system. These agreements illustrate the constraints under which the Member States, although fully sovereign States, operate at an international level as a result of their Union obligations; the way in which the international identity of the Union may be represented by the Member States alongside the Union; and the accommodations possible between the demands of the Union's legal order and the practical exigencies of international treaty-making.

MIXED AGREEMENTS AS A SOURCE OF EUROPEAN UNION LAW

Eleftheria Neframi

1. Introduction

Mixed agreements, concluded jointly by the European Union and its Member States, are derived from necessity, due to the division of competences – part of the agreement falls under EU exclusive competence, while other provisions fall under the Member States' reserved competence that may be shared with the EU.

Mixed agreements raise the question as to what extent they are binding on the institutions and on the Member States as EU law. While EU agreements are the source of EU law according to Article 216 (2) TFEU (ex Article 300 (7) TEC), can mixed agreements be considered as a source of EU law regardless of the sphere of competence under which their provisions fall? In other words, is a mixed agreement in its entirety a source of EU law or only as far as provisions falling under EU competence are concerned? And which EU competence, exclusive or also shared, is to be taken into consideration? The issue is of specific interest, given that the consideration of a mixed agreement as a source of EU law implies the Court's interpretative jurisdiction and the possibility to enforce its application against Member States.[1] On

[1] Academic contributions on reception of mixed agreements include: P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, Oxford: Oxford University Press, 2004, pp. 236–274; R. Holdgaard, *External Relations of the European Community*, The Hague: Kluwer Law International, 2008, pp. 205–234; F. Ippolito, 'Giurisdizione comunitaria e accordi misti: dal criterio della competenza alla leale cooperazione', in *Studi sull'integrazione europea*, 2009, pp. 657–679; M. Karayigit, 'Why and To What Extent a Common Interpretative Position for Mixed Agreements?', in *European Foreign Affairs Review*, 2006, pp. 445–469; P. Koutrakos, 'The Elusive Quest for Uniformity in EC External Relations', in *The Cambridge Yearbook of European Legal Studies*, 2001, pp. 258–261; P. Koutrakos, 'Interpretation of Mixed Agreements', in C. Hillion and P. Koutrakos (Eds.), *Mixed Agreements Revisited*, Oxford: Hart Publishing, 2010, pp. 116–137; A. Rosas, 'Mixed Union-Mixed Agreements', in M. Koskenniemi (Ed.), *International Law Aspects of the European Union*, The Hague: Kluwer Law International, 1998, pp. 125–148; T. Sell, *Das Gebot der einheitlichen Auslegung gemischter Abkommen*, Frankfurt am Main:

the other hand, as Member States are also contracting parties to the agreement, if part of the agreement is not considered as a source of EU law, it should be considered as a source of international law within the Member States' legal order.

First of all, we shall observe that the status of mixed agreements in the EU legal order is not determined by the treaties. Instead, conclusions should be drawn from the case-law of the Court of Justice, which raises many questions. Why distinguish between the status and the implementation of mixed agreements? What is the extent of exercise of the EU competence while concluding a mixed agreement? What is the impact of EU and Member States' international liability on the reception of a mixed agreement in the EU legal order? What is the importance of the requirement of uniformity?

Let us recall now, in general terms, the main statements of the Court of Justice. For the first time, it has been held in the *Haegeman* case that provisions of an international agreement, from the coming into force, form an integral part of Community (now EU) law.[2] However, while the agreement concerned was mixed, the relevant provisions were of Community nature. The issue of the status of provisions falling under the Member States sphere of competence was raised in *Demirel*.[3] The Court, after having recalled the *Heageman* assimilation of Community agreements to acts of the institutions,[4] held that its interpretative jurisdiction does not extend to provisions whereby Member States have entered into commitments in the exercise of their own powers.[5] The Court admitted, however, its jurisdiction for the agreement in its entirety, on the ground that it was an association agreement with Turkey, which created special links with a non-Member country and, as a consequence, the Community was empowered by the Treaty (ex-Article 310 TEC, now Article 217 TFEU) to guarantee commitments in all fields covered by the Treaty.[6]

Peter Lang, 2006, pp. 41–94, pp. 134–185; E. Vranes, 'Gemischte Abkommen und die Zuständigkeit des EuGH-Grundfragen und neuere Entwicklungen in den Aussenbeziehungen', in *Europarecht*, 2009, pp. 44–79.

[2] ECJ, Case 181/73 *Haegeman v. Belgium* [1974] ECR 449, para. 5.

[3] ECJ, Case 12/86 *Meyrem Demirel v. Stadt Schwäbisch Gmund* [1987] ECR 3719.

[4] "This agreement is therefore, in so far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (B) of the first paragraph of Article 177". ECJ, Case 181/73 *Haegeman, supra* note 2, para. 4.

[5] ECJ, Case 12/86 *Demirel, supra* note 3, paras 7–8.

[6] *Ibid.*, para. 9.

The particular nature of an association agreement – as an instrument creating special links in order to promote the *acquis communautaire*, the provisions of which should therefore be effectively implemented by the Union – may justify the Court's interpretative jurisdiction for the mixed agreement in its entirety. However, another ground of justification is to be advanced in the cases concerning WTO or other multilateral agreements. Indeed, in *Hermès*,[7] the Court admitted that its interpretative jurisdiction over a provision of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) was liable to apply to situations falling under national law, as well as under Community law, underlying the need for uniform interpretation. In *Dior*,[8] *Schieving-Nijstad*[9] and *Merck*[10] cases, the Court admitted its interpretative jurisdiction for the TRIPs agreement as a whole. However, the Court's interpretative jurisdiction concerns procedural provisions capable of applying both to situations covered by national law and to situations covered by EU law. The Court's interpretative jurisdiction also concerns the question to know which part of the agreement falls under the EU, and which part under the Member States's competence. It was held at the same time that the direct effect of provisions falling in a sphere in which the Community (now the Union) had not legislated is a question of the national judge's competence.

[7] ECJ, Case C-53/96 *Hermès International v. FHT Marketing Choise BV* [1998] ECR I-3603. For a comment: A.-F. Gagliardi, 'The Right of Individuals to Invoke the Provisions of Mixed Agreements Before the National Courts: A New Message from Luxembourg?', in *European Law Review*, 1999, pp. 276–292; J. Heliskoski, 'The Jurisdiction of the Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements', in *Nordic Journal of International Law*, 2000, pp. 395–412.

[8] ECJ, Joined cases C-390/98 and C-392/98, *Parfums Christian Dior SA v. Tuk Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV* [2000] ECR I-11307. For a comment: J. Heliskoski, in *Common Market Law Review*, 2002, pp. 159–174; P. Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure', in *European Foreign Affairs Review*, 2002, pp. 25–47; E. Neframi, 'La compétence de la C.J.C.E. pour interpréter l'accord TRIPs, selon l'arrêt *Parfums Christian Dior*, du 14 décembre 2000', in *Revue du droit de l'Union européenne*, 2001, pp. 491–519.

[9] ECJ, Case C-89/99 *Schieving-Nijstad vof and Others v. Robert Groeneveled* [2001] ECR I-5851. For a comment: P. Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure', *cit.*, at 47–52.

[10] ECJ, Case C-431/05 *Merck Genéricos-Produtos Farmacêuticos v. Merck & Co. Inc. and Merck Sharp & Dohme Lda* [2007] ECR I-7001. For a comment: R. Holdgaard, in *Common Market Law Review*, 2008, pp. 1233–1250; E. Neframi, 'L'invocabilité des accords OMC tributaire du régime juridique des accords mixtes', in *Revue du Marché commun et de l'Union européenne*, 2008, pp. 227–232.

The criterion of the extent of the Union's legislation may be helpful in order to determine the extent to which a mixed agreement is a source of EU law. The interpretative jurisdiction of the Court of Justice on that matter should be admitted without difficulties, in order to ensure uniformity and legal certainty. However, the case law, in the framework of direct actions for failure to fulfil obligations under a mixed agreement, reveals the limit of the criterion of the Union's legislation. Indeed, on the one hand, the Court held that "mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as their provisions fall within the scope of Community competence".[11] On the other hand, the Court considered that the Member States were in breach of Community law by failing to comply with provisions falling outside the Community's (now Union) exclusive competence. Indeed, in the *Berne Convention* case,[12] Ireland was accused of breaching its obligation deriving from a mixed agreement (the EEA) by not acceding to the Berne Convention concerning intellectual property rights, which are a matter of Member State competence. In the *Etang de Berre* case,[13] the Court of Justice held that France was in breach of its Community law obligations by failing to implement a mixed agreement, even though the alleged breach concerned a sphere not covered by Community legislation. Similarly, in the *Sellafield* or *MOX Plant* case,[14] Ireland infringed the duty of close cooperation and the provision establishing the Court's exclusive jurisdiction (Article 344 TFEU, ex-Article 292 TEC), by bringing dispute-settlement proceedings against the United Kingdom within the framework of the UN Convention on the Law of the Sea, while

[11] ECJ, Case C-239/03 *Commission v. France* [2004] ECR I-9325, para. 25.

[12] ECJ, Case C-13/00 *Commission v. Ireland (Berne Convention)* [2002] ECR 2943. For a comment: M. Dony, 'Les accords mixtes', in J.-V. Louis and M. Dony (Eds.), *Commentaire J. Megret, Le droit de la CE et de l'Union européenne, Relations extérieures,* vol. 12, Bruxelles: Bruylant, 2005, pp. 198–199.

[13] ECJ, Case C-239/03 *Commission v. France, supra* note 11. For a comment: P.-J. Kuijper, in *Common Market Law Review,* 2005, pp. 1491–1500.

[14] ECJ, Case C-459/03, *Commission v. Ireland* [2006] ECR I-4657. For a comment, see P. Eeckhout, 'General Report', *22nd FIDE Congress, External Relations of the EU and the Member States,* Cyprus, 2006, pp. 291–293; N. Lavranos, in *European Constitutional Law Review,* 2006, pp. 456–469; F. Mariatte, in *Europe,* juillet 2006, pp. 13–16; E. Neframi, 'La mixité éclairée dans l'arrêt *Commission contre Irlande* du 30 mai 2006 (affaire Mox): une double infraction, un triple apport', in *Revue du droit de l'Union européenne,* 2007, pp. 687–713.

the dispute related to an area not covered by the Community's exclusive competence.

It results from this first overview that the status of a mixed agreement in the EU legal order is the result of several parameters: the extent of the EU legislation, the extent of the EU competence, the need for uniform interpretation, and the need to effectively comply with international obligations. We will study these parameters in order to explain how a Member State's international obligation, concerning provisions of a mixed agreement in the origin of Member States participation to the conclusion of the agreement, may constitute a source of EU law.

From an EU law point of view, the status of a mixed agreement in the EU legal order should be linked to the question of competence (2). However, the parameter of competence is not sufficient to explain the Court of Justice's case law. A parameter of international law might be taken into consideration, the link being the extent of the international commitment of the Union (3). Finally, an intermediary approach, focusing on the Union's interest with respect to the promotion of international cooperation could provide for a more consistent reading of the jurisprudence (4).

2. The Parameter of Competence: an EU Law Approach

Mixity derives from the lack of exclusive external competence of the Union for all or some provisions of an international agreement. If provisions falling under the sphere of exclusive Union competence are to be considered as provisions of an EU agreement (1.1.), the question is to know the status of provisions falling under shared competence (1.2.).

2.1 *Mixed agreements and exclusive EU competence*

According to the *ERTA* principle, whether or not a provision falls within the exclusive competence of the Union depends on whether sufficiently comprehensive internal rules have been enacted in that area.[15]

[15] ECJ, Case 22/70 *Commission v. Council* [1971] ECR 263.

The Court specified this principle in the *Open Skies* judgments[16] and in Opinion 1/03.[17] The Union judge held that exclusivity of the Union competence depends on the need for a uniform and effective application of internal rules. As a consequence, Member States are deprived of the possibility to exercise their external competence, not only when the international commitments fall within the scope of common rules, but also when international commitments may affect internal measures. The Court establishes a general test in order to determine under which circumstances the scope of the common rules may be affected or distorted by the international commitments,[18] as well as a specific test consisting in a detailed analysis of the two systems of rules, both international and those of the European Union.[19]

In summary, the external competence of the European Union is of an exclusive nature when internal measures are to be affected by international commitments. In such a case, the commitments are undertaken by the Union. When an international agreement falls in its entirety under the exclusive Union competence, it will be concluded only by the Union, and it will be not mixed. However, from the Union law point of view, provisions of an agreement falling outside the exclusive Union competence cannot be concluded by the Union. Therefore, joint conclusion by the Union and the Member States is necessary. The Member States' participation to the agreement is justified from the existence of provisions outside the EU exclusive competence.

[16] ECJ, Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519; ECJ, Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575; ECJ, Case C-469/98 *Commission v. Finland* [2002] ECR I-9627; ECJ, Case C-471/98 *Commission v. Belgium* [2002] ECR I-9681; ECJ, Case C-472/98 *Commission v. Luxemburg* [2002] ECR I-9741; ECJ, Case C-475/98 *Commission v. Austria* [2002] ECR I-9797; ECJ, Case C-476/98 *Commission v. Germany* [2002] ECR I-9855; ECJ, Case C-523/04 *Commission v. Netherlands* [2007] ECR I-3267.

[17] ECJ, Opinion 1/03 *(Lugano Convention)* [2006] ECR I-1145.

[18] The Court held the criterion of international commitments falling within an area which is already largely covered by common rules. The Court further explained that international Member States action can affect the common rules whenever the Union has included in its internal legislative acts provisions relating to the treatment of nationals of non-Member countries or expressly conferred on its institutions powers to negotiate with non-member countries. The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-Member countries, where the Community has achieved complete harmonisation in a given area. See, for instance, ECJ, Case C-467/98 *Commission v. Denmark, supra* note 16, paras 81–84. This jurisprudence is now consolidated in Articles 3 (2) TFEU and 216 (1) TFEU.

[19] ECJ, Opinion 1/03, *supra* note 17, para. 151.

Provisions of a mixed agreement falling under the exclusive competence of the Union have the same status, in the EU legal order, as the provisions of an EU agreement. The Union could have concluded these provisions without the participation of the Member States if the agreement did not contain provisions falling outside the sphere of its exclusive competence. There is no doubt that the part of a mixed agreement related to the exclusive Union competence is an act of the institutions, according to the *Heageman* statement, falling under the Court's interpretative competence. Besides, this part of a mixed agreement is to be implemented by the Member States as an EU law obligation, in the framework of indirect administration and following Article 4 (3) TUE (ex-Article 10 TEC) (i.e., the duty of loyalty, specified in Article 216 (2) TFEU (ex-Article 300 (7) TEC)). In other words, the part of a mixed agreement falling under the Union's exclusive competence is a Union agreement, binding on the Member States who have the obligation to implement it effectively, as any unilateral act of the institutions or international agreement concluded by the Union.

2.2 *Mixed agreements and shared competence*

The question now concerns the status of the provisions of a mixed agreement falling outside the exclusive competence of the Union. These provisions could not have been concluded by the Union without the participation of the Member States. Are they concluded by the Union with the Member States' participation?

The question of whether the Union exercises its shared competence through the conclusion of a mixed agreement concerns both international and EU law. We will focus at this stage on EU law, as the international law approach constitutes the second parameter (see infra, under 3).

From the EU law point of view, the conclusion of a mixed agreement does not have a preemptive effect.[20] That means that mixity does not enable the Union to exercise its non exclusive competence. Shared competence of the Union before the conclusion of the agreement remains shared after its conclusion. What does such a statement then imply on the mixed agreement's status in the EU legal order?

[20] J. Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle', in D. O'Keeffe and H. Schermers (Eds.), *Mixed Agreements*, Deventer: Kluwer, 1983, p. 39.

It results from the case-law concerning the direct effect of the TRIPs that it is for the national judge to admit or deny the direct effect of a provision falling outside the exclusive Union competence. To be more precise, in the *Hermès* and *Dior* cases, the Court received preliminary references from Dutch courts about the interpretation and the direct effect of Article 50 (6) of the TRIPs agreement, imposing time limits on national interim measures. Both cases concerned national trade marks, but the *Dior* case related also to an industrial design right, an area in which the Community had not adopted any secondary measures.[21] One of the questions was whether the jurisdiction of the Court to interpret Article 50 TRIPs also extended to its provisions in cases where no trade marks were involved. According to the Court, "in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50 (6) of TRIPs or that it should oblige the courts to apply that rule of their own motion".[22]

In the *Merck* case, the reference from the Portuguese Supreme Court was about the effect of Article 33 of the TRIPs agreement, concerning the period of protection of patents. The Court held that "when the field is one in which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights and measures taken for that purpose by the judicial authorities do not fall within the scope of Community law, so that the latter neither requires nor forbids the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the TRIPs Agreement or to oblige the courts to apply that rule of their own motion".[23] As Article 33 TRIPs "forms part of a sphere in which, at this point in the development of Community law, the Member States remain principally competent, they may choose whether or not to give direct effect to that provision".[24]

[21] Indeed, the judgment in *Dior* concerns joint cases *Dior* (related to a national trade mark on cosmetics) and *Assco* (related to an industrial design right on a scaffolding system).

[22] ECJ, Joined cases C-392/98 and C-300/98 *Parfums Christian Dior and Assco*, *supra* note 8, para. 48.

[23] ECJ, Case C-431/05 *Merck Genéricos*, *supra* note 10, para. 34.

Furthermore, in the *Aarhus Convention* case, the Court received preliminary reference from the Slovak Court about the direct effect of Article 9 (3) of the Aarhus Convention, which is a mixed agreement. According to this provision, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. The Court held that if the European Union had not exercised its powers and had not adopted provisions to implement the obligations which derive from Article 9 (3), the obligations deriving from this provision would continue to be covered by the national law of the Member States. "In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion".[25]

It is thus clear that the appreciation of the direct effect of provisions of a mixed agreement outside of the Union's exclusive competence is for the national judge a matter of international law. The Court of Justice therefore has not jurisdiction to give or deny direct effect as far as the provisions of the mixed agreement fall under the Member States' competence.

Should we conclude that the provisions of a mixed agreement outside the sphere of the Union's exclusive competence do not constitute a source of EU law? The conclusion is far from being evident.

Indeed, in *Dior*, as well as in the *Hermès* case, the Court admitted its jurisdiction to interpret Article 50 of TRIPs. This procedural provision

[24] Para. 47.

[25] ECJ, Case C-240/09 *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, Judgment of 8 March 2011, para. 32.

can apply both to situations falling within the scope of national law and to situations falling within that of Union law, as was the case in the field of trade marks. "The Court has jurisdiction to interpret it in order to forestall future differences of interpretation".[26] It results that the jurisdiction of the Court of Justice covers the semantic interpretation of Article 50 of TRIPs, but not the appreciation of its direct effect.[27]

Such a statement implies that provisions of a mixed agreement falling outside the Union's exclusive competence may be considered as a source of EU law. The admission of the Court's jurisdiction to substantively interpret Article 50 of TRIPs is not linked to the special nature of this provision and should not be considered as implied by exceptional circumstances. The national judge is required to follow the semantic interpretation given by the Court of Justice whilst he keeps his freedom to assess the direct effect of the provisions falling within national competence.

Further case-law confirms that provisions outside the Union's exclusive competence have a status in the EU legal order. In the *Merck* case, the Court considered that the WTO Agreement, of which the TRIPs form part, has been signed by the Community. "Therefore, according to settled case-law, the provisions of that convention now form an integral part of the Community legal order". The Court thus established its jurisdiction "to define the obligations which the Community has thereby assumed and, for that purpose, to interpret the provisions of the TRIPs Agreement".[28] In the *Aarhus Convention* case, the Court held that the provisions of that mixed agreement form an integral part of the legal order of the European Union. "Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement".[29] However, in this case, the Court denied the direct effect of Article 9(3) of the Aarhus Convention, even if Regulation n° 1367/2006, which is intended to implement Article 9 (3), only concerns the institutions of the European Union and does not cover the obligations which derive from this provision with respect to national administrative or judicial

[26] ECJ, Case C-53/96 *Hermès, supra* note 7, paras 32 and 33. ECJ, Joined cases C-300/98 and C-392/98 *Parfums Christian Dior and Assco, supra* note 8, para. 35.
[27] R. Holdgaard, *External Relations of the European Community, cit.*, at 217.
[28] ECJ, Case C-431/05 *Merck Genéricos, supra* note 10, paras 31 and 33.
[29] ECJ, Case C-240/09 *Lesoochrnàrske zoskupene, supra* note 25, para. 30.

proceedings to challenge acts and omissions by private persons and public authorities. The Court held that this specific issue falls within the scope of EU law, as it relates to a field covered in large measure by it.[30] The appreciation of the direct effect of Article 9(3) of the Aarhus Convention, and its denial, allows the Court to underline the Member States' obligation to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.

It follows that the interpretative jurisdiction of the Court of Justice is irrelevant to the exclusivity of the Union competence. The Court can interpret substantively and thus determine precisely the meaning of provisions of a mixed agreement outside the Union's exclusive competence. The Court can interpret a mixed agreement in its entirety in order to determine which provisions fall under the Member States' and which under the Union's competence. But, the Court cannot establish or deny the direct effect of a provision falling outside the Union's exclusive, or in large measure exercised competence.

This limit to the Court's jurisdiction allows us to conclude that mixed agreements cannot be assimilated to EU agreements. In the case of an EU agreement, the Court's interpretative jurisdiction covers the judgment on direct effect. In other words, while in case of an EU agreement interpretation includes implementation, in a case of a mixed agreement, there is a division of implementation competences according to the extent of the Union legislation (i.e., according to the extent of preemption). Consequently, the distinction between exclusive and shared competence is relevant as far as direct effect, and thus implementation, is concerned.

Should we conclude that mixed agreements are a source of EU law as far as their provisions fall under EU competence, even not exclusive? Is the conferral of competence a sufficient criterion regardless of its exercise?

In the framework of direct actions, in the *Berne Convention, Etang de Berre* and *MOX Plant* cases, Member States are considered to have an EU obligation to implement the provisions of a mixed agreement falling outside the exclusive Union competence.[31] It should be noted that in all three cases, the relevant provisions of the mixed agreements

[30] Para. 39–43.
[31] P. Koutrakos, *EU International Relations Law*, Oxford: Hart Publishing, 2006, pp. 202–205.

concerned fell within the scope of EU law (i.e., the shared competence of the Union).

The *Berne Convention* case was related to Ireland's failure to adhere to this convention concerning intellectual property rights, with the obligation of adherence being provided by Article 5 of Protocol 28 annexed to the EEA Agreement. The Court considered that the requirement of adherence "comes within the Community framework, given that it features in a mixed agreement concluded by the Community and its Member States and relates to an area covered in large measure by the Treaty. The Commission is thus competent to assess compliance with that requirement, subject to review by the Court".[32]

In the *Etang de Berre* case, the Commission claimed that France had failed to fulfil its obligations under the Convention for the protection of the Mediterranean Sea against pollution by failing to prevent the discharge of fresh water into the aquatic environment of the Etang de Berre, a salt water marsh. The Court linked the reception of the Convention, concluded as a mixed agreement, in the EU legal order to the exercise of the Community competence, but not in the sense of exclusivity. It was held that since the Convention created rights and obligations "in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into". And, the Court continued, "The fact that discharges of fresh water and alluvia into the marine environment, which are at issue in the present action, have not yet been the subject of Community legislation is not capable of calling that finding into question".[33]

In the *MOX Plant* case, Ireland had brought dispute-settlement proceedings against the United Kingdom within the framework of a mixed agreement, the UN Convention on the Law of the Sea (UNCLOS), and not before the Court of Justice. The Irish proceedings concerned the legality of a decision of the United Kingdom to grant permission to operate a nuclear power plant, the MOX Plant, without having met a number of obligations under the Convention. The Court established that the UNCLOS provisions relied on by Ireland before the Arbitral Tribunal "come within the scope of Community competence which the Community has elected to exercise by becoming a party to the

[32] ECJ, Case C-13/00 *Commission v. Ireland*, *supra* note 12, para. 20.

Convention".[34] By contrast to the *Dior* and *Merck* cases, the Court paid no attention to the exclusivity of the Union competence, but distinguished between the exercise of competence and preemption, the first being sufficient to ensure reception of the agreement.

It follows that a mixed agreement is a source of EU law as far as its provisions fall under a field covered by EU legislation, even if the EU competence is not exclusive. However, the criterion of exercise of the Union's competence in the internal field does not give us a consistent reading of the jurisprudence.

First, the exercise of the Union's competence that does not lead to exclusivity establishes a specific status of the provisions of a mixed agreement. Provisions falling under non exclusive EU competence constitute an EU law obligation for the Member States (an obligation to implement and an obligation to interpret in accordance with the Court's approach), but still remain under the Member States' competence as far as their implementation is concerned.

Secondly, according to the competence criterion, the part of a mixed agreement relevant to a non-exercised Union competence or a non-conferred competence (and thus remaining with the Member States) does not enter the EU legal order.[35] Such an assumption does not align with some of the Court's statements. In the *Berne Convention* case, the Court ruled that the provision in question fell within the scope of Community law but did not examine the exercise of competence. Furthermore, in the *Merck* and in the *Aarhus Convention* cases, the Court admitted its interpretative jurisdiction before entering into the question of the exercise of competence, precisely because it is on the European Union judge to proceed to the demarcation between the EU and the national sphere of competence, in the framework of a mixed agreement.

Consequently, the criterion of competence is not liable to justify the reception of mixed agreements in the EU legal order. Certainly, competence is the first parameter to be taken into consideration when examining the status of mixed agreements in the EU legal order in the framework of the preliminary reference procedure; it has to be established by the Court which provisions of a mixed agreement fall under

[34] ECJ, Case C-459/03 *Commission v. Ireland*, *supra* note 14, para. 120.

[35] See J. Heliskoski, 'The Jurisdiction of the Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements', *cit.*, at 409.

Member States' competence, in order to establish the national judge's jurisdiction to pronounce the direct effect. However, the parameter of competence is not decisive in the framework of enforcement proceedings or in the case of substantive interpretation of a provision of a mixed agreement. Furthermore, the competence criterion focuses on an EU law approach; the extent of the Union competence determines the extent of the Union participation to the mixed agreement from an EU law point of view, and the extent of the Union's participation is mainly crystallized in the Council's decision on conclusion. One can align the reception of a mixed agreement to the extent that the Union's participation corresponds to the reception of the mixed agreement through the Council's decision and thus, to a dualistic approach. However, such an approach cannot explain the jurisdiction of the Court to determine the division of competences of implementation, jurisdiction that presupposes the reception of the mixed agreement as a whole.

Should an international law point of view, focusing on the criterion of EU liability, explain the specific status of a mixed agreement in the EU legal order?

3. The Parameter of the International Commitment of the Union: an International Law Approach

In order to appreciate the status of a mixed agreement in the EU legal order, as a source of EU law, the criterion of the international commitment of the Union also enters into consideration. By concluding an international agreement, the Union undertakes international obligations. According to the *Kupferberg* principle, "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement [...] form an integral part of the Community legal system".[36] Although the *Kupferberg* case concerns a purely Community agreement, the Court referred to it in the *Demirel* case[37] in order

[36] ECJ, Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641, para. 13.

[37] ECJ, Case 12/86 *Demirel, supra* note 3, paras 9–11.

to stress the duty of Member States towards the Community to ensure respect for commitments assumed by the latter.

Should we affirm that the reception of a mixed agreement in the EU legal order is dependent on the extent of the international responsibility of the Union? Certainly, if we link reception to international responsibility, we can explain why Member States have an EU law obligation to implement a mixed agreement and why there is a need for uniform interpretation, which could be provided by the Court of Justice.

However, the issue of international responsibility of the Union under a mixed agreement is far from being clear,[38] and the Court avoids dealing explicitly with that matter. Indeed, international responsibility under a mixed agreement may seem linked to the question of competence. Some mixed agreements contain a declaration of competences that reveals the allocation of competence between the Union and the Member States, and others do not.

For instance, the United Nations Convention on the Law of the Sea contains a declaration of competence. The question is if the international responsibility of the Union follows the extent of exclusive or shared competence. As the Court pointed out in the *MOX Plant* case, "the question as to whether a provision of a mixed agreement comes within the competence of the Community is one which relates to the attribution and, thus, the very existence of that competence, and not to its exclusive or shared nature".[39] In order to understand this statement, in relation to the Court's position about exclusivity and competence to give direct effect, we should distinguish the exercise of the Union's competence from an international law point of view from the exercise that leads to preemption and, thus, to exclusivity. In the *MOX Plant* case the Court held "that the Convention provisions on the prevention of marine pollution relied on by Ireland, which clearly cover a significant part of the dispute relating to the MOX plant, come within the scope of Community competence which the Community has elected

[38] M. Björklund, 'Responsibility in the EC for Mixed Agreements – Should Non-Member Countries Care?', in *Nordic Journal of International Law*, 2001, pp. 373–402; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague/London/New York: Kluwer Law International, 2001, p. 194; E. Neframi, *Les accords mixtes de la Communauté européenne*, Bruxelles: Bruylant, 2007, pp. 523–585.

[39] ECJ, Case C-459/03, *Commission v. Ireland, supra* note 14, para. 93.

to exercise by becoming a party to the Convention".[40] However, provisions for the prevention of marine pollution fall under the Union's shared competence. The Advocate General Maduro established that "as regards the provisions of Unclos relating to the protection of the marine environment, the Community exercised both its exclusive and its non-exclusive external competence in the area of environmental protection when it acceded to Unclos".[41]

These statements may seem in contradiction with the principle of conferral and the fact that only the exclusive external competence of the Union can be exercised. However, they can be explained if we take into consideration that the Community, by concluding the Convention on the Law of the Sea, submitted a declaration of competences, which determines the extent of its international responsibility. International responsibility aligns to an objective parameter, which is the declaration of competences, and non-Member States rely on the Union's statement without verification of whether the competence declared meets exclusivity. Therefore, the Community may enter into international commitments in the field falling under its competence, even non-exclusive, as the internal division of competences is not of concern for non-Member States unless it is contained in an annexed list.[42]

It follows that in case of allocation of competence in a mixed agreement, the international commitment of the Union is not a function of its exclusive competence, but of the competence declared. Determination of international commitment derives from an objective element without the need to look for the extent of the exclusive EU competence. Besides, the Union and the Member States are seen as unique contracting parties.[43] Despite the allocation of competences, the division of liability is flexible and adapts to the evolution of the Union competence. In other words, the Union and the Member States are seen as unique contracting parties, even if the extent of international commitment follows the declaration of competence deriving from the group.

This approach assimilates mixed agreements containing allocation of competences with mixed agreements without such an allocation. In

[40] Para. 120.

[41] Para. 27 of the conclusions.

[42] E. Neframi, *Les accords mixtes de la Communauté européenne, cit.*, at 338–451; R. Oen, *Internationale Streitbeilegung im Kontext gemischter Verträge der Europäischen Gemeinschaft und ihrer Mitgliedstaaten*, Berlin: Duncker&Humblot, 2005, pp. 117–152.

[43] E. Neframi, *Les accords mixtes de la Communauté européenne, cit.*, at 263–271.

the absence of a declaration, the Union and the Member States bear joint and several responsibilities for the execution of the mixed agreement as a whole.[44] The existence of joint and several responsibilities justifies the consideration of the mixed agreement in its entirety as a source of EU law.

Indeed, in the *Hermès* case the Court pointed out "that the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties".[45] In the *Merck* case, the Court established that "the TRIPs Agreement having been concluded by the Community and its Member States by virtue of joint competence, the Court, hearing a case brought before it in accordance with the provisions of the EC Treaty, in particular Article 234 TEC, has jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret the provisions of the TRIPs Agreement".[46]

Consequently, the extent of the interpretative jurisdiction of the Court of Justice follows the extent of the international commitment of the Union, which is determined by an international law criterion. A mixed agreement is thus a source of EU law as far as the Union assumed international obligations. Such an approach allows provisions falling under the scope of EU, regardless of the exclusivity of the Union competence, regardless of its internal exercise, to enter the EU legal order. When the Union concludes a mixed agreement, it exercises its external competence in the international law level, but such an exercise does not have a preemptive effect.[47] The exercise has the meaning of entering into conventional obligations towards third States, without affecting the division of implementation competences.[48] The opposite would contravene the principle of conferral and that of

[44] M. Cremona, 'The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community', in *Oxford Journal of Legal Studies*, 1982, pp. 426–427; J. Groux and P. Manin, *Les Communautés Européennes dans l'ordre international*, Luxembourg: OPOCE, 1984, p. 132; K. Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft*, Berlin: Duncker und Humblot, 1986, pp. 104–105. See also ECJ, Case C-316/94 *Parliament v. Council BV* [1994] ECR I-625.

[45] Para. 24.

[46] Para. 33.

[47] See *supra* note 20.

[48] M. Cremona, 'Community Report', *22nd FIDE Congress, External Relations of the EU and the Member States*, Cyprus, 2006, p. 339.

parallelism between internal and external competence; the exercise of external shared competence can lead to exclusivity only in the specific cases covered by the principle of Opinion 1/76.[49]

The particular meaning of exercise of the Union's external competence in a mixed agreement context may explain the distinction between reception and implementation of an agreement. While implementation depends on exclusivity, reception is linked to the existence of the Union external competence and its international commitment following international law. Existence of the external Union competence founds the Union's treaty making competence; the Union may undertake international commitments falling outside its exclusive competence, provided that the commitments derive from a mixed agreement.

The distinction between international and EU law commitment may explain the difference between international exercise of competence and preemption. While the commitment of the Union from an EU point of view is linked to exclusivity, the international commitment is independent from the competence question. EU and Member States are engaged as a group on the basis of a mutual mandate for the part of the agreement that exceeds their competence. Such a mandate is based on the duty of loyal cooperation, because the conclusion of the mixed agreement follows a Union objective that is to establish international links, despite the partial lack of competence. Furthermore, to consider that international commitment does not follow the extent of exclusive competence guarantees the autonomy of the EU legal order.

The detachment of international commitment of the Union from the competence question justifies the consideration of a mixed agreement as a source of EU law. The Union has to comply with its international obligations, and thus, it is necessary to ensure uniform interpretation and implementation from the Member States. This ground of justification reveals a monist approach. It is the mixed agreement as an international treaty, detached from the exact division of competences, that enters the EU legal order and not the Council's decision.

The international law approach, however, leaves some questions unresolved. First of all, if the status of mixed agreements follows international commitment, the question is to know why a mixed agreement

[49] ECJ, [1977] ECR-741. See the conclusions of AG Tizzano in ECJ, Case C-467/98 *Commission v. Denmark*, *supra* note 16, paras 46–58.

is not a source of international law obligation as Member States are also engaged towards third parties. Why is EU commitment superior to Member States' commitment? Another point of perplexity is the case of mixed agreements containing provisions outside the scope of EU law. If the existence of a shared competence may justify the particular perception of exercise of EU competence, the absence of conferral does not permit to link international commitment to the exercise of EU external competence. In such a case, should we consider that these provisions of mixed agreements are not a source or EU law? But how do we explain that the Court admits jurisdiction to resolve the competence question? How do we explain that in some cases, such as the *Berne convention* or the *Intertanko* case,[50] the Court does not refer at all to the competence question? Finally, how do we explain that the Court refers to the need of uniform interpretation more often than to the *Kupferberg* principle?

It follows that a purely international law approach, in line with the criterion of international commitment, is once again insufficient to explain all aspects of case law.

4. The Parameter of the Union Interest: An Intermediary Approach

In the *Dior* case the Court held that "the Member States and the Community institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they concluded the WTO Agreement, including TRIPs".[51] It is well established that the "obligation to cooperate flows from the requirement of unity in the international representation of the

[50] ECJ, Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport*, [2008] ECR I-4057. The Court of Justice was asked to determine the compatibility of a Council Directive with the International Convention for the Prevention of Pollution from Ships (MARPOL) and with the UN Convention on the Law of the Sea. While MARPOL was considered as non-binding for the Community, UNCLOS was accepted as binding on the Community in its entirety. For a comment: E. Denza, in *European Law Review*, 2008, pp. 870–879.

[51] ECJ Joined cases C-300/98 and C-392/98 *Parfums Christian Dior and Assco*, *supra* note 8, para. 36.

Community".[52] Indeed, as Advocate General Tesauro stated in the *Hermès* case, "the Community legal system seeks to function and to represent itself to the outside world as a unified system. That is, one might say, the inherent nature of the system which, while guaranteeing the maintenance of the realities of States and of individual interests of all kinds, also seeks to achieve a unified modus operandi".[53] There is therefore a Union interest in being a unitary actor on the international scene, in order to be affirmed as a unitary, global actor.

However, mixity jeopardizes the very nature of the unity objective. That is why Member States have a duty of close cooperation, deriving from the duty of loyalty (Article 4 (3) TEU, ex-Article 10 TEC) not to jeopardize the attainment of the Union's objectives.[54]

The duty of close cooperation ensures unity of the external representation. It implies uniform application of a mixed agreement, as it results from the *Dior* case, as well as unity in the process of negotiation and conclusion of mixed agreements.[55] It follows that the duty of close cooperation implies joint commitment of the Union and the Member States, regardless of the exclusivity of the Union's competence. In other words, the international responsibility of the Union for provisions of a mixed agreement falling outside its exclusive competence derives from the fact that the duty of loyal cooperation obliges the Union and Member States to act as a unitary actor, as a single contracting party on the international level. The extent of the international commitment of the Union is linked in that way to the Union's interest, beyond international law considerations. It has been noted that from an international law point of view the duty of close cooperation serves to justify the *ultra vires* commitment; from an EU law point of view, the duty of close cooperation bears the obligation for joint commitment.

[52] ECJ, Opinion 2/91 [1993] ECR I-1061, para. 36 and ECJ, Opinion 1/94 *(WTO Agreements)* [1994] ECR I-5267, para. 108.

[53] Para. 21 of the conclusions.

[54] P. Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure', *cit.*, at 49–50; E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations', in *Common Market Law Review*, 2010, pp. 331–338. Academic contributions on the duty of loyalty include: M. Blanquet, *L'article 5 du traité C.E.E.*, Paris: L.G.D.J., 1994, pp. 169–235, 369–431; J. Heliskoski, 'Should There Be a New Article on External Relations? Opinion 1/94 Duty of Cooperation in the Light of the Constitutive Treaties', in M. Koskenniemi (Ed.), *International Law Aspects of the European Union*, *cit.*, at 279–281.

[55] ECJ, Opinion 1/08 *(GATS, Schedules of specific commitments)*, (2009) ECR I-11129, para. 136.

The Union's interest approach is more helpful in order to consider the mixed agreement's status in the EU legal order than the international law approach. Indeed, the international law approach does not explain why a mixed agreement is not at the same time an international law obligation, on the basis of Member States' commitment. The Union's interest approach shows that the requirement of unity can only be fulfilled through uniform implementation. It follows that uniform implementation is not the consequence of the extent of the international commitment, but a prerequisite that determines international commitment as well as reception in the EU legal order. A mixed agreement is thus a source of EU law because only uniformity in its implementation can ensure unity in international representation. Besides, focusing on the Union's interest allows us to overcome the question of the status of provisions falling outside the sphere of Union law because unity of representation is not linked to the question of competence.[56]

It is noteworthy that this approach is compatible with the distinction between reception and implementation. If a mixed agreement is received as an EU law obligation in the EU legal order, uniformity may be ensured even if the implementation competence for provisions falling outside the Union's exclusive competence remains within the Member States. Uniformity may be ensured through interpretation by the Court of justice and through enforcing procedures.

The requirement of uniform implementation also serves the internal interest not to jeopardize the application of EU rules. The Court referred to the Community interest in uniform implementation through enforcement proceedings when the mixed agreement covers a field falling under Community law. In the *Etang de Berre* case, the Court held that "since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments".[57] Besides, in the *Berne Convention* case, the Court established that "the Berne Convention thus creates rights and obligations in areas covered by Community law. That being so, there

[56] F. Ippolito, 'Giurisdizione comunitaria e accordi misti: dal criterio della competenza alla leale cooperazione', *cit.*, at 675–679.

[57] ECJ, Case C-239/03 *Commission v. France*, *supra* note 11, para. 29.

is a Community interest in ensuring that all Contracting Parties to the EEA Agreement adhere to that Convention".[58] Furthermore, in the context of the preliminary reference procedure, the Court also referred to the Community interest in a uniform interpretation: "where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply".[59] In the *Merck* case, the Court held that "if it should be found that there are Community rules in the sphere in question, Community law will apply, which will mean that it is necessary, as far as may be possible, to supply an interpretation in keeping with the TRIPs Agreement".[60] The Court concluded: "There is, therefore, some Community interest in considering the Court as having jurisdiction to interpret Article 33 of the TRIPs Agreement in order to ascertain, as the national court has asked it to, whether it is contrary to Community law for that provision to be given direct effect".[61]

It follows that the Union interest has both an internal and an external aspect.[62] However, the criterion of the Union's interest in preserving the common rules meets the limits of the competence criterion; the field within which EU law determines the effects of provisions of mixed agreements is broader than the area within which internal EU legislation creates exclusive competence of the Union. Instead, the interest in unity of international representation overcomes the competence limit and, at the same time, meets the demands of non-Member States for guaranties in the implementation of mixed agreements.

However, focusing on the interest in unity of international representation still leaves a doubt concerning the ground of the Court's jurisdiction, established in *Merck,* to determine allocation of implementation competences in the framework of a mixed agreement. In other words, the interest for unity legitimates uniform application through the international commitment criterion; uniform application is necessary because the Union undertook obligations deriving from

[58] ECJ, Case C-13/00 *Commission v. Ireland, supra* note 12, para. 19.
[59] ECJ, Case C-53/96 *Hermès, supra* note 7, para. 32.
[60] ECJ, Case C-431/05 *Merck Genéricos, supra* note 10, para. 35.
[61] Para. 38.
[62] R. Holdgaard, *External Relations of the European Community, cit.*, at 189–191.

a mixed agreement in its entirety and to ensure the unity of its international representation. It follows that the interest of unity focuses on the normative nature of a mixed agreement, while the jurisdiction of the Court, according to *Merck*, to determine allocation of competences implies consideration of the mixed agreement as an act of the institutions. In the *Merck* case, the Court held that the question of the sharing of competence between the Community and its Member States "calls for a uniform reply at Community level that the Court alone is capable of supplying".[63]

Indeed, we can consider a mixed agreement as a Union instrument to achieve a specific objective. According to Article 21 (2) TEU, as introduced by the Lisbon treaty, the Union "shall work for a high degree of cooperation in all fields of international relations" in order to achieve the objectives assigned to its external action, in other words the objective of affirmation as a global actor. In that sense, and because of the partial lack of competence, a mixed agreement may be seen as an instrument in order to facilitate the exercise of the Union's competence; if the Union cannot conclude an agreement exceeding the field of its exclusive competence, mixity allows such a conclusion. In short, mixity may be seen as an obligation derived from the duty of loyalty, in order to permit the Union to work for a high degree of cooperation.

It follows that a mixed agreement pursues not only the substantive objectives in function of the matters covered by its provisions, but also an independent, specific objective, that is to allow exercise of Union's competence in order to promote international cooperation. A mixed agreement therefore may be considered as a specific Union instrument, such as an association agreement that legitimated its consideration as a source of EU law, according to the *Demirel* statement.[64] As such, the mixed agreement is an indivisible whole, regardless of the competence

[63] ECJ, Case C-431/05 *Merck Genéricos, supra* note 10, para. 37. The Court has therefore exclusive jurisdiction to determine the substantive scope and content of a specific provision in a mixed agreement. See R. Holdgaard, 'Comment on *Merck*', *cit.*, at 1249.
[64] The Court held that ex-Article 238 EC (ex-Article 310 TEC, now Article 217 TFEU) must necessarily empower the Community to guarantee commitments towards non-Member countries in all fields covered by the Treaty. See ECJ, Case 12/86 *Demirel, supra* note 3, para. 9.

question.[65] This approach is also based on the parameter of the Union's interest, but it is the interest to act in the international sphere by using a specific instrument that justifies its specific status. Such an interest is served through the duty of loyalty, which can explain why a mixed agreement is not to be considered as a Member States' act. By concluding a mixed agreement, Member States comply with their duty to facilitate the exercise of the Union's competence.

Such an approach is still compatible with the distinction between reception and implementation as it focuses on the *instrumentum*, leaving aside the question of the implementation competences. However, it allows the Court of Justice to consider the mixed agreement in its entirety as an act of the Union and thus, to define the allocation of the implementation competences, to enforce its application by the Member States, and to substantively interpret its provisions.

Consequently, the parameter of the Union's interest may justify the consideration of a mixed agreement as a source of EU law, while the division of implementation competences is not affected.[66] A mixed agreement would be a source of EU law on the ground that it is an instrument in order to achieve an objective of the Union. It is noticeable that in the *Berne Convention* case the Court held that "the requirement of adherence to the Berne Convention which Article 5 of Protocol 28 to the EEA Agreement imposes on the Contracting Parties comes within the Community framework, given that it features in a mixed agreement concluded by the Community and its Member States".[67]

In conclusion, a mixed agreement is a source of EU law. If we consider a mixed agreement from a normative point of view, the following conclusions may be drawn: provisions falling under the Union's exclusive competence are to be assimilated to provisions of a purely Union agreement; provisions falling under the Union's shared competence are a source of EU law obligation for the Member States and require uniform interpretation by the Court of Justice, but their direct effect and, generally, their implementation falls under the Member States'

[65] AG Mischo considered in the ECJ, Case C-13/00 *Berne Convention* that some international obligations should be regarded as an indivisible whole. See paras 48 ff. of his Opinion.

[66] M. Cremona, 'Community Report', *cit.*, at 339; P. Koutrakos, 'Interpretation of Mixed Agreements', *cit.*, at 133.

[67] ECJ, Case C-13/00 *Commission v. Ireland, supra* note 12, para. 20.

sphere of competence; provisions falling outside the Union's competence, while being implemented by the Member States, may be considered as a source of EU obligation for the Member States and may need uniform interpretation, if the need of unity of international representation of the Union is established. Furthermore, we can consider a mixed agreement from an instrumental point of view as a Union instrument serving the interest of international action. In that case, the Court deals with an act of the institutions and that establishes its interpretative jurisdiction as well as competence to enforce its implementation by the Member States. However, the Union's interest to act on the international level, despite the limits of its exclusive competence, does not lead to preemption. A mixed agreement is assimilated to an act of the institutions to the extent that it is necessary in order to ensure uniformity.