] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 203-204.

[82] P.M. Olson, "Mixity from the Outside: the Perspective of a Treaty Partner" in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 2010, 336.

those obligations resulting from the Cartagena Protocol on Biosafety which are covered by [Union] law in force".[83] Such a statement again is not helpful for other contracting parties to the agreement, at least no more helpful than the one provided in the declaration concerning the UNCLOS. The phrasing merely refers implicitly to the doctrine of pre-emption, but third States are left wondering what exactly is covered by "Union law" and are given no further indication as to the matters for which the EU is responsible. Moreover, the difficulty for the other contracting parties concerns not only the identification of "Union law" that would cover certain obligations stemming from the agreement but relates also more technically to the relevant legislation itself. As such, third States are for every competence left to assess themselves the criteria that need to be fulfilled as per the relevant legislation in order for the Union's responsibility to be triggered.

36. Finally, many declarations also contain a clause which signals the inherently evolving nature of EU competences. For instance, the declaration made to the United Nations ('UN') Convention on the Rights of Persons with Disabilities states: "The scope and the exercise of Community competence are, by their nature, subject to continuous development (…)".[84] The same phrase can be found in numerous other declarations, including the declaration issued when the EU joined the UNCLOS,[85] as well as in the declaration of competences annexed to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention')[86] and the UN Convention Against Transnational Organised Crime.[87]

3. Legal effects of declarations of competences in the European Union

37. When discussing the legal value of declarations of competences, a distinction must be made between the international level and the internal EU perspective. First, at the international level a declaration of competences can be classified as an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" under Article 31(2) of the Vienna Convention on the Law of

[83] Council Decision of 25 June 2002 concerning the conclusion, on behalf of the European Community, of the Cartagena Protocol on Biosafety, L 201/65, 2002/628/EC, Annex B.
[84] Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, L 23/35, 2010/48/EC, Annex II.
[85] Declaration of competences submitted to the UNCLOS, Annex II.
[86] Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, L 124/1, 2005/370/EC, Annex.
[87] Council Decision of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime, L 261/115, 2004/579/EC, Annex II.

Treaties ('VCLT').[88] The International Law Commission specified in the Commentaries to the draft Articles on the Law of Treaties in 1966 that such texts should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.[89] As such, this gives a declaration of competences interpretative value, providing the necessary background to the agreement it is linked to. If any conflict relating to the competences in the agreement would arise, the declaration will serve as an interpretative tool, as it is an authoritative statement on the scope of the parties' commitment under the agreement.[90]

38. Second, at the internal level in the EU itself, the Court has specified that declarations of competence do not entail independent legal effects, but rather find their effect as a part of the decision to which they are annexed. A declaration is an integral part of the specific decision by the Council, which is an act producing legal effects and can therefore be annulled by the Court of Justice.[91] The internal legal effects of declarations of competences flow from their inclusion in the Council decision that concludes an international agreement. Moreover, it is not entirely clear whether the classification in a declaration of a competence as exclusive can simultaneously determine the exclusiveness of the competence internally.[92] Strictly speaking a declaration cannot create new competences,[93] as it is only an instrument that gives the contracting parties of the agreement information on the division of competences at the time of the conclusion by the EU. Nevertheless, given the fact that the Court of Justice has stated that it could use declarations of competences as evidence that a competence has been transferred,[94] it cannot be excluded that a declaration has some internal legal effect in the EU's legal system itself.

4. Some preliminary observations

39. A first observation at this point is that the participation clauses usually grant the EU a lot of leeway as to the manner they report on the Union's competences in its declarations of competences. On the one hand, it can be assumed that a declaration must cover the necessary competences in respect of the specific agreement, and the Court of Justice has specified the principle of sincere

[88] Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331 ('VCLT'), Article 31(2)(b).
[89] International Law Commission, Draft Articles on the Law of Treaties with commentaries, YILC 1966, Vol. II, 221, Commentary to Draft Article 28, [13].
[90] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 496.
[91] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [40]. See also Casteleiro, *The International Responsibility of the European Union*, 2016, 497-498.
[92] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 497.
[93] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 497.
[94] *MOX Plant* case, [105].

cooperation requires them to be complete.[95] On the other hand, the lack of any specific requirements content-wise has resulted in declarations being vague, imprecise and largely unhelpful to third parties. A telling example of a declaration of competences excelling in these qualities is the one made pursuant to the Convention on the Transboundary Effects of Industrial Accidents. It first lists EU legislation pertaining to the subject matter of the Convention, namely a number of Council Directives adopted in the areas covered by the Convention, and then merely states the following: "As regards the application of the Convention, the Community and its Member States are responsible, within their respective spheres of competence".[96] In the view of this author, this statement leaves the other contracting parties to the convention no more wiser on the relevant EU competences than without the declaration.

40. A second preliminary observation pertains to the inherently dynamic nature of EU competences. While some declarations of competences note the dynamic character of the EU competence,[97] this does nothing to remedy the fact that competences in the EU are subject to continuous changes. These changes can occur through the obvious legislative channels, as with the entry into force of the Lisbon Treaty, but equally as a result of the case law of the Court of Justice. The ERTA doctrine is a perfect example of the latter occurrence.

41. Third, it is rare for declarations of competences to link the distribution of competence to individual provisions (or even parts) of the agreement it is annexed to. Most declarations merely provide a general description of the Union's competence regarding a policy area or subject matter, with no precise link to the actual wording or structure of the agreement.[98] Only exceptionally the Union did define its competences in terms of the individual provisions of the international agreement, with these rare examples including the declarations submitted under the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[99] the Straddling

[95] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [70].
[96] Council Decision of 23 March 1998 concerning the conclusion of the Convention on the Transboundary Effects of Industrial Accidents, L 326/1, 98/685/EC, Annex II.
[97] Here as well a standard phrasing is used, see for instance the declaration submitted to the UNCLOS.

> "The scope and the exercise of such Community competence are, by their nature, subject to continuous development (…)"

[98] See also Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 202.
[99] Council Decision of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, L 326/57, 90/611/EEC, Annex.

> "(…) the European Economic Community is at present competent for questions of commercial policy relating to the substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances, questions which are dealt with in Article 12 of the Convention."

Fish Stocks Agreement,[100] and the UN Convention against Transnational Organised Crime.[101] In some respect, it can also be argued that the declaration submitted at the conclusion of the UNCLOS equally addresses specific parts of the convention, as it specifies that the Union has exclusive competence "in respect of those provisions in Parts X and XI (…) related to international trade".[102] However, this arguably does not constitute a precise and well-explained link to the agreement. In any event, these examples constitute isolated cases and even there the references remain superficial. The concern voiced in the drafting process of the UNCLOS by the members of the Third Conference has thus not materialised into practice. The Union arguably prefers to keep an open field as to its competences, with as many possibilities and questions left open as possible.

[100] Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, L 189/39, 98/414/EC.

> "The following provisions of the Agreement apply both to the Community and to its Member States:
> — general provisions: (Articles 1, 4 and 34 to 50),
> — dispute settlement: (Part VIII)."

[101] Council Decision of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime, L 261/115, 2004/579/EC, Annex II.

> "This [Community] competence relates to Articles 7, 9 and 31(2)(c) of the Convention. Moreover, Community policy in the sphere of development cooperation complements policies pursued by Member States and includes provisions to combat corruption. This competency relates to Article 30 of the Convention. Moreover, the Community considers itself bound by other provisions of the Convention to the extent that they are related to the application of Articles 7, 9, 30 and 31(2)(c), in particular the articles concerning its purpose and definitions and its final provisions."

[102] Declaration of competences submitted to the UNCLOS.

CHAPTER II: AN OVERVIEW AND COMPARISON OF DECLARATIONS OF COMPETENCES IN THE PRACTICE OF THE EUROPEAN UNION

42. This second chapter aims to provide an overview of the declarations of competences in the practice of the EU. No provision is made in the EU Treaties that prescribes the drafting and adoption of these declarations, which provoked the formation of internal EU practice to accommodate the demand of the EU's treaty partners. In practice, declarations have varied considerably in style, length and detail, and it can be argued that no blueprint for the declarations exists. However, some broad categories and usual practices can be distilled.

43. This Chapter focuses first on the declarations submitted to the UNCLOS and the recent BBNJ Agreement, providing an overview of their content and a corresponding critical reflection. Next, other relevant declarations are listed to demonstrate the manner in which the Union drafts its declarations.[103]

§1. A comparison and review of the declarations of competences submitted to the UNCLOS and the recent BBNJ Agreement

A. The declaration submitted under the UNCLOS

44. The United Nations Convention on the Law of the Sea ('UNCLOS') of 1982 was the very first multilateral international agreement containing the requirement to submit a declaration of competences when an international organisation, *i.e.* the EU, wants to become a contracting party. Article 5(1) of Annex IX of the UNCLOS contains the participation clause, which broadly corresponds to the standard formula set out in Chapter I:

> "The instrument of formal confirmation of an international organisation shall contain a declaration specifying the matters governed by the Convention in respect of which competence has been transferred to the organisation by its Member States which are Parties to the Convention."[104]

45. Thus, UNCLOS contracting parties expect the EU to report on the division of competences between the Union and its member States that are also party to the UNCLOS. The European Community issued two declarations of competences in the process of joining the UNCLOS, one at signature in 1984 and one at accession in 1998. The declaration discussed here is the final

[103] The declarations are not listed exhaustively, and reference is made here to the overview of main features of declarations of competences above where many declarations were already discussed, see *supra* Chapter I.
[104] United Nations Convention on the Law of the Sea (1982), 1833 UNTS 3, Annex IX, Article 5(1).

version of the declaration issued at the time of formal confirmation of the UNCLOS by the Union in 1998.

1. The content of the declaration of competences annexed to the UNCLOS

46. The declaration starts by noting the participation clause in Article 5(1) of Annex IX as the *ratio legis* behind the drafting of the document. Then, it provides some historical background on the EC, stating how they were established by the Treaties of Paris and Rome and how this institution evolved into the European Union after Maastricht. Next, it lists the EC members at the time. Subsequently, the declaration specifies that the UNCLOS and Annex IX are only applicable in the territories where the Treaty establishing the European Community ('EC Treaty') is applied, under the conditions of Article 227 of the latter.[105]

47. The declaration then proclaims that "[t]he Community has exclusive competence for certain matters and shares competence with its Member States for certain other matters". This is followed by three subdivisions. The first two set out the matters for which the Community has either exclusive or shared competence. This is done in a reasonably comprehensive manner, as multiple policy areas are listed where the Community has the exclusive competence to adopt relevant rules and regulations, or conversely where the competence rests with the member States. It is also noteworthy to mention that the declaration at this point refers quite in detail to specific parts of the UNCLOS, as well as specifically denoting the subject matter of the provisions affected. While it was described above that most declarations do not provide for a clear link between the competence and the agreement, here at least some attempt is made to refer to the UNCLOS to establish a link with the competences described. This is still not as clear as it could be, as the most detailed solution would include a list of competences linked to each of the relevant articles of the agreement. Nevertheless, this declaration does represent some effort and provides for a respectable degree of legal clarity. Furthermore, the third subdivision notes the possible impact on activities in UNCLOS areas of other Community policies such as fair economic practices, government procurement and industrial competitiveness, and development aid. This is a common practice of the Union, as for example the declaration submitted to the UN Convention on the Rights of Persons with Disabilities also refers to a list of EU policies that may be relevant to that convention.[106] As LIJNZAAD and CASTELEIRO state, this referencing to other European policies is questionable because the legal value of such references is unclear, particularly when they are as

[105] Article 227 of the Treaty establishing the European Community, now Article 259 TFEU.
[106] Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 2010/48/EC, L 23/55, Annex II.

vague as in this case.[107] CASTELEIRO in that respect points out that such references to policy documents as a way to establish the division of competences may mislead third parties on where competence lies on a particular issue.[108]

48. Lastly, the declaration adds a three-page appendix, which consists of a list of Community acts that are adopted in the relevant policy areas of the UNCLOS.[109] This includes mention of Council Directives in the fields of maritime safety and prevention of marine pollution sectors, as well as the protection and preservation of the marine environment (Part XII UNCLOS) and some marine research programmes.

2. Remarks

49. What immediately stands out when reading the declaration of competences annexed to the UNCLOS is the size of the declaration, especially when compared to other declarations studied below. The text of the declaration is among the longest and most detailed, which at first glance would seem to indicate that the declaration succeeds in providing a full and comprehensible overview of the division of competences in the EU regarding the matters covered by the UNCLOS. The drafters clearly attempted to fulfil the requirements of the participation clause in the UNCLOS by providing a detailed declaration of competences. They composed a declaration that is fairly structured and that aims to clarify the division of competences in a comprehensive way, especially when contrasted with some of the later declarations.

50. However, despite its length, it should be noted that the declaration made to the UNCLOS is rather general in certain parts. The language used on certain points leaves quite some room for interpretation and guesswork on the part of the other contracting parties. Phrases such as “for a certain number of matters (…) there is shared competence”, “for example”, “*inter alia*”, “in particular”, “competence relates mainly to”, “these policies may also have some relevance”, and so on,[110] do not leave the reader with a clear picture of the Union’s competences. Moreover, no definition is provided for the “certain matters” that are shared or exclusive, and neither is explained which provision of the UNCLOS could affect other EU policies.[111] This author submits

[107] Lijnzaad, “Declarations of Competence in the Law of the Sea, a Very European Affair”, 197; Casteleiro, EU Declarations of Competence to Multilateral Agreements, 501.
[108] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 501.
[109] Declaration of competence submitted to the UNCLOS, L 179/131-133.
[110] Declaration of competence submitted to the UNCLOS.
[111] Declaration of competence submitted to the UNCLOS.
“The Community has exclusive competence for *certain matters* and shares competence with its Member states for *certain other matters*.” (emphasis added)

that this is understandable, as the declaration to the UNCLOS was one of the very first. It is only logical that the EU institutions were still figuring out the optimal manner to deal with this new instrument in practice. However, the opposite deduction can arguably be made as well. With this declaration being the first one, the Union endeavoured in good faith to report on the division of competences in the most clear and comprehensive way possible. This resulted in a declaration that stands out among its successors both in length and in structure, given that few of the later declarations for instance use subdivisions.

51. Lastly, it must be remarked that the declaration of competence to the UNCLOS has never been updated, despite the EU's obligation to do so in case of any substantive modifications to the division of competences.[112]

3. The MOX Plant case before the Court of Justice

52. The Court of Justice was presented with the opportunity to interpret the declaration of competences made to the UNCLOS in a 2006 annulment action between the Commission and Ireland, also called the '*MOX Plant* case'.[113] The case involved a dispute between Ireland and the United Kingdom ('UK') over the operation of the so-called MOX plant, located in Sellafield in England on the coast of the Irish Sea. A British company called BNFL designed the plant to recycle plutonium from spent nuclear fuel, converting it into mixed oxide fuel ('MOX'), which is then used as an energy source in nuclear power plants.[114] BNFL submitted an environmental statement for the MOX plant, after which the UK authorised construction of the plant based on the information submitted in that environmental statement.[115] Furthermore, the Commission delivered an opinion on the plan for the disposal of radioactive wastes by the MOX plant and concluded that the plan did not result in radioactive contamination in the water, soil or airspace of another member State.[116] However, Ireland repeatedly objected to the activities of MOX plant between 1994 and June 2001, doubting the viability of the environmental statement provided by BNFL. When the plant started operations in 2001, Ireland eventually brought two separate international arbitrations against the UK based on alleged failures of the UK to respect its environmental obligations. The first claim was made under the 1992 Convention for the

"These policies may also have some relevance to the Convention and the Agreement, in particular with regard to *certain provisions* of Parts VI and XI." (emphasis added)

[112] See UNCLOS, Annex IX, Article 5(4). The obligation to update declarations of competences is further discussed below in Chapter IV, §2.

[113] C-459/03, *Commission v. Ireland* ('MOX Plant'), 30 May 2006, ECR I-04635 ('MOX Plant case').

[114] *MOX Plant* case, [20-22].

[115] *MOX Plant* case, [23].

[116] *MOX Plant* case, [25].

Protection of the Marine Environment of the North East Atlantic ('OSPAR'), but the arbitral tribunal rejected Ireland's claims on 2 July 2003.[117]

53. For the purpose of this master's thesis, the second Irish claim is more relevant. Ireland instituted proceedings against the UK concerning the MOX plant before an arbitral tribunal established under Annex VII of the UNCLOS.[118] It alleged a number of breaches of provisions of the UNCLOS on the part of the UK, with its claim being centred around a group of three obligations: a failure to carry out a proper assessment of the potential effects of the MOX plant on the marine environment of the Irish Sea (Article 206 UNCLOS); a failure to cooperate with Ireland as its neighbour (Articles 123 and 197 UNCLOS) and a failure to take all the steps necessary to protect the marine environment of the Irish Sea (Articles 192-194, 207, 211, 213 and 217 UNCLOS).[119] However, the proceedings under the UNCLOS were suspended on 24 June 2003, pending a decision by the CJEU on the impact of Community law on the dispute before the arbitral tribunal.[120] The issue at hand concerned the fact that Ireland was under the obligation to submit the case to the Court of Justice, insofar as the matter was within the competence of the EU. Although the amount of the EU's competences was not entirely clear, there was the fear of contradicting judicial decisions, which caused the tribunal to suspend its proceedings. It is worth noting that the decision to suspend the arbitral proceedings was made "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions",[121] which is commendable for the rule of law and judicial efficacy. Moreover, the arbitral tribunal pointed out that whatever the view of the parties regarding this jurisdictional dilemma and as to the scope and effects of the applicable European law, the question was ultimately not for the parties to decide. Rather, it was a question to be decided within the institutions of the European Communities, and particularly by the Court of Justice.[122]

54. As a result of Ireland's claim, the Commission brought an infringement action under Article 258 TFEU (ex Article 226 EC Treaty) before the Court of Justice against Ireland for failure to fulfil

[117] *MOX plant* case, [30-32]. See Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, Ireland vs. United Kingdom of Great Britain and Northern Ireland, Final Award of 2 July 2003, Arbitral Award (Permanent Court of Arbitration).
[118] *MOX Plant* case, [20-22]. See also UNCLOS, Article 287(1)(c).
[119] P.J. Cardwell and D. French, "Who Decides? The ECJ's Judgment on Jurisdiction in Mox Plant Dispute", Journal of Environmental Law 2007, Vol. 19, No. I, 122.
[120] Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, UNCLOS for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, The MOX Plant Case, Ireland v. UK, *Order No. 3: Suspension Of Proceedings On Jurisdiction And Merits, And Request For Further Provisional Measures*, 24 June 2003, Permanent Court of Arbitration.
[121] Ibid., [28].
[122] Ibid., [26].

its Treaty obligations.[123] More specifically, the Commission claimed that by instituting dispute-settlement proceedings against the UK under the UNCLOS, Ireland had failed to fulfil its obligations under Article 344 TFEU (ex Article 292 EC Treaty) and 4(3) TEU (ex Article 10 EC Treaty).[124] These provisions contain, respectively, the exclusive jurisdiction of the Court of Justice over Treaty matters and the duty of sincere cooperation of EU member States. More specifically, the issue at the heart of the Commission's action against Ireland was whether the case should have been heard at the level of the European Community, *i.e.* before the Court of Justice, rather than before the UNCLOS arbitral tribunal.[125] Ireland had brought its claim against another EU member State about a dispute involving the UNCLOS, which is a mixed agreement and as such the Union has competence over parts of the agreement. The Commission therefore felt that an enforcement action was warranted.

55. The Grand Chamber of the Court of Justice handed down a lengthy judgement, in which it eventually held Ireland to have violated its Treaty obligations. As can be expected, the Commission and Ireland found themselves diametrically opposed in their arguments about the jurisdiction of the Court to hear the case. On the one hand, Ireland contended that given the fact that it based its claim on obligations arising under the UNCLOS and not the EC Treaty, the articles invoked were not matters of Community law over which the Court of Justice would enjoy jurisdiction. On the other hand, the Commission held the view that all the issues under the dispute fell within the jurisdiction of the Court by virtue of the fact that even if only part of the dispute falls within Community law, the Court of Justice is nevertheless competent.[126]

56. The Court first set out to determine whether the provisions of the UNCLOS fell within the scope of Union competence. It made clear early on that it was not necessary to establish exclusive competence of the Community within the areas concerned by the dispute.[127] As such, the nature of the Community's competence at issue in the dispute was irrelevant, as long as there was a competence transferred. The Court in that respect went on to state that the declaration of competences made to the UNCLOS "confirms that a transfer of areas of shared competence, in

[123] *MOX Plant* case, [55].
[124] *MOX Plant* case, [1].
[125] See *MOX Plant* case, [50] and [59]. The claim that Ireland has failed to respect the exclusive jurisdiction of the Court is addressed in paragraphs 60-139.
[126] P.J. Cardwell and D. French, "Who Decides? The ECJ's Judgment on Jurisdiction in Mox Plant Dispute", Journal of Environmental Law 2007, Vol. 19, No. I, 122-123.
[127] *MOX Plant* case, [62].

particular in regard to the prevention of marine pollution, took place within the framework of the Convention".[128]

57. Thus, it was only necessary to examine the Commission's claim that the Court has the jurisdiction to interpret those provisions which are shared between the member States and the Community. To do so, the Court relied on the ERTA doctrine, which stipulates that implied competence of the Community in the external field arises from the corresponding conferred internal competence in a given area.[129] *In casu*, competence in environmental matters was clearly conferred upon the Community by virtue of Article 192 TFEU (ex Article 175 EC Treaty). Yet, in the environmental field, the Community had fixed only minimum rules, a fact clearly noted in the declaration of competences.[130] As a result, Ireland argued that the dispute did not cover areas in which competence had been transferred. The Court of Justice rejected this line of argument, as according to the principle of pre-emption and the ERTA doctrine, "each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".[131] Thus, the Court noted that the provisions of the UNCLOS relied on by Ireland in the dispute relating to the MOX plant and submitted to the Arbitral Tribunal are rules which form part of the Community legal order.[132] Therefore, they involve the exclusive jurisdiction of the Court of Justice.[133]

58. In conclusion, since the Court found that the UNCLOS provisions fall within the scope of Community competence, and that these provisions form part of the EC legal order, the question becomes one of interpretation or application of the Treaties.[134] Thus, the exclusive jurisdiction of the Court under Article 292 EC Treaty arises. Or, insofar as Union legislation has been adopted in an area covered by the UNCLOS, that area necessarily falls within Union competence, whether exclusive or shared, and correspondingly also within the Court's exclusive jurisdiction. This author submits that while this solution appears agreeable, one can still ask the question: how did the UNCLOS become EU law?

[128] *MOX Plant* case, [105].
[129] *Erta* case. See also Chapter I, §1.
[130] Declaration of competence submitted to the UNCLOS.
[131] *Erta* case, [17].
[132] *MOX Plant* case, [121].
[133] Ibid.
[134] *MOX Plant* case, [127-128]; P.J. Cardwell and D. French, "Who Decides? The ECJ's Judgment on Jurisdiction in Mox Plant Dispute", Journal of Environmental Law 2007, Vol. 19, No. I, 122-123.

59. As regards the role of the declaration of competences in the findings of the Court in the *MOX Plant* case, some interesting remarks can be made. Firstly, the Court examined the declaration made by the Union in order to ascertain whether the Union had exercised its external competence with regard to the UNCLOS provisions on the protection of the environment. Thus, the Court showed its eagerness to refer to the declaration as a "useful reference base"[135] in order to deal with the complex issues involved in the division of competences in the EU and the interests of third States, as well as the corresponding jurisdiction of the Court. However, eyebrows can be raised at the Court's approach, as it has been argued that the discussion about the interpretation of the declaration regarding the nature of the competence on the protection of the environment casts much doubt over the legal certainty that a declaration must provide to third parties.[136] If internally a member State and an EU institution are diametrically opposed in their view on the distribution of competences in a declaration, it is difficult to expect any vote of confidence or understanding from other contracting parties to mixed agreements.[137] Lastly, an attentive reader will remark that the Court did not go into an actual interpretative exercise of the declaration annexed to the UNCLOS. This is again a telling showcase of the nature of mixed agreements and declarations of competences as such, which are inherently affected by the vertical division of competences in the EU. This division is shrouded in secrecy, as none of the EU institutions like to provide a full and definitive overview of competences. While this does leave the other contracting parties of the EU in an uncertain legal position, it can at the same time be argued that the dynamic nature of EU competences leaves few opportunities for any other solution. Third States are aware of the nature of competences in the EU and as such accept the flaws inherent in the system of declaring the division of competences.

B. The declaration of competence submitted under the BBNJ Agreement

60. The second declaration studied in this subsection is the declaration of competences submitted to the Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ('BBNJ Agreement'), or also known as the High Seas Treaty. The BBNJ Agreement was adopted under the aegis of the UNCLOS in New York on 19 June 2023. Given the recency of its conclusion, it is highly relevant to compare the practice of the EU, ranging from its declaration to the UNCLOS in 1998 to the most recent declaration submitted in the context of the BBNJ Agreement in 2024.

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[135] *MOX Plant* case, [109].
[136] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 497.
[137] Ibid.

61. The BBNJ Agreement aims to protect the world's ocean in areas beyond national jurisdiction, on behalf of present and future generations. In particular, the BBNJ Agreement focuses on preserving, restoring and maintaining biological diversity and ecosystems. The agreement is not yet into force, as Article 68(1) stipulates that it shall enter into force 120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession.[138] The EU signed the BBNJ Agreement on 20 September 2023, subject to its conclusion at a later date.[139] In accordance with the participation clause in Article 67(2), the Union should in its instrument of approval declare the extent of its competence in respect of the matters governed by the BBNJ Agreement.

62. The Commission submitted a proposal for a Council decision and corresponding declaration in October 2023,[140] which led to several months of discussions and negotiations within the Council's Law of the Sea Working Group (so-called COMAR). The Council approved the conclusion of the BBNJ Agreement with an amended version of the declaration of competences in March 2024, after which the Council formally adopted the decision in June 2024.[141]

1. The content of the declaration of competences submitted to the BBNJ Agreement

63. Like the declaration under the UNCLOS, the declaration of competences submitted to the BBNJ Agreement starts by addressing the *ratio legis* of the document, citing the participation clause in Article 67(2) of the BBNJ Agreement.[142] It then lists the current EU members in paragraph 2. This is followed by a reminder that Articles 3 and 4 of the TFEU prescribe that the Union has exclusive competence in certain matters and shares competence with the member States in others, with a reference to the principles of conferral and pre-emption.[143]

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[138] BBNJ Agreement, Article 68(1).

[139] Council Decision (EU) of 18 September 2023 on the signing, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, L 235/1, 2023/1974.

[140] European Commission, Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 12 October 2023, 2023/0353 (NLE), COM(2023) 580 final ('Commission Proposal for a Council Decision (12 October 2023)'), Annex 2.

[141] Council Decision (EU) of 17 June 2024 on the conclusion, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, OJ L, 2024/1830; Declaration of Competence of the European Union made in accordance with Article 67(2) of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 19 July 2024, 2024/1832 ('Declaration of competences submitted to the BBNJ Agreement').

[142] Declaration of competences submitted to the BBNJ Agreement, [1].

[143] Declaration of competences submitted to the BBNJ Agreement, [3].

> "3. Pursuant to Article 4(1) of the Treaty on European Union (TEU), the Member States remain solely competent for all matters in respect of which no competence has been conferred upon the Union in the Treaties."

64. The declaration then makes three points relating to the different types of competences in the EU. Firstly, it is stated that the Union is competent to enter into international agreements relating to the environment, a **shared competence** following Article 4(2)(e) TFEU and reinforced by the objectives in Article 191 TFEU.[144] Remarkably, this is followed by a rather elaborate subparagraph that in a number of ways seems to attempt to minimise the sphere of influence of the Union regarding the BBNJ Agreement.[145] The subparagraph first emphasises the limits of the Union competence under Article 3(2) TFEU (*i.e.* the ERTA doctrine) to adopt Union rules. Then, it vigorously argues that the declaration in no way affects the attribution of competences between the Union and its member States. In particular, it is declared that the declaration "should not be interpreted as making use of the possibility for the Union to exercise its external competence with regard to areas covered by the Agreement falling within shared competence to the extent that such competence has not yet been exercised internally by the Union".[146] Moreover, the subparagraph goes on to state that "the extent of the Union's competence must be assessed on the basis of a comprehensive and detailed analysis of the relationship between the Agreement and the precise provisions of each measure of Union law, on a case-by-case basis".[147] To this author, this subparagraph appears as a clear attempt by the Council, which added this part to the declaration,[148] to delimit the Union's sphere of influence in favour of the member States. It explicitly and repeatedly emphasises how the Union ought to respect the limits of its competences, while the member States retain their competences in all matters outside those strictly delimited matters. As such, these elaborate statements in paragraph four are a first example of the Council attempting to delimit the Union's competences in favour of the member States' interests. Furthermore, the declaration also notes that the scope and the exercise of any Union competences are, by their nature, subject to continuous development.[149]

65. Secondly, the declaration notes the **parallel competence** of the Union in two fields, namely research and technological development, and development cooperation.[150] What is notable however is the fact that a second subparagraph explicitly points out that in accordance with Article 4(3) and (4) TFEU, the exercise of the Union's parallel competence does not prevent the member

[144] Declaration of competences submitted to the BBNJ Agreement, [4].
[145] Declaration of competences submitted to the BBNJ Agreement, [4], second subparagraph.
[146] Declaration of competences submitted to the BBNJ Agreement, [4], second subparagraph.
[147] Declaration of competences submitted to the BBNJ Agreement, [4], last subparagraph.
[148] Compare the Commission Proposal for a Council Decision (12 October 2023), Annex 2 and the Declaration of competences submitted to the BBNJ Agreement. See further comparison below under Subsection 2.
[149] Declaration of competences submitted to the BBNJ Agreement, [4], last subparagraph.
[150] Declaration of competences submitted to the BBNJ Agreement, [5].

States from exercising their competences. This is a second example of the declaration explicitly advocating the case of the member States.

66. Thirdly, the declaration rather shortly notes the area where the Union has **exclusive competence** in accordance with Article 3(1)(d) TFEU, namely conservation of marine biological resources under the common fisheries policy.[151]

67. The declaration contains four more paragraphs, of which paragraph 8 is the most notable. It states that for measures to be adopted under the BBNJ Agreement, the area of competence of the Union within which the measure falls will depend on an internal assessment of the main purpose or component of the measure to be adopted, as well as the objectives and components more specific to the position to be established by the Union.[152] The declaration thus again places the other contracting parties in a position where they are depending on the internal discussions in the EU, without providing any comprehensive or specific clarity regarding the competent actor for the obligations in the BBNJ Agreement.

68. Lastly, paragraph 10 declares the Union will inform the depositary of any relevant modification of the extent of its competence, in accordance with its obligation under Article 67(2) of the BBNJ Agreement.[153]

2. A critical reflection on the declaration submitted to the BBNJ Agreement

69. A first reflection pertains to the drafting process of the declaration submitted to the BBNJ Agreement and more particularly the changes made by the Council compared to the original proposal of the Commission. The adoption of the declaration to the BBNJ Agreement constitutes an interesting case study, in which the mechanisms behind the declaratory procedure are visible. In that respect, a comparison of the initial proposal for the text of the declaration of competence by the Commission and the final version adopted by the Council demonstrates the intricate relation between the EU institutions. As stated above,[154] the Commission submitted a proposal for a Council Decision in October 2023, but the Council adopted an amended version in 2024.

70. The differences between both texts demonstrate in a number of ways the diverging views of the Commission and the Council regarding mixed agreements and EU competences in general. First,

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[151] Declaration of competences submitted to the BBNJ Agreement, [6].
[152] Declaration of competences submitted to the BBNJ Agreement, [8].
[153] Declaration of competences submitted to the BBNJ Agreement, [10].
[154] See fn. 140-141.

while both texts refer to the Union competences following Article 191 TFEU and the environmental objectives therein, no reference is made in the initial proposal of the shared competence in Article 4(2)(e) TFEU, nor of the principle of pre-emption. Second, in the fifth paragraph on the parallel competences of the Union and the member States, the final version adds the previously mentioned caveat that the exercise of the Union's parallel competence does not prevent the member States from exercising their competences. These two additions are illustrative of the position of the Council, who in this declaration of competences clearly advocates the interests of the member States. Furthermore, it must be noted that the final version contains more details than the initial Commission proposal. For example, while the initial proposal merely lists the competences of the Union in a rather nonchalant manner,[155] the adopted declaration provides a more coherent overview by way of the three subdivisions on shared competences, parallel competences and exclusive competences. It is also remarkable that the Commission proposal only includes the competences of the Union without any reference to the member States, yet the version amended by the Council seems to do all it can to shift the focus to the limits of those Union competences, simultaneously aiming to reinforce the role of the member States.

71. A second but related remark pertains to the overall content of the declaration. It is noteworthy to point out that no reference is made to specific provisions or even parts of the BBNJ Agreement to link the listed competences with the agreement. Moreover, the overview in the previous subsection has already shown that the declaration submitted to the BBNJ Agreement is monopolised by internal discussion among the EU institutions. Large parts of the declaration consist of repeatedly emphasising the fact that the member States retain their competences, and that the Union should respect the limits of its own competence. These statements take up more space in the declaration than the actual references to the types of competences the Union can exercise. And even in these concise references of Union competence, a caveat is made twice to remind the reader of the fact that either the declaration must not be interpreted to result in the member States having less competences, or that the situation at the very least should be assessed on a case-by-case basis to verify the precise extent of the Union's competence. To this author, this appears largely unhelpful to the other contracting parties of the BBNJ Agreement, as they are not provided with a clear overview of the division of competences in the EU. On the contrary, they are presented with a document in which the internal struggles between the EU institutions

[155] Commission Proposal for a Council Decision (12 October 2023), Annex 2.
"Furthermore, the European Union declares that it has competences in the following areas:
− the conservation of marine biological resources under the common fisheries policy;
− research."

shine through profoundly. The other contracting partners are in this declaration made explicitly dependent on an internal case-by-case assessment of the relevant Union rules, in which the extent of the Union's competence will be established.[156] Thus, in the view of this author, the declaration does not aid the EU's treaty partners in establishing the responsible party for the obligations in the BBNJ Agreement in a given situation, but rather complicates matters unnecessarily by getting stuck on constantly trying to strengthen the position of the member States.

72. In conclusion, the declaration submitted to the BBNJ Agreement constitutes a perfect example of how declarations of competences impose on third parties the internal struggles between the Union institutions concerning the division of competences. As pointed out by CASTELEIRO and above, declarations of competences externalise the vertical division of competences in the EU,[157] which is an internal matter that is now extrapolated to the EU's treaty partners. As such, the declaration to the BBNJ Agreement doesn't provide a clear and comprehensive overview of the division of competences in matters related to the Agreement, but rather showcases how the Council and the Commission have diverging and even strongly opposing views about the exercise of Union and member State competences.

73. As a final note, it must be remarked that by adopting internal coordination arrangements the EU seems to try to accommodate to the problems left open by declarations of competences. Article 67(1) of the BBNJ Agreement stipulates that the organisation and its member States shall decide on their respective responsibilities for the performance of their obligations under the BBNJ Agreement. Accordingly, the Council Decision on the conclusion of the BBNJ Agreement of 17 June 2024 states that a code of conduct laying down internal arrangements between the Union and its member States reflecting their respective responsibilities for the performance of their obligations and the exercise of rights under the BBNJ Agreement has been drawn up between the Council, the member States and the Commission.[158] The same mechanism was followed when the EU acceded to the Istanbul Convention in 2023, where the code of conduct addresses for instance situations where the Union and its institutions or member States must strive to elaborate common positions, or it specifies the way voting rights will be exercised.[159] The adoption of a

[156] See Declaration of competences submitted to the BBNJ Agreement, [4].
[157] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 492 and 503.
[158] Council Decision (EU) of 17 June 2024 on the conclusion, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, OJ L, 2024/1830, [10].
[159] Code of Conduct laying down the internal arrangements regarding the exercise of the rights, and the fulfilment of the obligations, of the European Union and Member States under the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2 June 2023, 2023/C194/03.

code of conduct has become a fairly standard practice of the EU institutions, with other noteworthy examples being the coordination arrangements adopted for the Codex Alimentarius Commission and for the UNESCO Convention on Cultural Diversity,[160] as well as the Code of Conduct adopted for the representation of the EU and the member States in the framework of the UN Convention on the Rights of Persons with Disabilities, which contains a different modus operandi depending on whether an exclusive, shared or member State competence is at issue.[161] It can be argued that the inclusion in the BBNJ legal system of a coordination arrangement in the form of a code of conduct indicates that the EU institutions and the member States are trying to present themselves to their treaty partners in a more coherent manner. This should result in more clarity for the EU's treaty partners, thus at least partly addressing a major fallacy of the declarations of competence.

§2. An overview of other declarations of competences

74. This section provides an overview of several other relevant declarations of competences and their noteworthy features. Many of these features have already been highlighted above, so this section touches upon some declarations which exemplify the contents and flaws of declarations of competences in general.

75. The declaration to the UN Agreement on Straddling and Highly Migratory Fish Stocks (also called the **Straddling Fish Stocks Agreement**) appears to follow the basic structure previously seen in the declarations of competences submitted to the UNCLOS and the BBNJ Agreement.[162] It equally divides the declaration into two parts, one reporting on the exclusive and one on the shared competences. However, the declaration with respect to the Straddling Fish Stocks Agreement is more limited, as it is short in length and does not contain any lists referring to relevant European legal instruments. The declaration does refer to a number of relevant areas of the agreement in a manner which can aid the Union's treaty partners. For example, it provides that the conservation and management of living marine resources, including the regulatory competence concerning flag State vessels, is among the transferred competences to the Union,

[160] F. Hoffmeister, "Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States" in Hillion C. and Koutrakos P. (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 260-262.

[161] Council of the European Union, Code of Conduct setting out internal arrangements for the implementation by and representation of the EU to the CRPD, 29 November 2010, Doc 16243/10.

[162] Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, 1998, L/189/39, 98/414/EC ('Declaration submitted to the Straddling Fish Stocks Agreement'), Annex B.

but also points out that the member States remain competent in other matters such as the refusal, withdrawal or suspension of authorisations to serve as master or officer on such vessels.[163]

76. The declaration under the **Basel Convention**[164] was made in accordance with Article 22(3) of that Convention, and is among the shortest examples. It reads as follows:

> "As provided for in the EEC Treaty and in the light of existing Community legislation in the field covered by the Basel Convention, more particularly Council Regulation (EEC) No. 259/93 and Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (as amended), the Community possesses competence at an international level in this field. The Member States of the European Economic Community also have competence at international level, including on certain matters which are covered by the Basel Convention."[165]

77. In this author's view, this declaration entails the perfect example of how declarations of competences often fall short of their intended purpose. The declaration is short and does not provide a comprehensive overview of the internal division of competences. The other contracting parties do not have legal clarity as to the responsible party on the EU's part. On the contrary, the declaration appears more a statement submitted *pro forma*, rather than substantially adhering to the conditions of specificity and legal certainty as intended by the participation clause and the other contracting parties.

78. The Union's declaration under the **Aarhus Convention** is another example of a declaration of competences which follows the broad general practice of the Union.[166] Without providing much specific details as to the matters in the Aarhus Convention, the declaration refers to the general areas in which the Union is competent to enter into international agreements according to the TFEU, as well as to several legal instruments the Union has already adopted in the field.[167] Like the declaration under the BBNJ Agreement, the principle of pre-emption is emphasised here, albeit in a shorter manner than under the former convention.[168]

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[163] Declaration submitted to the Straddling Fish Stocks Agreement.
[164] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), 1673 UNTS 57.
[165] Declaration of competences made to the Basel Convention, accessible on the website of the United Nations Treaty Series, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-3&chapter=27&clang=_en
[166] Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, L 124/3, 2005/370/EC, Annex.
[167] Ibid.
[168] Ibid.

79. Similarly, the declaration submitted to the **Codex Alimentarius** is drafted in line with most declarations of competences.[169] After some introductory remarks, the declaration opens with a short and again rather vague statement on the exclusive competences of the Union. Next, it specifies the areas of member State's and shared competences. However, no specific or substantial guidance is provided to the other contracting parties as to the competent actor for the obligations in the agreement, particularly regarding the information given about shared competences. the language used is open-ended and vague. Much is thus left for third States to figure out by themselves, which requires a thorough understanding of EU law.

80. Another example that showcases the problems with how the declarations are drafted is the declaration submitted to the **UNESCO Convention on Cultural Diversity**.[170] In a single paragraph, the declaration sets out to list both the exclusive and shared competences of the Union in a wide range of policy areas, with references to the relevant Treaty paragraphs. This is then followed by a list of 23 secondary Union measures, which is intended to "illustrate the extent of the area of competence of the Community in accordance with the provisions establishing the European Community".[171] As is regular practice, the declaration finally points out that the exercise of Community competence is by its nature subject to continuous development. However, the declaration continues by adding that therefore, "the Community reserves the right to notify other future declarations regarding the distribution of competences between the European Community and the Member States".[172] Remarkably, notwithstanding the obligation in Article 27(3)(c)(ii) of the agreement, the use of this phrasing appears to signal that the Union doesn't view the need to provide updated declarations as an obligation, but rather as a prerogative.

81. In conclusion, the overview provided in this Chapter, as well as the declarations touched upon throughout this master's thesis, has shown that declarations of competences often fall short of achieving their objective, namely providing legal certainty to the Union's treaty partners. Declarations are often drafted with imprecise, open-ended and vague language, without substantially reporting on the division of competences regarding the agreement in question.

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[169] Council Decision of 17 November 2003 on the accession of the European Community to the Codex Alimentarius Commission, L 309/14, 2003/822/EC, Annex II.
[170] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), 2440 UNTS 311. For the declaration of competences see Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2006/515/EC, L 201/28, Annex 1(b).
[171] Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2006/515/EC, L 201/28, Annex 1(b).
[172] Ibid.

CHAPTER III: INTERNAL CONSEQUENCES ARISING FROM THE PRACTICE OF DECLARATIONS OF COMPETENCES: CONFLICTS BETWEEN THE EU INSTITUTIONS

§1. General observations: the EU institutions and the use of declarations of competences

82. Initially, declarations of competence were supported by neither the Commission nor the Court of Justice.[173] In a way, a declaration freezes the division of competences, which is not favoured by the Union institutions. However, the institutions of the EU came to gradually accept and in some instances even support the use of declarations of competences. The Court of Justice has in a number of cases addressed the functioning and nature of declarations of competences. Some of these findings were already touched upon above, but it is appropriate to provide in this section an overview of some of the most important judgements. Afterwards, the positions of the Council and the Commission are studied.

A. The position of the Court of Justice of the European Union

83. Originally, the Court of Justice did not favour the Union (or at the time the Community) institutions submitting declarations of competences. In *Ruling 1/78*, the Court even explicitly stated that the division of competences between the Union and its member States was purely a question of domestic Community law in which third States "have no need to intervene".[174]

84. Nowadays, the Court of Justice regards declarations of competences as useful and as an aid to interpretation.[175] Moreover, in the *MOX Plant* case, as described above, the Court of Justice described the declaration made to the UNCLOS as "a useful reference base" and stated that it could use declarations of competences as evidence that a competence has been transferred.[176] However, at the same time it must be noted that the case law of the Court is not altogether consistent. For instance, the approach taken by the Court in the *LZ* case concerning the declaration made to the Aarhus Convention contrasts the findings of the *MOX Plant* case.[177] The case concerned a preliminary reference made by the Slovakian Supreme Court on the direct effect of Article 9(3) of the Aarhus Convention.[178] During the proceedings, the question of the Court's

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173 Casteleiro, EU Declarations of Competence to Multilateral Agreements, 492.
174 Court of Justice, *Ruling 1/78*, 14 November 1978, ECR I-2151, [35].
175 *MOX Plant* case.
176 *MOX Plant* case, [105] and [109].
177 C-240/09, *Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republiky ('LZ case')*, 8 March 2011, ECR I-1285 ('LZ case').
178 See for a detailed overview of the *LZ* case, Casteleiro, EU Declarations of Competence to Multilateral Agreements, 505-507.

jurisdiction on Article 9(3) of the Aarhus Convention, being a mixed agreement, was raised.[179] In its judgement, the Court first continued its approach from the *MOX Plant* case by linking its jurisdiction to the exercise of competence by the EU.[180] However, while the Court then noted the declaration of competences annexed to the Aarhus Convention,[181] it did not go into any interpretation of the declaration for the purpose of defining its jurisdiction.[182] Instead of engaging in an interpretative exercise of the declaration, the Court based its jurisdiction on the explicit external competence in the field of environmental protection.[183] Thus, in the *LZ* case, the Court apparently did not find the declaration *in casu* to be a useful reference base.

85. Another relevant example of the Court's position is a case between the Commission and Sweden in 2010, called the *PFOS* case.[184] The dispute concerned the prerogatives of the EU member States under the Stockholm Convention on Persistent Organic Pollutants ('Stockholm Convention'), in particular the right of a member State or organisation to submit a proposal for the inclusion of a pollutant to be prohibited.[185] What is particularly relevant is that the Court found that "the declaration deposited by the Community (…) does not contain specific rules as regards the allocation of competence between itself and the Member States".[186] This is substantiated by reference to the language of the declaration, which the Court thus finds insufficient to provide an answer in the dispute at hand. This is a remarkable statement, as the Court in this case looked at the declaration of competences yet dismissed it on the basis of its lack of specificity. It can be argued that the Court implicitly found the declaration to fall short of its intended objective, namely providing a clear overview of the allocation of competence between the Union and the member States regarding the matters covered by the Stockholm Convention. This finding is in line with an earlier judgement of the Court in an annulment action between the Commission and Council on the Convention on Nuclear Safety. There, as already mentioned above, the Court considered that the declaration of competences must enable the Commission to comply with international law, and must thus be complete.[187] Consequently, it found that by not drafting the declaration as

[179] *LZ* case, [32-33].
[180] *LZ* case, [32].
[181] *LZ* case, [39].
[182] *LZ* case, [39-40].
[183] *LZ* case, [35].
[184] C-246/07, *Commission v. Sweden* ('PFOS judgement'), 20 April 2010, ECR I-3332.
[185] For a detailed overview of the *PFOS* case, see P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 191-196. See also the discussion on the duty of cooperation, *infra* Chapter III, §2.
Sweden had submitted unilaterally a proposal to the Convention that PFOs (a type of POPs) be included in its annexes as a prohibited substance. The Commission objected to this action and argued that it amounted to a violation of EU law, in particular the duty of cooperation set out in Article 4(3) TEU. See also *infra*, Chapter III, §2.
[186] C-246/07, *Commission v. Sweden* ('PFOS judgement'), 20 April 2010, ECR I-3332, [95].
[187] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [69-71].

completely as possible, the Council had breached its duty of cooperation towards the Commission.[188]

86. In conclusion, the Court initially did not look favourably upon the use of declarations of competences. Its position has changed however, as in most of its cases the Court of Justice nowadays regards declarations of competences as normal, useful and as an aid to interpretation.

B. Commission and Council: a conflicted relationship

87. The stance of the Commission regarding declaration of competences is similar to the position taken by the Court, with the Commission initially not looking favourable upon declarations of competence.[189] In general, the Commission is not very eager to declare international agreements as mixed agreements, as in its view the division of competences should remain an internal issue.[190] Moreover, the Commission is traditionally against the inclusion of the obligation to submit a declaration of competences in an international agreement.[191] When declarations are being drafted, the Commission advocates the position of the Union and therefore aims to include all relevant Union competences in the declarations. This can for instance be seen in the initial proposal for the declaration submitted to the BBNJ Agreement.[192] It is also demonstrated by the fact that the Commission brought an annulment action to the declaration adopted by the Council in the context of the Convention on Nuclear Safety because the Commission considered it as incomplete, since it did not include all the competences which fell within the scope of that Convention.[193]

88. As regards the position of the Council, it can be said that the Council is wary of the Commission trying to enlarge the scope of Union competence through the declarations of competences. This has become abundantly clear from the analysis of the declaration made to the BBNJ Agreement above.[194] As such, the wording and language of the declarations proposed by the Commission have seldom proved acceptable to the Council from the start. In the majority of occasions, the Council has insisted on amending the declaration, with as a result the wording being wired down to a formulation based on a more restrictive interpretation of the scope of Union competence.[195] Only exceptionally the Council adopted the proposed phrasing without any amendments, with the

[188] Ibid.
[189] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 492.
[190] Ibid., 493.
[191] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 209.
[192] See *supra*, Chapter II, §1, B.
[193] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281.
[194] See *supra*, Chapter II, §1, B.
[195] Heliskoski, *Mixed Agreements*, 2001, 144.

declaration submitted to the Straddling Fish Stocks Agreement being one such exceptional case.[196] The Council is particularly wary of the Commission's position in the situation where the Union and the member States share competence. In this scenario, the view of the Council is that the authority remains with the member States until the Union competence has been exercised.[197] It is clear by now that disagreements between the Commission and the Council on the competences to be included in declarations are plenty. While political and practical considerations result in the fact that the Council often prefers mixity over the situation where the EU is the only contracting party,[198] the Commission conversely generally doesn't favour mixed agreements.

89. In conclusion, the Union is generally reluctant to make a formal declaration about the extent of its competence in relation to international agreements.[199] Neither the Union nor the member States are particularly eager to specify in great detail the allocation of competences in respect of a mixed agreement. The result of this reluctance is that a declaration of competence becomes a negotiated instrument, with its language and contents the outcome of often tough internal debates.[200] These internal discussions on a particular declaration can take up considerable amounts of time as they become inflated with internal friction regarding the division of competences.[201] Thus, the original objective of providing a coherent and precise oversight of the division of competences regarding the obligations in an international agreement gets lost in the internal debate between the institutions. Or, as LIJNZAAD puts it, "what is supposed to be an instrument with an external effect is largely a reflection of the internal debate".[202] The analysis above of the declaration submitted under the BBNJ Agreement is the perfect example of this phenomenon.[203] Consequently, the language of most declarations is difficult to comprehend for those without a profound knowledge of EU law. Moreover, the fact that declarations are in practice rarely reviewed or updated can

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[196] Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, L 189/39, 98/414/EC.
Even in the case of the Straddling Fish Stocks Agreement, there was some sort of discussion; it was declared as a mixed agreement only because of the financial articles therein.

[197] Heliskoski, *Mixed Agreements*, 2001, 144.

[198] C. Matera and M. Gatti, "Facultative Mixity in the Area of Freedom Security and Justice" in M. Chamon and I. Govaere (eds.), *EU External Relations Post- Lisbon: The Law and Practice of Facultative Mixity*, 209-210.

[199] S. Boelaert-Suominen, "The European Community, the European Court of Justice and the Law of the Sea", The International Journal of Marine and Coastal Law 2008, Vol. 23, 643-713; Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair", 202.

[200] Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair", 202.

[201] As an example, LIJNZAAD points out that negotiating the declaration of competence at signature under the Fish Stocks Agreement took four consecutive days (and nights) of work by the Community's External Fisheries group together with COMAR in 1998. See Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair", 202.

[202] Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair", 202.

[203] See Chapter II, §1, B.

arguably also be linked to this difficulty of finding a common internal position in the EU institutions on the division of competences.[204]

§2. Declarations of competences and the duty of cooperation: the obligation of the European Union and its member States to coordinate their positions

90. The relation between the Union and the member States in a mixed agreement is not only determined in terms of competences, but also entails a number of internal EU obligations, irrespective of who the competent actor is. More particularly, the Court has in a number of Opinions, Rulings and judgements emphasised the duty of cooperation by the Union and its member States when conducting international relations.[205] In that respect, the Court has held that the duty of genuine cooperation, laid down in Article 4(3) TEU (ex Article 10 EC Treaty), is of general application and does not depend on whether the Union competence concerned is exclusive or on any right of the member States to enter into obligations towards non-member countries.[206] Moreover, close cooperation is required between the member States and the EU institutions when acting in the context of a mixed agreement, both in the negotiation phase as well as in the implementation stage.[207] This for instance means the member States and the Union institutions must coordinate their positions in international negotiations.[208] When international discussions relate to subjects within the competence of the Union, a delegation from the Commission will normally attend.[209] Before the Lisbon Treaty, the Commission invariably negotiated all EU agreements. Today, Article 218(2) and (3) TFEU leave more room for the Council to denominate the negotiating actor.[210] The latter paragraph stipulates that when the negotiation and conclusion of an agreement are envisaged, it is for the Council to nominate the Union negotiator or the head of the Union's negotiating team, depending on the subject of the agreement envisaged.[211] Nevertheless, Article 218(2) and (3) TFEU should be interpreted as meaning that negotiations should normally be conducted by the Commission or, in specific cases such as mixed agreements by a negotiating team involving the Commission and representatives of the Council or of the

[204] Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair", 202-203. For the section on the obligation to update declarations of competences, see Chapter IV.
[205] See for an excellent overview of the duty of cooperation C. Hillion, "Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'" in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 2010, 87-115; P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 179-196.
[206] C-246/07, *Commission v. Sweden*, 20 April 2010, [71].
[207] D. Van Eeckhoutte and T. Corthaut, "The Participation of the EU and its Member States in Multilateral Environmental Negotiations post Lisbon", YEL 2017, Vol. 36, No. 1, 749-809.
[208] Ibid., 769.
[209] Lenaerts et. al, *EU Constitutional Law*, 478.
[210] Lenaerts et. al, *EU Constitutional Law*, 605-606.
[211] Lenaerts et. al, *EU Constitutional Law*, 478.

member States.[212] Only as far as the CFSP is concerned, negotiations are to be conducted by the High Representative, in all other areas it is the Commission who negotiates.

91. A perfect example of the Union requiring unity in its external representation is the negotiations of the recent BBNJ Agreement.[213] In practice, delegates from the Council and Commission speak with one voice, which means States could only participate in the negotiations if a common position had been agreed upon in COMAR.[214] This results in unity and clarity in the European position, but also means that the compromise reached is often the so-called 'minimum common denominator', which can undermine the bargaining power of the EU.[215] Also, given the difficulty of reaching a common, coherent and satisfactory position within the EU, the Union suffers from a slower capacity to react.[216] A concrete example of when the lack of a united front weakens the EU is found in the situation of the Basel Framework (I, II and III) under the Basel Committee on Banking Supervision. Every time banking legislation is being discussed within the Council, the divides among the member States become apparent, which has resulted in the fact that the EU has not been able to influence the formation of global banking rules, precisely because it lacks a common position at the international negotiating tables.[217]

92. In situations where the international discussions also cover subjects which fall within the competences of the member States, most notably including the negotiations of a mixed agreement, the member States will thus generally insist on their own representatives being present.[218] Indeed, in the negotiations of the BBNJ Agreement, member States had to be represented in order to protect their interests.[219] In such cases, the duty of cooperation between the member States and the Union is applicable. The Court of Justice has established a clear approach in its case law concerning the duty of cooperation in mixed agreements. The foundations were laid in *Ruling 1/78*, in which the Court held that the convention *in casu* could only be implemented "by means of a close association between the institutions of the Community and the Member States both in

[212] Lenaerts et. al, *EU Constitutional Law*, 605-606.
[213] See for an excellent overview of the tensions in the negotiations of the BBNJ Agreement, P. Ricard, "The European Union and the future international legally binding instrument on marine biodiversity beyond national jurisdiction" in M.C. Ribeiro, *The Global Challenges and the Law of the Sea*, Springer, 2020, 379-399.
[214] Ibid.
[215] Ibid., 385.
[216] Ibid.
[217] M. Ortino, "EU External Competences and the Participation to the Basel Committee on Banking Supervision", European Business Law Review 2017, Vol. 28, No. 6, 931.
[218] Lenaerts et. al, *EU Constitutional Law*, 478.
[219] P. Ricard, "The European Union and the future international legally binding instrument on marine biodiversity beyond national jurisdiction" in M.C. Ribeiro, *The Global Challenges and the Law of the Sea*, Springer, 2020, 384.

the process of negotiation and conclusion and in the fulfilment of the obligations entered into".[220] This line of reasoning was continued in *Opinion 2/91* in 1993, where the Court pointed out that when the subject-matter of an agreement falls in part within the competence of the Union and in part within that of the member States, it is important to ensure that there is a close association between the institutions and the member States, both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into.[221] This duty of cooperation equally applies in the context of the EU Treaties, since it "results from the requirement of unity in the international representation of the Community".[222] Moreover, the Court stated that the duty of cooperation requires the Union institutions and the member States to take all necessary steps to ensure the best possible cooperation.[223] These findings were reiterated in *Opinion 1/94*.[224]

93. The implications of this line of case law are considerable, as the duty of cooperation has been described as one of the fundamental principles of the external relations of the Union.[225] As a result, the Union and its member States must in the negotiations for mixed agreements arrange internally how their position will be presented in the international organisation or agreement, and how voting rights are to be exercised.[226] On the other hand, a certain nuance is appropriate here, as the legal value of the duty of cooperation is debated: is it to be regarded as an obligation of EU law which the Court is prepared to enforce, or rather as a merely political commitment, its practical application to be left to the discretion of the member States and the EU institutions?[227] The 1996 *FAO* judgement seems to point to the former, as there the Court explicitly relied upon the duty of cooperation to ascribe normative content to an arrangement on the voting rights between the Council and the Commission agreed upon the Community's accession to the FAO.[228] The Court thus enforced the duty of cooperation by referring to the voluntarily arrangements of the Union institutions and the member States.[229]

94. Furthermore, the duty of cooperation was also the main subject matter in the *PFOS* case. As discussed above, the dispute arose as a result of the proposal by Sweden to include a particular

[220] Court of Justice, *Ruling 1/78*, 14 November 1978, ECR I-2151, [34-36].
[221] Court of Justice, *Opinion 2/91*, 19 March 1993, ECR I-1064, [36].
[222] Ibid.
[223] Ibid., [38].
[224] Court of Justice, *Opinion 1/94*, 15 November 1994, ECR I-5389, [108].
[225] Heliskoski, *Mixed Agreements*, 2001, 63.
[226] Lenaerts et. al, *EU Constitutional Law*, 478.
[227] This question was raised by critics of *Opinion 1/94*, as expertly pointed out by HELISKOSKI, see Heliskoski, *Mixed Agreements*, 2001, 64, fn. 155.
[228] C-25/94, *Commission v Council* ('FAO Judgement'), 19 March 1996, ECR I-1497, [48-50].
[229] See also Heliskoski, *Mixed Agreements*, 2001, 64-67; P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 178-182.

group of Persistent Organic Pollutants (more specifically perfluoroctane sulfonates, or 'PFOS') in the annexes to the Stockholm Convention. Under the Convention, parties can submit proposals for the inclusion of a certain pollutant to be included in the annexes as a prohibited substance. After deliberations in the Commission and the Council, a Union proposal was submitted, but this did not yet include the particular substance Sweden wanted to include. Subsequently, Sweden unilaterally submitted a proposal to the Stockholm Convention that PFOs be included in Annex A. The Commission objected to this action and argued that it amounted to a violation of EU law, in particular the duty of cooperation set out in Article 10 EC (now Article 4(3) TEU).[230] The Court held that by unilaterally proposing the substance to the Stockholm Convention, Sweden had breached its obligations under Article 4(3) TEU, as there had been a common strategy of the Union not to propose the very action of Sweden's initiative.[231] The Court found that member States are "subject to special duties of action and abstention" in a situation in which concerted action is involved, as going against the common position "is likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power with regard to the other parties to the Convention concerned".[232] Thus, following the *PFOS* case, a member State cannot deviate from a common Union strategy by exercising the rights bestowed upon it under a mixed agreement even though it had previously consulted with the EU institutions on the matter.[233]

95. The Court also has commented on the duty of cooperation in the reciprocal relationship between the Council and Commission. For instance, as mentioned above, in an annulment action between the Commission and Council on the Convention on Nuclear Safety, the Court found that by not drafting the declaration as completely as possible, the Council had breached its duty of cooperation towards the Commission.[234]

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[230] P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 192.
[231] C-246/07, *Commission v. Sweden* ('PFOS judgement'), 20 April 2010, ECR I-3332, [89-91].
"91. It follows that, in unilaterally proposing the addition of PFOS to Annex A to the Stockholm Convention, the Kingdom of Sweden dissociated itself from a concerted common strategy within the Council."
[232] C-246/07, *Commission v. Sweden* ('PFOS judgement'), 20 April 2010, ECR I-3332, [103-104].
[233] P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 194.
[234] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [69-71].

CHAPTER IV: REFLECTION ON THE DESIRABILITY AND EFFECTIVENESS OF DECLARATIONS OF COMPETENCES

§1. The lack of specificity in declarations of competences

96. The overview provided in Chapter II has shown that the language used in the EU's declarations of competences is often deliberately vague, imprecise and open-ended. While it is difficult to deduce the reasons behind these characteristics, it can be argued that this observation relates closely to the nature of mixed agreements themselves.[235] Any requirement to provide a "full and detailed" declaration of competence,[236] runs counter to the primary rationale behind the use of mixed agreements by the Union, that is, the possibility of leaving questions of competence undecided, to be resolved on a case-by-case basis.[237]

97. However, while this lack of specificity can partly be explained by way of referring to the nature of EU competences, it remains highly problematic from the perspective of third States in international law. More specifically, declarations of competences are a tool for the EU's treaty partners to identify the responsible party in a mixed agreement. The *travaux préparatoires* of the UNCLOS indicate that one of the rationales behind the inclusion of the obligation to submit a declaration of competence is precisely to address the question of the international responsibility of the Union and its member States under mixed agreements.[238] The President of the Third UNCLOS Conference stated in that regard that it was "imperative that the sovereign parties to the Convention must know who is to be sued or who bears responsibility".[239] Moreover, this direct link between the declared competences and the attribution of responsibility is also present in the wording of Article 6(1) of Annex IX to the UNCLOS, which states that "[p]arties which have competence under Article 5 of this Annex [*i.e.* the actor which the EU declaration of competences attributes the competence to] shall have responsibility for failure to comply with obligations or for any other violation of this Convention". As such, the drafters of Article 6 aimed to link the division of competences to international responsibility. This has been confirmed by the International Tribunal for the Law of the Sea ('ITLOS') in 2015 in an Advisory Opinion, in which the Tribunal recalled that under the UNCLOS the liability of an international organisation for an

[235] Heliskoski, *Mixed Agreements*, 2001, 143-144.
[236] See *supra*, Chapter I, §3, B, 1.
[237] Heliskoski, *Mixed Agreements*, 2001, 143-144.
[238] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 190. See also Conf. Docs. FC/13 (August 20, 1979) and FC/17 (August 23, 1979), which contain the president's summary of the debates on participation in the UNCLOS.
[239] President's note to Informal Plenary on Final Clauses, 20 August 1979, doc. FC/13, [9], as reproduced in R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, vol. XII, Dobbs Ferry, Oceana, 1987, 342.

internationally wrongful act is linked to its competence,[240] and that the declaration of competence lays down the exclusive competence of the EU for the subject matter in question.[241] A declaration of competence thus inherently needs to be specific and complete, in order for third States to assess where the responsibility lies among the contracting parties. However, this link between competence and responsibility has been questioned in literature, in particular by HELISKOSKI. He argues that "even if there had been a declaration of competence, however meticulously drafted, the relationship between the concepts of competence and responsibility is a much more nuanced one, so that, within the system of general international law of international responsibility, the incidence of competence should not be conceived of as providing an appropriate criterion for determining the incidence of responsibility".[242] This argument appears well-founded, as in a legal system as complex as the EU, multiple actors often contribute towards a single objective. This author therefore follows HELISKOSKI in his reasoning, pointing to the fact that the essential criterion for the purposes of establishing responsibility in the EU is the impact or influence that a measure taken by the Union (such as a decision, authorisation or recommendation) is deemed to have upon the member States, while conversely the mere possession of a certain competence by the Union is not sufficient for the Union to incur responsibility for an act attributable to its member State.[243] Thus, it can be questioned whether declarations of competences are the appropriate instrument to report on the responsibility of the Union and its member States in the EU's treaty relations.

98. Declarations of competences therefore bring about a paradox in European Union law. On the one hand, the objective is to provide clarity to the other contracting parties in the international agreement. They want legal certainty by way of a clear communication as to who is competent for which areas covered by the mixed agreement. This also relates to the fundamental question who incurs responsibility for the competence in question, for which it can thus be disputed whether declarations are the appropriate tool. On the other hand, declarations of competence more often than not use obscure and vague language, resulting in their "imprecise, incomplete and open-ended" nature.[244] Aggrieved by the vagueness of the declarations, some authors have even gone so far as to wonder whether this is not illustrative of the fact that the external relations law

[240] ITLOS, Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, Case no. 21, 2 April 2015, ITLOS Reports 2015, [168].
[241] Ibid., [164][172-173].
[242] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 192.
[243] Ibid., 194.
[244] Ibid., 202.

of the EU is "out of control".[245] Indeed, it is puzzling how the often vague and incomplete declarations may be deemed by their drafters to be helpful to the Union's partners in international agreements.

99. Moreover, if the division of competences is not clearly communicated to the EU's treaty partners, the general international law principle of *pacta sunt servanda* stipulates that the EU and its member States are bound to all of the provisions in the agreement to which they have become parties.[246] As such, the EU and its members run a risk of being bound to all obligations in a mixed agreement in the absence of a clear disclosure of competences to their treaty partners. This is because the division of competences between the EU and its member States derives from the EU Treaties, which is *res inter alios acta* for third States. Thus, in accordance with the *pacta tertiis* principle, the internal division of competences cannot be opposed to third parties in the absence of their consent, *i.e.* in the absence of clear communication.[247] The Court of Justice itself equally seems to have taken the position that the EU and its members are bound to all obligations in a mixed agreement in the absence of a clear disclosure of competences to their treaty partners. In *Étang de Berre*, the absence of a declaration of competence to the agreement in question[248] resulted in the fact that both the Community and France were bound to the obligation to strictly limit pollution from land-based sources in a sea lake called Étang de Berre.[249] In another case, the Court found that "in the absence of derogations expressly laid down" in the Lomé Convention (the predecessor of the Cotonou Agreement), the EU and its member States were "jointly liable (...) for the fulfilment of every obligation arising from [the Lomé Convention]".[250] Thus, when the division of competences is not disclosed, or arguably also when it is not clearly done so, the EU and its member States risk being held jointly responsible for the obligations owed in the agreement.

[245] B. De Witte, "Too Much Constitutional Law in the European Union's Foreign Relations" in M. Cremona and B. De Witte (eds.), *EU Foreign Relations-Constitutional Fundamentals*, Oxford, Hart Publishing, 2008, 15.
[246] N. Nedeski, "Shared Obligations and the Responsibility of an International Organization and Its Member States: The Case of EU Mixed Agreements", IOLR 2021, Vol. 18, no. 2, 150-151.
[247] Ibid.
[248] Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution (1976), 1102 UNTS 27, and the Athens Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (1980), 1328 UNTS 105, Article 6(1).
[249] C-239/03, *Commission v France ('Étang de Berre')*, 7 October 2004, ECR I-9325, [26].
[250] C-316/91, *European Parliament v Council of the European Union ('Lomé Convention')*, 2 March 1994, ECR I-625, [29][24-35]. See P.J. Kuijper, "International Responsibility for EU Mixed Agreements" in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 2010, 209-210; N. Nedeski, "Shared Obligations and the Responsibility of an International Organization and Its Member States: The Case of EU Mixed Agreements", IOLR 2021, Vol. 18, no. 2, 150-151.
The Court continued its reasoning in paragraph 33, where it held that "[i]t follows from the above that, in accordance with the essentially bilateral character of the cooperation, the obligation to grant 'the Community's financial assistance' falls on the Community and on its Member States, considered together."

100. However, a certain degree of nuance needs to be added here regarding the specificity of declarations of competences. While it is true that other contracting parties of an international agreement to which the EU becomes party are entitled to legal clarity as regards the responsible party for obligations in the agreement, some level of *bona fide* understanding is appropriate as well. In that respect, it can be argued that by accepting an international organisation such as the EU to join alongside its member States, the other contracting parties thereby acknowledge and accept that a certain division of competences between the EU and its member States exists. Taking this logic one step further would mean that if the treaty partners of the EU accept a certain division of competences at the time of the EU joining the convention, then these contracting parties should equally accept that division of competences in the implementation of the agreement. Thus, a duty of respect can be ascribed on the part of the EU's treaty partners, which should prompt them to request information when necessary and accept the results of the EU's communication.[251] Viewed from this perspective, this becomes more a mechanism of cooperation rather than the EU merely reporting on the division of competences. However, in order for such a system of cooperation to function, the relations between the parties must be carried out with good faith. The other contracting parties must respect the EU's communications, but the Union itself must provide these communications in good faith to ensure that the interests of the third parties are adequately protected. This system would also require of the EU to provide regular updates of its reports through its declarations. This last caveat in some way brings a vicious circle to a close, as it again comes down to the question how adequate the declarations of competences of the EU are in practice, and how the EU has kept up with its obligation to regularly update its communications on the division of competences.

§2. The lack of updated or amended declarations of competences

101. Many participation clauses contain the requirement to update the declarations of competences submitted at the time of ratification of the international agreement. The declarations themselves very often include a standard sentence acknowledging the dynamic nature of the scope and exercise of the Union's competences and referring to the participation clause providing for a duty to update the declaration.[252]

[251] E. Paasivirta, "The Responsibility of Member States of International Organizations? A Special Case for the European Union", International Organizations Law Review 2015, Vol. 12, 463-464.
[252] See the overview provided in Chapter I, and in particular fn. 97.

102. However, neither the Commission nor the European External Action Service is monitoring this obligation to update the declarations of competence.[253] In practice, declarations of competences are only very rarely updated, which results in the fact that a declaration does not always reflect the current division of competences between the EU and the member States. The best example in this respect is the declaration annexed to the UNCLOS, which has never been updated since its formal adoption in 1998. Yet, at least four instruments of EU legislation referred to in the declaration to UNCLOS have been amended and others have been combined into new legislation.[254] Thus, the list of legislation provided is not accurate anymore, and what is more, LIJNZAAD points out that the EU might have ventured into other fields of the law of the sea, gradually taking over competence of its member States, which is thus not reflected in the declaration as it stands but is nevertheless part of the current state of EU law.[255] The fact that EU competences are subject to continuous change and evolution thus only emphasises the need to update the communications on the division of competences in the EU. For instance, even after the entry into force of the Lisbon Treaty, which brought about important changes to the scope and nature of the Union's competences, the prior declarations have remained in place unchanged.[256] This dynamic nature of the division of competences, paired with the fact that declarations are rarely updated, means that the EU's treaty partners are not always aware of the present-day division of competences concerning a given agreement.[257] Consequently, CASTELEIRO argues that the participation clauses "have yet to find a way to meet both the EU's dynamic nature and third parties' legal certainty".[258] One possible explanation for the reluctance of the Union to update its declarations relates closely to the initial reluctance of the EU institutions towards declarations of competences in general. The absence of a clear division of powers, either by not making a declaration of competences or by failing to update one, is favoured from the point of view of the Union[259] and has equally been approved by the Court of Justice.[260]

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[253] T. Molnár and C. Brière, "The New Review Mechanism of the UN Smuggling of Migrants Protocol" in N. Levrat, Y. Kaspiarovich, C. Kaddous and R. Wessel (eds.), *The EU and its Member States' Joint Participation in International Agreements*, London, Hart, 2022, 217.
[254] Lijnzaad, "Declarations of Competence in the Law of the Sea, a Very European Affair", 197-198.
[255] Ibid., 198.
[256] Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 207.
[257] N. Nedeski, Shared Obligations in International Law, Cambridge, Cambridge University Press, 2022, 37.
[258] Casteleiro, A.D., *The International Responsibility of the European Union: From Competence to Normative Control*, Cambridge, Cambridge University Press, 2016, 134.
[259] HILLION points out that "Mixity has been used precisely to avoid having to establish scrupulously the distribution of competences between the Community and the Member States in the context of a particular agreement". See C. Hillion, "Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'" in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 2010, 109.
[260] Court of Justice, *Ruling 1/78*, 14 November 1978, ECR I-2151, [35].

103. Nevertheless, some rare cases exist where the Union set out to modify or amend a declaration. One such exceptional case is the declaration submitted to the Rotterdam Convention,[261] which was amended as a result of the *Rotterdam Convention* judgement mentioned above,[262] in which the Court had annulled the initial Council Decision on the approval of the Rotterdam Convention on behalf of the European Community.[263]

104. Another more recent example is the declaration submitted under the UN Convention against Corruption ('UNCAC'). In the context of the forthcoming review of the convention, it was noted by the Commission that since the adoption of UNCAC "the EU acquired new competences under Title V of the TFEU".[264] This led the Commission to conclude that that the "Secretary-General of the United Nations must therefore be informed of these developments" in accordance with its obligation under Article 67(3) UNCAC to inform the depositary of any relevant change in the extent of its competence.[265] Thus, in some cases the Union realises the need to update its declarations of competences, but these remain isolated examples.

105. Furthermore, the case of the participation of the Union and its member States in the FAO constitutes another interesting example involving the obligation to update the declarations of competences. As set out above, the Union became a member of the FAO along with its member States following an amendment of the FAO's constitution which permitted international organisations to accede to it.[266] In 2013, the Commission proposed a revision of the previously

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"35. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene."

[261] Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade (2004), 2244 UNTS 337.

[262] C-94/03, *Commission v Council ('Rotterdam Convention')*, 10 January 2006, ECR I-22. See also above Chapter 1, §3. In its judgment of 10 January 2006, the Court of Justice annulled Decision 2003/106/EC as it was based solely on Article 175(1), in conjunction with Article 300 TFEU, ruling that both Articles 133 and 175(1), in conjunction with the relevant provisions of Article 300, were the appropriate legal basis.

[263] For the original declaration of competences, see Council Decision of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, 2003/106/EC, L 63/47, Annex B; and for the revised one, see Council Decision of 25 September 2006 on the conclusion, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, 2006/730/EC, OJ L299/25, Annex.

[264] Communication From The Commission To The European Parliament, The European Council, The Council, The Court Of Justice Of The European Union, The European Central Bank And The Court Of Auditors on the review of the European Union under the Implementation Review Mechanism of the United Nation Conventions against Corruption (UNCAC), 14 December 2020, COM(2020) 793 final, 3.

[265] Communication From The Commission To The European Parliament, The European Council, The Council, The Court Of Justice Of The European Union, The European Central Bank And The Court Of Auditors on the review of the European Union under the Implementation Review Mechanism of the United Nation Conventions against Corruption (UNCAC), 14 December 2020, COM(2020) 793 final, 3.

[266] P. Koutrakos, *EU International Relations Law*, Bloomsbury Publishing, 2015, 178. See *supra* Chapter I, §3, B.

mentioned Arrangement between the Council and the Commission agreed upon the Community's accession to the FAO, as well as the Union's declaration of competences.[267] In its proposal, the Commission realises the need for "a coherent, comprehensive and unified external representation of the EU", which it argues can be achieved by way of two actions. First, by submitting to the FAO a new declaration of competences to replace the last version issued in 1994", and second, "by replacing the current internal arrangements between the Council and the Commission".[268] This proposal thus acknowledges the need and obligation of the Union to update the declaration of competences under the FAO in light of the internal changes after the adoption of the Lisbon Treaty. Moreover, the Commission explicitly states that the adoption and amendment of a declaration of competences is in the interest of the Union, in order to ensure a coherent and unified external representation of the EU. Consequently, the obligation to update declarations of competences can equally be linked to the fact that the Union needs to ensure unity of representation. The Union is obligated to provide the treaty partners with correct, up-to-date and relevant information. Thus, it continuously needs to ensure that the positions of the institutions and the member States internally coincide in order to be able to present a uniform image to third States by way of correct declarations of competences.

106. In conclusion, declarations of competences are rarely updated or amended in practice. In the research for this master's thesis no case was found where a declaration was formally updated because of a change in secondary EU legislation. The developments around the FAO declaration indicate the Union realises its obligation and the need to update declarations after the adoption of the Lisbon Treaty, but in any event, the updating of declarations is exceptional and takes place in an incidental rather than a systematic manner.

§3. Other issues with the practice of declarations of competences

107. Continuing the reasoning from the last section, one can ask the question what happens if there is no declaration of competences, or if an updated version of a declaration is missing. It can be assumed that the Union would then resolve to some form of ad hoc communication, informing its treaty partners on an informal basis.[269] The Union usually complies with the participation clauses

[267] Communication From The Commission To The Council, The role of the European Union in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon: Updated Declaration of Competences and new arrangements between the Council and the Commission for the exercise of membership rights of the EU and its Member States, 29 May 2013, COM(2013) 333 final, 3.
[268] Ibid.
[269] E. Paasivirta, "The Responsibility of Member States of International Organizations? A Special Case for the European Union", International Organizations Law Review 2015, Vol. 12, 463.

and timely submits a declaration of competences, fulfilling the condition to join the international agreement in question. However, it appears that on occasion promised declarations of competences are not in fact provided, as in the case of the Beijing Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer.[270] As set out above, it can be argued that if the Union fails to declare the division of competences concerning an agreement, the member States and the Union are jointly liable for the obligations in the agreement.[271]

108. Another issue pertains to the fact that different competences can be active in the field covered by an international agreement. The Court recognised in *Opinion 1/94* that the competence used to conclude an agreement might be different from the competence needed to implement it.[272] Competences can thus not only change over time, but also depending on the stage of the lifecycle of the international agreement. A different actor might be responsible in the negotiation stage than in the conclusion or implementation stage of the process.[273] In *Opinion 1/94*, the Agreement on Agriculture annexed to the World Trade Organisation Agreement was concluded on the ground of the EU's exclusive competence to regulate the common commercial policy, but its implementation has been done through internal measures adopted under a shared competence, namely agriculture.[274] In conclusion, the competent actor, either the Union or its member States, can vary depending on whether the agreement is in the stage of conclusion or implementation.

§4. Positive elements of declarations of competences

109. While many aspects of declarations of competences can be questioned, it must be said that they equally add a number of good practices to the legal system in the EU. In some cases, the declaration clearly discloses the division of competences to third parties. A good example can be found in the *Swordfish* case between Chile and the EU before the ITLOS,[275] where "the division

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[270] Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (Beijing, 3 December 1999), 2173 UNTS 183. See P.M. Olson, "Mixity from the Outside: the Perspective of a Treaty Partner" in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 2010, 336, fn. 21.
[271] See Chapter IV, §1. See also C. Hillion, "Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'" in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 2010, 109, fn. 114 and the sources cited.
[272] Court of Justice, *Opinion 1/94*, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, 15 November 1994, ECR I-05267.
[273] Casteleiro, EU Declarations of Competence to Multilateral Agreements, 498-499 and 508.
[274] Court of Justice, *Opinion 1/94*, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, 15 November 1994, ECR I-05267, [29].
[275] The case was discontinued by agreement of the Parties, see ITLOS, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*, Case No. 7, Order of 16 December 2009, ITLOS Reports 2008-2010, p. 13.

of competence was indeed mirrored in the scope of external obligation".[276] The case concerned the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean. What is relevant here is the fact that Chile opted to institute proceedings solely against the EC, and not (also) against its member States. This can probably (at least partly) be attributed to the EC declaration of competences to the UNCLOS, where it is pronounced that the "Member States have transferred competence to [the Union] with regard to the conservation and management of sea fishing resources".[277] This example demonstrates that the use of declarations of competences can in practice fulfil its envisaged function, at least when the declaration unambiguously communicates the responsible party to the Union's treaty partners.

110. Moreover, as HOFFMEISTER points out, even a declaration of competences drafted in general terms may gain importance in interpreting EU law.[278] In this respect, the Court of Justice uses declarations of competence when assessing for which parts of a multilateral agreements the Union has exercised competence by concluding the agreement.[279] Thus, the Commission may even be forced at times to bring the matter before the Court when it considers that the Council has not properly reflected the division of competences in the declaration.[280]

111. Also, as described above, declarations of competences may constitute a useful tool of interpretation under Article 31(2)(b) of the VCLT when considering obligations under the given agreement.[281]

112. In conclusion, while declarations of competences have rightly faced criticism, this section has shown that there equally is some merit in their use.

[276] A. Nollkaemper, "Joint Responsibility between the EU and Member States for Non- Performance of Obligations under Multilateral Environmental Agreements" in E. Morgera (ed.), *The External Environmental Policy of the European Union*, Cambridge, CUP, 2012; N. Nedeski, "Shared Obligations and the Responsibility of an International Organization and Its Member States: The Case of EU Mixed Agreements", IOLR 2021, Vol. 18, no. 2, 149-150.
[277] Declaration of competences submitted to the UNCLOS, L 179/130. The same conclusion is drawn by other authors, see Heliskoski, EU Declarations of Competence and International Responsibility, 2013, 191, fn. 5; N. Nedeski, "Shared Obligations and the Responsibility of an International Organization and Its Member States: The Case of EU Mixed Agreements", IOLR 2021, Vol. 18, no. 2, 149-150.
[278] F. Hoffmeister, "Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States" in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 260.
[279] See the *MOX Plant* case.
[280] C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281, [84-107].
[281] See Chapter I.

CONCLUSION

113. Declarations of competences are in theory designed to ensure the Union's treaty partners to mixed agreements regarding the allocation of competences in the European Union on the matters covered by the mixed agreement in question. By communicating on the internal division of competences, the Union institutions aim to provide to third States an overview of how the obligations in the given agreement will be exercised and most importantly by which actor. However, this master's thesis has shown that in practice declarations of competences fall short of their intended objective in several ways.

114. First, declarations of competences externalise a matter that is essentially internal, namely the division of competences within the EU. While this appears an appropriate solution to the demand of legal certainty by the Union's treaty partners, the division of competences is itself a highly controversial and debated issue in the EU. The Union institutions and the member States themselves frequently disagree on the allocation of competences. Internal disputes between the Union and the member States result in declarations that are not informative but rather merely reflect the internal struggle for competences. The recent declaration submitted under the BBNJ Agreement is the perfect example of this occurrence. The declaration is plagued by the internal struggle for competences between the Commission and the Council. In general, internal friction often monopolises the content and language of the declarations. Moreover, knowledge of EU law of the level of a qualified EU lawyer is required in order to understand the principles governing EU competences. As such, declarations of competences export internal struggles on a highly complex topic. Considering that it has taken the Union many years to clarify the scope, effect and nature of EU competences in judgements such as the *ERTA* case, it is remarkable that the Union's treaty partners to mixed agreements are expected to grasp the finer elements of EU competences on the basis of broadly worded and vague declarations. Moreover, one can wonder whether the use of declarations of competences does not oversimplify the question of international responsibility by linking competence to responsibility.

115. The second major issue with declarations of competences lies in the fact that they are formulated in a broad, open-ended and imprecise manner. The declarations seldom contain references to specific provisions of the international agreement in question. On the contrary, they are drafted using standard phrases and vague language, which does not contribute to the objective of providing the other contracting partners with legal certainty.

116. Thirdly, declarations of competences do not take into account the inherently dynamic nature of EU competences. Competences in the EU change over time, with for instance the Lisbon Treaty bringing about a major shift in the legal system of the EU. In the case of the UNCLOS for instance, it is unlikely that the allocation of competences has remained wholly unchanged since the adoption of the declaration. However, declarations are very rarely updated in practice, which means the other contracting parties are not being kept up to date with the evolutions of the division of competences. Moreover, in the years since the adoption of the first declarations, the practice of the Union has changed little in terms of the content and phrasing of the declarations.

117. All these factors make that declarations of competences in practice remain flawed instruments. There is no doubt that it is difficult to draft a meaningful and complete declaration, as Union institutions often find themselves with opposing views and sometimes there may even be genuine uncertainty on the allocation of competences under European law. Nevertheless, such problems do not excuse the Union for failing to meet the demands of the EU's treaty partners for clarification and legal certainty. It is therefore regrettable that the current practice of declarations of competences essentially amounts to a merely formal fulfilment of the conditions laid down in the participation clauses, without substantially reporting on the division of competences regarding the agreement.

118. However, as a final point it must be noted that it would be inappropriate to conclude that declarations of competences have absolutely no value whatsoever in the relations between the EU and its treaty partners. In practice, the declarations have in a number of instances succeeded in providing the other contracting parties of an agreement with information on the division of competences between the EU and its member States under European Union law. As such, perhaps there lies a certain value in the use of declarations as an instrument to provide the necessary information to third States. Whether the information in the declarations is sufficient for third States to determine the competent EU actor is another question, as the fact remains that in practice the declarations of competences issued by the Union have often proved incomplete and largely unhelpful.

BIBLIOGRAPHY

LEGISLATION

1. Treaties and conventions

- Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331;
- Convention on the protection and use of transboundary watercourses and international lakes (1992), 1936 UNTS 269;
- Convention on the Rights of Persons with Disabilities (2006), 2515 UNTS 3;
- Convention on the protection and use of transboundary watercourses and international lakes (1992), 1936 UNTS 269;
- Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), 2161 UNTS 447;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), 1673 UNTS 57;
- Vertrag zwischen der Bundesrepublik Deutschland und der Europäischen Wirtschaftsgemeinschaft einerseits und der Republik Österreich andererseits über die wasserwirtschaftliche Zusammenarbeit im Einzugsgebiet der Donau (1 December 1987, Regensburg), as reproduced in OJ L 90/20, 5 April 1990;
- Convention on Biological Diversity (1992), 1760 UNTS 79;
- Convention on the Transboundary Effects of Industrial Accidents (1992), 2105 UNTS 457;
- United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994), 1954 UNTS 3;
- Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), 2303 UNTS 162;
- Stockholm Convention on Persistent Organic Pollutants (2001), 2256 UNTS 119;
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (2004);
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), 2440 UNTS 311;
- Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (2023), BBNJ Agreement;

2. Documents by institutions of the European Union

- Bulletin of the European Communities, “Convention on the Law of the Sea: Competence of the European Communities with regard to matters governed by the Convention on the Law of the Sea”, 12-1984, Vol. 17;
- Council Decision of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, L 326/57, 90/611/EEC, Annex;
- Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity, L 309/19, 93/626/EEC, Annex B;
- Council Decision of 23 March 1998 concerning the conclusion of the Convention on the Transboundary Effects of Industrial Accidents, L 326/1, 98/685/EC, Annex II;
- Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, L 179/129, 98/392/EC;
- Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, 1998, L/189/39, 98/414/EC, Annex B;
- Council Decision of 25 June 2002 concerning the conclusion, on behalf of the European Community, of the Cartagena Protocol on Biosafety, L 201/65, 2002/628/EC, Annex B;
- Council Decision of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, 2003/106/EC, L 63/47, Annex B;
- Council Decision of 17 November 2003 on the accession of the European Community to the Codex Alimentarius Commission, L 309/14, 2003/822/EC, Annex II;
- Council Decision of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime, L 261/115, 2004/579/EC, Annex II;
- Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, L 124/1, 2005/370/EC, Annex;

- Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2006/515/EC, L 201/28, Annex 1(b);
- Council Decision of 25 September 2006 on the conclusion, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, 2006/730/EC, OJ L299/25, Annex;
- Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, L 23/35, 2010/48/EC, Annex II;
- Communication From The Commission To The Council, The role of the European Union in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon: Updated Declaration of Competences and new arrangements between the Council and the Commission for the exercise of membership rights of the EU and its Member States, 29 May 2013, COM(2013) 333 final;
- Communication From The Commission To The European Parliament, The European Council, The Council, The Court Of Justice Of The European Union, The European Central Bank And The Court Of Auditors on the review of the European Union under the Implementation Review Mechanism of the United Nation Conventions against Corruption (UNCAC), 14 December 2020, COM(2020) 793 final;
- Code of Conduct laying down the internal arrangements regarding the exercise of the rights, and the fulfilment of the obligations, of the European Union and Member States under the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2 June 2023, 2023/C194/03;
- Council Decision (EU) of 18 September 2023 on the signing, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, L 235/1, 2023/1974;
- European Commission, Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 12 October 2023, 2023/0353 (NLE), COM(2023) 580 final, Annex 2;
- Council Decision (EU) of 17 June 2024 on the conclusion, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the

conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, OJ L, 2024/1830;
- Declaration of Competence of the European Union made in accordance with Article 67(2) of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 19 July 2024, 2024/1832;

3. United Nations Documents
- Charter of the United Nations, 26 June 1946;
- Statute of the International Court of Justice, as annexed to the Charter of the United Nations, 26 June 1946;
- International Law Commission, Draft Articles on the Law of Treaties with commentaries, YILC 1966, Vol. II;
- Vienna Convention on the Law of Treaties, 23 May 1969, UNTS, vol. 1155, 331;

4. Documents stemming from the drafting process of international agreements
- President's note to Informal Plenary on Final Clauses, 20 August 1979, doc. FC/13, Third United Nations Conference on the Law of the Sea;
- Informal Proposal by the Group 77, 25 March 1981, Third United Nations Conference on the Law of the Sea;
- Report of the President on the question of participation in the convention, 26 March 1982, Third United Nations Conference on the Law of the Sea, 1973-82, Vol. XVI, Documents of the Conference, Eleventh Session, A/CONF.62/L.86;

5. Documents by other international organisations
- Report of the Council of the FAO, Ninety-eight Session, 19 to 30 November 1990, CL 98/REP;

CASE LAW

1. Court of Justice of the European Union
- Court of Justice, *Ruling 1/78*, 14 November 1978, ECR I-2151;
- C-316/91, *European Parliament v Council of the European Union* ('Lomé Convention'), 2 March 1994, ECR I-653;

- Court of Justice, *Opinion 1/94*, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, 15 November 1994, ECR I-5380;
- C-25/94, *Commission of the European Communities v Council of the European Union* (‘FAO Judgement’), 19 March 1996, ECR I-1497;
- Court of Justice, *Opinion 2/94*, Re: Accession to the ECHR, 28 March 1996, ECR I-1759;
- C-29/99, *Commission v Council*, 10 December 2002, ECR I-11281;
- C-239/03, *Commission v France* (‘Étang de Berre’), 7 October 2004, ECR I-9325;
- C-94/03, *Commission v Council*, 10 January 2006, ECR I-22;
- C-459/03, *Commission v. Ireland* (‘MOX Plant’), 30 May 2006, ECR I-04635;
- C- 22/70, *Commission v Council, European Agreement on Road Transport* (‘ERTA/AETR’), 31 March 1971, 264;
- C-246/07, *Commission v. Sweden* (‘PFOS judgement’), 20 April 2010, ECR I-3332;
- C-240/09, *Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republiky* (‘LZ case’), 8 March 2011, ECR I-1285;

2. Other courts and tribunals

- Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, The MOX Plant Case, Ireland v. United Kingdom, *Order No. 3: Suspension Of Proceedings On Jurisdiction And Merits, And Request For Further Provisional Measures*, 24 June 2003, Permanent Court of Arbitration;
- Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, Ireland vs. United Kingdom of Great Britain and Northern Ireland, Final Award of 2 July 2003, Arbitral Award, Permanent Court of Arbitration;
- International Tribunal for the Law of the Sea, Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union), Case No. 7, Order of 16 December 2009, ITLOS Reports 2008-2010, p. 13;
- International Tribunal for the Law of the Sea, Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, Case No. 21, 2 April 2015, ITLOS Reports 2015, p. 4;

LEGAL DOCTRINE

- Boelaert-Suominen, S., "The European Community, the European Court of Justice and the Law of the Sea", The International Journal of Marine and Coastal Law 2008, Vol. 23, 643-713;
- Cardwell P. J. and French, D., "Who Decides? The ECJ's Judgment on Jurisdiction in Mox Plant Dispute", Journal of Environmental Law 2007, Vol. 19, No. I, 121-129.
- Casteleiro, A.D., "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", European Foreign Affairs Review 2012, Vol. 17, no. 4, 491-510;
- Casteleiro, A.D., "The International Responsibility of the European Union - The EU Perspective: Between Pragmatism and Proceduralisation", The Cambridge yearbook of European legal studies 2013, Vol. 15, 563-586;
- Casteleiro, A.D., *The International Responsibility of the European Union: From Competence to Normative Control*, Cambridge, Cambridge University Press, 2016, xviii + 259 p.;
- De Baere, G., *Constitutional Principles of EU External Relations*, Oxford, Oxford University Press, 2008, 407 p.;
- De Witte, B., "Too Much Constitutional Law in the European Union's Foreign Relations" in Cremona M. and De Witte B. (eds.), *EU Foreign Relations—Constitutional Fundamentals*, Oxford, Hart Publishing, 2008, 3-16;
- Fischer, P., Hafner, G. and Loibl, G., "Aktuelle österreichische Praxis zum Völkerrecht/Recent Austrian practice in International Law", Austrian Journal of Public and International Law 1991, Vol 42, no. 4, 489-494;
- Heliskoski, J., *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, Leiden, Brill Nijhoff, 2001, xxiii + 321 p.;
- Heliskoski, J., "EU Declarations of Competence and International Responsibility" in Evans M. and Koutrakos P. (eds.), *The International Responsibility of the European Union – European and International Perspectives*, Oxford, Hart Publishing, 2013, 189-212;
- Hillion C. and Koutrakos P. (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, London, Hart Publishing, 2010, xxi + 396 p.;
- Konstadinides, T., *Division of powers in European Union law: the delimitation of internal competence between the EU and the member states*, Wolters Kluwer, 2009, xiv + 333 p.;
- Koutrakos, P., *EU International Relations Law*, Bloomsbury Publishing, 2015, lxiii + 579 p.;

- Lenaerts, K., Van Nuffel P. and Corthaut T. (eds.), *EU Constitutional Law*, Oxford, Oxford University Press, 2020, clxxx + 838 p.;
- Lijnzaad, L., "Declarations of Competence in the Law of the Sea, a Very European Affair" in Lodge M.W. and Nordquist M. H. (eds.), *Peaceful Order in the World's Oceans*, Leiden, Brill Nijhoff, 2014, 186-207;
- Levrat, N., Kaspiarovich, Y., Kaddous C. and Wessel, R.A. (eds.), *The EU and its Member States' Joint Participation in International Agreements*, London, Hart, 2022, xiv + 314 p.;
- Matera C. and Gatti, M., "Facultative Mixity in the Area of Freedom Security and Justice" in Chamon M. and Govaere I. (eds.), *EU External Relations Post- Lisbon: The Law and Practice of Facultative Mixity*, 187-210;
- Nedeski, N., "Shared Obligations and the Responsibility of an International Organization and Its Member States: The Case of EU Mixed Agreements", International Organisations Law Review 2021, Vol. 18, no. 2, 139-178;
- Nedeski, N., *Shared Obligations in International Law*, Cambridge, Cambridge University Press, 2022, xiv + 229 p.;
- Ortino, M., "EU External Competences and the Participation to the Basel Committee on Banking Supervision", European Business Law Review 2017, Vol. 28, No. 6, 911-936;
- Paasivirta, E., "The Responsibility of Member States of International Organizations? A Special Case for the European Union", International Organizations Law Review 2015, Vol. 12, 448-467;
- Platzöder, R., *Third United Nations Conference on the Law of the Sea: Documents*, vol. XII, Dobbs Ferry, Oceana, 1987;
- Ricard, P., "The European Union and the future international legally binding instrument on marine biodiversity beyond national jurisdiction" in Ribeiro, M.C., *The Global Challenges and the Law of the Sea*, Springer, 2020, 379-399;
- Schermers, H.G., "A Typology of Mixed Agreements" in O'Keeffe D. and Schermers H.G. (eds.), *Mixed Agreements*, Kluwer, Deventer, 1983, 25-26;
- Van Eeckhoutte D. and Corthaut, T., "The Participation of the EU and its Member States in Multilateral Environmental Negotiations post Lisbon", Yearbook of European Law 2017, Vol. 36, No. 1, 749-809;
- V. Gowlland-Debbas, H. Hadj-Sahraoui and N. Hayashi (eds.), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International* Legislative Process, Leiden, Brill Nijhoff, 2000, 144 p.;

- Wessel, R., Kaddous, C., Kaspiarovich Y. and Levrat N., (eds.), *The EU and its member states' joint participation in international agreements*, London, Hart Publishing, 2022, 400 p.

ABSTRACT

This master's thesis studies the practice of the European Union of submitting a declaration of competences when it participates in a mixed agreement. In a multilateral context, the Union was first required to issue such a declaration in the context of the UNCLOS, which required international organisations that intended to join the convention to submit a declaration indicating the competence of both the member States and the organisation with respect to matters governed by the convention. Many other international agreements have followed suit and equally included a similar participation clause. Consequently, the Union has established a practice in its external relations of submitting declarations of competences, reporting on the internal division of competences. Chapter I of this master's thesis analyses the nature and characteristics of these declarations, setting out the broad similarities in the way they are drafted. Next, Chapter II entails a case study of two major declarations of competence, namely the declaration under the UNCLOS and the declaration recently submitted to the BBNJ Agreement. This section studies both declarations and provides a critical reflection as to their drafting process, content, and interpretation. In the latter declaration the institutional clashes between the Council and Commission are laid bare, as the text of the declaration clearly is aimed at preserving the member States' competences. Furthermore, several other declarations are studied, highlighting some features that are typical in the EU practice. This overview demonstrates how the EU declarations rarely meet the required standards of specificity, and are drafted in an imprecise, vague and open-ended manner. This is followed by Chapter III, in which the positions of the Union institutions regarding declarations of competences are analysed. While the Court of Justice is nowadays more open towards the concept of declarations of competences, its case law is nevertheless not altogether uniform. Moreover, the relation of the Council and the Commission equally shows that internal friction often monopolises the content and language of the declarations. Lastly, Chapter IV contains a critical reflection to the concept of declarations of competences, listing several issues that shine through in the EU's practice. First, the lack of specificity in the drafting of the declarations results in the fact that the objective of providing legal certainty to the Union's treaty partners is not achieved. Second, this is reinforced by the fact that declarations are rarely, if ever, updated in practice. Thus, the declarations of competences do not take into account the inherently evolving and dynamic nature of EU competences. Finally, the Chapter closes with shining a light on some positive aspects in the practice of the EU regarding declarations of competences, as it would be inappropriate to suggest they have no added value in the EU legal system as it has been shown they can in some instances fulfil their function in practice.

German abstract

Diese Masterarbeit untersucht die Praxis der Europäischen Union, eine Zuständigkeitserklärung abzugeben, wenn sie sich an einem gemischten Abkommen beteiligt. Im multilateralen Kontext wurde die Union erstmals im Rahmen des UNCLOS zur Abgabe einer solchen Erklärung verpflichtet. Darin wurde von internationalen Organisationen, die dem Übereinkommen beitreten wollten, die Abgabe einer Erklärung verlangt, in der die Zuständigkeit sowohl der Mitgliedstaaten als auch der Organisation in Bezug auf die durch das Übereinkommen geregelten Angelegenheiten angegeben wird. Viele andere internationale Übereinkommen sind diesem Beispiel gefolgt und haben ebenfalls eine ähnliche Beteiligungsklausel aufgenommen. Infolgedessen hat die Union in ihren Außenbeziehungen die Praxis eingeführt, Zuständigkeitserklärungen abzugeben, in denen sie über die interne Zuständigkeitsverteilung berichtet. In Kapitel I dieser Masterarbeit werden die Art und die Merkmale dieser Erklärungen analysiert und die großen Ähnlichkeiten in der Art und Weise, wie sie abgefasst sind, dargelegt.

Kapitel II enthält eine Fallstudie über zwei wichtige Zuständigkeitserklärungen, nämlich die Erklärung im Rahmen des UNCLOS und die kürzlich zum BBNJ-Übereinkommen vorgelegte Erklärung. In diesem Abschnitt werden beide Erklärungen untersucht und eine kritische Reflexion über ihren Entstehungsprozess, ihren Inhalt und ihre Auslegung angestellt. In der letztgenannten Erklärung werden die institutionellen Konflikte zwischen dem Rat und der Kommission deutlich, da der Text der Erklärung eindeutig darauf abzielt, die Zuständigkeiten der Mitgliedstaaten zu wahren. Darüber hinaus werden mehrere andere Erklärungen untersucht, wobei einige für die EU-Praxis typische Merkmale hervorgehoben werden. Dieser Überblick zeigt, dass die EU-Erklärungen nur selten den geforderten Präzisionsstandards entsprechen und unpräzise, vage und ergebnisoffen formuliert sind.

Es folgt Kapitel III, in dem die Positionen der Unionsorgane zu den Zuständigkeitserklärungen analysiert werden. Auch wenn der Gerichtshof dem Konzept der Zuständigkeitserklärungen heute offener gegenübersteht, ist seine Rechtsprechung dennoch nicht ganz einheitlich. Auch das Verhältnis von Rat und Kommission zeigt, dass interne Reibereien oft den Inhalt und die Sprache der Erklärungen prägen.

Kapitel IV schließlich enthält eine kritische Betrachtung des Konzepts der Zuständigkeitserklärungen, in der mehrere Probleme aufgezeigt werden, die sich in der Praxis der EU zeigen. Erstens führt der Mangel an Spezifität bei der Abfassung der Erklärungen dazu, dass

das Ziel, den Vertragspartnern der Union Rechtssicherheit zu bieten, nicht erreicht wird. Zweitens wird dies durch die Tatsache verstärkt, dass die Erklärungen in der Praxis selten, wenn überhaupt, aktualisiert werden. Somit tragen die Zuständigkeitserklärungen nicht dem inhärent sich entwickelnden und dynamischen Charakter der EU-Zuständigkeiten Rechnung. Abschließend werden in diesem Kapitel einige positive Aspekte in der Praxis der EU in Bezug auf die Zuständigkeitserklärungen beleuchtet, denn es wäre unangebracht zu behaupten, dass sie keinen Mehrwert im EU-Rechtssystem haben, da sich gezeigt hat, dass sie in einigen Fällen ihre Funktion in der Praxis erfüllen können.