A Typology of EU Mixed Agreements Revisited

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PART I

Mixed Agreements from an EU Law Perspective

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I. Introduction

Mixed agreements have been aptly described as one of the 'defining characteristics'[1] of the European Union's constitutional structure and a 'hallmark'[2] of its external relations. They include among their contracting parties not only the Union but also all or some of the Member States and fall partly within the external competence of the Union and partly within that of the Member States.[3]

Mixity has always been topical. However, it became particularly contentious after the entry into force of the Lisbon Treaty, including before the Court of Justice. The Court's relevant case law has reduced the material fields *not* covered by the Union's exclusive external competence and, by inference, the scope for mixity.[4] Yet, the scope for mixity has certainly not disappeared. It is safe to conclude that mixity will remain of great practical significance for the EU's treaty-making, especially in view of the broad political discretion of the Council to resort to mixed agreements in areas of shared competence.[5]

Treaty-making practice shows that ideas of different types of mixed agreements have evolved over time, with several authors aiming at identifying a typology of mixed agreements.[6] In the light of the recent case law as well as developments in the actual

[1] C Hillion and and P Koutrakos, 'Introduction' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited* (Oxford, Hart Publishing, 2010).

[2] P Eeckhout, *EU External Relations Law,* 2nd edn (Oxford, OUP, 2011) 212.

[3] J Heliskoski, *Mixed Agreements as a Technique for Organizing the External Relations of the European Community and its Member States* (The Hague, Kluwer Law International, 2001) 7.

[4] Case C-414/11, *Daiichi Sankyo*, EU:C:2013:520; Case C-137/12, *Commission v Council*, EU:C:2013:675; Opinion 3/15, *Marrakesh Treaty*, EU:C:2017:114; Opinion 2/15, *Free Trade Agreement between the EU and the Republic of Singapore*, EU:C:2017:376. For a recent analysis on the impact of the Court's case law on the scope of mixity, see J Heliskoski, 'Shaping the Future of Mixity' in M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon. The Law and Practice of Facultative Mixity* (Leiden, Brill/Nijhoff, 2020) 396, 399–408, 423–24.

[5] Case C-600/14, *Germany v Council*, EU:C:2017:935. See further M Chamon and I Govaere (n 4). See also C Kaddous, 'Les accords mixtes' in N Aloupi, C Flaesch-Mougin, C Kaddous and C Rapoport, *Les accords internationaux de l'Union européenne* 3rd edn (Brussels, Commentaire J. Mégret, 2019) 301, 306–10.

[6] See HG Schermers, 'A Typology of Mixed Agreements' in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Deventer, Kluwer, 1983) 23; M Dolmans, *Problems of Mixed Agreements* (The Hague, TMC Asser, 1985) 39–42;

practice, time now seems ripe for revisiting the classification of mixed agreements. The typology presented in this chapter aims to provide a conceptual and analytical framework for understanding the existing practice of the institutions, including the Court of Justice, with regard to mixed agreements. Certainly, treaty-making practice reflects the changes in the legal framework and in the political considerations concerning mixity, and should therefore be considered on its own merits.[7] A typology merely seeks to classify the vast and diverging practice of mixed agreements into more general groups or categories with a view to shedding light on the different facets of the phenomenon of mixity. It does not provide a detailed legal analysis of the mixed procedure or the problems associated with mixity. In our view, a typology of mixed agreements may nonetheless present an insightful overview or be a useful starting point for further analysis, especially as it is sometimes assumed that all mixed agreements are concluded for the same reasons and present the same challenges.[8] Specific problems of mixity are further discussed in the remaining chapters of this volume.

The present chapter is divided into two parts, based on two main criteria for a typology of mixed agreements: first, the distribution of competences and, secondly, the number of parties to an agreement. After a brief explanation on the rules and principles concerning the allocation of competence between the Union and the Member States, the first part explains the conceptual distinction between mandatory, facultative, and false mixed agreements. The second part of this chapter categorises mixed agreements based on the criterion of the number of parties – both on the side of the Union and on the side of the treaty partner(s) – and, accordingly, differentiates between complete and incomplete, as well as bilateral and multilateral mixed agreements. The conclusion illustrates our view of the purpose, limitations, and use of a typology of mixed agreements.

II. Distribution of Competence as a Criterion for a Typology

A. The Rules on the Distribution of Competence between the Union and the Member States

The legal justification or explanation for mixity boils down to the principle of conferral, defined in Article 5(2) TEU. Under that principle, the Union shall act only within

A Rosas, 'Mixed Union – Mixed Agreements' in M Koskenniemi (ed), *International Law Aspects of the European Union* (The Hague, Kluwer, 1998) 125, 128–33; A Rosas, 'European Union and Mixed Agreements' in A Dashwood and C Hillion (eds), *The General Law of E.C. External Relations* (London, Sweet & Maxwell, 2000) 200, 203–7; M Maresceau, 'A Typology of Bilateral Mixed Agreements' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited* (Oxford, Hart Publishing, 2010) 11; E Neframi, *Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux* (Brussels, Bruylant, 2007) 16–20; and AJ Kumin and P Bittner, 'Die "gemischten" Abkommen zwischen der Europäischen Union und ihren Mitgliedstaaten einerseits und dritten Völkerrechtssubjekten andererseits' in W Oberwexer (ed), *Die Europäische Union im Völkerrecht*, Zeitschrift Europarecht-Beiheft 2/2012 (Baden-Baden, Nomos, 2012) 75, 77–79.

[7] See Eeckhout (n 2) 214.

[8] See also A Rosas, 'Mixity Past, Present and Future: Some Observations' in Chamon and Govaere (n 4) 8, 12.

the limits of the competence conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. When the conclusion of an international agreement or convention falls in part within the competence of the Union and in part within that of the Member States, there is, in principle, either an obligation or a possibility to conclude that agreement or convention as a mixed agreement.

The more precise nature of a mixed agreement depends however on the way in which the competence to conclude international agreements is divided between the Union and the Member States in respect of a given agreement. That in turn depends on the general provisions of the Treaties governing the scope and nature of the Union's competence[9] as well as the power-conferring provisions (legal bases) authorising, either expressly or by implication, the Union to conclude international agreements in the various areas of its competence. While the concrete attribution of competence between the Union and the Member States under a given mixed agreement depends on the characteristics of that particular agreement, the provisions of the Treaties governing the division of competence between the Union and the Member States also enable us to classify mixed agreements for the purpose of establishing a typology of mixed agreements.[10] The purpose of the present section is to present such a typology based on the criterion concerning the distribution of competence.

Before presentation of the typology, there will be a brief look at the rules of the TFEU governing the scope and nature of the Union's external competence. The *scope* of that competence in respect of a given subject matter or area is determined by the relevant legal bases,[11] read in conjunction with Article 216(1) TFEU,[12] while the *nature* of that competence is determined by Title I of Part One TFEU governing the categories or areas of Union competence. Insofar as the nature of the Union's competence is concerned, there is a fundamental distinction between *exclusive* and *non-exclusive* Union competence.[13] Where the Union has an exclusive competence,[14] only it may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts (Art 2(1) TFEU). In areas of non-exclusive Union competence, however, the

[9] See Title I TFEU and Art 216 TFEU.

[10] In the literature, the distribution of competence has been the central criterion for establishing typologies of mixed agreements. See, eg Schermers, (n 6) 23; Dolmans (n 6) 39–42; Rosas, 'Mixed Union – Mixed Agreements' (n 6) 128–33 and Rosas, 'European Union and Mixed Agreements' (n 6) 203–7 and; insofar as concerns bilateral mixed agreements, Maresceau (n 6) 14 et seq.

[11] See Art 2(6) TFEU.

[12] Under Art 216(1) TFEU, '[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.'

[13] See Case C-600/14, *Germany v Council*, EU:C:2017:935, para 46. On rationale of that distinction see esp. M Cremona, 'EU External Relations: Unity and Conferral of Powers' in L Azoulai (ed) *The Question of Competence in the European Union* (Cambridge, CUP, 2014) 33. On the outcome of the application of the principle of conferral more generally see I Govaere, 'To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' in M Cremona (ed) *Structural Principles in EU External Relations Law* (Oxford, Hart Publishing, 2018) 71.

[14] See Art 3 TFEU.

existence of that competence does not a priori preclude the Member States from exercising their competence. The notion of non-exclusive competence – which is not included in the Treaties – comprises the following categories of competence, in each of which the implications of the exercise of the Union's competence are different. In areas of shared competence,[15] Member States may exercise their competence to the extent that the Union has not exercised its competence (Art 2(2) TFEU).[16] In the areas where the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States,[17] the exercise of Union competence does not supersede the competence of the Member States (Art 2(5), first subpara, TFEU). The same is probably also true for the Union's competence to coordinate the economic and employment policies of the Member States (Art 2(3) TFEU),[18] and to define and implement a common foreign and security policy (Art 2(4) TFEU), even though the Treaty is silent on the implications of the exercise of the Union's competence in those areas. While the exercise of Union competence in the areas of shared competence may turn that competence into an exclusive one through the operation of the AETR principle[19] now codified in Article 3(2) TFEU[20] or, in any event, preclude the exercise of a corresponding Member State competence under Article 2(2) TFEU, the breadth of the above categories of non-exclusive competence, extending to the great majority of the policy areas of the Union (Arts 4 to 6 TFEU), shows that, in the attribution of competence upon the Union, non-exclusive competence is the rule and exclusive Union competence very much an exception. This aspect concerning the distribution of competence between the Union and its Member States provides the principal explanation for the wide-spread practice of concluding mixed agreements. Finally, insofar as *no* Union competence exists, there is, by definition, an exclusive competence of the Member States, in either a 'horizontal' or 'vertical' sense. This distinction will be explained in detail further on.

Drawing on the above rules and principles governing the distribution of competence, one could present the general structure of a mixed agreement depicted in Figure 1.1, which could then be used as a 'matrix' for drawing up of a general typology (or typologies) of mixed agreements based on the criterion of distribution of competence:[21]

[15] See Art 4 TFEU.

[16] In the areas of research, technological development and space as well as those of development cooperation and humanitarian aid the exercise of Union competence shall not result in Member States being prevented from exercising theirs (Arts 4(3) and 4(4) TFEU, respectively).

[17] See Art 6 TFEU.

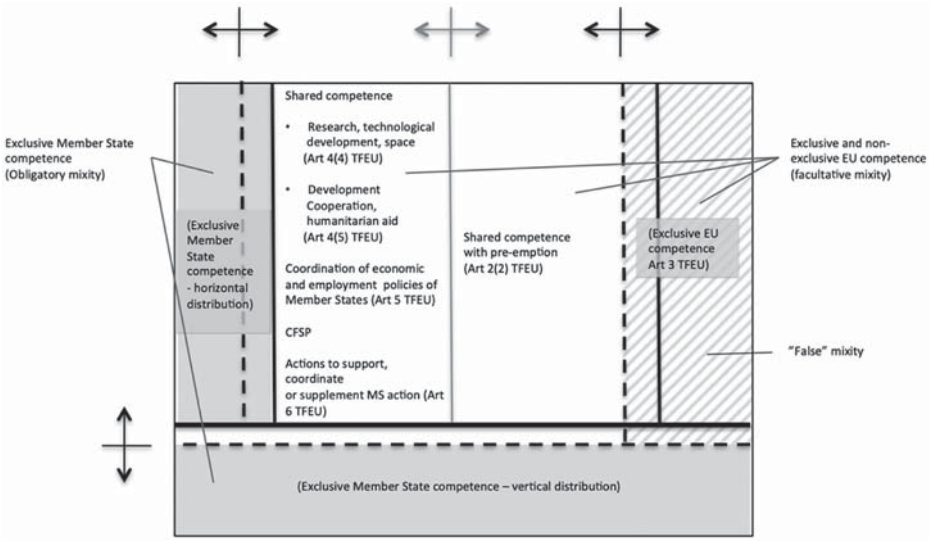
[18] See Art 5 TFEU.

[19] Case 22/70, *Commission v Council*, EU:C:1971:32, especially paras 17 and 22.

[20] Under Art 3(2) TFEU, '[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'

[21] This 'general structure of a mixed agreement' was originally presented in J Heliskoski, 'Mixed Agreements: the EU Law Fundamentals' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law, Volume 1: The European Union Legal Order* (Oxford, Oxford University Press, 2018) 1174, 1183.

Figure 1.1 Structure of a mixed agreement



Such a typology (or typologies) would however easily risk becoming all too abstract and, as such, potentially incapable of describing the actual practice of mixity. Therefore, to us, a preferable option would be to use the above 'matrix' as a mere conceptual tool for understanding and assessing certain categories of mixed agreements that have originated from, and evolved in, the actual practice of the institutions, including the case law of the Court of Justice, and that now have a firm footing in the doctrine. In that regard, the most important distinction concerns the distinction between, on one hand, 'mandatory' mixed agreements (section II.B) and 'facultative' mixed agreements (section II.C). Reference is sometimes also made to so-called 'false' mixed agreements, that is, mixed agreements that could not legally have been concluded through the mixed procedure (section II.D). For the reasons of space, the present typology is limited to these principal categories and their variants.

B. Mandatory Mixed Agreements

The notion of mandatory mixed agreements refers to agreements for the conclusion of which there is *a legal obligation* to use the mixed procedure in light of the fact that the Union has no competence to act alone without the participation of its Member States. Otherwise, the principle of conferral would be infringed, the Union would act ultra vires under EU law, and would risk acting ultra vires under international law. The notion does not however refer to those cases where an international agreement itself requires its ratification by the Member States alongside with the Union,[22] or, for

[22] For such a 'subordination clause' see Art 52(3) of Customs Convention on the international transport of goods under cover of TIR carnets [1978] OJ L252/2. See further below, section III.D.

instance, where the participation of (some or all of) the Member States is required solely by the fact that the agreement requires them to amend (or possibly denounce) a prior international agreement to which they are parties.[23] The rationale of the notion of mandatory mixed agreement therefore has only to do with the idea of the Union as an entity based on a specific and limited authorisation – now embodied in the Treaty as the principle of conferral. If, along with the parts of the agreement falling within the exclusive competence of the Member States, there are also parts falling within the exclusive competence of the Union, the conclusion of the agreement as a mixed agreement becomes mandatory.[24]

Mixed agreements that are legally mandatory in the above sense are relatively rare in practice. Indeed, with the exception of the early Ruling 1/78, based on the Treaty establishing the European Atomic Energy Community,[25] there have been no cases where the Court of Justice would have regarded the use of a mixed agreement as legal *necessary* in the light of the Union not possessing the competence required for the conclusion of an agreement by the Union in its own right without its Member States.[26] In all other cases, the Court has only had to address the question as to whether a given agreement falls within the Union's exclusive competence and, as a corollary, whether a mixed agreement *may* be concluded or not – as opposed to whether there is a legal requirement to do so.

Nonetheless, the notion of mandatory mixed agreement is by no means a solely theoretical construction.[27] Perhaps the most obvious example of a multilateral convention for the conclusion of which by the Union alone there would be no authorisation in either the TEU or the TFEU is the United Nations Convention on the Law of the Sea (UNCLOS). Besides questions falling within the Union's exclusive competence, that agreement covers a whole range of matters falling within the corpus of international

[23] As the Court held in Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63, paras 6–7. The same would apply to mixed agreements the territorial scope of application of which exceeds the territorial scope of application of the Treaties, which then justifies the participation of Member States in the agreement. See further below, section III.B. Corresponding to what we suggest in that section, one might classify instances where the rationale of the notion of mandatory mixed agreement does not follow from the criterion of distribution of competence but from criteria external to EU law (international law, territorial scope of application etc.) as 'special instances of mandatory mixity'.

[24] Rosas, 'European Union and Mixed Agreements' (n 6) 204–6, speaks of 'coexistent competences' in this respect. If, however, no part of an agreement falls within the Union's exclusive competence, the agreement could be concluded by the Member States without the participation of the Union.

[25] Ruling 1/78, *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, EU:C:1978:202, para 36.

[26] It is true that, in Opinion 2/15, *Free Trade Agreement between the EU and the Republic of Singapore*, EU:C:2017:376, the Court held that 'Section A of Chapter 9 of the envisaged agreement [relating to investment protection] cannot be approved by the European Union alone' (para 244). However, by that conclusion, the Court had merely acknowledged the fact that there had been no possibility of obtaining the required majority within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in the area of non-direct foreign investment. See Case C-600/14, *Germany v Council*, EU:C:2017:935, para 68. See also Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:1996:140, where the Court concluded that the Union had no competence to accede to the ECHR *even as a mixed agreement*.

[27] Prior to the entry into force of the Treaty of Lisbon, Art 133(6) EC even contained a specific provision rendering mandatory the conclusion of agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services as mixed agreements. See Opinion 1/08, *Agreements modifying the Schedules of Specific Commitments under the General Agreement on Trade in Services (GATS)*, EU:C:2009:739, paras 134–5.

maritime law, as well as questions such as the exercise of jurisdiction over vessels, flagging and registration of vessels, and the enforcement of penal and administrative sanctions, conceived of as falling within the exclusive competence of the Member States.[28] Another example would be the Convention relating to Temporary Admission, certain provisions of which have been considered to fall outside the competence of the Union and, presumably, within the exclusive competence of the Member States in the field of taxation.[29] The UN Convention on the Rights of Persons with Disabilities (CRPD) may also be classified as a mandatory mixed agreement.[30] It governs rights that are exclusively guaranteed by national law[31] and rights that, albeit recognised in the EU Charter of Fundamental Rights, can only be guaranteed in accordance with the Member States' national laws governing the exercise of these rights.[32] While no exhaustive account of mandatory multilateral mixed agreements may be provided in the present context, it may be noted that a request by the European Parliament for an opinion under Article 218(11) TFEU concerning the Istanbul Convention on preventing and combating violence against women and domestic violence[33] is currently pending before the Court of Justice.[34] Should the Court find that the Convention contains provisions falling within the exclusive competence of the Member States and other provisions falling within the (exclusive) competence of the Union, that agreement would also become a mandatory mixed agreement.

Mixed agreements of a bilateral nature might contain provisions in respect of which no Union competence exists: reference could be made, for instance, to provisions regulating civil or administrative procedures of the Member States[35] or certain specific

[28] See the declaration concerning the competence of the European Community with regard to matters governed by the Convention ([1998] OJ L179/129).

[29] See the notification ([1993] OJ L130/75) made by the European Community pursuant to Art 24(6) of the Convention relating to Temporary Admission of 26 June 1990 providing that ' the Community … is competent for all the matters governed by the Convention, except: determination of the *duties, taxes, fees or other charges* referred to in Article 1 (b) of the Convention other than Community customs duties, charges having equivalent effect to Community customs duties, agricultural levies or other import charges provided for under the Community's agricultural policy, *notifications pursuant to Article 30 [Territorial extension]*' (emphasis added).

[30] See the declaration concerning the competence of the European Community with regard to matters governed by the Convention, [2010] OJ L23/55, and further M Chamon, 'Negotiation, ratification and implementation of the CRPD and its status in the EU legal order' in D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Cheltenham, Edward Elgar Publishing, 2020) 52, 55.

[31] Eg the right to acquire and change a nationality (Art 18(a) CRPD). The Court recognised that 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'. See eg Case C-135/08, *Rottmann*, EU:C:2010:104, para 39. The fact that due regard must be given to EU law in the exercise of a national competence does not alter the nature of that competence as such.

[32] Eg the right to marriage (Art 23(1)(a) CRPD). Further compare Art 9 of the EU Charter of Fundamental Rights.

[33] For the text, see www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210.

[34] Opinion 1/19 (pending). The second question submitted to the Court is as follows: 'Is the conclusion by the European Union of the Istanbul Convention, in accordance with Article 218(6) TFEU, compatible with the Treaties in the absence of mutual agreement between all the Member States concerning their consent to be bound by that convention?'. That question is further discussed in section III.B, in the light of Advocate General Hogan's view (opinion of Hogan AG in Opinion 1/19, *Istanbul Convention*, ECLI:EU:C:2021:198). On mixity and the Istanbul Convention see also the chapter by Viktorija Soneca and Panos Koutrakos in this volume.

[35] See, eg, Arts 291 and 292 of the Trade Agreement between the EU and its Member States, of the one part, and Colombia and Peru, of the other part, [2012] OJ L354/3.

commitments that only the Member States may carry out.[36] Yet, the Court of Justice does not appear to consider that these provisions give rise to an independent external competence of the Member States.[37] As the parts of a bilateral mixed agreement that may be conceived as falling beyond scope of the Union's competence are usually excluded from the scope of provisional application of the agreement, the practice concerning provisional application of the EU's free trade, cooperation and association agreements[38] may also provide a useful illustration of the potential mandatory nature of certain mixed agreements. A more thorough analysis of those provisions would obviously exceed the limits of the present contribution.

It has been suggested that in respect of mandatory mixed agreements a distinction could be made between, on the one hand, a 'horizontal' and, on the other hand, a 'vertical' distribution of competence between the Union and the Member States.[39] The former would refer to the various substantive areas of cooperation (eg, in the case of UNCLOS, fisheries protection falling within the (exclusive) competence of the EU and questions concerning navigation and passage within that of the Member States) while the latter would highlight the exclusive competence of the Member States in the implementation and enforcement of those substantive provisions. It seems however that the Court of Justice is inclined to treat such vertical elements of an international agreement as subsidiary or ancillary provisions helping to achieve the primary objective of the agreement.[40] On the other hand, substantive provisions of an agreement falling within the exclusive competence of the Member States in the horizontal sense (eg, on navigation and passage, or taxation) – however marginal – should probably not be regarded as subsidiary or ancillary so as to remove the need for a mandatory mixed agreement. Otherwise, there would be a risk of the Union not only disregarding the principle of conferral but also acting ultra vires under EU law and, possibly, under international law.[41]

[36] See eg Art 17(3) of Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, [2012] OJ L346/3, providing that '[t]he Parties agree to cooperate to promote universal adherence to the Rome Statute [of the International Criminal Court] by: continuing to take steps to *implement the Rome Statute and to ratify and implement related instruments* (such as the Agreement on Privileges and Immunities of the International Criminal Court)' (emphasis added).

[37] In Opinion 2/15, the Council and some Member States submitted that individual provisions of the EU-Singapore Free Trade Agreement (EUSFTA) fall within the Member States' exclusive competence (eg provisions referring to administrative proceedings (Art 13.3 (EUSFTA)~~)~~, moral rights (Art 10.4 EUSFTA), certification schemes of timber and timber products (Art 12.7 EUSFTA) or diplomatic protection (now Art 3.23 EU-Singapore Investment Protection Agreement)). The Court however concluded that not a single provision of the EUSFTA falls within the Member States' exclusive competence. The Court stressed that the implementation of certain aspects of the EUSFTA by Member States has a direct impact on trade (see eg with regard to timber and timer products, para 160) and that the mere reference to international commitments of the Member States is not sufficient to determine the nature of the EU's external competence to conclude the EUSFTA (see, eg with regard to moral rights, para 129).

[38] See J Heliskoski, 'Provisional Application of EU Free Trade Agreements' in G Van der Loo and M Hahn (eds), *Law and Practice of the Common Commercial Policy: The first 10 years after the Treaty of Lisbon* ~~(~~(Boston, Brill, 2020) 586~~)~~. On the law and practice of provisional application see generally A Quest Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012).

[39] Rosas, 'European Union and Mixed Agreements' (n 6) 204–5, and Figure 1.1, above.

[40] See, eg, Case C-25/94, *Commission v Council*, EU:C:1996:114, para 47 (provisions concerning the imposition of possibly penal sanctions) and Case C-137/12, *Commission v Council*, EU:C:2013:675, para 70 (provisions concerning seizure and confiscation measures). Moreover, Art 2(1) TFEU foresees that the Member States may implement acts of the Union even in areas of the Union's exclusive competence.

[41] See M Chamon, 'Constitutional Limits to the Political Choice for Mixity' in E Neframi and M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Baden-Baden, Nomos, 2018) 137, 142–47.

As regards the horizontal distribution of competence for those parts of a mandatory mixed agreement in respect of which a competence of the Union exists, the more precise nature of the agreement depends on the nature of Union competence (or competences) that is (are) exercised in a given case. Usually, there is a combination of exclusive and non-exclusive competence at work, as in the case of UNCLOS for instance (eg, conservation and management of sea fishing resources and maritime transport, respectively). As regards the areas of non-exclusive Union competence, a distinction should be made between, on the one hand, those areas in which the exercise of Union competence may either supersede the competence of the Member States pursuant to Article 2(2) TFEU or preclude the Member States from exercising their competence through the AETR effect (Art 3(2) TFEU) and, on the other hand, those areas in which no such pre-emption is possible – that is, areas where the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States (Art 2(5), first subpara, TFEU); research, technological development and space (Art 4(3) TFEU); development cooperation and humanitarian aid (Art 4(4) TFEU; and, possibly, coordination of the economic and employment policies of the Member States (Art 2(3) TFEU) as well as the CFSP (Art 2(4) TFEU). With the former category, one may speak of a 'concurrent' non-exclusive Union competence and, with the latter, of a 'parallel' non-exclusive Union competence.[42] Obviously, there may be mixed agreements with elements of both concurrent and parallel non-exclusive Union competence, alongside with elements of both exclusive Union competence and exclusive Member State competence. Such a hybrid distribution of competence is frequently present in many trade, cooperation or association agreements.

C. Facultative Mixed Agreements

Mixed agreements that are not mandatory in the sense explained above are usually described as facultative mixed agreements.[43] While in the case of a mandatory mixed agreement there is a legal obligation to have recourse to the mixed procedure, in the case of a facultative mixed agreement the use of that procedure is left to the Union's (political) choice. The latter scenario takes place where the conclusion of an international

[42] There are also sui generis cases that may be regarded as situations of a parallel competence that do not seem to be covered by any of the above Treaty provisions. One example is provided by matters where a 'self-contained' body of Union regulation is created by Union law that exist in parallel with the similar legal regulation of the Member States: see, eg, the Community trade mark created by Council Regulation (EC) No 40/94 of 20 December 1993 ([1994] OJ L11/1) that exists in parallel with the national marks. See Case C-53/96, *Hermès*, EU:C:1998:292, para 32. The Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters ([2005] OJ L 124/4) could probably also be considered to involve elements of such parallel competence. See C-240/09, *Lesoochranárske zoskupenie*, EU:C:2011:125, para 42. The same would seem to be true with international human rights conventions laying down obligations directed at the same time to both the Union and its Member States. Therefore, should the EU one day accede to the European Convention on Human Rights and Fundamental Freedoms, that convention would also be likely to fall within this category.

[43] To our knowledge, the notion of 'facultative mixity' was first employed in the writings of Allan Rosas. See A Rosas, 'Mixed Union – Mixed Agreements' (n 6) 131–32 and A Rosas, 'European Union and Mixed Agreements' (n 6) 205–6. See also Chamon and Govaere (n 4).

agreement in its entirety would fall within the Union's competence but where that competence would not be exclusive for the whole of the agreement. In such cases, there would exist two possible ways to proceed: first, to conclude a 'pure' Union agreement between the Union and the other contracting party (or parties) or, secondly, to conclude a mixed agreement. The latter course of action would then result in a facultative mixed agreement. As a matter of fact, an overwhelming majority of mixed agreements fall within this category.

It has sometimes been argued that in areas falling within the shared competence of the Union and its Member States, the Union *cannot* exercise its competence externally if it has not first exercised its competence internally by adopting common rules in the sense of Article 3(2) TFEU.[44] It has also been suggested that, in the context of an international agreement falling in part within the Union's exclusive competence and in part within its non-exclusive competence, with no aspect of the agreement falling outside the scope of the Union's competence, the agreement should be concluded as a Union agreement instead of a mixed agreement. In other words, the Union's institutions, the latter argument says, would not be entitled to refrain from exercising the Union's non-exclusive competence where the Union would in any event exercise its exclusive competence.[45] However, it is clear that both of the above arguments are misconceived in the light of the case law of the Court.

The most recent and perhaps most unequivocal rejection of both the above arguments is contained in *Germany v Council (COTIF I)*.[46] In reaching that conclusion the Court followed a consistent line of opinions of Advocates General concerning the exercise of the Union's external competence, all of which had argued, albeit with certain nuances, that, in matters falling within the Union's non-exclusive competence, there is essentially *a political choice*, ultimately to be made by the Council, as to whether to exercise Union competence for the purpose of concluding an agreement as a Union agreement or, alternatively, to refrain from doing so, and thereby enabling the Member States to participate in the conclusion of a mixed agreement.[47] It is submitted that that finding is also entirely consistent with the Court's case law predating the entry into force of the Treaty of Lisbon. The Court had acknowledged that irrespective of whether Union competence for the conclusion of a given agreement existed, the Member States would nevertheless be entitled to participate in the conclusion thereof, if the Union's competence was not exclusive in respect of the agreement in its entirety.[48]

[44] See Case C-600/14, *Germany v Council*, EU:C:2017:935, paras 31–39.

[45] See P Eeckhout, *EU External Relations Law*, (Oxford, Oxford University Press, 2012) 265 and R Schütze, 'Federalism and Foreign Affairs: Mixity as a (Inter)national Phenomenon' in Hillion and Koutrakos (n 2) 83. See also Opinion of Kokott AG in Case C-13/07, *Commission v Council*, EU:C:2009:190, paras 83–84.

[46] See Case C-600/14, *Germany v Council*, EU:C:2017:935, para 68. See also opinion of Kokott AG in Joined Cases C-626/15 and C-659/16, *Commission v Council*, EU:C:2018:362, fn 71. According to her, it can be inferred from the COTIF judgment that 'the Union can decide in each individual case not to exercise its inherent powers in an area of shared competences fully, but only partially, thereby allowing scope for autonomous action by the Member States.'

[47] See the opinions of Sharpston AG in Opinion 2/15, EU:C:2016:992, paras 73–75; Wahl AG in Opinion 3/15, EU:C:2016:657, paras 119–21; and Szpunar AG in Case C-600/14, *Germany v Council*, EU:C:2017:935, para 84.

[48] See especially Opinion 2/91, *ILO Convention No 170*, EU:C:1993:106; Opinion 1/94, *WTO Agreement*, EU:C:1994:384; Opinion 2/92, *Third Revised Decision of the OECD on national treatment*, EU:C:1995:83; Opinion 2/00, *Cartagena Protocol on Biosafety*, EU:C:2001:664; and Case C-94/03, *Commission v Council*, EU:C:2006:2.

Of course, there are circumstances that may limit the discretion of the institutions in this respect, such as the principle of absorption of legal bases, the AETR principle as interpreted in the case law of the Court,[49] the principle of the duty of loyal cooperation, as well as international law.[50] Those circumstances do not however put into question the basic principle emerging from the case law.

Within the above basic definition of a facultative mixed agreement, there are, as in the case of mandatory mixed agreements, various different ways in which competence may be divided between the Union and its Member States. However, the elements of exclusive Member State competence (in both vertical and horizontal senses) are, by definition, lacking. This means that, over time, facultative mixed agreements with elements of (solely) concurrent non-exclusive Union competence might become covered, in their entirety, by an exclusive Union competence. In such a scenario, the participation of the Member States would no longer be legally justified. If, however, there were also elements of parallel non-exclusive competence, the Union would never be capable of entirely 'occupying the field' of the agreement. In the latter case, the agreement would always remain a genuinely facultative mixed agreement. Of course, as in the case mandatory mixed agreements, a facultative mixed agreement might involve elements of both concurrent and parallel non-exclusive EU competence.

D. False Mixed Agreements

In his early (1983) typology of mixed agreements,[51] *Schermers* introduced the notion of the 'false' mixed agreement to denote mixed agreements in respect of which the mixed procedure ought not to have been used at all given that they are covered entirely by the Union's exclusive competence.[52]

See also Case C-459/03, *Commission v Ireland*, EU:C:2006:345, para 96, where the Court refers to the need to establish '… whether and to what extent the Community, by becoming a party to the [United Nations Convention on the Law of the Sea], *elected to exercise* its external competence in matters of environmental protection.' (emphasis added).

[49] See esp Opinion 2/91, *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work*, EU:C:1993:106, para 25.

[50] See further, J Heliskoski, 'The Exercise of Non-Exclusive Competence of the EU and the Conclusion of International Agreements' in K Lenaerts et al (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Oxford, Hart Publishing, 2019) 293, 299–306. Insofar as concerns the impact of international law in this respect, see Joined Cases C-626/15 and C-659/16, *Commission v Council*, EU:C:2018:925, paras 127–33.

[51] Schermers (n 6) 27–28.

[52] See also PJ Kuijper et al (eds), *The Law of EU External Relations* (Oxford, OUP, 2013) 105, referring to agreements concluded as mixed agreements due to 'grounds that are manifestly untenable'. The notion of the false mixed agreement should however be distinguished from mixed agreements concluded in the mixed form as a result of what Rosas ('Mixed Union: – Mixed Agreements' (n 6) 147) has described as 'Member State manipulation with a view of making them mixed'. If, for instance, the Council (and the Member States) wish to include provisions falling beyond the Union's exclusive competence to an agreement to enable its conclusion as a mixed agreement, we should not be talking about a false mixed agreement. At the same time, one should remember that not any element, however marginal, falling outside the Union's exclusive competence can justify the conclusion of an agreement as mixed agreement. Such elements may well be considered as subsidiary or ancillary provisions that are 'absorbed' by the principal objective and content of the agreement.

In our submission, this is a rare as well as a rather contentious category. In practice, should an agreement have been concluded falsely as a mixed agreement, it only rarely retains its status as mixed agreement on a more permanent basis. The Commission would namely be likely to take the Council (or the Member States) to the Court of Justice, should Member States proceed to sign and ratify mixed agreements which, in the Commission's opinion, fall within the Union's exclusive competence. The European Convention on the legal protection of services based on, or consisting of, conditional access – which was first conceived by Member States a mixed agreement but which later became a pure Union agreement following a judgment of the Court – is one example of such an agreement.[53]

In the absence of a ruling by the Court, however, it is nearly always contentious as to whether a given agreement could legitimately have been concluded, or may remain in force, as a mixed agreement. Some might ask, for instance, whether the Member States are still entitled to remain contracting parties to the Agreement establishing the World Trade Organization, given the transfer of the Union's (entire) Common Commercial Policy to an exclusive competence by virtue of the Treaty of Lisbon (Art 207 TFEU) and the Court's case law laid down in *Daiichi Sankyo*[54] and in Opinion 2/15,[55] or whether that agreement has become a false mixed agreement. Therefore, until the Court has settled the issue in respect of a given agreement, the notion of false mixed agreement rather seems to be employed as a legal and (mainly) political device against the use of the mixed procedure on this or that occasion. Therefore, and given the fact that genuinely false mixed agreements only rarely tend to remain in place on a more permanent basis, one may ask whether the notion really is that useful in any typology of mixed agreements.

III. The Number of Parties as a Criterion for a Typology

Besides the division of competence, the type of mixity is determined by the number of parties to the agreement. Mixity is 'complete' when alongside the Union all of the Member States ratify the agreement in their own right (section 3.1). By inference, mixity is 'incomplete' when the agreement is concluded by one or more but not all of the Member States alongside the Union (section 3.2). Irrespective of whether mixity is 'complete' or 'incomplete', the number of participating third states may vary. Bilateral mixed agreements are concluded by the Union, the Member States, and a single third party or a single group of third parties (section 3.3.). Multilateral mixed agreements, by contrast, include the Union and the Member States as well as several third parties (section 3.4).

[53] See Case C-137/12, *Commission v Council*, EU:C:2013:675.

[54] Case C-414/11, *Daiichi Sankyo*, EU:C:2013:520. See further I Van Damme, 'Case C-411/11 Daiichi: The Impact of the Lisbon Treaty on the Competence of the European Union over the TRIPS Agreement' (2015) 4 *Cambridge International Law Journal* 73.

[55] Opinion 2/15, *Free Trade Agreement between the EU and the Republic of Singapore*, EU:C:2017:376.

A. Complete Mixed Agreements

Mixity is usually 'complete'.[56] The recourse to mixity is generally based on a collective decision by the Member States in the Council to exercise their retained treaty-making power for either legal or political reasons, implying that all Member States become contracting parties to the agreement in their own right. Incomplete mixity is rare in practice. As will be further explained below, this is especially the case for bilateral mixed agreements because they invariably require ratification by the Union and all the Member States as a criterion for entry into force. In practice, bilateral mixed agreements can therefore only become 'incomplete' in specific circumstances after they have entered into force.

Complete mixity ensures that the agreement applies to the territory of the Union in full. The Union and the Member States may commence treaty negotiations without pre-determining the more precise allocation of competences, so as to avoid competence battles within the Union.[57] In contrast to situations where mixity is 'incomplete', it is not necessary to consider in advance whether certain parts of the agreement do not apply to non-ratifying Member States. The attribution of responsibility can be determined at a later stage of the treaty-making process, if necessary.[58]

In the multilateral context, the Union and the Member States have to coordinate the deposition of their respective ratification instruments in order to ensure that a complete mixed agreement enters into force on the same day. It is a common practice for the Union to wait for the Member States' individual deposit of ratification instruments before depositing its own instrument. To that end, the Council, in its decision to conclude a mixed agreement, has at times called upon Member States to deposit their ratification instruments simultaneously with the Union and within a certain time frame.[59] Yet, ratification delays in one or more Member States can cause the Union to go ahead and submit its ratification instrument alone, which may temporarily make mixity 'incomplete'.[60]

B. Incomplete Mixed Agreements

If only some, but not all, of the Member States become parties to a mixed agreement, the question arises to what extent the agreement also applies to the non-ratifying Member States. Pursuant to Article 216(2) TFEU, international agreements concluded by the Union are binding on the Member States. The extent to which an incomplete mixed

[56] To our knowledge, the terms 'complete' and 'incomplete' mixity were introduced by Schermers (n 6) 26.

[57] See esp Heliskoski (n 3).

[58] On the international responsibility of the EU and the Member States in the context of mixed agreements see further M Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' (2006) 22 *EUI Working Paper Law*, 15 et seq; and the chapter by Andres Delgado Casteleiro and Cristina Contartese in this volume.

[59] See eg Art 6(1) of the Council Decision (EU) 2015/1339 of 13 July 2015 ([2015] OJ L 207/1) or Art 3 of the Council Decision (EEC) 88/540 of 14 October 1988 ([1988] OJ L 297/8).

[60] See eg the case of the Paris Convention, discussed further below.

agreement applies to the territory of non-ratifying Member States by virtue of EU law depends on the extent to which the Union exercises treaty-making competence and assumes responsibility for that agreement. Especially for third states, the scope of application and responsibility for incomplete mixed agreements may be difficult to grasp.[61] A detailed declaration of competence could indicate the scope of Union's and the Member States' respective treaty-making power and responsibility.[62] Yet, as mentioned above, mixity is often purposefully chosen by the Union and the Member States to avoid a concrete attribution of competence. It is therefore unsurprising that EU declarations of competence tend to 'suffer from a lack of clarity and elegance'.[63] In the absence of a detailed declaration of competence, incomplete mixity may however become problematic, as the carve-out of some provisions from the scope of legal obligations assumed by the Union may be perceived as an unlawful reservation by third parties.[64]

Despite the complexities surrounding incomplete mixity, the Court of Justice recognised in *Opinion 1/76* that the joint conclusion of an agreement by the (then) Community and only some Member States can, in specific circumstances, be 'explain[ed] and justif[ied]'.[65] In *Opinion 1/76*, 'a special problem' arose, as the Inland Waterway Transport Agreement required six Member States to amend two agreements, namely the Mannheim Convention on the Navigation of the Rhine and the Luxembourg Convention on the Canalisation of the Moselle, to which they alone were parties.[66] The (then) Community legislature solved this problem by allowing these six Member States to become contracting parties in their own right to the Inland Waterway Transport Agreement, and the Court subsequently confirmed the legality of the participation of those six Member States 'for this particular undertaking'.[67] The geographical scope of application of the Mannheim and Luxembourg Convention explains why they were only concluded by some Member States and why only these Member States participated in the Inland Waterway Transport Agreement. Although, based on the number of parties, the Inland Waterway Transport Agreement qualified as an incomplete mixed agreement, it is a special instance of incomplete mixity because the decision of some Member States *not* to participate results from the geographical area to which the Mannheim and Luxembourg Convention as well as the Inland Waterway Transport Agreement applied.

Such a special instance of incomplete mixity was more recently considered by AG Kokott in her reasoning in *AMP Antarctique*.[68] Although the AG asserted that there

[61] See also J Czuczai, 'Mixity in Practice: Some Problems and Their (Real or Possible) Solution' in Hillion and Koutrakos (n 1) 229–48, 241 et seq. For third parties' perspective of on mixity, see Heliskoski (n 3) 121 et seq; PM Olson, 'Mixity from the Outside: The Perspective of a Treaty Partner' in Hillion and Koutrakos (n 1) 331; and J Odermatt, 'Facultative Mixity in the International Legal Order – Tolerating European Exceptionalism?' in Chamon and Govaere (n 4) 291.

[62] On EU declarations of competences see esp 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) 189–214; and A Delgado Castelleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge, CUP, 2016) 110–29.

[63] Opinion of Maduro AG in Case C-459/03, *MOX Plant*, EU:C:2006:42, para 36.

[64] Rosas (n 8) 17.

[65] Opinion 1/76, *Inland Waterways*, EU:C:1977:63, para 7.

[66] Ibid, para 6.

[67] Ibid.

[68] Opinion of Kokott AG in Joined Cases C-626/15 and C-659/16, *AMP Antarctique*, EU:C:2018:362.

would not be scope for the voluntary participation of the Member States alongside the Union, she recognised that the territorial interests of individual Member States may justify incomplete mixity. As the contested decisions 'offered *all* Member States and not just *individual* Member States the possibility of participating … alongside the Union', they would however 'quite clearly go beyond what would be necessary to safeguard those territorial interests.'[69] The Court of Justice did not follow the AG's view and found that mixity was necessary for the adoption of the contested decisions as a matter of international law.[70] The Court's conclusion in *Opinion 1/76* that in certain situations the participation in EU external relations of only some, but not all, of the Member States is justifiable nevertheless remains good law. This is all the more so where incomplete mixity is an inevitable result of an agreement's geographical scope of application.

Over time, incomplete mixity arose not only as a result of the geographical scope of application of certain agreements but turned into a deliberate treaty-making technique. Incomplete mixity was used inter alia to speed up the ratification process on the side of the Union. The most prominent example is the Paris Agreement on Climate Change. The Union and all the Member States signed the Paris Agreement on 22 April 2016.[71] Pursuant to Article 21(1) Paris Agreement, it enters into force 'on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification'. At the end of September 2016, approximately one month prior to the US elections, 61 countries had ratified the agreement, including the US and seven EU Member States; but they accounted for only 48% of global emissions. In order to 'spee[d] up the entry into force of the Paris Agreement',[72] the Council decided to deviate from its common practice to wait for the completion of the remaining Member States' internal ratification processes and concluded the agreement on behalf of the Union on 5 October 2016.[73] The ratification by the Union triggered the 55 per cent ratification threshold and the Paris Agreement entered into force on 4 November 2016 – four days prior to the US election.[74] Pursuant to Article 28 of the Paris Agreement, a party may only withdraw from the Paris Agreement three years after its entry into force. The newly elected President Trump was therefore unable to initiate US withdrawal from the Paris Agreement, despite signalling his wish to do so. By October 2017, all of the Member States had ratified the Paris Agreement also in their own right.

In other situations, incomplete mixity has not been a deliberate ratification technique but a consequence of a Member State's decision *not* to continue the ratification process of, or to withdraw from, a formerly (envisaged) complete mixed agreement. For example, all Member States were originally signatory parties to the 1994 Government

[69] Ibid, para 123, emphasis in original.

[70] Joined Cases C-626/15 and C-659/16, *AMP Antarctique*, EU:C:2018:925, para 133. See further the chapter by Merijn Chamon and Marise Cremona in this volume.

[71] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

[72] Council of the European Union, press release, 'Climate change: Council speeds up process for EU ratification of Paris Agreement', 30.9.2016, 541/16.

[73] Council Decision (EU) 2016/1841 of 5 October 2016 ([2016], OJ L 282/1).

[74] United Nations, Reference: C.N.735.2016.TREATIES-XXVII.7.d, Depository Notification Paris Agreement, https://treaties.un.org/doc/Publication/CN/2016/CN.735.2016-Eng.pdf.

Procurement Agreement (GPA). In the end, however, the 1994 GPA was ratified by the (then) Community 'with regard to' its Member States. Some Member States nevertheless submitted individual ratification instruments on the same day as the (then) Community.[75] Technically, the 1994 GPA therefore qualified as an incomplete mixed agreement.[76] Another example is the Energy Charter Treaty (ECT), to which originally all the Member States and the EU were parties. In 2016, Italy however withdrew from the ECT, turning the ECT into an incomplete mixed agreement.[77]

In recent discussions, incomplete mixity has been suggested as a solution to the non-ratification of mixed agreements by individual Member States.[78] In its request for *Opinion 1/19*, the EP asked the Court of Justice to confirm the legality of that solution. The EP asked the Court of Justice inter alia if the conclusion of the Istanbul Convention by the Union is 'compatible with the Treaties in the absence of mutual agreement between all the Member States concerning their consent to be bound by that convention'.[79] The Istanbul Convention has been signed by the Union and all of the Member States.[80] Yet, some Member States, including in particular Bulgaria, whose highest court found the Istanbul Convention unconstitutional,[81] have since declared that they no longer wish to become contracting parties. Provided that the Council may decide by a QMV to conclude the agreement, incomplete mixity could provide a technique for the Union to become a party to the Istanbul Convention despite the opposition of individual Member States. The question which parts of the Convention would, in such a scenario, apply to the non-ratifying Member States would become particularly complex should the Court, as mentioned above,[82] find that the Istanbul Convention is a mandatory mixed agreement falling in part within the Union's (exclusive) competence and in in part within the exclusive competence of the Member States.[83] AG Hogan, in his opinion, held that the Council is obliged neither to await the common accord of the Member States nor to conclude a mixed agreement immediately after signing it.[84] The choice to opt for an incomplete mixed agreement is, in his view, fully at the discretion of the Council. The AG however noted that, in the case of the Istanbul Convention, incomplete mixity would raise problems under international law.[85] If the EU were to conclude

[75] WTO, *Status of WTO Legal Instruments* [2015] 124–25. See further esp R Kampf, '81. Verordnung (EG) Nr. 816/2006' in HG Krenzler, C Herrmann, and M Niestedt (eds), *EU-Außenwirtschafts- und Zollrecht*, Stand: Oktober 2019, 14. Erg.-Lfg. (Munich, C. H. Beck, 2019) para 31.

[76] The revised GPA was then concluded by the EU alone, irrespective of the individual ratification of the 1994 GPA by some Member States. See Council Decision (EU) 2014/115 of 2 December 2013 ([2014] OJ L 68/1).

[77] See www.energycharter.org/who-we-are/members-observers/countries/italy.

[78] See esp G van der Loo and RA Wessel, 'The non-ratification of mixed agreements: Legal Consequences and Solutions' (2017) 54 *CML Rev* 735.

[79] Request for Opinion 1/19 (n 34).

[80] See www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures.

[81] See further V Radosveta, 'Bulgaria's Constitutional Troubles with the Istanbul Convention' (2018) *Verfassungsblog,* https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention.

[82] See further section II.B.

[83] On the EU's treaty-making powers for, and problems with regard to, the ratification of the Istanbul Convention see esp. S Prechal, 'The European Union's Accession to the Istanbul Convention' in Lenaerts et al (n 50) 279.

[84] Opinion of Hogan AG in Opinion 1/19, Istanbul Convention, ECLI:EU:C:2021:198, para 223. For an analysis see M Chamon, 'Op-Ed: "AG Hogan's Opinion in Avis 1/19 regarding the Istanbul Convention"' (2021) *EU Law Live Analysis* https://eulawlive.com/op-ed-ag-hogans-opinion-in-avis-1-19-regarding-the-istanbul-convention-by-merijn-chamon/.

[85] Opinion of Hogan AG in Opinion 1/19, Istanbul Convention, ECLI:EU:C:2021:198, para 205 et seq.

the Convention without some of its Member States, it could be held liable, under international law, for actions of the non-participating Member States, even if the latter acted within the realm of their exclusive competence under EU law. While such problems may be solved by an EU declaration of competence functioning as a reservation, the Istanbul Convention does not permit reservations that could be used for that purpose.[86] Moreover, in contrast to other multilateral mixed agreements, the Istanbul Convention does not provide for a regional integration organisations (RIO) clause, requiring the EU to declare the scope of its competence in respect to matters governed by a specific agreement.[87] It remains to be seen whether the Court will address the legal specificities of the Istanbul Convention in the context of incomplete mixity and/or establish the legal limits of having to recourse to incomplete mixity.

C. Bilateral Mixed Agreements

Bilateral mixed agreements are concluded between the Union and the Member States, of the one part, and a single third party (eg Canada[88]) or a single group of third parties (eg the Andean states[89] or the EFTA states[90]), of the other part. Although they aim to establish contractual relations between two (groups of) parties, bilateral mixed agreements therefore have to be ratified by at least 29 parties in accordance with their respective national constitutional requirements.

Bilateral mixed agreements generally prescribe that all parties must complete their respective internal ratification requirements before they may enter into force.[91] Provided that all Member States are listed as contracting parties, the entry into force clause of bilateral mixed agreements hence precludes incomplete mixity *ab initio*. Bilateral mixed agreements may however become 'incomplete'.[92] That risk emerges in particular after the accession of new Member States to the Union. New Member States join the set of existing EU mixed agreements through so-called accession protocols.[93] If there is a gap in time between the date of accession and the entry into force of the accession

[86] Art 78 Istanbul Convention.

[87] Compare, for example, Art 44(1) second and third sentence of the UN Disability Convention (n 30): 'Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence in respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.'

[88] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23.

[89] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3; Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador [2016] OJ L 356/3.

[90] See eg Agreement on the European Economic Area [1994] OJ L 1/ 3. On the EEA's classification as a bilateral mixed agreement see esp. C Hillion, 'Brexit means BR(EEA)XIT: The UK Withdrawal from the EU and its Implications for the EEA' (2018) 55 *CML Rev* 135.

[91] eg Art 30.7(2) CETA.

[92] See further van der Loo and Wessel (n 78).

[93] These accession protocols are in themselves mixed agreements. Yet, the acts of accession provide for a simplified ratification procedure, empowering the Council to conclude the accession protocols on behalf of the Member States, which significantly reduces the gap in time between the new Member States' accession to the EU and the entry into force of the accession protocols. See further eg Czuczai (n 61) 240.

protocols, the EU's mixed agreements become temporarily 'incomplete'. Yet, the effects of incomplete mixity are, in that context, rarely tangible, as the acts of accession oblige new Member States to apply the provisions of EU mixed agreements 'as from the date of accession, and pending the entry into force of the necessary protocols'.[94]

Certain categories of bilateral agreements were usually concluded under the mixed procedure, including association agreements, cooperation agreements, and, until recently, free trade agreements (FTAs).[95] However, the Court found, in *Opinion 2/15*, that all aspects of contemporary FTAs fall within exclusive Union competences, except for investments other than direct investments (or portfolio investments) and investor-state-dispute settlement (ISDS).[96] In practice, a 'new architecture' involving a splitting of FTAs into 'EU-only' FTAs and 'mixed' investment protection agreements (IPAs) has emerged.[97] In this way, *Opinion 2/15* has therefore considerably narrowed the scope for mixity. Bilateral mixity will nevertheless remain relevant, especially for association agreements,[98] IPAs, and comprehensive trade and investment agreements, such as the Comprehensive Economic and Trade Agreement (CETA) with Canada.[99]

D. Multilateral Mixed Agreements

A majority of the Union's multilateral relations are governed by mixed agreements.[100] The continuing trend towards mixity for multilateral agreements is certainly facilitated by the Member States' strong political preference to remain visible sovereign actors on the international stage in general, and within international organisations in particular.[101] Historically, mixity also evolved because numerous multilateral agreements entered into force prior to the founding of the EEC in 1957, and/or originally did not allow for international organisations to become contracting parties. The EEC Member States were, for example, already parties to the 1947 General Agreement on Tariffs and Trade (GATT), and

[94] See eg Art 6(4) of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded ([2005] OJ L 157/203) or Art 6(3) of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community ([2012] OJ L 112).

[95] On the different categories of bilateral mixed agreements see esp. M Maresceau (n 6) 11–29.

[96] Opinion 2/15, *Free Trade Agreement between the EU and the Republic of Singapore*, EU:C:2017:376, operative part. See further M Cremona, 'Shaping the EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017'(2018) 14 *European Constitutional Law Review* 231.

[97] On the new architecture see G Kübek and I Van Damme, 'Facultative Mixity and the European Union's Trade and Investment Agreements' in Chamon and Govaere (n 4) 137, 158 et seq.

[98] That is not to say that all future association agreements will be mixed agreements. Mixity will generally be facultative. The Trade and Cooperation Agreement (TCA) between the EU and the UK, which has been legally based on Art 217 TFEU, has for instance been concluded as a (facultative) 'EU-only' agreement. On that agreement see G Kübek, CJ Tams and JP Terhechte (eds), *Handels- und Kooperationsvertrag EU/GB* (Baden-Baden, Nomos, forthcoming 2021 in both German and English).

[99] On the mixed character of CETA see further the chapter by Manon Damestoy and Nicolas Levrat in this volume.

[100] F Kaiser, *Gemischte Abkommen im Lichte bundesstaatlicher Erfahrungen* (Tübingen, Mohr Siebeck, 2009) 3.

[101] See also CD Ehlermann, 'Mixed Agreements: A List of Problems' in O'Keeffe and Schermers (n 6) 3–21, 6. On mixity in the context of international organisations see further the chapter by Julija Brsakoska and Elaine Fahey in this volume.

their prior contracting party status enabled both them and the European Communities to become original members of the World Trade Organization (WTO) in 1994.[102] The Court's decisions in *Daiichi Sankyo*[103] and *Conditional Access Convention*[104] highlighted that the WTO Agreements fall within the Union's exclusive competence post-Lisbon. Nevertheless, the Member States' independent status in the WTO is not merely nominal, as Brexit illustrates. Due to its independent contracting party status, the United Kingdom could remain a member of the WTO despite its decision to withdraw from the Union.[105] The same cannot be said about the UK's membership in bilateral mixed EU agreements post-Brexit, as will be further outlined in another contribution to this volume.[106]

The recourse to mixity for multilateral agreements is sometimes not only a legal requirement or legitimate policy choice under EU law, but predetermined by the multilateral agreement itself by means of 'a subordination clause'. Article 3 of Annex IX UNCLOS, for example, stipulates that the Union may only deposit its ratification instrument after the majority of its Member States have deposited theirs.[107] In other instances, mixity is *implied* in the decision-making framework of multilateral agreements. Many multilateral agreements specify that the EU may cast a number of votes equal to the number of Member States that are contracting parties, implying that the EU cannot exercise (full) voting rights without the Member States, and that the number of EU votes is highest if mixity is 'complete'.[108] In the multilateral context, mixity therefore remains 'here to stay'[109] – for political, legal, and practical reasons.

IV. Conclusion

We conclude with a small reminder of how one should treat the above typology (and, indeed, any typology of mixed agreements). Any user of a typology of mixed agreements should be aware of the purpose as well as the limitations of such an exercise of classification. At best, typologies of mixed agreements may serve as a shorthand for describing

[102] Art XI:1 WTO Agreement. On the EU's and the Member States' joint membership in the WTO see esp C Herrmann and T Streinz, 'Die EU als Mitglied der WTO' in A von Arnauld (ed) *Enzyklopädie Europarecht*, Band 10 (Baden-Baden, Nomos, 2014) § 11; and in the context of WTO dispute settlement J Heliskoski, 'Joint Competence of the European Community and its Member States and the Dispute Settlement Practice of the World Trade Organization' (1999) 2 *Cambridge Yearbook of European Legal Studies* 61.

[103] Case C-414/11, *Daiichi Sankyo*, EU:C:2013:520. As explained above, one might therefore question whether the Agreement establishing the WTO has become a false mixed agreement (section II.D).

[104] Case C-137/12, *Commission v Council*, EU:C:2013:675.

[105] On the problems that Brexit nevertheless creates for the UK's WTO membership see esp. C Herrmann, 'Brexit and the WTO: challenges and the solutions for the United Kingdom (and the European Union)' in (2017) *ECB Legal Conference Volume* 165; and F Baetens, "No deal is better than a bad deal'? The fallacy of the WTO fall-back option as a post-Brexit safety net' (2018) 55 *CML Rev* 133.

[106] See the contribution by Habib Touré and Christine Kaddous to this Volume.

[107] See also n 22.

[108] See eg Art IX:1 WTO Agreement or Art 9(2) Conditional Access Convention. Indeed, for this reasons, some Member States did not denounce the Conditional Access Convention after Case C-137/12, *Commission v Council*, EU:C:2013:675, turning it into a false mixed agreement (see above section II.D.).

[109] A Rosas, 'The Future of Mixity' in Hillion and Koutrakos (n 1) 376.

the complex reality of mixed agreements through classifying such agreements into certain more general groups or categories and, by so doing, help one to understand the phenomenon of mixity. No more, no less. For instance, a typology may serve as illustrating the fundamental significance of the distinction between the existence and nature of the Union's external competence for the practice of concluding and applying mixed agreements and, as a corollary, the distinction between mandatory and facultative mixed agreements. Likewise, the categories of bilateral and multilateral mixed agreements each have a set of distinct characteristics of their own that may usefully be illustrated by means of typology. The same applies to the phenomenon of incomplete mixed agreements which involves a specific set of legal issues that do not arise with complete mixed agreements. Therefore, a typology may shed light on the complex and varying landscape of mixity for the purpose of either a further study or gaining a more general understanding of the practice of mixed agreements. In that sense, a chapter on a typology of mixed agreements would seem as an appropriate opener for a collection of more specific studies on the topic.

In our submission, however, one would be ill-advised to rely on a typology for the purpose of ascertaining what the state of the law is in respect of specific legal problems arising in the context of mixed agreements. To us, certain categories of mixed agreements established within a given typology have no normative content of their own. In that regard, the sources of law are what they are: the Treaties, legislation, including international agreements, and the case law of the Court. Typologies may only serve as a tool of describing those sources and their implications in a more user-friendly manner. Whether they succeed in serving this purpose depends solely on the merits of a given typology in the eyes of both scholars and practitioners. This chapter has sought to provide one such tool of description. In principle, there may be an infinite number of others, and the authority of each of them will be decided on how well or badly they are conceived of as serving the task describing the legal complexities of mixity.