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# Member States as 'Trustees' of the Union? The European Union and the Arctic Council

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The European Union in the Arctic Council**

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## **Abstract**

This paper sets out to analyse two elements often overlooked in the literature on the European Union (EU) and international organisations, namely EU representation in the Arctic Council and the duty of sincere cooperation as a tool of EU representation. Since the EU is not a member of the Arctic Council, this paper assesses to what extent the EU is able to rely on its three member states (Denmark, Sweden and Finland), as members of the Arctic Council, to represent Union interests. After having shown the extent to which the duty of sincere cooperation has effectively been invoked by the European Court of Justice to enforce unity in representation, EU representation in the Arctic Council serves as a case study exemplifying the limits of the duty. While the duty of sincere cooperation entails general and concrete obligations on the activities of member states in international organisations, the duty remains a reactive legal tool only applicable when the EU legal order is challenged. Hence, the duty of sincere cooperation plays a minor role for international organisations dealing with matters of Common Foreign and Security Policy and with decision-making powers that do not directly affect the EU legal order. For the Arctic Council, this paper therefore concludes that the EU has only to a limited extent been able to rely on its member states as 'trustees' of the Union.

## Introduction: The EU on thin ice in the Arctic

In April 2016, the High Representative and Vice-President of the European Commission, Federica Mogherini, presented the European Union's (EU) new integrated policy for the Arctic, underlining the importance of the Arctic for the EU and its citizens.<sup>1</sup> In recent years, the Arctic region has raised considerable interest among scholars and decision-makers. Especially the media but also a few scholars have focused on the Arctic as a source of tensions and potential conflicts visible through the coining of terms such as the "race to the Arctic", "the fight over the Arctic", "the scramble for the Arctic" or even "the new Cold War" in the Arctic.<sup>2</sup> Most scholars, however, concur that the region remains an example of successful international cooperation.<sup>3</sup> In a region characterised by new trade routes, untapped energy resources, environmental change, and overlapping territorial claims, decision-makers have recognised the need for developing multilateral institutions and intensifying bilateral cooperation. The current governance of the Arctic is not marked by military confrontation or a fight for the control of resources, as predicted by some, but rather by patterns of intergovernmental cooperation.<sup>4</sup> In the governance of the Arctic, the Arctic Council has over the years become the primary forum for cooperation.

The Arctic Council, established in 1996 with the Ottawa Declaration, today sees itself as "the leading intergovernmental forum promoting cooperation, coordination and interaction" in the region.<sup>5</sup> Sometimes described as the first post-modern regional organisation, the Arctic Council retains, nonetheless, central elements of traditional intergovernmental organisations.<sup>6</sup> In developing patterns of cooperation, the Arctic

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<sup>1</sup> European Commission and High Representative, "Joint Communication to the European Parliament and the Council – An integrated European Union policy for the Arctic", JOIN (2016) 21 final, Brussels, 27 April 2016.

<sup>2</sup> See Kurek, Laura, "The Race for the Arctic", *Wilson Quarterly*, 20 July 2015; Aljazeera, "The new cold war: The race for Arctic oil and gas", 5 September 2015; Sherlock, Ruth, "America and Russia locked in race to control the Arctic Circle", *The Telegraph*, 2 September 2015; Roughead, Gary, "In the Race for Arctic Energy, the U.S. and Russia Are Polar Opposites", *The Wall Street Journal*, 25 August 2015; Roston, Eric, "Experts Worry the U.S. Is Losing the Race for Arctic Power", *Bloomberg*, 22 March 2017; Sale, Richard and Potapov, Eugene, "The Scramble for the Arctic: Ownership, Exploitation and Conflict in the Far North", *Frances Lincoln*, 1 December 2009; Cohen, Ariel, Dolbow, Jim and Szaszdi, Lajos, "The New Cold War: Reviving the US Presence in the Arctic", *The Heritage Foundation*, 30 October 2008.

<sup>3</sup> Haftendorn, Helga, "The Case for Arctic Governance: The Arctic Puzzle", University of Iceland, Institute of International Affairs, Centre for Arctic Policy Studies, Reykjavik, 2013.

<sup>4</sup> Jakobson, Linda and Melvin, Neil John, "The New Arctic Governance", SIPRI, Oxford, Oxford University Press, February 2016.

<sup>5</sup> Arctic Council, "The Arctic Council: A Backgrounder", online, 7 April 2017.

<sup>6</sup> Brigham, Lawson, Exner-Pirot, Heather, Heininen, Lassi and Plouffe, Joël, "The Arctic Council: Twenty Years of Policy Shaping", in Heininen, Lassi, Heather Exner-Pirot and Joël Plouffe (eds.), *Arctic Yearbook 2016*, Akureyri, Northern Research Forum, pp.14-22.

states have sought to keep Arctic governance intergovernmental. In these intergovernmental waters, the EU has found it difficult to navigate.

The Arctic Council's member states include Canada, the United States, Denmark, Iceland, Norway, Sweden, Finland and the Russian Federation, limiting the membership of states to the ones with territory above the Arctic Circle. The Arctic Council has, however, taken an innovative approach to multilateral cooperation by including organisations representing Arctic indigenous peoples as permanent participants, providing them with full and active participation rights. Observer status in the Arctic Council has been granted to 12 "non-Arctic states", 9 intergovernmental and inter-parliamentary organisations and 11 non-governmental organisations.<sup>7</sup> The EU, however, has not been granted formal observer status in the Arctic Council. Its bid was blocked by Canada in 2009, and deferred in 2011, 2013, and again in 2015, this time with Russia opposing it.<sup>8</sup> Indeed, the EU's quest for observer status in the Arctic Council has been long and tumultuous. In its 2012 Communication on improving the EU status in international organisations, the Commission listed the Arctic Council as one of the main international organisation for which it would strategically seek to improve its representation.<sup>9</sup> Five years after the Communication, the EU's status in the Arctic Council has not changed.

Given the limited EU representation in the Arctic Council, the question arises to what extent the EU has been able to rely on its three member states which are members of the Arctic Council (Sweden, Finland and Denmark) to represent Union interests. In order to assess member-state activities in the Arctic Council, this study will look into the obligations deriving from the duty of sincere cooperation laid down in art. 4(3) of the Treaty on European Union (TEU).<sup>10</sup> The obligations deriving from art. 4(3) TEU, as developed by the case law of the European Court of Justice (ECJ), will serve as

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<sup>7</sup> The literature and the Arctic Council itself tends to talk about "non-Arctic states" when referring to all states that do not have territory above the Arctic Circle (see for example Coates, Ken and Holroyd, Carin, "Non-Arctic States and their Stake in Arctic Sustainability", in Keil, Kathrin and Sebastian Knecht (eds.), *Governing Arctic Change, Global Perspectives*, Palgrave Macmillan, Basingstoke, 2017, pp. 207-228). Conversely, "Arctic states" is employed when referring to the United States (Alaska), Canada, Iceland, Norway, Sweden, Finland, Russia and Denmark (Greenland).

<sup>8</sup> Østhagen, Andreas, "In or Out? The Symbolism of the EU's Arctic Council Bid", The Arctic Institute, Washington, DC, Center for Circumpolar Security Studies, 18 June 2013.

<sup>9</sup> European Commission, "Communication to the Commission from the President in agreement with Vice-President Ashton: Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon", C(2012) 9420 final, Brussels, 20.12.2012.

<sup>10</sup> European Union, "Consolidated Version of the Treaty on European Union", *Official Journal of the European Union*, C326/13, 26 October 2012, art. 4(3).

basis for analysing member states' actions within the Arctic Council. The paper will review the case law and analysis of the ECJ on the matter, before applying it to EU member states within the Arctic Council. This study focuses on criteria when the duty of sincere cooperation may apply, and what concrete duties result from it.

### **The duty of sincere cooperation: A tool for EU representation**

Several provisions in the EU Treaties impose certain obligations on member states in international organisations. Most of these, however, are provisions of the EU's Common Foreign and Security Policy (CFSP) and are therefore only to a limited extent enforceable by the ECJ. The duty of sincere cooperation has been one of the few legally enforceable instruments at the Union's disposal to safeguard unity in international representation.

#### *Why the duty of sincere cooperation?*

EU member states as sovereign states remain solely responsible of their actions in international organisations. For the vast majority of international organisations, EU member states still ensure their own representation. Notable exceptions include the World Trade Organisation, the Food and Agriculture Organisation (FAO) and the Codex Alimentarius Commission, where representative tasks have been, to various degrees, taken over by the EU. One main challenge that the EU often faces in international organisations is that it is either represented through a limited status or not represented at all. EU representation in the Arctic Council appears to be somewhat in-between these two scenarios, as the EU enjoys a *de facto* observer status but this status remains *ad hoc* and hinges on the goodwill of the Arctic Council members.

In such a context, where the EU is not a member and enjoys only a limited status, the Union has to rely on its member states to pursue its interests.<sup>11</sup> The Treaties specify that also in their activities in international organisations, the EU member states still have to act in accordance with EU obligations. According to art. 34(1) TEU, the "member states shall coordinate their actions in international organisations [...] They shall uphold the Union's position in such forums". Importantly, art. 34(1) TEU specifies that "[i]n international organisations [...] where not all the member states participate, those

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<sup>11</sup> Wouters, Jan, Odermatt, Jed and Ramopoulos, Thomas, "The EU in the world of international organizations: Diplomatic aspirations, legal hurdles and political realities", *Working Paper*, no. 121, KU Leuven, Leuven, September 2013, p. 3.

which do take part shall uphold the Union's position".<sup>12</sup> Furthermore, in art. 34(2) TEU the Treaty refers to the principle of "loyalty and mutual solidarity" of art. 24(3) TEU, in stating that the member states participating also have an obligation to keep other member states and the HR/VP "informed of any matter of common interest".<sup>13</sup> However, these provisions fall within the CFSP and the ECJ shall therefore "not have jurisdiction with respect to these provisions".<sup>14</sup> As stated by art. 24(3) TEU, the compliance with these principles shall be ensured by the Council and the High Representative.<sup>15</sup> In other words, the Commission may not, under these provisions, bring a member state before the Court for breach of CFSP duties.<sup>16</sup> This had led scholars to argue that compliance with art. 34 TEU is done through political control, rather than judicial control and ECJ monitoring.<sup>17</sup>

However, the ECJ has based itself on another Treaty provision to review the actions of member states in international organisations, occasionally even curbing the scope for independent member-state actions. Indeed, the duty of sincere cooperation as laid down in art. 4(3) TEU has been used over the years by the ECJ to ensure close cooperation between the Union and the member states in international organisations.<sup>18</sup> As argued by van Elsuwege, whereas art. 24 TEU (one could also add art. 34 TEU) does not provide the Commission with the possibility to bring member states before the ECJ, actions of member states jeopardising the attainment of EU external action objectives could fall within ECJ jurisdiction according to art. 4(3) TEU.<sup>19</sup> Art. 4(3) TEU states:

(3) 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.

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<sup>12</sup> European Union, "Consolidated Version of the Treaty on European Union", *op. cit.*, art. 34(1).

<sup>13</sup> *Ibid.*, art. 34(2) TEU.

<sup>14</sup> *Ibid.*, art. 24(1) TEU.

<sup>15</sup> *Ibid.*, art. 24(3) TEU.

<sup>16</sup> Van Elsuwege, Peter, "The duty of sincere cooperation (Art. 4(3) TEU) and its implications for the national interests of EU Member States in the field of external relations", UACES conference paper, Bilbao, 2015, p. 5. Cited with authorisation from the author.

<sup>17</sup> Govaere, Inge, "Novel issues pertaining to EU Member States membership of other international organisations: The OIV case", in Govaere, Inge, Lannon, Erwan, Van Elsuwege, Peter and Stanislas, Adam (eds.), *The European Union in the World - Essays in Honour of Marc Maresceau*, Leiden, Brill, 2014, p. 236.

<sup>18</sup> Van Elsuwege, *op. cit.*, p. 1.

<sup>19</sup> *Ibid.*, p. 5.



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.<sup>20</sup>

Based on art. 4(3) TEU, the ECJ has used different denominations to refer to the duty of sincere cooperation in its case law: "the duty of genuine cooperation", "the obligation to cooperate in good faith" or "the principle of the duty to cooperate in good faith".<sup>21</sup> Also, the literature employs alternatively the "duty of loyal cooperation", the "duty of loyalty" and the "duty of cooperation".<sup>22</sup> The many denominations given to the duty of sincere cooperation reflects how it has gradually developed through the Court's case law, but without being initially mentioned explicitly in the Treaties. Before the Lisbon Treaty, the duty already existed under art. 10 of the Treaty establishing the European Community.<sup>23</sup> At Lisbon, the provision was strengthened with a central position in the fourth article following the first provisions on Union values and objectives, and by explicitly referring to the "principle of sincere cooperation", thereby codifying ECJ jurisprudence.<sup>24</sup> To properly assess the duty and its implications for member states in international organisations, a review of relevant case law is necessary. The following cases all deal with EU and member states' representation in international organisations and are fundamental to the ECJ's case law on unity of representation. Except for case 399/12 Germany v Council, they deal directly with the duty of sincere cooperation.

*Review of the relevant case law: Case 25/94 Commission v Council (FAO)*<sup>25</sup>

In the Food and Agriculture Organisation case, the question of the duty arose around the fact that both the EU (as a member-organisation) and the EU member states are members of the FAO. As the FAO deals with mixed issues of exclusive and shared EU competences, the EU and its member states both have interventions and voting rights in the FAO. In order to clarify who would act when, the Council and the Commission

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<sup>20</sup> European Union, "Consolidated Version of the Treaty on European Union", *op. cit.*, art. 4(3), [emphasis added].

<sup>21</sup> Case 433/03, *Commission v Germany*, 2005, ECR I-7011, para. 64; Case 246/07, *Commission v Sweden*, 2010, ECR I-03317, para. 77; and Case 355/04, *Segi and Others v Council*, 2007, ECR I-1662, para. 52.

<sup>22</sup> Van Elsuwege, *op. cit.*, p. 1; Neframi, Eleftheria, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations", *Common Market Law Review*, vol. 47, no. 2, 2010, pp. 323-359.

<sup>23</sup> European Community, "Consolidated version of the Treaty establishing the European Community", *Official Journal of the European Communities*, C325/33, 24 December 2002, art. 10.

<sup>24</sup> Van Elsuwege, *op. cit.*, p. 3.

<sup>25</sup> Case 25/94, *FAO, Commission v Council*, 1996, ECR I-01469.

concluded an internal arrangement on the right to vote in the FAO. Who would vote depends on whether the issue discussed concerns exclusive or shared EU competences. Notwithstanding the internal arrangement, the Committee of Permanent Representatives (COREPER) adopted a decision to grant member states the right to vote in the FAO on an agreement on fisheries and the conservation of marine biological resources.<sup>26</sup> Hence, the Commission brought an action for annulment of the Council decision before the ECJ. The Commission claimed that the FAO agreement on fisheries partly dealt with matters in which the EU had exclusive competence. FAO rules stated that in cases where an issue deals with competences at the member-organisation and member-state levels, only one party would have the right to vote.<sup>27</sup> While the Commission proposed that the formula defined in the internal arrangement would apply, the Council confirmed the decision taken in COREPER that the member states would vote. Based on these facts, the Court decided to annul the Council decision on the grounds that participation in an international organisations requires coordination and respect of the "duty of cooperation".<sup>28</sup> According to the Court, in concluding the internal arrangement, the Council and the Commission fulfilled the duty of cooperation between the Community and its member states within the FAO, thereby ensuring unity of representation. In giving the member states the right to vote on the FAO agreement, the Council acted in breach of that internal agreement.

In its FAO judgement, the Court did not establish any specific or concrete obligations for EU member states in international organisations, nevertheless it did underline the general duty of cooperation in achieving unity of representation.<sup>29</sup> It determined that an inter-institutional arrangement such as the one for the FAO was an expression of this duty. In other words, member states would have to act in a general spirit of cooperation in international organisations and "refrain from any measure which could jeopardise the attainment of the Union's objectives", as stated in art. 4(3) TEU.<sup>30</sup>

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<sup>26</sup> Case 25/94, FAO, *op. cit.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Delgado Casteleiro, Andres and Larik, Joris, "The Duty to Remain Silent: Limitless Loyalty in EU External Relations?", *European Law Review*, vol. 36, no. 4, Florence, 2011, p. 527.

<sup>30</sup> European Union, "Consolidated Version of the Treaty on European Union", *op. cit.*, art. 4(3).

Case 45/7 *Commission v Greece (IMO)*<sup>31</sup>

The case of the International Maritime Organisation (IMO) differs somewhat from the FAO case, as it concerns an organisation where only states are members. Hence, the EU may not accede to IMO Conventions. The Commission enjoys, nonetheless, an observer status in the IMO. The issue arose when Greece, as a member of IMO, submitted a proposal on monitoring the compliance of ships and port facilities with obligations outlined in the International Ship and Port Facility Security Code (ISPS) and the International Convention for the Safety of Life at Sea (SOLAS). Greece had previously asked for this issue to be raised within the relevant EU committee. However, as the Commission did not proceed to add the item to the agenda, Greece decided to raise it in the IMO.<sup>32</sup> Without being an IMO member nor party to IMO Conventions, the EU had already integrated the ISPS Code and the SOLAS Convention within its legal order, with the implementation of a 2004 EU regulation on maritime safety. Therefore, recalling the 'ERTA principle' of *in foro interno, in foro externo*, the Community enjoyed exclusive competence to assume international obligations in areas covered by the regulation.<sup>33</sup> The Commission argued that the Greek IMO initiative would likely affect the EU *acquis*. In its judgement, the Court agreed with the Commission's reasoning and stated that Greece had failed to comply with its obligations under art. 10 TEC (now art. 4(3) TEU).<sup>34</sup> The Court found that the Commission could have 'endeavoured' to submit the Greek proposal on the agenda. However, as long as no coordination has taken place, member states must abstain from any measure that might affect the EU *acquis*. The Court stated that the duty would equally apply to binding as well as non-binding proposals, including the adopting of a position within international organisations.<sup>35</sup>

It is clear from the IMO judgement that for matters of exclusive competences, member states must refrain from acting.<sup>36</sup> Cremona has argued that member states may be required to act as 'trustees' of the EU in international organisations where the EU is not a member and which deals with issues of exclusive competences.<sup>37</sup> However,

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<sup>31</sup> Case 45/7, *IMO, Commission v Greece*, 2009, ECR I-00701.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Van Elsuwege, *op. cit.*, p. 6.

<sup>37</sup> Cremona, Marise, "Member States as 'Trustees' of the Community Interest: Participating in International Agreements on Behalf of the European Community", *EUI Working Papers*, no. 17, Florence, European University Institute, 2009, p. 17.

as we shall see, the Court clarified further that the duty is of general scope and does not hinge on whether the issues concern exclusive or shared EU competences.<sup>38</sup>

*Case 246/07 Commission v Sweden (PFOS)*<sup>39</sup>

This case dealt with a Swedish proposal to add perfluorooctane sulfonate (PFOS) to the list of dangerous substances in the Stockholm Convention on Persistent Organic Pollutants. Both the EU and the member states are parties to this Convention. Sweden consulted the EU in advance on the possibility of adding PFOS to the list. Despite several attempts by Sweden in the Council, no EU agreement was reached. Sweden therefore unilaterally tabled a proposal to list PFOS in the Stockholm Convention.<sup>40</sup> The Court ruled that with its proposal, Sweden failed to fulfil its obligations under the “duty of loyal cooperation”. By deliberately not taking action, the Council had *de facto* a “concerted common strategy” of not suggesting the listing of PFOS to the Convention.<sup>41</sup> In other words, the Court upheld that the duty would be binding upon the member states even when there is a lack of agreement, or if no conclusion had yet been reached in EU institutions. The fact that Sweden had raised the issue within the Council, as required by the obligation of coordination described in the IMO case, was not enough for the Court to declare that Sweden had fulfilled its duty.<sup>42</sup>

In its PFOS judgement, the Court deemed it sufficient for a member state’s action to *likely* affect the principle of unity in international representation for it to be in breach of the duty. Consequently, there is no need for the breach to have already happened. Also, the nature of the competence at stake is not directly relevant for the relevance of the duty.<sup>43</sup> While the IMO case dealt with matters of exclusive EU competences, the PFOS case dealt with matters of shared competences. Hence, the duty remains of general application. Moreover, the judgement outlines concrete duties of actions for member states when there is a ‘concerted common strategy’. In such a case member states may have to abstain from certain actions in international organisations, even before formal decision-making comes into play.<sup>44</sup>

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<sup>38</sup> Govaere, *op. cit.*, p. 229.

<sup>39</sup> Case 246/07, PFOS, Commission v Sweden, 2010, ECR I-03317.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, para. 104.

<sup>43</sup> Delgado Casteleiro and Larik, *op. cit.*, p. 536.

<sup>44</sup> Van Elsuwege, *op. cit.*, p. 8.

Case 399/12 Germany v Council (OIV)<sup>45</sup>

In the International Organisation of Vine and Wine (OIV) case, the Court did not deal directly with the duty of art. 4(3) TEU. However, this case brought by Germany against the Council on EU positions within the OIV has been viewed by scholars as an attempt to roll back the growing implications of the duty for the representation of member states in international organisations.<sup>46</sup> The FAO, IMO and PFOS cases all illustrated an activism by the Court in applying the duty of art. 4(3) TEU to restrict or pose conditions on the freedom of action of member states in international organisations.<sup>47</sup> In the OIV case, on the contrary, a member state sought to limit EU action in an organisation where the EU is not a member. Hence, its implications are essential for the cooperation between the EU and the member states in international organisations.

The OIV is an intergovernmental organisation of technical and scientific nature. It allows for discussions and eventually adopts non-binding recommendations on vine, wine marketing and wine production standards.<sup>48</sup> The EU is not a member of the OIV, and only 21 of its member states are. Issues dealt with in the OIV fall within the area of agriculture, a shared competence. The member states and the Commission initially coordinated OIV positions informally prior to OIV meetings. Later, the procedure was formalised and the Council started adopting common positions on recommendations by the Commission through art. 218(9) TFEU, a Treaty provision concerning procedures on international agreements.<sup>49</sup> In other words, EU institutions and member states found ways to cooperate to assure unity of representation in the OIV, thereby fulfilling the duty of art. 4(3) TEU.

Germany, challenged this practice by arguing that the legal basis of art. 218(9) TFEU could not be used when the international organisation does adopt legally binding acts and the EU is not a member. Yet, the Court judged against Germany's opinion:

50. [...] there is nothing in the wording of Article 218(9) TFEU to prevent the European Union from adopting a decision establishing a position to be adopted on its behalf in a body set up by an international agreement to which it is not a party.<sup>50</sup>

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<sup>45</sup> Case 399/12, OIV, Germany v Council, 2014, ECLI:EU:C:2014:2258.

<sup>46</sup> Van Elsuwege, *op. cit.*, pp. 11-12; and Govaere, *op. cit.*, p. 227.

<sup>47</sup> Govaere, *op. cit.*, p. 227.

<sup>48</sup> Case 399/12, OIV, *op. cit.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

The Court did specify that such a decision establishing a position would have to concern an area of law falling within EU competences, that is, EU exclusive or shared competences. The Court recalled the IMO case and added that the EU may rely on its member states to act on its behalf in international organisations where it is not present. Finally, on the nature of the acts adopted by the international organisation, the Court pointed out that despite not being legally binding, OIV recommendations should be understood as “acts having legal effect” as they would affect the EU legal order if implemented by member states.<sup>51</sup>

### **Lessons from the case law: A framework for unity of representation**

As exemplified by the ECJ’s case law, the duty enshrined in art. 4(3) TEU establishes certain obligations for EU member states and their actions in international organisations. As argued by Allan Rosas in referring to this case law: “the Court has [...] emphasised that the *raison d’être* of the duty of co-operation in the field of external relations lies in the requirement of *unity in the international representation* of the Union”.<sup>52</sup> As such, member states are not only encouraged to comply with the duty but legally obliged. In spite of this, it does not seem that the duty is actively used by the EU in ensuring consistency and enforcing coordination between the EU and the member states in international organisations. This is an understanding the author has acquired from interviews with EU officials.<sup>53</sup> One official even stated: “no one has even talked about art. 4(3) TEU in years”.<sup>54</sup> One of the possible reasons for why the duty is not actively used may be that there is no framework codifying it in practical terms. Scholars often focus on the duty in more theoretically terms through legalistic approaches, but rarely sketch out practical guidelines for the interaction between the EU and its member states in international organisations on the basis of the duty. Based on the Court’s case law and on contributions from scholars, this part will sketch out central elements of such a framework before looking more closely at the case of the Arctic Council.

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<sup>51</sup> *Ibid.*

<sup>52</sup> Rosas, Allan, “Exclusive, shared and national competence in the context of EU external relations: Do such distinctions matter?”, in Govaere, Inge, Lannon, Erwan, Van Elsuwege, Peter and Stanislas Adam (eds.), *The European Union in the World - Essays in Honour of Marc Maresceau*, Leiden, Brill, 2014, p. 35.

<sup>53</sup> Interview with an official 1, EEAS, Brussels, via telephone, 18 January 2017; interview with an official 2, EEAS, Brussels, 17 January 2017; and interview with an official 3, EEAS, Oslo, 6 January 2017; Interview with an official, DG MARE, Brussels, via telephone, 28 March 2017.

<sup>54</sup> Interview with an official 2, EEAS, Brussels, 17 January 2017.

In outlining such a framework, the first element to look at would be the applicability of the duty, answering the question: when does it apply? First, the duty is of general application. It may, therefore, apply both to matters of EU exclusive or shared competences. The IMO judgement concerned issues of maritime safety where the EU enjoys exclusive external competence. Also, the fisheries agreement in the FAO judgement dealt with issues within EU exclusive competence. The PFOS judgement, however, concerned a mixed agreement with shared competences between the EU and its member states. By ruling that the duty could still apply in such a case, the Court clearly stated that whether the issue concerns exclusive or shared competences is not relevant. However, it is still unclear to what extent the duty would apply to matters where EU competences are only to support, coordinate or supplement according to art. 6 TFEU.<sup>55</sup>

Second, the duty applies when member-state actions in all likelihood impact on the EU legal order. In the IMO judgement, the Court ruled that the Greek initiative was in breach of the duty as it would 'likely' affect the EU *acquis* on maritime safety. Similarly, in the PFOS judgement, the Court assessed that the member-state action would 'likely' affect the principle of unity in international representation.

Third, the duty applies when there is a 'concerted common strategy'. For the FAO and IMO judgements, there was already an established EU policy on marine biological resources and on maritime safety. In the PFOS judgement, however, as the Council had not formally taken a stance on the addition of PFOS to the Stockholm Convention, there was no EU policy on the matter. The Court in its judgement considered the early work and minutes of the Council Working Party on International Environmental Issues, and stated that raising the issue internally and not taking any decision amounted to a 'concerted common strategy'. Hence, the Court has deemed it sufficient for a member state to potentially act in breach of the duty if a 'concerted common strategy' exists.

The following part looks into what concrete obligations are asked of EU member states in international organisations, answering the question: what is the nature of the duties? In its case law, the Court has especially underlined the importance of member states acting as 'trustees' of EU interests in international organisations where the EU is not a member.<sup>56</sup> In its Opinion 2/91 concerning EU representation in the International

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<sup>55</sup> European Union, "Consolidated version of the Treaty on the Functioning of the European Union", *op. cit.*, art. 6.

<sup>56</sup> Cremona, *op. cit.*; Van Elsuwege, *op. cit.*, p. 1.

Labour Organisation, the Court stated that the inability of the EU to conclude a Convention would imply that the Union should act “through the medium of the member states”.<sup>57</sup> Still, the Court’s case law outlines different duties for member states in international organisations depending on whether the matter concerns EU exclusive or shared competences.<sup>58</sup>

In the IMO judgement, the issue that arose concerned EU exclusive competences. In such a case, the member state shall (1) endeavour to inform and coordinate within the EU with a view to reach a common EU position. If there is no common EU position, the member state shall (2) abstain from acting unilaterally and risking undermining the unity of external representation.<sup>59</sup>

Moreover, in an international organisation where the EU is a member, when dealing with issues of exclusive competence, as in the case in the FAO judgement, member states are still bound by the duty to cooperate and shall refrain from measures that could ‘jeopardise’ the unity of representation. All in all, this would amount to a ‘duty of result’ with member states either representing EU positions or abstaining. In other words, for matters of exclusive competences, the Court has outlined a strict ‘duty of result’ for member states in international organisations.

On matters of shared competences, member states seem to retain more freedom to act. In a case such as the PFOS, the member state shall still (1) endeavour to inform and coordinate within the EU with a view to reach a common EU position. However, if there is no EU position (not even a ‘concerted common strategy’), member states may act autonomously as long as their actions do not conflict with the EU *acquis*.<sup>60</sup> This would amount to a ‘duty of conduct’ with member states’ best endeavour to inform and coordinate.

For an organisation such as the OIV, dealing with matters of shared competences and where the EU is not a member, the issue is less straightforward. The fact that matters of shared competences are addressed would seem to indicate a ‘duty of conduct’, nonetheless the Court underlines the importance of member states acting as ‘medium’ of the EU, especially in international organisations where the EU is not a member. In its OIV judgement, the Court seems to indicate that the coordination

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<sup>57</sup> Opinion 2/91, ILO Convention, 1993, ECR I-1061.

<sup>58</sup> Delgado Casteleiro and Larik, *op. cit.*; Van Elsuwege, *op. cit.*; Wouters, Odermatt and Ramopoulos, *op. cit.*

<sup>59</sup> Wouters, Odermatt and Ramopoulos, *op. cit.*, p. 6.; Van Elsuwege, *op. cit.*, p. 7; Delgado Casteleiro and Larik, *op. cit.*, p. 531.

<sup>60</sup> Van Elsuwege, *op. cit.*, p. 7.



of binding positions through art. 218(9) TFEU represents a good exercise of the duty in assuring unity of representation. Therefore, whether this amounts to a 'duty of conduct' or a 'duty of result' remains to be assessed by the Court.

As summarised in Table 1, the Court has outlined both a 'duty of result' and a 'duty of conduct' for member states in international organisations, depending on the nature of the issue that would be raised. Both duties imply different obligations for member states.

Table 1 Duties of EU member states in international organisations

Competence \ International organisation	EU not a member: member states as 'trustees'	EU is a member
Exclusive EU competence <sup>61</sup>	IMO 'duty of result'	FAO 'duty of result'
Shared competences	OIV 'duty of result'?	PFOS 'duty of conduct'

The duty provides the Court with important jurisdictional powers in securing a unified EU voice or representation in international organisations. However, this does not seem to be the case for all international organisations. As we shall see in the following part, which applies the framework sketched out above, the duty plays a limited role in promoting EU representation within the Arctic Council.

### 'Trustees' of the Union's interest? EU member states in the Arctic Council

The Arctic Council is a regional organisation covering a wide range of policy areas, including the environment, sustainable development, maritime affairs, biodiversity and energy, depending on the priorities of the chairmanship and issues raised by Arctic Council members. In other words, as a regional intergovernmental organisation, the Arctic Council is highly dependent on its members setting the agenda. For the EU, this means that issues raised in the Arctic Council may touch upon policy areas where the EU possesses different competences. So far, no Arctic Council agreement has covered issues of exclusive EU competence. However, nothing would hinder Arctic Council members to raise issues related to trade or the conservation of marine biological

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<sup>61</sup> The IMO and the FAO deal with matters of both exclusive and shared competences in general, however the judgements concerned matters of exclusive competence.

resources in the future. In such a case, according to the case law of the ECJ, the three EU member states would have to intensify cooperation with the EU and abstain if no common EU position has been found. They would have to act according to a 'duty of result'.

The case of the Arctic Council also illustrates the limits of the application of the duty. While Arctic Council agreements and discussions may cover areas of shared competences such as energy and environment, for most countries, Arctic policies remain a part of their foreign policy. Hence, representation in the Arctic Council is carried out by Ministries of Foreign Affairs, and Arctic policies are guided by foreign policy strategies. The EU competence on CFSP remains non-exclusive and *sui generis*, running in parallel with member states' national competences in the same field. The EU has limited possibilities to hold member states accountable on CFSP issues in international organisations, as exemplified by art. 24(3) TEU and art. 34 TEU, which entail political but not legal control. As stated in the ECJ's case law, the duty could be activated if a breach is likely to affect the EU legal order (on matters of exclusive or shared competences). On a *sui generis* matter such as CFSP, the relevance of the duty remains limited. In the literature, the CFSP is almost regarded as the duty's 'final frontier': both outside of its scope of application, but also as a domain to be conquered.<sup>62</sup> Scholars like Delgado Casteleiro, Larik, Hillion and Wessel, have underlined the strong wording of art. 24(3) TEU: "The Member States *shall* support the Union's external and security policy *actively* and *unreservedly* in a spirit of *loyalty* and mutual *solidarity* and shall comply with the Union's action in this area".<sup>63</sup> They have argued that such wording could eventually entail an obligation of cooperation amounting to an obligation of best endeavour as defined by the duty.<sup>64</sup> Indeed, art. 40 TEU and art. 275 TFEU foresee two important exceptions where the ECJ may have jurisdiction on CFSP issues: in ensuring that the CFSP does not affect other areas of EU competence and in reviewing the legality of restrictive measures.<sup>65</sup> Such an optimistic vision would still have to be confirmed by the ECJ in its case law.

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<sup>62</sup> Delgado Casteleiro and Larik, *op. cit.*, p. 537.

<sup>63</sup> European Union, "Consolidated Version of the Treaty on European Union", *op. cit.*, art. 24(3), [emphasis added].

<sup>64</sup> Delgado Casteleiro and Larik, *op. cit.*, p. 538; and Hillion, Christophe and Wessel, Ramses, "Restraining External Competences of EU Member States under CFSP", in Cremona, Marise and De Witte, Bruno (eds.), *EU Foreign Relations Law: Constitutional Fundamentals. Essays in European Law*, Oxford, Hart Publishing, 2008, pp. 79-121.

<sup>65</sup> European Union, "Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union", *Official Journal of the European Union*, C202/1, 7 June 2016, art. 40 TEU and art. 275 TFEU.

In many regards the functioning of the Arctic Council is similar to the one described in the OIV case. The Arctic Council does not have the capacity to adopt legally binding acts but functions as a forum for cooperation and coordination. However, as we shall see, two international agreements have been negotiated under its auspices. The core of the work done in the Arctic Council is technical, scientific and research-based cooperation within its six working groups and task forces.<sup>66</sup> Moreover, the Arctic Council can establish task forces and expert groups to work on specific issues. The working groups and task forces aim to strengthen and encourage national actions by providing reliable and sufficient information through scientific assessments and projects on the ground.<sup>67</sup> On that basis, the working groups and task forces may adopt and propose recommendations on decisions to be taken by Arctic states. These recommendations are non-binding and constitute soft law practices. However, as recalled by the ECJ in its case law, international recommendations do not need to be legally binding for them to produce acts with legal effects.<sup>68</sup> In the OIV case, the Court stated that recommendations relating to oenological practices and methods could qualify as acts having legal effect if adopted and transposed into law in member states. Therefore, if leading to the adoption of legal acts, affecting EU legal order, Sweden, Denmark and Finland have a duty to cooperate with the EU on the issues addressed in the working groups and task forces.

The situation of EU representation in the Arctic Council differs somewhat from other international organisations. The EU's *ad hoc* observer status grants it the possibility to be present, take part in the discussions and contribute to the Arctic Council's working groups and task forces. However, not being a member, the EU may not formally adopt recommendations and guidelines. In that capacity, the EU must rely on Sweden, Finland and Denmark, though still being present when recommendations are adopted. The need to inform and to consult – usually essential in international organisations where the EU is not present – could seem less stringent in this case as the EU takes part in the deliberations of the working groups and task forces of the Arctic Council. Directorate-General (DG) MARE acts as contact and entry point for the Commission and is the entity representing the EU in most working groups and task forces.<sup>69</sup> Hence, if a working group or task force meeting deals with matters touching upon the expertise of other Commission DGs, DG MARE will coordinate for that DG to

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<sup>66</sup> Arctic Council, "The Arctic Council: A backgrounder", online.

<sup>67</sup> *Ibid.*

<sup>68</sup> Case 399/12, OIV, *op. cit.*

<sup>69</sup> Interview with an official, DG MARE, Brussels, via telephone, 28 March 2017.

attend.<sup>70</sup> Both DG MARE and member-state officials stated in interviews that ample information and cooperation activities on Arctic affairs take place between the Commission and the three EU member states.<sup>71</sup> These activities are not institutionalised and most often consist of meetings, email exchanges and dialogues.

For Ministerial and Senior Arctic Officials' meetings, the European External Action Service (EEAS) usually represents the EU as observer. The EEAS acts as contact and entry point for EU Arctic affairs in general.<sup>72</sup> Also EEAS officials underline that information and cooperation activities take place informally between the EEAS and the three member states.<sup>73</sup> One element, however, may provide for a stronger cooperation at the level of the EEAS. The Council's Working Party on Eastern Europe and Central Asia (COEST), chaired by the EEAS, is an institutionalised body that deals with Arctic issues. Before being adopted by the Council in June 2016, the EU's new integrated policy for the Arctic was raised and discussed within COEST.<sup>74</sup> Hence, the EEAS has the possibility to raise issues linked to the Arctic and the Arctic Council in the working party. Equally, the member states could use this platform to inform and cooperate on Arctic Council issues. However, the working party also deals with the European Neighbourhood Policy and the Eastern Partnership as well as with relations towards Russia and Central Asia. As such, little time is reserved for issues concerning the Arctic, and even less for Arctic Council issues.<sup>75</sup> An interviewee stated that the COEST "discusses Arctic affairs when needed, but this could be more often".<sup>76</sup> Arctic issues were raised more frequently in the aftermath of the Council Conclusions on the Arctic of June 2016, calling for intensifying cooperation on Arctic issues. When discussing the Arctic, the working party would then mostly discuss the EU's Arctic policy.<sup>77</sup> National Arctic policies and member states' activities in the Arctic Council are rarely, if ever, discussed. An exception was a presentation by Finland of its programme and future priorities for its upcoming chairmanship in the Arctic Council.<sup>78</sup> Still, this was more of an information undertaking rather than a tentative to coordinate and cooperate on common positions.

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*; Interview with a Finnish diplomat, Brussels, via telephone, 24 April 2017.

<sup>72</sup> Interview with an official 1, EEAS, Brussels, via telephone, 18 January 2017.

<sup>73</sup> Interview with an official 1, EEAS, Brussels, via telephone, 18 January 2017; Interview with an official 2, EEAS, Brussels, 17 January 2017.

<sup>74</sup> General Secretariat of the Council, Public Information Service, via email, 8 March 2017.

<sup>75</sup> Interview with a Finnish diplomat, Brussels, via telephone, 24 April 2017.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

EU and member-state officials alike point out that, so far, interest in Arctic affairs has been very limited among non-Arctic member states. The EEAS and DG MARE are most often the ones contacting non-Arctic member states to coordinate their views on Arctic issues.<sup>79</sup> This was also the case for the EU's new integrated policy for the Arctic, where non-Arctic member states were invited to contribute to the EU's policy. Yet, most of the intra-EU coordination on Arctic affairs takes place between the EEAS, DG MARE and the three Arctic member states. DG MARE also acknowledged that a first contact is often made by the three member states themselves.

The EU has its own Arctic policy. The Joint Communication of April 2016 is the basis for this policy. It was preceded by a 2008 Communication on the Arctic and a 2012 Joint Communication on developing an EU policy towards the Arctic region. The 2016 Arctic policy focuses on three priority areas: (1) climate change and preserving the Arctic environment, (2) sustainable development, and (3) international cooperation.<sup>80</sup> It recalls the EU's comprehensive environmental policy and states that the EU has "a duty to protect the Arctic environment".<sup>81</sup> Respect for international obligations to protect and preserve the marine environment through the UN Convention on the Law of the Sea (UNCLOS) is viewed as central, as are a high level of biodiversity protection and establishing protected marine areas. Also mentioned is the importance of prohibiting or phasing out pollutants and heavy metals and promote the highest standards and preparedness response for oil and gas activities in the region. On sustainable development, the EU's policy response is to focus on energy efficiency and renewable energy solutions for the region. Innovative technologies are to be supported through Horizon 2020 funding. Access to the EU's single market is critical for contributing the necessary stimulus in that regard. Furthermore, enhancing the safety of navigation remains a crucial element. Finally, the EU policy lists international cooperation as a central element of its approach. UNCLOS, the Arctic Council and other sub-regional forums such as the Barents Euro-Arctic Council and the Northern Dimension are mentioned as central to the EU's approach. On the Arctic Council, the EU's policy states that "[t]he [2017-2019] Finnish Presidency of the Arctic Council [...] will offer an opportunity to bring European ideas and initiatives to the work

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<sup>79</sup> Interview with an official, DG MARE, Brussels, via telephone, 28 March 2017; Interview with an official 1, EEAS, Brussels, via telephone, 18 January 2017.

<sup>80</sup> European Commission and High Representative, "Joint Communication to the European Parliament and the Council – An integrated European Union policy for the Arctic", *op. cit.*

<sup>81</sup> *Ibid.*

of the Arctic Council".<sup>82</sup> Moreover, the EU is to promote dialogue with Arctic indigenous peoples and ensure that their rights are respected. Better fisheries management is also to be achieved through international cooperation.

The priorities of the three member states in the Arctic are quite similar to the ones of the EU's Arctic policy. A comparative analysis of the three member states' Arctic policies and chairmanships of the Arctic Council concludes that the member states mostly focus on environment, sustainable development, indigenous peoples' rights and international cooperation.<sup>83</sup> UNCLOS and the IMO are mentioned as central forums for enhancing the work of the Arctic Council. Overall, there appears to be a high degree of concordance between the member states' Arctic policies and the EU's integrated policy for the region. Within the Arctic Council, the three member states have developed chairmanship programmes on the basis of these priorities. They have therefore to a large extent pursued programmes that have been in line with the EU's priorities. However, some member states seem to be more willing than others to include EU priorities and formulate EU-oriented approaches. Finland has been very active in this regard, exemplified by the high degree of cooperation and coordination it has sought with EU institutions in the formulation phase of its programme for the upcoming chairmanship. All three member states have encouraged greater involvement of the EU in the Arctic and are in favour of enhancing the EU's status in the Arctic Council. Denmark, however, also actively promotes the 'Arctic five' format<sup>84</sup> outside of the Arctic Council framework. It includes Arctic coastal states and *de facto* excludes the other Arctic Council members and observers, also the EU. This has led to criticism from the other EU member states Sweden and Finland. If this format is pursued further, it could to an even greater extent limit the EU's role in the region.

All three member states do show some willingness to inform and coordinate on Arctic issues with the EU. Informal contacts take place between the EEAS, DG MARE and the member states. Furthermore, EU institutions do acknowledge that the first contact is often established by the member states themselves.<sup>85</sup> Formal institutional structures such as the COEST Working Party seem, nonetheless, rarely used to coordinate on Arctic Council issues. Overall, the three member states seem to

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<sup>82</sup> *Ibid.*, p. 3.

<sup>83</sup> Bjerkem, Johan, "On Thin Ice: The EU in the Arctic Council – Member States as 'Trustees' of the Union", Master's thesis, College of Europe, Bruges, 2017, pp. 42-47.

<sup>84</sup> The 'Arctic five' format comprises the five Arctic coastal states, that is, Denmark (Greenland), the US, Canada, Russia and Norway. The Arctic five have met over issues dealing with the Arctic Ocean, notably in 2008 in Ilulissat.

<sup>85</sup> Interview with an official, DG MARE, Brussels, via telephone, 28 March 2017.

endeavour to inform and coordinate on issues raised within the Arctic Council. Whether this amounts to a degree of 'best' endeavour, as required by the duty of conduct, remains difficult to assess.

Indeed, it is difficult for the EU to enforce the obligation of member states to act as 'trustees' of the Union's interest. The EU may call upon member states to increase cooperation on matters raised in international organisations of which it is not a member. However, the duty does not provide the Union with the means to oblige member states to actively represent EU interests. This seems to be the case especially for a regional organisation such as the Arctic Council that does not in itself adopt legal acts. However, two binding international agreements were negotiated under the auspices of the Arctic Council, and nothing hinders Arctic Council states to adopt further agreements or conventions that could impact on the EU legal order. This shows the limits of the application of the duty, which remains mostly a reactive instrument that may be enforced once a legal act with implications for the EU legal order is on the table. Therefore, beyond efforts of best endeavour, the EU is only to a limited extent able to rely on its member states as 'trustees' of the Union's interest in the Arctic Council.

## **Conclusion**

This paper examined how the duty of sincere cooperation has been used by the EU with a view of enforcing unity of representation in international organisations and the degree to which this is the case within the Arctic Council. It can be concluded that the EU has only to a limited extent been able to rely on its three member states which are members of the Arctic Council to represent Union interests.

In general, the EU has to a large extent been successful in enforcing unity of representation in a number of international forums. This has been the case for organisations dealing with matters of both exclusive and shared competences and regardless of whether the EU has been granted membership. The ECJ, through its interpretation of art. 4(3) TEU, has developed specific obligations applicable to EU member states in international organisations. Overall, the duty of sincere cooperation entails an obligation of best endeavour and a duty to inform and coordinate, especially in organisations in which the EU is prevented from participating. While such obligations may seem minor, they have occasionally significantly affected member states' scope of independent action.

The case study of the Arctic Council has shown the limits of enforcing the duty of sincere cooperation. Denmark, Sweden and Finland have been willing to inform and coordinate on Arctic issues, and the EU depends on its member states' willingness. Member states do have a duty to endeavour to cooperate and represent Union interests in organisations where the EU is not a member. Nonetheless, for art. 4(3) TEU to be enforced, there would need to be a direct challenge to the EU legal order. The duty of sincere cooperation therefore continues to play a minor role for international organisations dealing with CFSP matters and taking decisions that do not directly affect the EU legal order. As such, the duty of sincere cooperation is no 'silver bullet', but it remains a reactive legal tool that may only to a limited extent oblige member states to act as 'trustees' of the Union's interest.



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