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**“Are EU member States still States according to
International Law?”**

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Abstract:

The EU's practice in signing and concluding "mixed agreements" alongside its member States – all 29 legal subjects thus being parties to such agreements and accordingly each bound with one or several third parties – was not, and is still not, being properly considered by the rules of international law. Nevertheless, this practice exists and a huge number of third States have accepted it through conclusion of those "mixed agreements". As long as a member State of the EU remains a member State, the problem may adequately be solved by the EU law which establishes a very clear hierarchical relationship between different kinds of legal norms within the EU's legal order. EU mixed agreements are thus considered as being some kind of secondary legislation binding upon its institutions and member States (article 216(2) TFEU). However, when a member State is leaving the EU, as it is the case of the UK, the relationship between the EU and the UK as well as with third States parties to mixed agreements will solely be covered by rules of general international law. This complex situation is envisaged in this paper through the case-study of the EEA agreement.

La pratique de l'UE consistant à signer et à conclure des « accords mixtes » aux côtés de ses États membres – les 29 sujets juridiques étant ainsi parties à ces accords et donc chacun lié à un ou plusieurs États tiers – n'a pas été et n'est toujours pas dûment prise en compte par les règles du droit international. Néanmoins, cette pratique existe et un très grand nombre d'États tiers l'ont acceptée par la conclusion de ces « accords mixtes ». Tant qu'un État membre de l'Union européenne reste un État membre, le problème peut être résolu par le droit de l'UE qui établit une hiérarchie très claire entre différents types de normes juridiques au sein de l'ordre juridique de l'UE. Les accords mixtes de l'UE sont donc considérés comme faisant partie du droit dérivé obligatoire pour ses institutions et ses États membres (article 216 par. 2 du TFUE). Toutefois, lorsqu'un État membre quitte l'UE, comme c'est le cas du Royaume-Uni, les relations entre l'UE et le Royaume-Uni ainsi qu'avec les États tiers parties à des accords mixtes seront uniquement régies par les règles du droit international général. Dans ce papier, nous analysons cette complexe question juridique à travers l'exemple de l'accord sur l'EEE.

Keywords: Mixed agreements, Brexit, EEA agreement, VCLT, federal principle

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“Are EU member States still States according to International Law?”¹

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The European Court of Justice (ECJ) famously declared in 1963 that European Union (EU) law should be considered “a new legal order of international law”³. In saying so however, it was referring to relationships inside the European Economic Community (EEC⁴), between the EEC, its member States and private persons; not to mention the relationship between the EEC and the rest of the world, which, naturally, was assumed to remain under the realm of general international law. Or at least, so we believed; and so seems to say the ECJ⁵.

The creation of a messy situation in the 1960's

Even before the 1963 landmark ECJ decision, the EEC initiated a very novel practice in its international conventional relations, by concluding so-called “mixed agreements”. The first mixed agreement was concluded by the EEC in 1961 to regulate its relationship with Greece. Mixed agreements are concluded when the issues to be regulated by a treaty are complex and include both competencies that the member States have transferred to the EU (thus for which the EU is competent in the field of international relations) and competencies that still belong to the member States, as sovereign States under international law⁶. Therefore, mixed agreements bind both the EU and its member States⁷ as well as each member State individually – each as a

¹ Paper presented at the ECSA Switzerland Annual Conference, University of Fribourg, 29-30 November 2018. The general theme of the Conference was: “The state of the European State”.

² Both authors would like to thank GSI WPS reviewers, Prof Gabrielle Marceau and Mr Angus Wallace for their detailed and useful comments, which helped improving our arguments and writing.

³ ECJ, 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v, Netherlands Inland Revenue Administration*, case C-26/62.

⁴ The EU only appears in 1993, when it coexists with the EEC (which is rebranded the EC in 1993) until it succeeded and replaced it (cf. art. 1(3) TEU) in 2009. For the sake of readability, we will refer to the EU, as well as to the EU law, even if at points of its development, it was formally the EEC or the EC.

⁵ For example, the Decision *Racke*; ECJ, 16 June 1998, *A. Racke GmbH & Co. v Hauptzollamt Mainz*, C-162/96, in which the Court stated that the EEC was subject to the international Law of treaties according to the Vienna Conventions of 1969 and 1986, as it codified customary law (general international law).

⁶ Albert BLECKMANN, “The Mixed Agreements of the EEC in Public International Law”, in David O’KEEFFE and Henry G. SCHERMERS (edit.), *Mixed Agreements*, Kluwer Law and Taxation Publishers, Deventer, (1983), pp.155-165.

⁷ According to the article 216(2) of Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012.

party to the mixed agreement – with a third party (or parties in a pluri- or multilateral agreement).

Almost simultaneously, that is between 1961 and 1963, the International Law Commission of the United Nations (UN), which had been endowed with the task of codifying Treaty Law, decided after lengthy and complex debates in its 1962 session, to abandon the reference, in international treaty law, to what had thus far been qualified as the “federal clause”⁸. “Federal clause” describes the practice in some federal States which allows both the Federation and its constituent units to enter agreements under international law. Such practice, which seems to correspond to the EEC-EC-EU practice of mixed agreements, has been deliberately set aside and since then not used by general international law (experts). Thereafter, this practice of the EU and its member States has not been thoroughly investigated by international law scholars. The main reason for this lack of interest is most likely due to the fact that the ECJ insists that this issue of the nature and the extent of the respective engagements of the EU and its member States in a mixed agreement should be dealt with according to EU law and not under international law⁹. The stated reason is that it raises the issue of the allocation of competencies between the member States and the EU, which is a question of interpretation of the EU law, under exclusive competence of the ECJ. Such claim made by the ECJ is perfectly consistent with the exclusion of the “federal clause” from international treaty law.

Thus, the question of the legal status of EU member States parties to mixed agreements has not been investigated under international law. As a matter of fact, it may have remained a very theoretical question until the 23rd of June 2016, when voters in the UK decided by an almost 52% majority to leave the EU¹⁰. Unexpectedly, the Brexit process is forcing lawyers to reconsider this question in very practical terms and, most likely, under international law, not EU law, since after Brexit, UK external relations will not be submitted to EU law. As in the old

⁸ “Report of the International Law Commission covering the work of its Fourteenth Session, 24 April-29 June 1962, Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209)”, extract from the *Yearbook of the International Law Commission*, Vol. 2, (1962), p. 164: http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_cn4_148.pdf&lang=EF (accessed on 02/01/2019).

⁹ See for example: ECJ, 14 December 1991, *Opinion 1/91* (opinion on EEA agreement); ECJ, 30 May 2006, *Commission v. Ireland (MOX)*, case C-459/03; ECJ, 8 March 2011, *Opinion 1/09* (opinion on the creation of a unified patent litigation system); ECJ, 18 December 2014, *Opinion 2/13* (opinion on the agreement managing the accession of the EU to the ECHR); ECJ, 16 May 2017, *Opinion 2/15* (opinion on the free trade agreement between the EU and the Republic of Singapore).

¹⁰ See the result of the 2016 referendum in which 51.9% of voters voted in favour of leaving the EU on: https://www.bbc.com/news/politics/eu_referendum/results (accessed on 02/01/2019).

day photographic process, where a developer was required to reveal the image captured on the film, Brexit also appears as a revealer of some aspects of the true nature of the EU (understood in the broad sense of EU institutions and the member States). It reveals in particular the very strange and original relationship that has been developed over time between the EU and its member States and third parties through mixed agreements. Brexit thus offers a new perspective from which to reconsider the legal status of EU member State under international law.

In this paper we would thus like to clarify the legal status of the UK as regards its participation in mixed agreements, before, during and after leaving the EU. In order to do so, we will discuss the provisions in EU law and in general international law regarding mixed agreements (I), since the UK will no longer be bound by the EU law after Brexit (II). Finally, to illustrate the numerous issues raised, we propose to analyse as a case study an interesting mixed agreement which is the European Economic Area agreement (EEA) (III).

I. The unusual legal nature of EU mixed agreements

While most of the numerous studies on Brexit focus on the internal dimension (both for the EU and the UK) of the withdrawal agreement and on the future relationship agreement between the EU and the UK¹¹, only few contributions to the academic debate analyse the external dimension of Brexit, namely its effect on already concluded EU agreements with almost all the countries in the world¹². Looking at EU international agreements, one rapidly stumbles on this more

¹¹ Non-extensive list of academic writings on Brexit: Hannes HOFMEISTER, “Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU”, 16 *ELJ* (2010); Adam LAZOWSKI, “Withdrawal from the European Union and Alternatives to Membership”, 37 *ELRev.* (2012); Ramses A. WESSEL, “You Can Check Out Any Time You Like, But Can You Really Leave? On ‘Brexit’ And Leaving International Organizations”, 13 *IOLR* 2 (2016); Federico FABBRINI, *The Law and Politics of Brexit*, Oxford Scholarship online, (2017); different blog posts, especially: <http://dcubrexitinstitute.eu/blog/>; <http://www.europeanfutures.ed.ac.uk/topics/leru-leuven-2017> (accessed on 03/01/2019).

¹² House of Commons Library, “EU External Agreements: EU and UK Procedures”, by Vaughne MILLER, Briefing Paper CBP 7192 (28 March 2016); House of Commons Library, “UK adoption of EU external agreements after Brexit”, by Stefano FELLA, Briefing Paper 8370 (24 July 2018); Guillaume VAN DER LOO and Steven BLOCKMANS, “The Impact of Brexit on the EU’s International Agreements”, CEPS (15 July 2016), <https://www.ceps.eu/publications/impact-brexit-eu%E2%80%99s-international-agreements> (accessed on 03/01/2019); Adam LAZOWSKI and Ramses A. WESSEL, “The External Dimension of Withdrawal from the European Union”, forthcoming in *Revue des Affaires européennes* (2017), <https://www.utwente.nl/en/bms/pa/research/wessel/wessel122.pdf> (accessed on 03/01/2019); Ramses A. WESSEL, “Consequences of Brexit for International Agreements concluded by the EU and its Member States”, *Common Market Law Review* 55 (2018); Jed ODERMATT, “Brexit and International Law: Disentangling Legal Orders”, *Emory International Law Review* 31 (2017); Eleftheria NEFRAMI, “Brexit et les accords mixtes de l’Union européenne”, *Annuaire français de droit européen* (2017); Panos KOUTRAKOS, “Negotiating International Trade Treaties after Brexit”, *European Law Review* 41(4) (2016); Panos KOUTRAKOS, “Brexit, European Economic Area (EEA) membership, and Article 127 EEA”, <https://www.monckton.com/brexit->

complex and intriguing category of EU international agreements, qualified by legal doctrine as “EU mixed agreements”, to which not only the EU, but also each of its member States are parties. Member States are thus doubly bound by such mixed agreements: as EU member States, according to the art. 216(2) TFEU¹³ rule, and as States parties under international law. Such form of agreement is not specifically dealt with by general international law and the legal situation of the UK under international law after Brexit as regards its participation to such international treaties is far from clear. In our view, the dominant academic literature underestimates the outcome of a Brexit without agreement¹⁴ on the UK and EU’s international commitments towards third countries and towards each other under the regime of mixed agreements after Brexit¹⁵.

From the legal point of view, the EU’s status as a singularity under international law is an already well-known assumption, widely shared by the doctrine¹⁶. Constituted as international organizations, the European Communities have gradually but substantially emancipated themselves from their international origins, to create “a new legal order of international law”¹⁷, to which the EU has succeeded¹⁸. The EU is based on the principle of conferral: “Competences not conferred upon the Union in the Treaties remain with the member States” (art. 5(2) TEU¹⁹). The distribution of competences between the EU and its member States is however not so

[european-economic-area-eea-membership-article-127-eea/](#) (accessed on 03/01/2019); Robert G. VOLTERRA, “The Impact of Brexit on the UK’s Trade with Non/EU Member States Under the EU’s Mixed Free Trade Agreements”, <https://www.law.ox.ac.uk/business-law-blog/blog/2017/05/brexit-negotiations-series-impact-brexit-uk%E2%80%99s-trade-non-eu-member> (accessed on 03/01/2019).

¹³ Article 216(2) Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012.

¹⁴ The situation also referred to as a “no-deal Brexit”; according to the article 50(3) Treaty on European Union (TEU), OJ C 326, 26 October 2012: “The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2 (...)”.

¹⁵ The question is explored by some recent contributions dealing with the fate of mixed agreements under WTO Law. See for example, Ines Willemyns Marieke KOEKKOEK, “The Legal Consequences of Brexit from an International Economic Law Perspective”, Leuven Centre for Global Governance studies, Working Paper No. 188, June 2017. Otherwise, several authors, mostly in Blog contributions, point out that any agreement about future relationship between the UK and the EU will most likely be a mixed agreement. See for example Pavlos ELEFThERIADIS, “How to make a transitional Brexit Arrangement”, <https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/how-make-transitional-brexit-arrangement> (accessed on 03/01/2019).

¹⁶ See in particular Pierre PESCATORE, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities*, Leiden and Geneva, AW Sijthoff / IHEID, (1974), p. 99; or Charles LEBEN, “About the legal nature of the European Communities”, *Rights*, No. 14, (1991) p. 61. *Contra*, but very isolated, Alain PELLET, “The international legal bases of Community law”, *Collected Races of the Academy of European Law*, vol. 5, No. 2, (1994) p. 226.

¹⁷ CJE, 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, case 26/62.

¹⁸ Article 1(3) Treaty on European Union (TEU), OJ C 326, 26 October 2012, for the succession of EU to EC (which replaced EEC according to the Maastricht Treaty).

¹⁹ Article 5 TEU, OJ C 326, 26 October 2012.

simple, and the adding of non-exclusive competencies by the Maastricht Treaty²⁰ not only had impact on the internal distribution of competencies, but also on the international capacity of the EU and its member States. In the ECJ famous 1971 ruling²¹, the Court stated that “external competence” (the capacity to conclude treaties) of the EEC didn’t have to rely on competencies formally conferred by the Treaties to the EEC, but may result of the exercise of EEC competencies to develop domestic policies, which then implies that the member States have renounced – according to EEC law general principles – to their competencies to conclude international agreements and have implicitly transferred such competence to the EEC²² (nowadays the EU).

However, the transfer of such international competence from member States to the EEC did not confer a general competence for the EEC to represent its member States in International Relations. The external competence of the EEC is only sectoral, and very soon EEC and its member States realized that for concluding complex international agreements, neither the EEC nor its member States were fully competent. Thus, emerged the practice of jointly concluding agreements, the EEC and its member States jointly becoming parties to an international agreement with a third party. Such category of International Treaties will be called “mixed agreements”. The very first mixed agreement of the EEC was concluded with Greece in 1961 to establish a political and economic dialogue with countries in the immediate neighbourhood. This association agreements with Greece, AASM and Turkey led the doctrine to propose the notion of “mixed agreements”²³ to qualify this formal participation of both the EEC and all its member States as contracting parties. The notion of “mixed agreement” was absent from the EEC Treaty and still does not appear, neither in the TFEU nor in the TEU. Only the Euratom

²⁰ Maastricht Treaty, article G.5 introducing in the Treaty establishing the European Economic Community a new article 3B (See *OJEC* n° C-191/6, 29 July 1992), which introduced the concept of subsidiarity in EU law, but even more significantly, the concept of non-exclusive competences, nowadays called “shared competencies” (article 2(2) and article 4 TFEU).

²¹ CJE, 31 March 1971, *Commission v. Council (ERTA)*, case 22/70.

²² See also very interesting contribution by Robert POST, “Constructing the European Polity: ERTA and the Open Skies Judgments” in Miguel Poiars MADURO and Loïc AZOULAI (edit.), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, (2010), pp. 234-247.

²³ “Some clauses of the association agreement with Greece, AASM and Turkey relate to matters that are not covered by the EEC but by member States competences. Thus, rather than concluding two agreements, one between the Six and the other contracting party and the other between the EEC and the same contracting party, each relating to matters falling within its respective competences, it was decided to negotiate only one treaty, a mixed agreement, signed at the same time by the EEC and the member States” (our translation from French), Michel MELCHIOR, “La procédure de conclusion des accords externes de la Communauté économique européenne”, *Belgian Review of International Law*, vol. 2, (1966), p. 202.

Treaty contained from the beginning a reference to this type of agreements²⁴. The absence of an explicit mention of this category of agreement did not prevent the EU and its member States from concluding very early many mixed agreements²⁵ with the rest of the world. The Community thus concluded association agreements covering very large areas, some of which falling within the competences of the EEC, and others within member States' competences²⁶. It is for this reason that the association agreements are concluded, from procedural and formal point of view, as mixed agreements. With the many waves of EU enlargement²⁷, this form of association agreements with the current EU member States have been replaced by so-called accession agreements that are not mixed, because such agreements are concluded between EU member States (and not the EU itself) and the acceding State. The mixed nature of an agreement depends essentially on the areas of competence mobilized in the EU framework for its conclusion, whether they have been wholly or partly transferred to the EU, or whether they remain within its member States.

The main problem with this complex situation is that both international treaty law and the international law of responsibility try to ignore the composite nature of the legal entities they regulate. With regard to the law of treaties, the idea that the capacity of a State to engage conventionally depending on the internal arrangements for the division of competences was

²⁴ Article 102 of the Euratom Treaty, consolidated version OJ C 327/01, 2012: "Agreements or contracts concluded with a third State, an international organization or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws".

²⁵ See particular for the typology of "mixed agreements": Marc MARESCEAU, "A Typology of Mixed Bilateral Agreements", in Christophe HILLION and Panos KOUTRAKOS (edit.), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford and Portland, Oregon (2010), pp. 11-30. For some examples of mixed agreements: Partnership and Cooperation Agreement between the EU and its Member States, of the one part, and the Republic of Iraq, of the other part, signed on 11 May 2012; Free Trade Agreement between the EU and its Member States, of the one part, and the Republic of Korea, of the other part, signed on 6 October 2010; Global Framework Agreement on Partnership and Cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part, signed on 9 November 2009; Cooperation Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity affecting their financial interests, signed on 26 October 2004.

²⁶ Currently, association agreements are covered by the article 217 TFEU, OJ C 326, 26 October 2012: "The Union may conclude with one or more third countries or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."

²⁷ The six founding countries of the Community are: the FRG, France, Belgium, Italy, Luxembourg and the Netherlands. Currently, the EU has 28 Member States following successive enlargements: in 1973, the United Kingdom, Ireland and Denmark; in 1981, Greece; in 1986, Spain and Portugal; in 1995, Austria, Sweden and Finland; in 2004, Cyprus, Malta, Estonia, Hungary, Latvia, Lithuania, Poland, the Czech Republic, Slovakia and Slovenia; in 2007, Romania and Bulgaria and in 2013, Croatia.

rejected. The so called "federal clause"²⁸ was abandoned by the UN International Law Commission when it codified the law of treaties. In 1986, the Convention on the Law of Treaties between States and International Organizations or between International Organizations²⁹ also uses the same exclusive dualist logic: it is either the State that commits itself or the international organization. There is no place for intermediate situation; so no mixed agreements. The same is not true for the rules of international responsibility³⁰. If, under general international law, there can be no situation of common or shared responsibility between a federal State and its federated entities³¹, only the federal State being a subject of international Law, the same logic is not applicable for the division of responsibility between an international organization and its member States, since both are subjects of international law³². This gap, we will see, could be problematic.

Originally, the mandate given to the UN International Law Commission to identify customary rules on the Law of Treaties led it to propose a text on both the ability of States, as States and as member States of a federal union and international organizations, to enter international agreements³³. The decision was finally made to limit the purpose of the 1969 Vienna

²⁸ See the "Report of the International Law Commission covering the work of its Fourteenth Session, 24 April-29 June 1962, Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209)", extract from the *Yearbook of the International Law Commission*, Vol. 2, (1962), *op.cit.*, See also commentary by Daniel TURP and François ROCH "Vienna Convention on the Law of Treaties - Article 6", in Olivier CORTEN and Pierre KLEIN (edit.), *The Vienna Conventions on the Law of Treaties*, Oxford, Oxford University Press, (2011), pp. 107-116.

²⁹ In 1969 within the UN was opened for signature the Vienna Convention on the Law of Treaties, which codified the already existing customary rules governing the law of treaties between states. In 1986, a "(Vienna) Convention on the Law of Treaties between States and International Organizations or between International Organizations was opened for signature", but it still didn't enter into force. The texts and structure of these two Conventions are very similar; see Olivier CORTEN and Pierre KLEIN, *The Vienna Conventions on the Law of Treaties, Article by Article Commentary*, Brussels, Bruylant, (2004).

³⁰ The law of international responsibility is, like the law of treaties, mainly of a customary nature; however, unlike the law of treaties, the codification work of the UN International Law Commission did not result in treaties. There is thus an "ILC Draft Article on International Responsibility of States", Approved by the UN General Assembly on December 12, 2001 (Res 56/83), and a 2011 draft article on the responsibility of international organizations adopted by the International Law Commission at its sixty-third session in 2011 and submitted to the General Assembly as part of its report on the work of that session (A / 66/10, para 87).

³¹ This question has been raised and systematically rejected by the ICJ, in particular in its advisory opinion of 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, *Reports* (1988), p. 12; and in *LaGrand case*, ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, *Reports* (2001), p. 466; and *Avena case*, ICJ, 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *ICJ Reports*, (2004), p. 12.

³² This issue of the division of responsibility between the EU and its member States was considered as one of the main problems which has led the ECJ to consider the participation of the Union – alongside its member States – to the ECHR as not been in conformity with the spirit of the Treaties on which the Union is founded. See ECJ, 18 December 2014, *Opinion 2/13*, on the accession of the EU to the ECHR.

³³ This question of the capacity to conclude treaties had not been addressed by the first special rapporteur. The second Special Rapporteur, Sir Humphrey WALDOCK, proposed in a first report an article 3 which was dealing with the capacity of States to conclude treaties as independent States (Article 3(1)), as States members of a

Convention to the law of treaties between States³⁴, and then refrained from dealing with the question of the member States of a federation or of a union of States. Thus, the current article 6 of the 1969 the Vienna Convention on the Law of Treaties is extremely concise and reads as follows: "Every State possesses capacity to conclude treaties".

When the Commission was preparing a draft convention for treaties to which international organizations are parties, the desire to follow closely the provisions of this new Convention with those of the 1969 Convention led to a similarly concise formula: "The capacity of an international organization to conclude treaties is governed by the rules of that organization"³⁵. This formulation does not recognize the specific case of mixed agreements where an international organization *and* its member States, on the one hand, and a third entity, on the other hand, participate together³⁶. Yet, in the draft convention on treaties of international organizations as discussed in 1982 by the ILC, an art. 36a was designed almost for codifying the EEC conventional practice and indirectly mentioned the case of mixed agreements as an instrument of international organizations to conclude agreements with thirds parties:

"Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if: (a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and (b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly

federation or a union of States (Article 3(2)), as dependent States which conduct in international relations has been entrusted to another State, as well as the treaty practice of international organizations and institutions which have their own legal personality (Article 3(4)). See CIDA 1962, Vol. II, pp. 40-41; or this version of his proposal submitted to the General Assembly by the Commission: CIDA 1962, Vol II, p 179.

³⁴ In practice, the issue has been the subject of several contradictory decisions. As early as 1951, the Commission had considered it useful to limit its work to treaties between States. But during the first session of the Diplomatic Conference held in Vienna in 1968, the question was debated. See Philippe GAUTIER, "Commentary on the Art. 1 of the 1969 Vienna Convention", in Olivier CORTEN and Pierre KLEIN (edit.), *The Vienna Conventions on the Law of Treaties. Article by Article Commentary*, op. cit., pp. 27-43.

³⁵ Article 6 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986. See the commentary of this article in the work of Olivier CORTEN and Pierre KLEIN above-mentioned pp. 183-193.

³⁶ Rafael LEAL-ARCAS, "The European Community and Mixed Agreements", *European Foreign Affairs Review*, No 6, Kluwer Law International, (2001), p. 502.

brought to the knowledge of the negotiating States and negotiating organizations."³⁷.

This provision would have allowed to qualify the member States of the EU parties to mixed agreements in a proper way. They would not have been considered as third countries to the EU (as being parties to the agreement on their own capacity), nor as entities that are only part of the international organization, which would be the case in an agreement concluded solely on behalf of the EU, as provided by article 216(2) TFEU. Instead, according to such provision, they would have been seen as EU members with their own competences implemented through their commitment under the agreement. This article, which was ultimately not included in the final version of the Convention, was based on the idea of both member States' and the third party's consent to accept this particular status of "Member State of an international organization".

The current codification of public international law, however, does not seem to go in that direction. Thus, the draft article on the responsibility of international organizations, as submitted by the International Law Commission in 2011 to the UN General Assembly, states that the responsibility of a member State of an international organization for the implementation of a convention concluded by that organization is not supposed to be engaged; eventually and where appropriate, such responsibility could only be of subsidiary nature. However, the rules specific to the organization are reserved³⁸, which is useful in the EU context. The EU treaties are very clear in this respect since they provide that the agreements concluded by the Union bind the institutions of the Union and the member States³⁹. This formulation recalls identical provisions of certain federal constitutions⁴⁰. Thus, from the point of view of EU law, what seems to be the exception in general international law would be the rule.

³⁷ Draft articles on the Law of Treaties between States and International Organizations or between International Organizations and comments, *Yearbook of the International Law Commission*, vol. II (2), (1982), p. 44.

³⁸ Draft articles on the International Responsibility of International Organizations adopted by the International Law Commission at its sixty-third session, in 2011 (*Yearbook of the International Law Commission*, vol II (2), (2011), respectively ad Articles 62 and 64).

³⁹ Article 216(2) TFEU, OJ C 326, 26 October 2012, reads: "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

⁴⁰ Article 5(4) of the Federal Constitution of Switzerland. The Constitution of Belgium does not explicitly state this principle, but Article 169 authorizes the federal legislative and executive powers to substitute themselves to the powers of communities and regions to guarantee the fulfilment of Belgium's international or supranational commitments; this has the same effect in practice. Article 25 of the *Grundgesetz*.

In practice, it is worth asking whether the distinction between the respective obligations and the law applicable to them would not be excessively delicate or even impracticable⁴¹. In terms of legal certainty, mixed agreements don't seem to be the best solution, as they are not envisaged by general international law nor clearly regulated in EU law. From the point of view of EU law, the coherence could probably be achieved through the principle of sincere cooperation⁴², but the situation stays unsatisfactory. From the perspective of a third state party to a mixed agreement, the special nature of the agreement generates, from the standpoint of international law, not one but twenty-nine treaty commitments. Such a situation, to say the least, is very unusual under public international law. In this respect, Allan Rosas stated: *"The European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organization, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements (...) offers a telling illustration of the complex nature of the EU (...) as an international actor"*⁴³.

II. The UK's participation to EU mixed agreements before, during and after Brexit

After Brexit and in the absence of any specific additional provision, the UK, as a party to mixed agreements, shall remain bound by its legal commitments towards other parties, as other parties will remain legally bound towards the UK. Except if the UK ceases to be a party to these agreements, which is neither foreseen by EU law (article 50 TEU), nor by these agreements (at least none of those we investigated), nor by general international law. Furthermore, even if a Brexit agreement settles the UK's status as party to mixed agreements, under general

⁴¹ In this sense, Joel RIDEAU writes: "The question of controlling "mixed agreements" is delicate. By retaining the Court's questionable assimilation of agreements to acts of the institutions, the most coherent solution would be to distinguish in the "mixed agreement" what is within Community competence and controllable by the Court and what is not within its competence and consequently not controllable. The implementation of the solution linking the control power to the nature of competences could also give rise to thorny problems because of the consequences and the difficult divisibility of the fate of the agreement. » (our translation from French), *Droit institutionnel de l'Union européenne*, Paris, LGDJ, (6th ed.), (2010), p. 309.

⁴² Article 4(3) TEU, OJ C 326, 26 October 2012, reads: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

⁴³ Allan ROSAS, "Mixed Union-Mixed Agreements", in Martti KOSKENNIEMI (edit.), *International Law Aspects of the European Union*, Kluwer Law International, (1998), p. 125.

international law, the consent of third parties to the same agreement would be mandatory. According to the article 34 of the Vienna Convention on the Law of Treaties: “A treaty does not create either obligations or rights for a third State without its consent”⁴⁴. Therefore, neither the withdrawal agreement of the UK from the EU, nor a future relationship agreement between the EU and the UK, may create or alter rights or obligations towards third States parties to EU mixed agreements without the consent of third States. In its judgement issued on the 27 February 2018 regarding the application of Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco to the territory of Western Sahara, the ECJ explicitly referred to the provisions of the art. 34 of the Vienna Convention on the Law of Treaties arguing that:

“62. The Court has previously held that the latter concept must be construed as referring to the geographical area over which the Kingdom of Morocco exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as that of Western Sahara (judgment of 21 December 2016, *Council v Front Polisario*, C-104/16 P, EU:C:2016:973, paragraphs 95 and 132).

63. If the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression (judgment of 21 December 2016, *Council v Front Polisario*, C-104/16 P, EU:C:2016:973, paragraphs 88 to 93, 100, 103 to 107 and 123).”⁴⁵

If the specific rights of such a peculiar subject of international law – people’s rights to self-determination – may not be altered by an EU bilateral agreement with another subject of international law (in that case the Kingdom of Morocco), the rights of States parties to EU mixed agreement may definitely not be altered by a bilateral agreement between EU and the

⁴⁴ Article 34 of the Vienna Convention on the Law of Treaties (VCLT).

⁴⁵ ECJ, 21 December 2016, *Council v. Front Polisario*, C-104/16 P, par. 95 and 132; ECJ, 28 February 2018, *Western Sahara Campaign UK v. Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, C-266/16, par. 62-63.

UK. Whether this prevents the UK and the EU from settling their own bilateral relationship after Brexit under the regime of such mixed agreements is open for discussion; as for example, deciding by a provision of a Brexit agreement that the EU and the UK are not legally bound towards each other by the mixed agreement to which they both remain parties may affect the rights of other parties to the agreement. That would for example be the case with the EEA that we examine in part III.

Naturally, the implementation of the provisions of these treaties may become awkward⁴⁶ after Brexit, but the validity of the legal commitments remains unaffected after Brexit. If the situation may become complex and may end up producing unexpected results, as regards the relationship between the UK (as a State outside the EU) and third parties that concluded an agreement with the EU and its member States, the issue of the legal relationship between the EU and the UK under the provisions of such treaties is an issue that has not been examined by the legal doctrine. This situation requires analysis under EU law (but it will not formally be applicable to the EU-UK relationship after a Brexit without agreement), general international law (especially customary international law of treaties as codified by the 1969 and 1986 Vienna Conventions on the Law of Treaties) and the specific provisions of each mixed agreement.

According to the provisions of article 50 TEU⁴⁷, the international agreements concluded only by the EU without the participation of the EU member States will cease to be applicable to the UK on the day of Brexit. Regarding mixed agreements, as the EU's competences were (considered) not sufficient to conclude an international agreement with one or several third States alone, the participation of EU member States as contracting parties and as States under international law will remain unchanged. According to the EU law, the status of mixed agreements in the EU's legal order is the same as the status of EU only agreements⁴⁸. The ECJ has the exclusive competence to interpret all the agreements concluded by the EU⁴⁹ under EU law. But the nature of members States' commitments under mixed agreements is very unclear. It is accepted that in mixed agreements all the EU member States are parties alongside the EU,

⁴⁶ For example as regards the old association agreements (such as the 1963 association agreement with Turkey) or more recent "Stabilisation and Association Agreements" (such as the 2007 agreement with Montenegro), it would make little sense for the UK to continue monitoring these countries' accession process to the EU, since it would not be a political or legal concern for the UK anymore.

⁴⁷ Article 50 TEU, OJ C 326, 26 October 2012.

⁴⁸ ECJ, 16 June 1998, *Hermès*, C-53/96, Rec. I-3603, p. 33; ECJ, 14 December 2000, *Dior e.a.*, C-300/98 and C-392/98, Rec. I-11307, p. 33; ECJ, 19 March 2002, *Commission/Irlande*, C-13/00, Rec. I-2943, pp. 14, 20; ECJ, 30 May 2006, *Commission/Irlande (MOX)*, C-459/03, Rec. I-4657, pp. 63, 84.

⁴⁹ Article 19 TEU and Article 344 TFEU, OJ C 326, 26 October 2012.

and the nature of “party” to mixed agreements was extensively analysed by EU legal scholarship⁵⁰. An effort of classification of mixed agreements according to the distribution of competences between the EU and its member States was made a long time ago by Alan Rosas⁵¹ and continues to be debated⁵². Some authors argue that mixed agreements are of bilateral nature as the EU and its member States side should be considered as one and indivisible⁵³. Naturally, Brexit does not fit well with such assertion.

From the perspective of international law, the participation of States to international agreements is extremely clear: States are sovereign subjects of international relations and can conclude international agreements as autonomous parties (on their own). However, Brexit raises interesting questions with regard UK’s participation in mixed agreements. Political actors and legal doctrine are divided on this issue. Of course, some argue that this question might be settled in an “exit agreement” mentioned in article 50(2) TEU⁵⁴. In this case, there would then be a precedent that could afterwards help clarify the legal issues at stake. But what happens if Brexit takes place without agreement? There is no clear rule, either in EU law (which would no longer be applicable to the UK) nor in international law (this specific situation was not foreseen, we will see it in the third part). We shall try to investigate the issue by looking at the very concrete case of UK’s legal situation as regards the EEA agreement after Brexit⁵⁵.

III. A case study: the EEA as a mixed agreement

⁵⁰ Jed ODERMATT, “Brexit and International Law: Disentangling Legal Orders”, *op. cit.*, p. 1060; Also, very interesting contributions in Christophe HILLION and Panos KOUTRAKOS, *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford and Portland, Oregon (2010).

⁵¹ Allan ROSAS, “Mixed Union – Mixed Agreements”, in M. KOSKENNIEMI (edit.), *International Law Aspects of the European Union*, Kluwer Law International (1998).

⁵² Rafael LEAL-ARCAS, “The European Union and Mixed Agreements”, *European Foreign Affairs Review* 6 (2001).

⁵³ Guillaume VAN DER LOO and Steven BLOCKMANS, “The Impact of Brexit on the EU’s International Agreements”, *op. cit.*

⁵⁴ See the reservation we have to such solution as it may, as we have shown at the beginning of our Part II, alter the rights that third parties have according to these mixed agreements.

⁵⁵ Dora SifTYNES and Elisabeth Lian HAUGSDAL, “In, out or in/between? The UK as a contracting party to the Agreement on the European Economic Area”, *European Law Review* (2016), in this article the authors argue that it is not possible for the UK to remain a contracting party after Brexit without entering one of the EEA agreement’s pillars; and especially Ulrich G. SCHROETER and Heinrich NEMECZEK, “The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European economic Area”, *EBLR*, (2016), the arguments defended by the authors of this last article are very similar to ours but the reasoning differs. We argue that there is a duty of cooperation under the article 3 of the EEA agreement that should push the parties to find an acceptable solution for UK’s membership in case of a no-deal Brexit.

The EEA agreement was signed on 2 May 1992 and entered into force on 1 January 1994⁵⁶; it has been also amended on several occasions, particularly when new member States entered the EU. It is now in force between 32 contracting parties: the EU (as successor to the European Community), each of its 28 Member States (including the UK), and three of the four States composing the European Free Trade Association (EFTA): Iceland, Liechtenstein and Norway (Switzerland, an EFTA member and signatory of the EEA, rejected by a referendum on 6 December 1992 the ratification of this treaty). The UK is thus currently bound by this treaty both as an EU member State, and as a party in its own right. The main purpose of this agreement, negotiated between the EFTA States on the one side, and the EU and its member States on the other, is to allow European States not wishing to join the EU to benefit from access to the EU's single market. According to the article 1(1) EEA agreement: "The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA."⁵⁷

Will the UK remain party to the EEA agreement after a Brexit without agreement?

According to article 2(c) of the EEA agreement: "The term 'Contracting Parties' means, concerning the Community and the EC member States, the Community and the EC member States, or the Community, or the EC member States. The meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of this Agreement and from the respective competences of the Community and the EC member States (...)." ⁵⁸ Every member State of the EU is thus bound by the EEA agreement on its own as a contracting party to the EEA agreement alongside the EU and three EFTA States. We thus take note that the UK is an EEA State party, not only because of its membership to the EU, but also because of its "Contracting Party" status to the EEA agreement. That being said, we will need to investigate to what extent Brexit may have an effect on the UK's membership of the EEA. In order to do so, we will look at the provisions in the EEA agreement, in EU law, and also in international law.

⁵⁶ The Agreement on the European Economic Area, *OJ L* 1, 3 January 1994, 3, (EEA agreement later).

⁵⁷ Article 1 EEA agreement.

⁵⁸ Article 2(c) EEA agreement.

First, according to article 127 of the EEA agreement: “Each Contracting Party may withdraw from this Agreement provided it gives at least 12 months' notice in writing to the other Contracting Parties.”⁵⁹ If the UK wants to leave the EEA agreement it must make a notification in this sense, with a one-year notice. However, the UK never explicitly expressed its desire to leave the EEA agreement. The withdrawal notification addressed to President Tusk was only about leaving the TEU, TFEU and the Treaty Establishing the European Atomic Energy Community (Euratom)⁶⁰. Furthermore, the notification of withdrawal from the EEA should also have been made to the three EFTA States parties to the EEA agreement, not only to the EU. In the absence of such notification, the UK will remain party to the EEA beyond the 30th of March 2019 in case of a Brexit without agreement.

Is there an obligation for the UK to leave the EEA agreement in case of Brexit?

According to the wording of the EEA agreement there is no “cross-treaty” provisions⁶¹ with the TEU. In other words, if article 50 TEU is activated by a member State there is no automatic withdrawal from the EEA agreement. There is such “cross-treaty” effect for example between the article 50 TEU and the article 106(a) of the Euratom treaty⁶²; but nothing similar with any provision of the EEA agreement.

This said, in order to become a party to the EEA agreement, a State should be a member of the EU or party to the EFTA agreement. Article 128(1) of the EEA agreement provides: “Any European State becoming a member of the Community shall, or becoming a member of EFTA may, apply to become a Party to this Agreement. It shall address its application to the EEA Council.”⁶³ Such provision however does not concern the UK, since it only concerns accession to the EEA, whereas the UK is already a contracting party to the agreement. Accordingly, unless

⁵⁹ Article 127 EEA agreement.

⁶⁰ Letter from Theresa May, Prime Minister of the U.K., to Donald Tusk, President of the European Council (March 29, 2017):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf (accessed on 06/01/2019); One other explicit notification of withdrawal was given in the same letter with regard the Treaty Establishing the European Atomic Energy Community, according to the Article 106a of this treaty.

⁶¹ By « cross-treaty provision », EU legal doctrine refers to provisions that link the commitments of a Party to an International Treaty to its commitments under another International Treaty. See also: Ulrich G. SCHROETER and Heinrich NEMECZEK, “The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European economic Area”, *op. cit.*

⁶² Article 106(a) of the Euratom Treaty, consolidated version OJ C 327/01, 2012, on the “Application of certain provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union”.

⁶³ Article 128 EEA agreement.

it decides otherwise or another solution is agreed by all the contracting parties (or other contracting party contests UK's membership, as we will see it later), the UK will remain bound by the EEA agreement as a Sovereign State.

Clearly the issue of "party" definition will play a crucial role in the UK's participation in mixed agreements after Brexit. In this sense, the first version of the EEA agreement was submitted to the ECJ for its opinion "as to whether an agreement envisaged is compatible with the treaties"⁶⁴ (according to the opinion procedure that is now enshrined in article 218(11) TFEU). In the first EEA agreement, the contracting parties agreed to establish one single Court of the European Economic Area with competence to interpret the provisions of the treaty. In its opinion 1/91, the ECJ stated:

"As the Court of the European Economic Area has jurisdiction in relation to the interpretation and application of the agreement, it may be called upon to interpret the expression "Contracting Parties". As far as the Community is concerned, that expression covers the Community and the Member States, or the Community, or the Member States. Consequently, that court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement. To confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty. Under Article 87 of the ECSC Treaty and Article 219 of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein."⁶⁵

The Court of Justice then seems to be very reluctant to let any international judicial body other than itself to interpret the expression "Contracting Party" regarding the issue of distribution of competences between the EU and its member States. According to the EEA agreement, the term "Contracting Parties", implies for the EU and its member States: "The EU and the EU member

⁶⁴ Article 218 (11) TFEU, *OJ C 326*, 26 October 2012.

⁶⁵ ECJ, 14 December 1991, *Opinion 1/91*, ECR I-6079.

States, or the EU, or the EU member States”⁶⁶. Regarding this distinction, for the EU side, in interpreting “Contracting Party” status, the judicial body responsible for the dispute settlement within the EEA agreement would have the competence to adjudicate on the distribution of competences between the EU and its member States (purely EU law issue). We infer from that position that the ECJ is well aware that “Contracting Party” may be given a different meaning by the EU law and international law. Particularly, when it concerns the legal status of EU member State’s participation to a mixed agreement. Nevertheless, the legal solution for the EU legal order regarding mixed agreements is, according to the ECJ, very clear: as they are touching the issue of the internal distribution of competences, no other jurisdiction than the ECJ may interpret the expression “Contracting Party” as regards the EU and its member States. Notwithstanding the provision of the article 27 of the Vienna Convention on the Law of Treaties, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁶⁷ In other words, from the point of view of international law, which rules the legal effects of a mixed agreement between the EU and its member States on the one side, and (a) third party(ies) on the other, domestic provisions of the parties (*in casu* the EU) are irrelevant to interpret or mitigate the legal effect of obligations arising from an international treaty. Furthermore, as the UK will no longer be submitted to the jurisdiction of the ECJ once it has left the EU (if nothing else is agreed by the parties), it will be only submitted to general international law regarding its participation to international agreements, or alternatively a specific multilateral regime to which both the EU and the UK will be parties, such as for example WTO law. Even from the standpoint of EU Law, Advocate General Sharpston argued in this sense in her opinion on Singapore agreement (Opinion 2/15):

“If an international agreement is signed by both the European Union and its constituent Member States, both the European Union and the Member States are, as a matter of international law, parties to that agreement. (...)”

Finally, where an international agreement is signed by both the European Union and its Member States, each Member State remains free under international law to terminate that agreement in accordance with whatever is the appropriate termination procedure under the agreement. Its participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the European Union (and the fact that the European Union may have played the leading role in negotiating the

⁶⁶ Article 2(c) EEA agreement.

⁶⁷ Article 27 VCLT.

agreement is, for these purposes, irrelevant). If the Member State were to do so, however, the effect of Article 216(2) TFEU will be that — as a matter of EU law — it continues to be bound by the areas of the agreement concluded under EU competence (because it is an EU Member State) unless and until the European Union terminates the agreement. The ability to act independently as an actor under international law reflects the continuing international competence of the Member State; the fact that the Member State remains partially bound by the agreement even if, acting under international law, it terminates it reflects not international law but EU law.”⁶⁸

A contrario, if an EU member State withdraws from the EU, it continues to be bound by an international mixed agreement, despite the fact that it ceases to be bound as an EU member State according to article 216(2) TFEU for the part of the agreement concluded by the EU within its competences. This will be the case for the UK under the EEA agreement. However, the competencies transferred to the EEC and then to the EU by the accession agreement of 1971 will be regained by the UK, which shall then possess all the capacities and competencies to implement its commitments under the agreement. The reallocation of competences between the EU and the UK post-Brexit (after an eventual transition) will thus not change its commitments as a contracting party, according to article 2(c) EEA agreement⁶⁹.

Does general international law provide a solution?

This situation of continued participation in a mixed agreement is so novel, that general international law does not give a clear-cut answer. It may in fact, resuscitate the issue of the “federal clause” for Treaties that the UN International Law Commission had dismissed in its codification of Treaty Law in 1962. What we do know for sure however is that no rule of general international law allows for the automatic termination of UK participation in this treaty. First, we may discard any issue about succession to the treaty since the UK is already a party, and will remain a party after Brexit; not as a successor to the EU, but as a party to the original treaty, since 1993.

⁶⁸ Opinion of AG SHARPSTON delivered on 21 December 2016, ECLI:EU:C:2016:992; ECJ, 16 May 2017, *Opinion 2/15*, ECLI:EU:C:2017:375.

⁶⁹ Article 2(c) EEA agreement.

Of course, beyond the provision for withdrawal of article 127 of the EEA agreement⁷⁰, article 54(b) of the Vienna Convention on the Law of Treaties provides that the termination of a treaty or the withdrawal of a party may take place at any time by consent of all the parties after consultation with the other contracting party⁷¹. Thus, all parties to the EEA agreement, including the UK, may agree on the termination or the UK's withdrawal from the EEA agreement.

We are well aware that international law also allows for the suspension or the termination of a Treaty by other contracting parties as regards the UK. It may happen if there is a serious breach of the EEA agreement by the UK (it would be very difficult to consider Brexit as a breach of the EEA agreement) the other parties may suspend or terminate the UK participation to the EEA (article 60 of the Vienna Convention on the Law of Treaties⁷²). The UK itself could invoke a “fundamental change of circumstances” (lawyers do call that principle “*clausula rebus sic stantibus*”). This principle has been codified by the UN International Law Commission and is now to be found in the Vienna Conventions on the Law of Treaties of 1969 and 1986 (article 62 in both cases). The members of the UN International Law Commission were however quite reluctant to include such provision in their codification project, since international law wants to limit the possibilities for a State to invoke reasons for avoiding implementing its international commitments. Therefore, the principle is formulated in negative terms and its application is subject to restrictive and cumulative criteria that would most likely not be met by Brexit. According to the article 62(1): “(a) The existence of those circumstances [that have fundamentally changed] constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”⁷³ Brexit is, from our analysis, unlikely to constitute a serious enough ground for the UK to suspend or terminate its participation to the EEA on the basis of a fundamental change of circumstances. Among other reasons, the obligations to be performed under EEA agreement by the UK after Brexit would be very close to *statu quo* (since it would mean remaining in the internal market); not really a transformation of “the extent of obligations still to be performed under the treaty.” And it certainly will not be invoked by the EU, because if the EU was to admit that the withdrawal of the UK from the EU constitutes, for

⁷⁰ Article 127 EEA agreement.

⁷¹ Article 54(b) VCLT.

⁷² Article 60 VCLT.

⁷³ Article 62 VCLT.

the EU, a fundamental change of circumstances as regards the EEA, it would mean that any EU member State may raise the same argument as regards TEU and TFEU. In clear terms, a Brexit without agreement would constitute a fundamental change of circumstances as regards the continued operation of these two treaties (TEU and TFEU).

Conclusions

1. What does that tell us as regards the UK and the EEA?

Can the UK just switch-sides while remaining Contracting Party to the EEA agreement? Without developing all possible consequences of Brexit on UK's participation to the EEA, we reaffirm that the UK will – if no alternative rule is accepted by all the concerned parties – remain party to the agreement. Does that mean that it can just “switch-sides”, and keep all the benefits from a free access to the single market as a third country (this is the precise purpose of EEA for third countries)? We have not found any legal rule that prevent the UK from remaining a party to this agreement, there are no legal rules either saying it can switch-sides. When legal scholars are short of rules, they search for practice of concerned actors. Has any State already switched-sides as regards the EEA agreement? If yes, how was this done, and how did the EU and all the States parties to this agreement react?

As a matter of fact, the EEA agreement was signed by Austria, Finland and Sweden (among other States) as non-EU member States on the 2nd of May 1992. On the 1st of January 1995, these three States became members of the EU. Two legal options would have been possible as regards the EEA. Either these new EU member States should ratify once more the EEA agreement as EU member States (as article 128 EEA⁷⁴ formally requests), or the accession agreement of these three countries to the EU should have laid down a specific legal rule settling their situation as regards this agreement. In the “act (94/C 241/08) concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded”, article 5 provides that: “The agreements or conventions concluded by any of the Communities, with one or more third States, with an international organization or with a

⁷⁴ Article 128(1) EEA agreement: “Any European State becoming a member of the Community [the EU] shall, or becoming a member of EFTA may, apply to become a Party to this Agreement. It shall address its application to the EEA Council”.

national of a third State, shall, under the conditions laid down in the original Treaties and in this Act, be binding on the new member States.”⁷⁵ Further, the second paragraph of this article specifies that: “The new Member States undertake to accede, under the conditions laid down in this Act, to the agreements or conventions concluded by the present member States and any of the Communities, acting jointly [...]” The EEA agreement does not exactly fit these rules, since it is an EEC mixed agreement, to which Austria, Finland and Sweden were already parties, albeit as third parties. In fact, article 172⁷⁶ of the aforementioned act provides for the continuity of procedures engaged under the EEA implementation mechanisms as regards Austria, Finland and Sweden. It implies from the EEC and its new member States perspective that there is continuity in the participation of these three States to the agreement, and that they shall simply switch-sides. Therefore, in practice, as was confirmed to us by a senior legal adviser of the Austrian Ministry of Foreign Affairs, these three countries remained party to the EEA and just switched-sides. That despite some provisions of the EEA being incorrectly worded due to this sides-switch; it was only in 2004, with the accession to the EU of ten new member States, and their subsequent accession to the EEA, that the wording of the EEA was amended to properly reflect the fact that Austria, Finland and Sweden had switched-sides, almost ten years earlier.

It thus means that there is a practice, that has been accepted by at least 15 EU member States and the EU institutions (starting with the Commission), allowing States to switch-sides in the EEA agreement, even in the absence of any explicit provision and without formal modification of the EEA agreement. Our conclusion therefore, is that without any specific new legal provision concerning the UK’s legal situation as regards the EEA agreement, the UK will remain bound by it in its relationship with the EU and with the three EFTA countries. According to article 3 of the EEA agreement: “The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement.”⁷⁷ This is an explicit obligation for all the parties to the agreement to cooperate in order to find a solution for adapting the EEA agreement to the legal consequences of a Brexit without explicit arrangements regarding the UK further participation to the EEA.

⁷⁵ Article 5(2) of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ C 241, 29 August 1994, 21).

⁷⁶ Article 172 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, *op. cit.*, pp. 50-51.

⁷⁷ Article 3 EEA agreement.

2. What does that tell us about EU member State's status in international law

The EU's practice in signing and concluding mixed agreements alongside its member States – all 29 legal subjects thus being parties to such agreements and accordingly bound with one or several third parties – was not, and is still not, being properly considered by the rules of international law. Nevertheless, this practice exists and a huge number of third States have accepted it through conclusion of those “mixed agreements”. This situation is problematic because of the current stage of development of international law: such design of international agreements is simply meeting none of existing categories. As long as a member State of the EU remains a member State, the problem may adequately be solved by the EU law which establishes a very clear hierarchical relationship between different kinds of legal norms within the EU's legal order. EU mixed agreements are thus considered as being some kind of secondary legislation binding upon its institutions and member States (article 216(2) TFEU). However, when a member State is leaving the EU, as it is the case of the UK, the relationship between the EU and the UK as well as with third States parties to mixed agreements will solely be covered by rules of general international law. This complex situation was neither envisaged by the EU treaties nor by rules of international law.

One convenient proposal would be to consider that if a member State leaves the EU, its participation to mixed agreements of the EU shall cease, since it did accede to such agreements as a member State of the EU; a status it doesn't have anymore. This is factually correct, but, as we have shown, legally and politically problematic. The law of Treaties very clearly specifies the limitative set of conditions a State may invoke for suspending or terminating its participation in a Treaty. With a possible discussion on the invocation of a fundamental change of circumstances – but we've seen above, as the restrictive conditions set forth in article 62 of the Vienna Convention on the Law of Treaties (considered as a codification of customary international law) will be hard to meet for most mixed agreements to which the UK is a party – the UK, as a State bound by an international agreement, will remain bound. In legal terms, only two other options are available.

First, one may try to argue that Brexit constitutes such a novel situation that a new spontaneous customary rule of international Law has just emerged, providing for a legal base justifying UK's

withdrawal from mixed agreements at the time of Brexit⁷⁸. We think that it might not be very likely, as nor practice neither *opinio iuris* have so far been observed. The second possible legal qualification would be to consider that the UK has never been bound, as a State, by the mixed agreements. Somehow, the EU overplays the importance of its own “domestic” rules about the sharing of competencies, and the signature and ratification by EU member States of mixed agreements is a fantasy of EU practice, with no relevance for the international commitments of the EU as regards the third parties. One may, by analogy, think of the (quite extraordinary) practice of Belgium as regards its domestic procedures for entering some international agreements: where as many as seven different Parliament have to approve the agreement for Belgium to be validly bound according to both international and its national law. The only difference remains, as the legal rules and practice of Belgium are based on the very non-discussed premise that the only subject of international law is Belgium. Flanders and Wallonia (among other regions), even if they participate to the domestic procedures for concluding an international treaty, do not become parties to the agreement, because they are not subject of international law. The same reasoning would then have to apply to EU member States. Have they really ceased to be States under general international Law? We would not support such conclusion.

From the point of view of EU Law, such a conclusion would also be unsustainable, as it would mean that the principle of conferral, as stated in articles 4 and 5 TEU⁷⁹, is irrelevant and actually by accepting that the EU signs and implements mixed agreements, member States are *de facto* transferring competencies to the EU, which then becomes the sole party, as regards international law, to these mixed agreements. This is not what the Treaties (TEU and TFEU) say and such hypothesis would be in contradiction with the quite extensive case-law of the ECJ under the article 218(11) TFEU opinion procedure, whose wording implies that the EU shall possess the adequate competencies according to the Treaties, before entering an international agreement

⁷⁸ The idea of « Instant » international customary law has first been put forward by Bin Cheng in 1965. See Bin CHENG, “United Nations Resolutions on Outer Space: “Instant” International Customary Law?”, *Indian Journal of International Law* 5 (1965), pp. 23-48. This concept has regularly been invoked since in international legal scholarship. See in example Georges ABI-SAAB, “Cours general de droit international public”, *Collected Courses of the Hague Academy of International Law*, 1987-VII, vol. 207.

⁷⁹ Articles 4 and 5 TEU, OJ C 326, 26 October 2012. According to article 5(1 and 2) TEU: “1. The limits of Union competences are governed by the principle of conferral. [...] 2. Under the principle of conferral, the Union shall act only within the limits of the competences 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.”

(and not, as would be the case with this hypothesis, as a consequence of the entering into force of the international agreement).

As we have shown in this paper, the apparently easy solution implying that Brexit also terminates the UK's participation in mixed agreements could only be legally achieved, according to current international law, by considering that EU member States are not in fact States according to international Law, as long as they remain member States of the EU. This is evidently not the case.

So how will the legal situation of UK be solved as regards its participation in EU mixed agreements concluded before Brexit? The current legal frameworks allow no clear answer to that question. What is sure however is that the EU and the UK will not be able to deal with this issue on their own. Again, according to article 34 of the Vienna Convention on the Law of Treaties⁸⁰, the consent of third State(s), as parties to mixed agreements, would be needed to alter their rights in any way. Thus, Brexit will create a very complex legal situation, not only as regards UK-EU future relationships, but also as regards general rules of international law. We thus conclude that somehow, solving these issues will imply significant new developments, both in EU and International Treaty Law; probably including a reconsideration of the relevance of a “federal clause”, at least for the EU – understood in the broad sense to include its member States – as an original subject of international law.

⁸⁰ Article 34 VCLT.