

EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?

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The participation of the European Union alongside its Member States in multilateral agreements can create situations of uncertainty for third parties. In order to deal with this uncertainty, the EU makes a declaration stating the extent to which the international agreement is governed by EU competence. However, these declarations of competence create uncertainty as regards their legal effects and effectiveness. This article aims to examine these issues by analysing these declarations from a practical perspective. The first section conceptualizes the declarations, first by establishing their basic features, second, indentifying their legal effects, and third, by identifying a list of problems attached to these instruments. The second section focuses on both the internal and the external practice regarding the declarations of competence. This section highlights how the increasing tendency of the European Court of Justice (ECJ) to rely on the declaration of competence is not mirrored in the external sphere. In fact, no declaration of competence has ever been invoked by a third party or used by an international court to apportion the responsibilities between the EU and its Member States. The third section assesses the overall effectiveness of the declarations balanced with the problems that they entail.

1 INTRODUCTION

The joint participation of the EU and its Member States in an international agreement (also known as mixity)¹ blurs the extent of the rights and obligations governed by the agreement.² The use of this mixed formula can create situations of uncertainty for third parties since it avoids the question of the division of competence between the EU and its Member States in the matters governed by the mixed agreement.³ The desire of third parties to a mixed agreement to know

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¹ P.J. Kuijper, *Of 'Mixity' and 'Double-hatting'*. *EU External Relations Law Explained* (Amsterdam University Press 2008).

² Ruling 1/78/EURATOM *Nuclear Materials* (ECJ, 1978) ECR 2151, para. 35. Cf. C.-D. Ehlermann, *Mixed Agreements A list of Problems*, in *Mixed Agreements*, 3–21 (D. O'Keeffe & H.G. Schermers eds., Kluwer Law and Taxation 1983).

³ See, R. Schütze, *Federalism and Foreign Affairs: Mixity as a (Inter)national Phenomenon*, in *Mixed Agreements in EU Law Revisited. The EU and its Member States in the World*, 81 (C. Hillion & P. Koutrakos eds., Hart

the scope of the competence and the responsibility of the EU and its Member States has been the driving force behind a specific treaty-making practice developed by the EU in the framework of multilateral agreements.⁴ Within these multilateral conventions, third parties want to know beforehand who is voting (to avoid a double exercise of voting rights), who is implementing (to ensure compliance) and who is responsible for a breach of the agreement (even before an internationally wrongful act has been committed).⁵ In response to these concerns, the EU makes a declaration when concluding the mixed agreement delimiting the extent to which the international agreement falls within EU competence.⁶ In other words, declarations of competence are an attempt to apportion the responsibilities within a multilateral agreement based on who has competence (the EU and/or its Member States) over the issue covered by the specific provisions of the multilateral agreement.

These declarations of competence externalize an internal matter (i.e., the vertical division of competences).⁷ Moreover, the vertical division of competences is one of the most complex and debated issues in EU External Relations Law, not only among scholars,⁸ but also among the EU institutions.⁹

Initially, declarations of competence were supported by neither the Commission¹⁰ nor the European Court of Justice (ECJ).¹¹ In their view, the

2010). Cf. J. Groux, *The European Communities in the international order*, 325 (Commission of the European Communities, 1985); J. Roldán Barbero, *La CEE y el Convenio sobre Derecho del Mar de 1982. : consideraciones sobre la relación entre el Derecho de Comunitario y el Derecho Internacional*, *Revista de Instituciones Europeas*, 551–583 (1991); J. Temple Lang, *The Ozone Layer Convention: A new Solution to the question of Community participation in 'Mixed' International Agreements*, 23 *CML Rev.*, 157–176 (1986); J. Heliskoski, *Mixed agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International 2001).

⁴ F. Hoffmeister, *Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States*, in Hillion & Koutrakos eds., *supra* n. 3, at 259.

⁵ Kuijper, *supra* n. 1, at 12.

⁶ A list of the declarations of competence made by the EU can be found at the European Commission Treaty Office Database: <http://ec.europa.eu/world/agreements/viewCollection.do> (accessed Oct. 25, 2011).

⁷ The vertical division of competences concerns the division of competences between the EU and its Member States. By contrast, the horizontal division of competences concerns the division of competence between the different EU institutions. E. Neframi, *L'action extérieure de l'Union européenne. Fondements, moyens, principes*, 79 (LGDJ 2010).

⁸ For a recent and complete overview see P. Eeckhout, *EU External Relations Law*, 11–163 (Oxford 2011); Neframi, *supra* n. 7, at 21–75; M. Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy*, in *The Evolution of EU Law*, 217–268 (P. Craig & G. de Burca eds., 2d ed., Oxford University Press 2010).

⁹ Some recent examples: ECJ Case C-246/07, *Commission v. Sweden (PFOS)* [2010] ECR I-03317; ECJ *Opinion 1/08 GATS*, [2009] ECR I-11129; ECJ Case C-45/07, *Commission v. Greece (IMO)* [2009] ECR I-00701; ECJ *Opinion 1/03 Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-01145.

¹⁰ I. Macleod, I. D. Hendry & S. Hyett, *The External Relations of the European Communities : a Manual of Law and Practice*, 325 (Clarendon 1996).

distribution of competences should have remained an internal issue. However, in recent years both the Commission and the ECJ have gradually accepted the possibility of clarifying the internal division of competences to third parties to mixed agreements. The Commission has learned to recognize that third parties might require a declaration of competence from the EU so it can conclude the agreement, and it relies on them when pleading in Luxembourg.¹² Moreover, the ECJ has used them increasingly when interpreting mixed agreements,¹³ and when dealing with complex external competence issues,¹⁴ leading the Court to acknowledge that the declarations of competence constitute ‘a useful reference base’.¹⁵

Despite their gradual acceptance by the ECJ and the Commission, declarations of competence create uncertainty as regards their legal effects and effectiveness. This article examines these declarations from a practical perspective. The first section conceptualizes the declarations, first, by establishing their basic features, second, by questioning which are their legal effects, and third, by identifying a list of problems attached to these instruments. The second section focuses on both the internal and the external practice regarding the declarations of competence. The section puts forwards some recent developments concerning the use of the declarations of competence in the ECJ. The third section provides with a set of conclusions assessing the overall effectiveness of the declarations balanced with the problems that they entail.

2 DECLARATIONS OF COMPETENCE: AN ATTEMPT AT CONCEPTUALIZATION

2.1 BASIC FEATURES OF DECLARATIONS OF COMPETENCE

2.1[a] *Basic content of the participation clauses which enshrine the obligation of making a declaration of competence*

Declarations of competence are designed to comply with the conditions established in the participation clause of an international agreement to which the EU and its Member States intend to become parties. In other words, participation

¹¹ Ruling 1/78/EURATOM, *Nuclear Materials*, *supra* n. 2.

¹² European Commission, *Non-Paper, Disconnection Clauses*, (in file with the author).

¹³ Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky (LZ)*, [nry]; ECJ Case C-459/03, *Commission v. Ireland (MOX Plant)* [2006] ECR I-04635.

¹⁴ E.g. ECJ Case C-246/07 *Commission v. Sweden (PFOS)* [2010] ECR I-03317; ECJ C-29/99, *Commission v. Council (Convention on Nuclear Safety)* [2002] ECR I-11221; ECJ Case C-94/03, *Commission v. Council (Rotterdam Convention)* [2006] ECR I-1; ECJ *Opinion 2/00, Cartagena Protocol* [2001] ECR I-09713.

¹⁵ *MOX Plant*, *supra* n. 13, at para. 109.

clauses are those provisions of an international agreement establishing the conditions under which an International Organization (IO) can participate in that international agreement.¹⁶ They do this in two ways. First, the agreement can be opened to IOs without establishing any condition besides the signature and the ratification of the agreement. Second, the international agreement may establish some requisites for the accession of the IO. These requisites are typically due to the mixed nature of the agreement. For instance, the international agreement might require the IO to make a statement on the division of powers between the IO and its Member States (declaration of competences), or on the management of voting rights.¹⁷ Participation clauses requiring a declaration of competence have most often been used in multilateral conventions which cover issues related to Environmental Law.¹⁸

The existence of a declaration of competence always responds to the exigency envisaged in an international agreement of clarifying the distribution of competence between an IO and its Member States. There are no cases in which the EU (or any other IO) has made a declaration of competence without the agreement expressly requiring it to do so.

Although it is not explicitly recognized, participation clauses are designed with the EU and its Member States in mind. Since the United Nations Convention for the Law Of the Seas (UNCLOS),¹⁹ international agreements have opted to refer to a particular category such as Regional Economic Integration Organization (hereinafter REIO) instead of a general one like IO or the specific name of the organization. These provisions establish the general obligation of declaring the extent of the competence when both the REIO and at least one of its Member States are parties to the agreement. Some participation clauses also establish subsidiary mechanisms to ensure that the declaration made by the REIO answers the question of the division of competences in a quick and trustworthy way.²⁰ For instance, Annex IX of the UNCLOS establishes, in the first place, the obligation of making *a declaration specifying the matters governed by this Convention in*

¹⁶ J.J. Feenstra, *A Survey of the Mixed Agreements and their Participation Clauses*, in O'Keeffe & Schermers eds., *supra* n. 2, at 207–248.

¹⁷ See Art. 30. 4 iv of the Convention on Nuclear Safety, p. 0021 – 0030 (Dec. 11, 1999), OJ L 318.

¹⁸ E.g. Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, 0003 – 0022 (1993), OJ. L-039; Cartagena protocol on biosafety to the convention on biological diversity. Convention on the protection and use of transboundary watercourses and international lakes, 0044 – 0058 (1995), OJ. L-186; Convention on the Transboundary Effects of Industrial Accidents, 0006 – 0033 (1998), OJ. L 326; United Nations Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, 3-35 (1998), OJ. L 083; United Nations Framework Convention on Climate Change, 0013-0028 (1994), OJ. L 033.

¹⁹ Temple Lang, *supra* n. 3, at 157–176.

²⁰ P.J. Kuijper, *International Responsibility for EU Mixed Agreements*, in Hillion & Koutrakos eds., *supra* n. 3, at 225.

respect of which competence has been transferred to the organization by its member States which are Parties to this Convention (Article 5.1). In addition, the UNCLOS envisages a mechanism to force compliance with the obligation of making a declaration of competence.²¹ Article 6 of Annex IX establishes that if the REIO and its Member States fail to provide clarification on the division of competence on a certain issue they will be subjected to joint and several liability.

The importance of a subsidiary mechanism such as this must not be overlooked. It is a good way to encourage the REIO and its Member States to clearly establish the distribution of competences. Thus, if they do not comply with this provision, the uncertainty over responsibility for implementation leads to joint liability of the REIO and its Member States.²²

2.1[b] Common Formal Structure of Declarations of Competence

Despite the freedom given by participation clauses to REIOs on how to report their competences on matters related to the international agreement, the EU has developed a standard practice. All declarations of competence have a similar basic structure. First, declarations often begin by signalling the existence of an EU competence on the issue. For example, the declaration made pursuant to the Convention on Biological Diversity reads: *In accordance with the relevant provisions of the [TFEU], the [Union] alongside its Member States has competence to take actions aiming at the protection of the environment.* In this first part, the declaration does not evaluate the nature of the competence; it simply signals its existence.

Second, the declaration explains the aspects of the international agreement covered by the EU competence. Depending on the declaration, this part will take a different shape. The declaration can determine the existence of EU's competence by linking it to the existence of EU legislation on issues covered by the international agreement.²³ It can also acknowledge the existence of EU's competence on general subject-matters like environment protection or trade in

²¹ P.J. Kuijper & E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations*, 1 Int'l. Org. L. Rev. 111–138 (2004).

²² On the issue of joint liability of the EU and its Member States in Multilateral Environmental Agreements see, A. Nollkaemper, *Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements*, in *The EU and International Environmental Law* (E. Morgera & G. Marín Durán eds., 2012).

²³ E.g. Montreal Protocol on Substances that deplete the Ozone Layer, 0021 – 0028 (1988), OJ. L-297.

goods.²⁴ Declarations can also establish the existence of EU competences by making reference to both general subjects and EU legislation.²⁵

Finally, some declarations have a clause which signals the dynamic character of the EU competence.²⁶ For instance, the declaration made to the UN Convention on the Rights of Persons with Disabilities mentions that: 'The scope and the exercise of Community competence are by their nature, subject to continuous development [...]'.²⁷

2.2 LEGAL EFFECTS OF THE DECLARATIONS OF COMPETENCE

The legal consequences of a declaration of competence may be different in International Law than in EU Law. From an international point of view, the question of the legal effects of the declaration relates to the binding force of the statements made in the declarations towards third parties to the agreement. From an (internal) EU perspective, the question of legal effects relates to the internal value of the division of competence made in the declaration. In other words, internally the main question would be, to what extent can the statement made in a declaration in relation to a competence affects the development of that specific competence?

At an international level, it is possible to consider declarations of competence as one of these instruments made by one party related to the conclusion of the agreement and accepted by the other parties in the sense of Article 31.2 of the Vienna Convention on the Law of the Treaties.²⁸ This would give them an interpretative value. In the event of a conflict related to the competence, the declarations would serve as an interpretative tool. They are *an authoritative statement* on the scope of the parties' commitment under the agreements.²⁹

At the internal level, the issue of the legal effects of the declarations of competence is relevant to the extent that the declarations could be used to expand

²⁴ E.g. Rotterdam convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, 0029 – 0047 (2003), OJ. L-063; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 0004 – 0020 (2002), OJ. L-130; Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 0050 – 0065 (2002), OJ. L-201.

²⁵ E.g. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 0015 – 0030 (2006) OJ. L-201; Council Decision 2006/719/EC of Oct. 5, 2006 on the accession of the Community to the Hague Conference on Private International Law, 001 – 0010 (2006), OJ. L- 297.

²⁶ Cf. Declaration by the European Community in accordance with Art. 34(3) of the Cartagena protocol, *supra* n. 18.

²⁷ Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Rights of Persons with Disabilities, (2010) OJ L-23/55.

²⁸ Macleod, Hendry & Hyett, *supra* n. 10, at 324.

²⁹ P. Okawa, *The European Community and International Environmental Agreements*, Yearbook of European Law, 176 (1995).

the scope EU competence on a specific issue mentioned in a declaration.³⁰ It is not clear whether the classification of a competence made in a declaration as exclusive could determine its exclusiveness internally.³¹ Strictly speaking, declarations of competence cannot create new spheres of EU powers.³² Moreover, the Court could use them as evidence that a competence has been exercised in a specific case.³³ Consequently, the possibility that declarations have some internal effects when used as interpretative tools by the ECJ cannot be excluded.³⁴

Therefore, since the Court could refer to the declaration in order to interpret the agreement in respect to which it was made,³⁵ could a declaration of competence be challenged in the ECJ? Such a scenario could arise as a consequence of the different views of the competence to be included in a specific declaration. This was the case with the Convention on Nuclear Safety (the Convention).³⁶ The Council made a declaration to this Convention (concluded by virtue of the EURATOM Treaty) which the Commission considered as incomplete since it did not include all the competences which fell within the scope of the Convention.

The Court considered that declarations of competence have legal effects which flow from their inclusion in the decision that concludes an international agreement.³⁷ More specifically, the ECJ considered that by not drafting the declaration as completely as possible, the Council breached its duty of cooperation towards the Commission.³⁸ An incomplete declaration of competence does not only run against the interests of the other contracting parties of the Convention on Nuclear Safety,³⁹ but also against the Union inasmuch as it does not enable it to fully comply with international law.⁴⁰

The ECJ considered that declarations of competence have the same legal effects as the concluding decisions to which they are attached and can therefore be challenged. Declarations of competence do not have independent legal effects but rather form part of the concluding decision. Furthermore, by virtue of the duty of cooperation, EU institutions have a Union obligation to make the most complete declaration of competence possible. However, the completeness of declarations of

³⁰ N.A. Neuwahl, *Mixed Agreements: Analysis of the Phenomenon and their Legal Significance*, 89 (EUI 1988).

³¹ Macleod, Hendry & Hyett, *supra* n. 10, at 325.

³² *Ibid.*

³³ MOX Plant, *supra* n. 13, at para. 105. LZ, *supra* n. 13, at para. 39.

³⁴ Hoffmeister, *supra* n. 4, at 249–268.

³⁵ P. Koutrakos, *The Interpretation of Mixed Agreements*, in Hillion & Koutrakos eds., *supra* n. 3, at 128–129.

³⁶ C-29/99, *Commission v. Council (Convention on Nuclear Safety)* [2002] ECR I- 11221.

³⁷ *Ibid.*, at para. 40.

³⁸ *Ibid.*, at para. 69.

³⁹ *Ibid.*, at para. 70.

⁴⁰ *Ibid.*, at para. 71.

competences is not an easy obligation to comply with, as will be shown in the next section.

2.3 MAIN PROBLEMS ASSOCIATED WITH DECLARATIONS OF COMPETENCE

There are two important points concerning declarations of competence that need to be analysed: the way in which declarations establish EU competence in relation to a multilateral agreement, and the question of managing a dynamic system of competence with an instrument like a declaration attached to an international agreement. As it was already mentioned, declarations of competence deal with the vertical division of powers within the European Union. They attempt at clarifying whether a certain competence lies at the EU level or at the Member State level. However, competences do not always lie either at the EU level or at the Member State level. The competence picture is much more complex.

First, the Treaties enshrine different types of competences.⁴¹ For instance, EU's common commercial policy falls within EU exclusive competence,⁴² which means that only the EU can act in that area.⁴³ By contrast, Article 2 TFEU also establishes that under shared competence the Union and the Member States may legislate and adopt legally binding acts. However, the Member States shall exercise their shared competence to the extent that the Union has not exercised its competence. For instance, environment and agriculture are examples of shared competences.⁴⁴ Yet, there are situations in which it is not clear which kind of competence the EU has exercised and their precise scope, for example due to the use of multiple legal bases when adopting the piece of legislation.⁴⁵

Moreover, different competences can cover the same subject in international agreements. In Opinion 1/94, the Court recognized that the competence used to conclude an agreement might be different from the competence needed to implement it.⁴⁶ For instance, the WTO Agriculture Agreement was concluded by virtue of EU's exclusive competence on common commercial policy. Yet, its implementation has been done through internal measures adopted under a shared competence (agriculture).⁴⁷ Therefore, the fact that the EU might have exclusive

⁴¹ Article 2 TFEU.

⁴² Article 3.1 (e) TFEU.

⁴³ Article 2 TFEU provides that 'when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts'.

⁴⁴ Article 4.2 (d) and (e) TFEU.

⁴⁵ Cf. Case C-94/03, *Commission v. Council (Rotterdam Convention)* [2006] ECR I-1; P. Koutrakos, *Legal Basis and Delimitation of Competence in the EU*, in *EU Foreign Relations Law*, 171–198 (M. Cremona & B. De Witte eds., Hart 2008).

⁴⁶ ECJ *Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR I-05267.

⁴⁷ *Ibid.*, at para. 29.

competence to conclude an agreement does not prevent the fact that the implementation might be done through shared competence, or *vice versa*.

Second, the dynamic nature of EU's competence adds another layer of complexity. Regardless the catalogue of competences in the Lisbon Treaty,⁴⁸ EU's competence is subject to continuous change and evolution. The ERTA doctrine is the perfect example of the evolutionary nature of the EU's competence. This doctrine recognizes the existence of EU powers not explicitly conferred by the Treaties.⁴⁹ This doctrine establishes that the competence of the Union to conclude international agreements may arise not only from an express conferment by the Treaty, but may also flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the EU institutions.⁵⁰ This doctrine, now codified in Article 216 TFEU, allows the EU to conclude international agreements where the conclusion of that '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'. Therefore, even though the Treaties do not expressly provide for the possibility of the EU to act in a certain field, the EU nevertheless might act if, for instance, is necessary to achieve an EU objective.

Moreover, the conditions under which this implied power becomes exclusive have also evolved through the case-law of the ECJ. Initially, the Court acknowledged that the EU had an exclusive external implied power each time the Union, 'with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules'.⁵¹ Nowadays, the Court has identified three situations under which the Union acquires an external competence not expressly provided in the Treaties:⁵² (a) where the international commitments fall within the scope of the common rules,⁵³ or in any event within an area which is already largely covered by such rules;⁵⁴ (b) whenever the Union has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions

⁴⁸ Articles 3–6 TFEU.

⁴⁹ See ECJ Case 22/70, *Commission v. Council (ERTA)*, [1971] ECR 0263, para. 16; Cf. M. Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy*, in *The Evolution of EU Law*, 217–268 (2d ed., Oxford, 2011); C. Hillion, *ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations*, in *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, 224–233 (M. Maduro & L. Azoulai eds., Hart 2010).

⁵⁰ *Opinion 1/03*, *supra* n. 9, at para. 114.

⁵¹ Case 22/70, *Commission v. Council (ERTA)*, *supra* n. 49, at para. 17.

⁵² ECJ Case C-476/98, *Commission v. Germany (re Open Skies Agreements)*, [2002] ECR I-9855, para. 108–110.

⁵³ Case 22/70, *Commission v. Council (ERTA)*, *supra* n. 49, at para. 30.

⁵⁴ ECJ *Opinion 2/91 (Re ILO)* [1993] ECR I-1061, para. 25.

powers to negotiate with non-member countries;⁵⁵ and (c) where the Union has achieved complete harmonization in a given area.⁵⁶ These three situations are now codified in Article 3.2 TFEU. However, the Court has recognized that these circumstances under which an implied exclusive power arises are *only examples*.⁵⁷ According to the Court, implied exclusive competences could arise under other circumstances apart from those enshrined in Article 3.2 TFEU.

In a nutshell, the system of division of competences is not only subject to constant change by virtue of the notion of implied powers, but also impacted by the conditions under which this implied powers arise and the exact scope of the competence.

2.3[a] *How declarations of competence clarify the vertical division of powers in the EU*

Therefore, how do declarations of competence explain the vertical division of competence? In practice, declarations of competence to mixed agreements usually appear in two scenarios: first, agreements that contain elements falling under both EU exclusive competence and shared competence; and second, agreements that only fall under a shared competence. Examples of the former would be the UNCLOS, the Rotterdam Convention,⁵⁸ the UNESCO Cultural Diversity Convention,⁵⁹ or the Codex Alimentarius.⁶⁰ The concluding decision of all these mixed agreements includes an article of exclusive competence and at least one article of shared competence. In all these agreements, the pertinence of a statement on the division of competences can be understood to the extent that there are two different types of competence covering the whole agreement.

Examples of the latter relate mainly to environmental issues⁶¹ that are a shared competence.⁶² From this point of view, it would not be useful to make a declaration stating the division of competences, since the EU and its Member States have shared competence over the subject-matter of the agreement.

⁵⁵ *Opinion 1/94*, *supra* n. 46, at para. 95; ECJ *Opinion 2/92 (re: OECD)* [1995] ECR I-521, para. 33.

⁵⁶ *Opinion 1/94*, *supra* n. 46, at para. 96; *Opinion 2/92*, *supra* n. 55, at para. 33.

⁵⁷ ECJ *Opinion 1/03 (Re Lugano Convention)* [2006] ECR I-1145, para. 121. Art. 3.2 TFEU thus provides with a list of examples of implied exclusive competences.

⁵⁸ Rotterdam Convention, *supra* n. 24.

⁵⁹ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *supra* n. 25.

⁶⁰ Council Decision 2003/822/EC of 17 November 2003 on the accession of the European Community to the Codex Alimentarius Commission, (2003) OJ L-309/0014 – 0021.

⁶¹ Stockholm Convention on Persistent Organic Pollutants, 3–29 (2006) OJ L-209; Cartagena protocol, *supra* n. 24; Kyoto Protocol, *supra* n. 24; Convention on the Transboundary Effects of Industrial Accidents, *supra* n. 15; United Nations Convention to combat desertification, *supra* n. 18; Convention on the protection and use of transboundary watercourses and international lakes, *supra* n. 18; United Nations Framework Convention on Climate Change, *supra* n. 18; Convention on Biological Diversity, 0003 – 0020 (1993) OJ L-309; Basel Convention, *supra* n. 18.

⁶² L. Krämer, *EC Environmental Law*, 95 (5th ed., Sweet & Maxwell 2003).

For instance, the declaration of competence made to the Aarhus Convention⁶³ starts by acknowledging the external competence of the EU to enter into environmental agreements. Then the declaration quotes the four objectives laid down in Article 191.1 TFEU. However, to what extent does listing the EU objectives in the environmental field help third parties understand whether a particular provision of the Aarhus Convention is to be implemented by the EU or by its Member States? First, environment is shared competence, and, by virtue of Article 2.2 TFEU, 'Member States shall exercise their competence to the extent that the Union has not exercised its competence.' The objectives envisaged in Article 191 are not to be interpreted in a preemptive way.⁶⁴ In other words, the mention of an objective envisaged in the TFEU does not mean that the EU has sole competence over them. Second, this declaration fails to clarify the division of competence to the extent that it does not even state the nature of the competence. The only indication that third parties receive as to the matters for which the EU responsible is through a clause which explains the doctrine of preemption: *The European [Union] is responsible for the performance of those obligations resulting from the Convention which are covered by [Union] law in force.*⁶⁵

Furthermore, in some declarations the EU establishes its competence through reference to pieces of legislation and policy documents, such as Commission Communications. In the declaration to the UN Convention to combat desertification, apart from a list of EU legislation, one of the general instruments mentioned is a Communication on development cooperation.⁶⁶ It suffices to say that Commission Communications do not have any legal nature whatsoever. In the Climate Change Convention, the EU included in the list environmental programmes.⁶⁷ This reference to policy documents as way to establish the division of competences may mislead third parties on where the competence stands on a particular issue.

⁶³ Council Decision 2005/370/EC of Feb. 17, 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, 3 (2005), OJ L 124.

⁶⁴ Krämer, *supra* n. 62, at 8.

⁶⁵ This clause is also envisaged, *inter alia*, in the Declarations to the Stockholm Convention, the Cartagena Protocol, and the Rotterdam Convention.

⁶⁶ Communication from the Commission to the Council and to the European Parliament concerning development cooperation policy in run-up to 2000, SEC (92) 915 final.

⁶⁷ Council Decision 89/625 EEC of Nov. 20, 1989 on European Programme on Science and Technology for Environment Protection, and a European Programme on Climatology and Natural Hazards (EPOCH), (1989) OJ L 369.

2.3[b] *Managing a dynamic system of competences with a static instrument*

Apart from explaining the vertical division of competences within the EU, declarations of competence also try to clarify how EU competences evolve. The EU's system of competence is still open to new developments. The ERTA principle is a paradigmatic example of the dynamic character of the EU competence.⁶⁸

The final clause of some declarations of competence acknowledges the continuous development to which the EU competence is subject. Yet, the declaration does not help third parties to the agreement. The participation clause, apart from demanding a declaration stating the division of competences between the EU and its Member States, imposes an obligation to make substantial changes known.⁶⁹ Taking that into account, such final clauses could be seen as a way of avoiding the obligation of updating the declarations.

The dynamic character of EU competence imposes on the EU the obligation of keeping declarations up to date. This obligation might be seen as a fairly straightforward task. However, declarations have never been updated. This becomes especially problematic in those declarations which establish EU competence through a list of EU legislation. For example, in the Convention on Climate Change, from a total of eleven norms, only one remains in force,⁷⁰ while in the UN Convention to combat desertification none of the legal norms cited is in force, only the political documents remaining 'in force'.⁷¹ This lack of update creates uncertainty on the existence of EU competence to the extent that a specific norm cited may not still be in force. Furthermore, the lack of update of the declarations also means that new legislation is not included in the declarations. Therefore, declarations of competence which makes reference to legislation do not only misinform third parties, they are also incomplete.

Overall, these problems show the extent to which declarations of competence fail to clarify the division of competence for the benefit of third parties to multilateral (mixed) agreements. In addition, they fail to provide a complete answer to the question of EU competences on the matters governed by the

⁶⁸ See *supra* sec. 2.3.

⁶⁹ See Art. 44.1 UN Convention on the Rights of Persons with Disabilities.

⁷⁰ Council Directive 92/6/EEC of Feb. 10, 1992 on the installation and use of speed limitation devices for certain categories of motor vehicles in the Community, 27–28 (1992), OJ L-57.

⁷¹ Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of Feb. 1, 1993 on a Community programme of policy and action in relation to the environment and sustainable development, 1 (1993) OJ C-138; Communication from the Commission to the Council and to the European Parliament concerning development cooperation policy in the run-up to 2000, SEC(92) 915 final; Commission communication in accordance with Council Regulation (EEC) No. 1973/92 of May 21, 1992 establishing a financial instrument for the environment (LIFE), relating to priority actions to be implemented in 1995, 3 (1994) OJ C 139.

agreement. These declarations externalize not only the internal division of competences, but also the problems and questions attached to the vertical division of powers in the EU.

3 RECENT DEVELOPMENTS CONCERNING THE DECLARATIONS OF COMPETENCE

By analysing existing practice on the issue, it will be possible to test the relevance and usefulness of the declarations as a way of helping third parties understand EU internal division of competences concerning a multilateral agreement. This section examines the most recent practice concerning the declaration. Interestingly, although declarations of competence are designed in order to be applied externally they are also being applied increasingly internally.⁷² More and more the ECJ uses these instruments to deal with internal discussions on the vertical division of powers within mixed agreements. There is thus the possibility of diverging (and conflicting) interpretations internally and externally. Moreover, this divergence could negatively affect the EU as an international actor. Third parties to a mixed agreement and international courts interpreting those agreements could read the declaration in a completely different way than the reading given by the ECJ. On one hand, an international court could acknowledge Member States' external competence (and responsibility) on a certain issue of a mixed agreement; while, on the other hand, the ECJ could recognize EU's external competence (and responsibility) on the same issue. Furthermore, these conflicting readings of a declaration of competence could not only endanger EU's compliance with its obligations under a mixed agreement, but also Member States' compliance with EU Law.

In recent years, declarations of competence have increasingly been invoked in front of the ECJ. Initially, the Court embraced them as a useful reference base. Yet, the Court's use of declarations is not as consistent as it might be expected. In this regard, two recent cases show how declarations of competence have played an important role in the internal discussion about the vertical division of competence while, at the same time, show the different approaches that the Court has taken to deal with declarations of competence.

3.1 A USEFUL REFERENCE BASE: THE *MOX PLANT* CASE

In the *MOX Plant* case, the Court used the declaration of competence made pursuant to UNCLOS to establish its jurisdiction. Moreover, this case constitutes

⁷² See *supra* nn. 10 and 11.

an interesting example since it shows how the declaration of competence on UNCLOS was used in the framework of a case before the ECJ, while it was not mentioned in the international legal proceedings which gave rise to the action at the ECJ.⁷³

In this case, Ireland brought an action UNCLOS against the United Kingdom concerning the operation of a MOX Plant in Sellafield. As mentioned above, UNCLOS is mixed agreements with an attached declaration of competence. As a consequence of this action, the Commission brought an infringement action against Ireland. It was the Commission's understanding that by instituting dispute-settlement proceedings against the UK under the UNCLOS concerning the MOX plant, Ireland had failed to fulfil its obligations under Articles 344 (ex Article 292) TFEU (ECJ's exclusive jurisdiction) and 4.3 (ex Article 10 TEC) TEU (the duty of sincere cooperation).⁷⁴

According to settled case-law, ECJ's jurisdiction over mixed agreements extends not only to those provisions of the agreement falling within the EU's exclusive competence but also to those which are covered by shared with the Member States.⁷⁵ Therefore, it seems logical for both parties to rely on the declaration of competence in order to make their point on the existence, or lack, of an EU competence.⁷⁶ Likewise, AG Maduro referred to the declaration in order to establish the jurisdiction of the Court, while pointing out its *lack of clarity and elegance*.⁷⁷

Logically, since both parties and the Advocate General had used the declaration of competence to shed some light on the issue of the exclusive jurisdiction of the Court, so did the ECJ. According to it, the declaration confirmed that a transfer of shared competence, *in particular in regard to the prevention of marine pollution, took place within the framework of the Convention* within the terms of the ERTA judgment.⁷⁸ Furthermore, the ECJ held that *within the specific context of the Convention, a finding that there has been a transfer to the [Union] of*

⁷³ For a more detailed analysis see A. Delgado Casteleiro, *The International Responsibility of the European Union: From competence to normative control*, 149–161 (EUI, 2011).

⁷⁴ Case C-459/03, *Commission v. Ireland (MOX Plant)*, para. 1.

⁷⁵ Case C-240/09 *LZ*, *supra* n. 13; ECJ Case C-431/05, *Merck Genéricos Produtos Farmacêuticos*, [2007] ECR I-7001; ECJ Case C-13/00, *Ireland v. Commission (Berne Convention)* [2002] ECR I-2953; ECJ Case C 53/96 *Hermès* [1998] ECR I-3603; ECJ Case C-300/98 & C-392/98 *Dior and Others* [2000] ECR I-11307. Cf. S. Mardsen, *Invoking Direct Application and Effect of International Treaties by the European Court of Justice: Implications for International Environmental Law in the European Union*, 60 *Int'l. & Comp. L. Q.* 750 (2011); A. Nollkaemper, *Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements*, in *The EU and International Environmental Law*, 27 (E. Morgera & G. Marín Durán eds., Cambridge University Press, Forthcoming).

⁷⁶ Case C-459/03, *Commission v. Ireland (MOX Plant)*, paras. 64–67.

⁷⁷ *Ibid.*, Opinion of Advocate General Maduro, at para. 36.

⁷⁸ *Ibid.*, at para. 105.

areas of shared competence is contingent on the existence of [Union] rules within the areas covered by the Convention provisions in issue, irrespective of what may otherwise be the scope and nature of those rules.⁷⁹ Therefore, insofar as there is Union legislation on an area covered by the UNCLOS, that area falls within Union competence, whether exclusive or shared, and the ECJ's exclusive jurisdiction.

Leaving aside the issue of whether this particular analysis is the best way to reach a conclusion on the jurisdiction of the Court,⁸⁰ the ECJ's approach illustrates some of the main questions identified in previous pages. The discussion about the interpretation of the declaration regarding the nature of the competence on the protection of environment casts much doubt over the legal certainty that a declaration must provide to third parties.⁸¹ If Ireland and the EU Institutions do not agree on what the declaration says about the distribution of competences, it is difficult to expect that from third parties to mixed agreement. The *MOX Plant* case shows on one hand, as AG Maduro said the lack of certainty of declarations of competence. On the other hand, the case shows ECJ's eagerness to use the declaration of competence in order to deal with complex issues concerning the vertical division of competence in the EU and some of the issues (like the jurisdiction of the Court) liked to it.

3.2 THE CRUCIAL IMPORTANCE OF THE DECLARATION OF COMPETENCE? THE *LZ* CASE

The approach towards the declaration of competence made to UNCLOS adopted by the ECJ in the *MOX Plant* case contrasts with the approach that it took to the declaration of competence made to the Aarhus Convention in the *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* case (hereafter *LZ* case).⁸²

The case concerns a preliminary reference made by the Slovak Supreme Court on the direct effect of Article 9.3 of the Aarhus Convention. Article 9.3 of the Aarhus convention provides, *inter alia*, that each Party shall ensure that, [...] members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. *Lesoochranárske zoskupenie VLK* (*LZ*), an environmental association, argued that by not allowing it to participate in various

⁷⁹ *Ibid.*, at para. 108.

⁸⁰ For a critical analysis of the approach developed by the ECJ in relation to the division of competences, see M. Cremona, *Defending the Community Interest: the Duties of Cooperation and Compliance*, in *EU Foreign Relations Law: Constitutional Fundamentals* (M. Cremona & B De Witte, Hart 2008); Koutrakos, *supra* n. 35.

⁸¹ R. Churchill & J. Scott, *The Mox Plant Litigation: The First Half-Life*, 53 *Int'l. & Comp. L. Q.* 666 (2004).

⁸² Case C-240/09 *LZ*, *supra* n. 13.

administrative procedures on the granting of permissions to hunt brown bears, the Slovak Republic had breached Article 9.3 of the Aarhus Convention. Given the fact that the Aarhus Convention was a mixed agreement, the question of the ECJ's jurisdiction on Article 9.3 of the Aarhus Convention was raised during the proceedings.

According to the declaration of competence, *the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European [Union] [...] and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European [Union] and will remain so unless and until the [Union], in the exercise of its powers under the [Treaties], adopts provisions of [Union] law covering the implementation of those obligations.*⁸³ In other words, Member States retain their competence (and responsibility) to ensure that members of the public have access to their national procedures on environmental issues. The declaration thus establishes a sort of parallel competence on issues having to do with Article 9.3: the EU is responsible for making sure that EU institutions comply with this provision;⁸⁴ while the Member States are responsible for making sure that their national institutions comply with this provision.⁸⁵ Therefore in a scenario like the *LZ* case, the ECJ would not have jurisdiction over the issue, since the EU has no competence on the issue.

AG Sharpston shared this view in her Opinion,⁸⁶ arguing that the declaration was of *crucial importance* to establish the jurisdiction of the Court. Furthermore, according to the AG, the obligations at stake in the case (i.e., the obligation to allow LZ to intervene in a national procedure on hunting licenses) were not within the sphere that lies within the scope of EU Law.⁸⁷ While Sharpston was following the Court's use of the declaration of competence in the *MOX Plant* case, the Court slightly departed from its previous approach. Like in the *MOX Plant* case,⁸⁸ the Court continued to link its jurisdiction to the exercise of

⁸³ Council Decision 2005/370/EC of Feb. 17, 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, 3 (2005) OJ L-124.

⁸⁴ The Union has transposed that obligation in Regulation 1367/2006 OJ 2006 the European Parliament and of the Council of Sept. 6, 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, L 264, 25, 13–19.

⁸⁵ Cf. Case C-240/09 *LZ.*, *supra* n. 13, Opinion of AG Sharpston, para. 77.

⁸⁶ *Ibid.*, at para. 78.

⁸⁷ *Ibid.*, at para. 79.

⁸⁸ *Commission v. Ireland (MOX Plant)*, *supra* n. 13, at para. 108.

competence by the EU.⁸⁹ Though, unlike in the *MOX Plant* case, the Court dismissed what the declaration of competence said regarding Article 9.3, and the view of AG Sharpston on the declaration. The declaration made to the Aarhus Convention was not a useful reference base. Instead of engaging with the discussion on the interpretation of the declaration of competence, the Court took a broader view basing its jurisdiction on the explicit external competence on environmental issues⁹⁰ and the exercise of an internal shared competence on the protection of certain species.⁹¹

The Court's reading (or lack of it) of the declaration of competence in the *LZ* case could create problems as the participation of the EU and its Member States in the Aarhus Convention. According to the Court, Article 9.3 of the Aarhus Convention falls within the scope of EU Law since it relates to a field covered in large measure covered by it.⁹²

In other words, the Court seems to be arguing that Article 9.3 of the Aarhus Convention falls within EU's exclusive competence,⁹³ even though the declaration of competence provides that unless the Union has adopted legislation on that specific issue, Member States retain their competence on Article 9.3. According to the Court, Member States seems to be no longer competent on issues covered by Article 9.3.

Nevertheless, the EU has yet to adopt legislation implementing Article 9.3 in relation to national procedures. Consequently, according to the declaration Member States are responsible for issues covered by EU's exclusive competence. There can be a scenario in which a Member State could bear international responsibility for the breach of Article 9.3 of the Aarhus Convention, but could not implement the decision since it is no longer competent to implement Article 9.3 of the Aarhus Convention. This scenario does not seem too hypothetical since in 2011 EU's compliance with Article 9.3 of the Aarhus Convention was examined by the Compliance Committee of the Aarhus Convention,⁹⁴ and made a similar reading of the declaration of competence than the one made by AG Sharpston.⁹⁵ Consequently, ECJ's interpretation of the declaration of competence made to the Aarhus Convention could endanger EU's image within the Aarhus Convention bodies.

⁸⁹ Case C-240/09 *LZ*, *supra* n. 13, at para. 32.

⁹⁰ *Ibid.*, at para. 35.

⁹¹ Mardsen, *supra* n. 75, at 755.

⁹² Case C-240/09 *LZ*, *supra* n. 13, at para. 40.

⁹³ Cf. *Opinion 1/03*, *supra* n. 9, at para. 121; Cf. Eeckhout, *supra* n. 9, at 108.

⁹⁴ Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, Report of the Compliance Committee, (Apr. 14, 2011), ECE/MPPP/C.1/2011/4/Add.1.

⁹⁵ *Ibid.*, at para. 58.

4 CONCLUSIONS

In theory, declarations of competence are supposed to give legal certainty to non-EU parties to mixed agreements with regard to where responsibilities reside. By externalizing the internal division of competence, the declarations of competence give an *a priori* solution to the questions of implementation and compliance with mixed agreements. They also provide legal certainty to third parties that neither the EU nor its Member States will try to avoid their responsibility in case of a breach by hiding behind the other. This is even clearer in those agreements in which the REIO clause establishes the joint and several responsibility of the REIO and its Member State as a subsidiary mechanism to the declaration of competence. In such agreements, if neither the EU nor a Member State provides an answer as to who is responsible, both will have to answer for their silence on the issue.⁹⁶

Although in theory, declarations could provide an easy solution to the different responsibility scenarios which were identified in the introduction, a closer look suggests otherwise. First, the internal division of competence is anything but simple. Competences do not only change over time, but also vary depending on the stage of the life-cycle of the agreement (e.g., negotiation, conclusion or implementation). Second, it appears that declarations create more problems than they solve. In terms of content, they are vague and fail really to clarify when the EU is responsible under each specific mixed agreement.⁹⁷ As Olson argues: *Declarations are not a particularly useful document from the point of view of the EU's Treaty partners. Declarations rarely, if ever, include something which would be far more informative: an article-by-article [...] analysis informing treaty partners clearly and in detail which entity will be exercising which rights and performing which obligations.*⁹⁸

Moreover, they need to be constantly updated so as to keep up with the evolution of the EU's powers, but they are not.⁹⁹ Consequently, after close examination, it is clear that declarations of competence do not answer the question of EU competence to implement mixed agreements but instead create more uncertainty. For instance, what are the legal effects of a declaration which carries outdated legislation?

In addition, there is little international practice in this area. This lack of visibility, which might imply disregard for this technique, contrasts with the increasing relevance that this instrument has internally. The MOX Plant dispute

⁹⁶ Cf. Heliskoski, *supra* n. 3.

⁹⁷ B. De Witte, *Too Much Constitutional Law in the European Union's Foreign Relations?*, in Cremona & De Witte, *supra* n. 45, at 15.

⁹⁸ Peter M Olson, *Mixity from the Outside: the Perspective of a Treaty Partner*, in Hillion & Koutrakos eds., *supra* n. 3, at 345.

⁹⁹ Hoffmeister, *supra* n. 4, at 259.

perfectly exemplifies this contradiction. In the international dispute, the declarations were not mentioned at all by any of the parties. On the contrary in the case before the ECJ, the parties relied on it in order to establish the division of competence over the issue. Their insistence on the internal use of the declaration does not follow the implicit rationale of legal certainty. On the contrary, it questions it. Given the contradictory interpretations of the declaration pleaded in the case, it is doubtful that a third party could understand how the internal division of competence over a specific issue works. Therefore, it would be difficult, if not impossible, to use the declaration in order to apportion the obligations between the EU and its Member States over a particular issue in an agreement, in order to understand who is responsible for that part of the agreement.

Having established that declarations of competence as they stand today do not provide legal certainty to third parties, one question arises: is there any other way that the EU and its Member States could provide legal certainty to the other parties to multilateral (mixed) agreements? First, the EU and its Member States should make a special effort during the negotiations of multilateral conventions to assure the other parties that the division of competence is an internal issue that does not affect their compliance with the multilateral convention.¹⁰⁰ Most of the time, the obligation to make a declaration of competence is the result of the lack of effective coordination between the EU and its Member States during the negotiation of the agreement.¹⁰¹ Therefore, most of the problems that the declarations of competence create could be avoided if the EU effectively spoke with one voice during the negotiations of a multilateral convention. Declarations of competence seem to be the price to pay for the lack of coordination during the negotiations.

Second, instead of trying to clarify the complexities surrounding the internal division of competence and its dynamic nature, the EU should stress in its declarations made to international agreements not the fact that it has competence over an issue, but that presented with a situation in which contracting parties may demand such clarification, the EU will promptly give an univocal response. Perhaps, by laying down clear procedures in the declaration in which a third party can obtain clarification on a particular aspect of the division of competence regarding the agreement, third parties' legal certainty would be effectively safeguarded.

¹⁰⁰ Kuijper, *supra* n. 17, at 225.

¹⁰¹ Cf. C. Rijken & V. Kronenberger, *The United Nations Convention Against Transnational Organised Crime and The European Union*, in *The EU and the International Legal Order: Discord or Harmony?*, 481–517 (V. Kronenberger ed., T.M.C. Asser Press 2001).