EU LOYALTY AS GOOD FAITH

GEERT DE BAERE AND TIMOTHY ROES*

Abstract Comparing the EU law principle of loyalty with international law good faith and the duty of federal good faith in German constitutional law (*Bundestreue*), this article contributes to the discussion on the nature of the EU legal order and its relationship to international law more generally by finding that EU loyalty is in essence a specific incarnation of the international law principle that treaties are to be interpreted in good faith. At the same time, it challenges the assumption that international law good faith differs fundamentally from federal good faith. To this end, the article points at historical links between both, and posits that good faith is in essence a principle of constructive interpretation, the strictures of which increase with the level of integration of the legal order in which it is applied.

Keywords: federal fidelity, federalism, good faith, loyalty, nature of the EU legal order, sincere cooperation.

I. INTRODUCTION

This article explores the connection, if any, between the principle of loyalty or sincere cooperation in EU law ('EU loyalty'),[1] international law good faith, and good faith in federal constitutional systems, and questions the conception of EU loyalty as fundamentally different from the former and essentially identical to the latter. In so doing, the article aims to contribute to the understanding of the foundations of EU loyalty. That exercise appears relevant in the light of

* The authors are, respectively, Associate Professor of EU Law and International Law at the Institute for European Law and the Leuven Centre for Global Governance Studies, University of Leuven, Geert.DeBaere@law.kuleuven.be, and PhD Candidate at the Institute for European Law, University of Leuven, Timothy.Roes@law.kuleuven.be. Many thanks to Bruno de Witte, Koen Lenaerts, Joanne Scott, John Temple Lang, Isabelle Van Damme, Bettina Wurster and the anonymous reviewers for reading the article in draft form and for their helpful comments and suggestions.

[1] Both in the case law of the ECJ and in scholarly writings, that principle has been referred to under various names ranging from 'good faith', 'loyalty' or 'loyal cooperation' to 'fidelity'. Art 4(3) TEU now refers to the 'principle of sincere cooperation'. The Court coined the latter term in the judgment in *Luxembourg v European Parliament*, 230/81, EU:C:1983:32, para 37, in which it also recognized the mutual character of the loyalty obligation. The Treaty of Lisbon has codified the mutual character of loyalty in art 4(3) TEU ('in full mutual respect'; see also art 13(2) TEU and art 24(3) TEU, which speak of 'mutual sincere cooperation' and 'mutual solidarity', respectively). Perhaps the origins of that mutual character in *Luxembourg v European Parliament* inspired the Treaty Drafters also to adopt the latter judgment's term for loyalty.

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the fact that the Court of Justice of the European Union[2] has used loyalty as a basis to establish fundamental constitutional principles of EU law and has more recently derived from it increasingly strict obligations for the Member States, in particular in the area of EU external action.[3] Furthermore, in analysing EU loyalty in the light of international law good faith and federal good faith, the article also explores one aspect of the ECJ's settled case-law according to which

> the founding treaties of the EU, *unlike ordinary international treaties*, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in van *Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65).[4]

This article suggests that the EU law principle of loyalty is in essence a specific incarnation of, and hence not conceptually different from, the international law principle that treaties are to be interpreted in good faith. However, as will be argued, that suggestion does not necessarily imply that EU loyalty is fundamentally different from 'federal' or 'constitutional' good faith.

Section II of the article first looks at the historical origins of EU loyalty, and briefly explores what the principle stands for in current EU law. Section III then compares the application and consequences of EU loyalty and international law good faith, while section IV explores the concept of *Bundestreue*. Finally, section V suggests that a common core of good faith in all its guises can be found in a principle of constructive interpretation, before section VI sums up the argument put forward in the article.

II. THE DUTY OF LOYALTY IN EU LAW

A. The History of EU Loyalty

Ever since the Treaty establishing the European Coal and Steel Community (ECSC),[5] the Treaties governing what is now the Union legal order have

[2] Under the first para of art 19(1) TEU, the institution of the Court of Justice of the EU encompasses the Court of Justice, the General Court and specialized courts (at present, the EU Civil Service Tribunal). For reasons of clarity, this chapter refers to the Court of Justice as the European Court of Justice ('ECJ' or 'the Court') in the sense of the highest court of this institution.

[3] See eg A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 ELR 524; E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev 323. In particular, the 'open-ended nature' of loyalty remains a cause of concern: eg G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 140–1; G De Baere, '"O, Where is Faith? O, Where is Loyalty?" Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the Light of the *PFOS* Case' (2011) 36 ELR 405.

[4] Opinion 2/13, *Accession to the ECHR*, EU:C:2014:2454, para 157 (emphasis added); see most recently the judgment in *Commission v Council*, C-28/12, EU:C:2015:282, para 39.

[5] The ECSC entered into force on 23 July 1952 and expired on 23 July 2002.

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contained a specific provision obliging the Member States to take all appropriate measures to ensure fulfilment of their obligations under 'the Treaty'[6] or, since the entry into force of the Lisbon Treaty, 'the Treaties'.[7] The original Article 86 ECSC read:

> Member States undertake to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community's tasks. Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4.

That text had only slightly changed since its first 'official' draft. Dated 8 November 1950 and tagged '*Non-discuté*', what was then Article 62 of the draft ECSC Treaty read:

> *Les États parties au présent Traité s'engagent à prendre, dans l'étendue de leur juridiction, toutes mesures générales ou particulières propres à assurer l'exécution des obligations résultant pour eux des décisions et recommandations des organes de la Communauté et à faciliter à celle-ci l'accomplissement de sa mission.*[8]

The definitive French text of Article 86 ECSC shows that apart from the replacement of '*États parties*' by '*États membres*', '*organes de la Communauté*' by '*institutions de la Communauté*' and the deletion of the words '*dans l'étendue de leur jurisdiction*', the original agreement among the delegations was maintained throughout the negotiations and the redrafting process.[9]

However, the *travaux préparatoires* do not tell us anything about the reasons for including a provision of this kind. Perhaps the drafters looked at the treaties

[6] Art 86 ECSC; art 192 of the Treaty establishing the European Atomic Energy Community (EAEC); art 5 of the Treaty establishing the European Economic Community (EEC), which after the Maastricht Treaty became art 5 of the Treaty establishing the European Community (EC) and after the Amsterdam Treaty art 10 EC. The Court has explicitly developed art 86 ECSC, art 192 EAEC, and art 5 EEC/art 10 EC in parallel. See eg the judgments in *Allain*, C-341/94, EU:C:1996:356, para 24; *Banks*, C-390/98, EU:C:2001:456, para 121; *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428, para 36; *Commission v Ireland ('Mox Plant')*, C-459/03, EU:C:2006:345, para 174; and *ČEZ*, C-115/08, EU:C:2009:660, para 138. Although the text of the second sentence of art 86 ECSC does not correspond to the text of its counterpart in the E(E)C, the ECJ considers it as an expression of the same principle: *Banks*, para 121.

[7] See art 1, para 3 TEU.

[8] 'The States party to the present treaty undertake to adopt, within the scope of their jurisdiction, all general or particular measures to ensure the execution of their obligations under the decisions and recommendations of the organs of the Community and to facilitate the accomplishment of the latter's mission' (our translation): Première Redaction du Projet de Traité ('Plan Schuman'), 8 November 1950, 86, consulted at the Archives of the Belgian Ministry of Foreign Affairs (Brussels), Dossier No 12284.

[9] Literally translated, the term 'State parties' was replaced by 'Member States', 'organs of the Community' by 'institutions of the Community', and the phrase 'within the scope of their jurisdiction' was deleted.

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founding other projects of large-scale, post-war international cooperation around the same time, such as the UN Charter (1945) and the Statute of the Council of Europe (1949). Notably, Article 3 of the Statute of the Council of Europe stipulates:

> Every member of the Council of Europe must […] collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

Similarly, Article 2(2) and (5) of the UN Charter provide:[10]

> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
>
> …
>
> 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

While these provisions convey the same message as the last part of Article 86 ECSC ('to facilitate the performance of the Community's tasks' and 'to refrain from any measures incompatible with the common market'), they differ from that provision in that they do not say that the Parties are to *implement* the acts taken by the organs of the international organization, as the first two lines of Article 86 ECSC do. Why did the drafters of the ECSC Treaty choose to state explicitly that the Member States were obliged to take all measures, whether general or particular, to ensure the execution of their obligation under the decisions and recommendations of the Community institutions? Did that not follow from the principle of *pacta sunt servanda* and the duty to fulfil treaty obligations in good faith? For example, in *Exchange of Greek and Turkish Populations*, the Permanent Court of International Justice (PCIJ) held that a clause worded in terms not dissimilar from Article 86 ECSC ('The High Contracting Parties undertake to introduce in their respective laws such

[10] See further B Simma, *The UN Charter: A Commentary* (OUP 2002) 92ff. The Heads of State and Government, and heads of delegation gathered at UN Headquarters in New York on 24 September 2012 to reaffirm their commitment to the rule of law also 'rededicated' themselves to 'the fulfilment in good faith of the obligations assumed in accordance with the Charter': UN Doc A/RES/67/1, para 3. As the International Court of Justice (ICJ) pointed out in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports (1971) 16, 46, para 90, member States have undertaken to fulfil in good faith the relevant obligations emanating from the UN Charter 'in all their international relations'; cf J Crawford, *Chance, Order, Change: The Course of International Law. General Course on Public International Law* (Hague Academy of International Law 2014) 458–9, who regards that passage as illustrating that the UN Charter is not just universal in the sense that practically all States have ratified it, but that it also makes 'a more fundamental claim to universality'.

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modifications as may be necessary with a view to ensuring the execution of the present Convention'):[11]

> merely lays stress on a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.

The *travaux préparatoires* of the ECSC Treaty do not answer the question of why the drafters opted to make that obligation explicit. However, we do know that Article 2(2) of the UN Charter was proposed in order to emphasize that States were expected to abandon 'legalistic contractual positivism' and should not 'be content with a merely formal, legalistic obedience towards the obligations laid down in the Charter'.[12] In much the same way, Article 86 ECSC was perhaps intended to emphasize that Member States in the first place were to make the newly established Community work in practice and, to that effect, they would have to do more than the new Treaty could mention explicitly. The same would appear from Article 88 ECSC. That provision put the High Authority under a duty[13] to start infringement proceedings against Member States that failed the obligations incumbent on them '*en vertu du present Traité*', ie 'under this Treaty' or flowing from it—not only those literally laid down by its text, and was described by the ECJ as 'the *ultima ratio* enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of Member States'.[14]

It is not unlikely that the introduction of the 'recommendation' as a legal instrument in Article 14, third paragraph, ECSC also played a role. Like the EU directive, ECSC recommendations were to be 'binding as to the aims to be pursued' but left 'the choice of the appropriate methods for achieving these aims' to those to whom the recommendations were addressed. Since this was a new type of legal instrument that, at first sight, left the Member States a significant leeway, it was arguably useful to emphasize in Article 86 that Member States were under a duty to implement ECSC legal instruments, including recommendations. These elements might suggest (part of) the reason for including Article 86 ECSC.

The 1957 Treaty of Rome copied the wording of Article 86 ECSC into Article 5 EEC, at the same time enlarging the scope of the duty to take all necessary measures to 'all obligations arising out of this Treaty or resulting from action taken by the institutions of the Community' as well as adding that the

[11] *Exchange of Greek and Turkish Populations*, 1925 PCIJ Reports Series B, No 10, 20. See also *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No 15, 26–27. See further E Zoller, *La Bonne Foi en Droit International Public* (Pédone 1977) 94.

[12] Simma (n 10) 92–3 and the sources mentioned there.

[13] See eg judgment in *Groupement des Industries Sidérurgiques Luxembourgeoises*, 7 and 9/54, EU:C:1956:2, at 190.

[14] Judgment in *Germany v Commission*, C-276/99, EU:C:2001:576, para 23 and the case law referred to there.

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Member States were to 'abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'. The original draft of Article 26 of the Vienna Convention on the Law of Treaties (VCLT),[15] which contains the principles of *pacta sunt servanda* and the duty to execute a treaty in good faith, was to have a second paragraph similar to this addition:

> Good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.[16]

The addition had been proposed by Sir Humphrey Waldock, but the International Law Commission ('ILC') found this proscription to be 'implicitly contained in the obligation to execute treaties in good faith'.[17] Accordingly, the International Court of Justice (ICJ) observed *inter alia* in *Land and Maritime Boundary between Cameroon and Nigeria* that 'the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 [VCLT]'.[18]

B. The Implications of EU Loyalty

The 2007 Treaty of Lisbon again altered the text of what (after the renumbering of the EC Treaty by the Amsterdam Treaty) had become Article 10 EC. As a constitutional principle governing the entire EU legal system, the provision was moved to Article 4(3) of the EU Treaty (TEU). That provision further clarified the scope of the loyalty obligation by adding that the Union and the Member States are to 'assist each other in full mutual respect in carrying out tasks which flow from the Treaties'.

However, rather than being the source of the loyalty obligation, Article 4(3) TEU codifies a general constitutional principle of the European Union.[19] It also

[15] Concluded on 23 May 1969, UN Doc A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969). [16] UNYBILC (vol II) (1964) 7. [17] ibid 177.

[18] *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections, Judgment)*, ICJ Reports (1998) 296, para 38, also noting that it was mentioned as early as the beginning of the twentieth century in the Arbitral Award of 7 September 1910 in *The North Atlantic Fisheries Case*, 11 UNRIAA, 188. It was upheld in several judgments of the PCIJ (*Factory at Chorzow (Merits)*, 1928 PCIJ Series A, No 17, 30; *Free Zones of Upper Savoy and the District of Gex*, 1932 PCIJ Series A, No 24, at 12, and 1932 PCIJ Series A/B, No 46, at 167) and it was applied by the ICJ as early as 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco (Judgment)*, ICJ Reports (1952) 212, then in *Fisheries Jurisdiction (Jurisdiction of the Court, Judgment)*, ICJ Reports (1973) 18, the *Nuclear Tests* cases, ICJ Reports (1974) 268 and 473, and *Border and Transborder Armed Actions (Jurisdiction and Admissibility, Judgment)*, ICJ Reports (1988) 105.

[19] J Temple Lang, 'Article 10 EC – The Most Important "General Principle" of Community Law' in U Bernitz *et al.* (eds), *General Principles of EC Law in a Process of Development* (Wolters Kluwer 2008) 76. See already P Hay, *Federalism and Supranational Organizations: Patterns for New Legal Structures* (Urbana 1966) 196. The Court first referred to art 5 EEC as the codification of a more general 'principle of cooperation' in the judgments in *Rewe-Zentralfinanz*, 33/76, EU:C:1976:188, para 5 and *Comet*, 45/76, EU:C:1976:19, para 12.

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finds expression in other provisions of the Treaties, such as Article 24(3) TEU, which provides for the Member States to 'support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity' and to 'comply with the Union's action in this area'.[20] Duties of loyal cooperation in fact underpin many provisions in the Treaties, such as Article 267 TFEU, which provides for the procedure for references for a preliminary ruling,[21] the requirements of mutual recognition between the Member States flowing from the free movement provisions in the TFEU,[22] or Article 351 TFEU, which governs the relationship between the Treaties (TEU and TFEU) and international agreements concluded by the Member States before they joined the Union.[23]

Conversely, the concrete obligations that loyalty imposes according to the Court's case law are sometimes codified in (secondary) EU law. For instance, Article 3 of Council Decision 2010/427/EU establishing the organization and functioning of the European External Action Service[24] lays down *inter alia* the duties to consult, to assist and to support, which the Court developed in the area of EU external action on the basis of the principle of loyal cooperation.[25] When a specific provision of primary or secondary EU law constitutes a concrete expression of the general obligation of loyalty laid down in Article 4(3) TEU, the effect of a declaration that a Member State has failed to fulfil its obligation under that specific provision is that there is no need for the Court to find a failure of Article 4(3) TEU.[26]

Crucially, the duty of loyal cooperation not only imposes obligations on the Member States but also on the Union institutions.[27] Those obligations are

[20] See also art 34(2) TEU.

[21] Judgment in *Kempter*, C-2/06, EU:C:2008:78, para 42. See also for example the judgment in *Petru*, C-268/13, EU:C:2014:2271, para 20 and the case law cited there.

[22] Judgments in *Thieffry*, 71/76, EU:C:1977:65, para 16; *Unectef*, 222/86, EU:C:1987:442, paras 11–13; *Vlassopoulou*, C-340/89, EU:C:1991:193, paras 14–17; A Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International 2002) 308.

[23] See the Opinions of Advocates General Tizzano in *Budvar*, C-216/01, EU:C:2003:302, point 150; and Poiares Maduro in *Kadi v Council and Commission*, C402/05 P, EU:C:2008:11, point 32; *Al Barakaat International Foundation v Council and Commission*, C-415/05 P, EU:C:2008:30, point 32; and in *Commission v Austria*, C-205/06 and *Commission* v *Sweden*, C-249/06, EU:C:2008:391, point 33.

[24] Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service, OJ 2010 L201/30.

[25] See S Blockmans and C Hillion (eds), *EEAS 2.0. A Legal Commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service* (CLEER Working Papers 2013) 1, 28ff.

[26] Judgments in *Compagnie Commerciale de l'Ouest*, C-78 to 83/90, EU:C:1992:118, para 19; *Commission v Germany*, C-195/90, EU:C:1992:219, paras 36–38; *Domingo Banchero*, C-387/93, EU:C:1995:439, para 17.

[27] Judgments in *Luxembourg v European Parliament* (n 1) para 37; *Commission v Greece*, C-45/07, EU:C:2009:81, paras 25–26; *Ireland v Commission*, C-339/00, EU:C:2003:545, paras 71–76. See also the judgment in *Aayhan and Others v Parliament*, F-65/07, EU:F:2009:43, paras 118–119, in which the Civil Service Tribunal of the EU held that it follows from 'the duty to cooperate in good faith' that 'it is incumbent on the institutions to ensure as far as possible consistency between their

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mutual,[28] and create obligations between the Member States and the Union, between the Union institutions,[29] and between the Member States.[30] In this way, the duty of loyalty has been 'the legal basis for a number of fundamental "constitutional" principles of [Union] law that are now so well established that nobody looks for their legal basis any longer'.[31] In *Francovich*,[32] for example, the Court derived the principle of Member State liability for breaches of EU law from the principle of loyalty. On that same basis, the ECJ had earlier limited the Member States' procedural autonomy by requiring that national procedural laws should not make it excessively difficult or virtually impossible to rely on EU law (the effectiveness principle as a limit to national procedural autonomy),[33] a condition which the Court later construed rather broadly by creating a duty for national courts to raise certain points of EU law of their own motion,[34] to reopen administrative

own internal policy and their legislative action at [Union] level, in particular as addressed to Member States'.

[28] Judgment in *Luxembourg v European Parliament* (n 1); Order in *Zwartveld*, C-2/88 IMM, EU:C:1990:315; see also judgment in *UK v Commission*, C-337/89, EU:C:1992:456, para 12.

[29] Art 13(2) TEU, which codifies ECJ case law to the same effect, eg the judgments in *Greece v Council*, 204/86, EU:C:1988:450, para 16; *European Parliament v Council*, C-65/93, EU:C:1995:91, para 23; *Commission v Council*, C-29/99, EU:C:2002:734. As the ECJ held in the judgment in *Commission v Council*, C-425/13, EU:C:2015:483, para 64, that cooperation pursuant to art 13(2) TEU 'is of particular importance for EU action at international level, as such action triggers a closely circumscribed process of concerted action and consultation between the EU institutions'; see eg the application for annulment of a Commission decision on the signature of an Addendum to a Memorandum of Understanding with Switzerland in *Council v Commission*, C-660/13, OJ 2014 C 45/26, the second plea of which argues that the Commission has infringed the principle of sincere cooperation contained in art 13(2) TEU. In the judgment in *Parliament v Council*, C-48/14, EU:C:2015:91, para 58, the Court further clarified that sincere cooperation pursuant to art 13(2) is exercised 'within the limits of the powers conferred by the Treaties on each institution'. That implies that the obligation resulting from art 13(2) TEU is 'not such as to change those powers'. In other words, the obligation to cooperate sincerely cannot detract from the duty to respect the principle of conferral. See also in that sense the Opinion of Advocate General Sharpston in *Council v Commission*, C-73/14, EU:C:2015:490, points 98–102. See further K Lenaerts and J Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20 Columbia Journal of European Law 5, arguing that the ECJ must, in the exercise of its jurisdiction, pay due attention to the principle of inter-institutional balance and of the principle of mutual sincere cooperation set out in art 13 (2) TEU. Similarly, see T Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking' (2013) 50 CMLRev 931.

[30] Judgments in *Athanasopoulos and Others*, C-251/89, EU:C:1991:242, para 57; *Van Munster*, C-165/91, EU:C:1994:359, para 32; *IKA*, C-326/00, EU:C:2003:101; and *FTS*, C-202/97, EU:C:2000:75, paras 51 and 56. See also the Opinions of Advocates General Sharpston in *Bressol and Others*, C-73/08, EU:C:2009:396, point 154 and Bot in *Hungary v Slovakia*, C-364/10, EU:C:2012:124, points 58–60.

[31] Temple Lang (n 19) 76.

[32] *Francovich* (n 6) para 36.

[33] *Rewe-Zentralfinanz* (n 19) para 5 ('impossible in practice'). cf the judgment in *Surgicare*, C-662/13, EU:C:2015:89 ('impossible in practice or excessively difficult'). The ECJ explicitly confirmed that the principle of effectiveness finds its basis in sincere cooperation enshrined in art 4(3) TEU in the judgment in *Commission v United Kingdom*, C-640/13, EU:C:2014:2457, para 32.

[34] Judgment in *Peterbroeck*, C-312/93, EU:C:1995:437. See also the Opinion of AG Saggio in *Océano Grupo*, C-240/98 to C-244/98, EU:C:1999:620, point 38.

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procedures in some circumstances[35] or to obtain evidence needed by a claimant in order to make a claim under EU law if that claim would otherwise be excessively difficult for the claimant to prove.[36]

It was also on the basis of the principle of loyalty that the Court held it to be impossible for the Member States operating outside the institutional framework of what is now the Union 'to assume responsibilities which might affect or alter the scope of [Union] rules that have been promulgated for the attainment of Treaty objectives'.[37] That implies in particular that each time the EU 'with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules'.[38] Arguably, even the primacy of EU law itself is based upon the duty of loyalty.[39]

Having examined the origins of the text of current Article 4(3) TEU and the scope of the obligations flowing from it, the following sections compare EU loyalty to international law good faith and *Bundestreue*.

III. EU LOYALTY AND INTERNATIONAL LAW GOOD FAITH

Parallels are frequently drawn between EU loyalty and the German constitutional law principle of *Bundestreue*,[40] thereby often emphasizing how loyalty and the international law principle of good faith are fundamentally different. In that context it is habitually argued that the EU law principle has detached itself from its international law origins and evolved into a federal,

[35] Judgment in *Kühne & Heitz*, C-453/00, EU:C:2004:17, paras 24–27.

[36] Judgment in *Laboratoires Boiron*, C-526/04, EU:C:2006:528, paras 55 and 57.

[37] Judgment in *Commission v Council ('ERTA')*, 22/70, EU:C:1971:32, para 22. *ERTA* is authority for the existence of implied external competences on the basis of the existence of internal Union rules and for the acquisition of exclusive external competences on the same basis. The former aspect is now codified in art 216(1) TFEU, while the latter aspect is codified in art 3 (2) TFEU.

[38] ibid para 17.

[39] Judgment in *Costa v ENEL*, 6/64, EU:C:1964:66, 593–594. See below, section III.

[40] eg V Constantinesco, 'L'article 5 CEE, de la bonne foi à la loyauté communautaire' in V Constantinesco *et al.* (eds), *Du droit international au droit de l'intégration. Liber amicorum P Pescatore* (Nomos 1987) 101; A Bleckmann, 'Die Bindungswirkung der Praxis der Organe und der Mitgliedstaaten der EG bei der Auslegung und Lückenfüllung des Europäischen Gemeinschaftsrechts: Die Rolle des Art. 5 EWG-Vertrag' and MA Dauses, 'Quelques réflexions sur la signification et la portée de l'article 5 du traité CEE', both in R Bieber and G Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts: die Auslegung des Europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organe* (Nomos 1987) 191 and 229, respectively; M Lück, *Die Gemeinschaftstreue als allgemeines Rechtsprinzip im Recht der Europäischen Gemeinschaft: ein Vergleich zur Bundestreue im Verfassungsrecht der Bundesrepublik Deutschland* (Nomos 1992); H Bauer, *Die Bundestreue: zugleich ein Beitrag zur Dogmatik des Bundesstaatsrechts und zur Rechtsverhältnislehre* (Mohr Siebeck 1992) 206; Verhoeven (n 22) 306; K Lenaerts and P Van Nuffel (N Cambien (ed)), *European Union Law* (Sweet & Maxwell 2011) 147–8; F Casolari, 'The Principle of Loyal Co-Operation: A "Master Key" for EU External Representation?' *CLEER Working Papers* 2012/5, 11; M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 55–8.

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constitutional-like principle.[41] The underlying premise is twofold: First, EU loyalty is unlike international law good faith and akin to *Bundestreue*; and second, which is implied by the first premise, *Bundestreue* and international law good faith are two different concepts. Along the same lines, describing EU loyalty as an expression of a principle of international law is often thought of as in one way or another detracting from the unique and special character of the EU.[42] This section examines the first premise, while the next section explores the second.

First a caveat: not all the international law obligations based on good faith have a counterpart in EU law and vice versa. That is so because EU loyalty can be regarded as international law good faith applied to a specific treaty system, to a specific international organization. As the ECJ put it in Opinion 2/13, while the EU is, 'under international law, precluded by its very nature from being considered a State', it has 'a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation'.[43] Put differently, as the EU goes 'well beyond the model of an international organisation coordinating areas of State policy', and possesses 'marked confederal features',[44] the obligations flowing from loyalty are correspondingly far-reaching. The consequences of the loyalty obligation within the Union are therefore commensurate to its complexity and level of integration as an international organization.

For instance, one would be hard-pressed to find an international law equivalent to many of the loyalty obligations in EU external action, such as Member States' duty to abstain from acting externally in a field that the Union has regulated internally (the above-mentioned *ERTA*-doctrine),[45] or their duty to cooperate and consult with the European Commission before taking external action whenever there is a 'start of concerted [Union] action'.[46] Another example is the right of a State to deny entry to foreign heads of State. Given the principle of sovereign equality of States, the right of entry depends entirely on the consent of the host State.[47] In the context of the EU, however, Advocate General (AG) Bot has argued that loyalty requires that 'Member States should not exercise their diplomatic competence in a manner that might lead to a lasting break in diplomatic relations between two Member States', since this would be 'incompatible with the integration process aimed at creating, in the words of the preamble to the EU Treaty, "an ever closer union among the peoples of Europe" and would constitute a barrier

[41] Constantinesco (n 40); Dauses (n 40); M Blanquet, *L'article 5 du traité CEE. Recherche sur les obligations de fidélité des États Membres de la Communauté* (LGDJ 1994) 29–34.
[42] eg Blanquet (n 41) 33–4.
[43] Opinion 2/13 (n 4), paras 156–158.
[44] J Crawford, *The Creation of States in International Law* (OUP 2006) 495.
[45] See (n 37) above.
[46] Eg judgment in *Commission v Luxembourg*, C-266/03, EU:C:2005:341, paras 57–60.
[47] See art 2 of the Vienna Convention of 18 April 1961 on Diplomatic Relations, 500 UNTS 212. See also art 2(1) and (2) of the Vienna Convention of 24 April 1963 on Consular Relations, 500 UNTS 95. cf the Opinion of AG Bot in *Hungary v Slovakia* (n 30), point 57.

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to the attainment of the essential objectives of the Union, including the aim of promoting peace'.[48]

Conversely, the case law on EU loyalty does not, for example, contain obligations of cooperation between riparian States bordering the same river—if such obligations exist under EU law, they are laid down in detailed legislation, so the need to rely on general principles such as loyalty does not arise.[49] Neither does EU loyalty impose separate duties to negotiate in good faith with other Member States in order to make the Treaties operational.[50] In most respects, the EU has simply outgrown these arguably rather rudimentary obligations of good faith, either by codifying them into specific legislation or by establishing institutions such as the European Commission or the ECJ to streamline cooperation, negotiation or dispute settlement.

With that in mind, this article explores some of the parallels between EU loyalty and international law good faith, by looking at a few key obligations that the ECJ has formulated on the basis of loyalty and comparing them to the case law on the general principle of good faith in international law. The following exploratory analysis will therefore of necessity be incomplete.[51]

A. *Pacta Sunt Servanda*

The principle that is arguably most closely linked to good faith is that of *pacta sunt servanda* which, in the ECJ's words:

> constitutes a fundamental principle of any legal order and, in particular, the international legal order. Applied to international law, that principle requires that every treaty be binding upon the parties to it and be performed by them in good faith (see Article 26 of the Vienna Convention).[52]

As the third recital in the preamble to the VCLT puts it: 'the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized'. In turn, the Greco-Turkish Arbitral Tribunal in *Megalidis* considered good faith to be 'the foundation of all law and all conventions'.[53]

[48] Opinion of AG Bot in *Hungary v Slovakia* (n 30), points 58–59.

[49] See eg Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1 (which imposes administrative coordination with regard to the management of international river basins, both between EU Member States and with non-Member States).

[50] *Gabčíkovo-Nagymaros Project (Judgment)*, ICJ Reports (1997) 7, paras 136–142, 155 (discussed below).

[51] See further, eg on good faith as the basis for the binding nature of unilateral declarations: *Nuclear Tests* cases (n 18) 268, para 46 and 473, para 49 (for a deconstruction, see M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 345–55); and good faith as the basis for acquiescence and estoppel in general international law: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Judgment)*, ICJ Reports (1984) 246, 305, para 130.

[52] Judgment in *Racke v Hauptzollamt Mainz*, C-162/96, EU:C:1998:293, para 49.

[53] Greco-Turkish Arbitral Tribunal, *Megalidis*, 8 TAM (1928) 395.

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In EU law, 'supremacy', 'primacy' or 'precedence' are used interchangeably as 'appropriate synonyms'[54] of *pacta sunt servanda*, and regarded as founded on the duty of loyalty. In *Costa v ENEL*, the ECJ held:

> The integration into the laws of each Member State of provisions which derive from the [Union], and more generally the terms and the spirit of the [Treaties], make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. The executive force of [Union] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the [Treaties] [intended by[55]] Article [4(3) TEU] and giving rise to the discrimination prohibited by Article [18 TFEU].[56]

It has often been argued that the primacy of EU law differs from the supremacy of international law.[57] In several paragraphs of the *Costa* judgment, the ECJ seemingly contrasted the EU legal order with those established by 'ordinary international treaties'.[58] While the latter leave Contracting Parties the choice as to form and methods, including the choice between a 'monist' and a 'dualist' attitude towards international law,[59] the EU Treaties are 'an integral part of the legal systems of the Member States … which their courts are bound to apply'. In assessing compliance with obligations, international law

[54] cf O Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 EJIL 785 (with respect to precedence).

[55] In the authentic Italian text of the judgment, this passage reads: 'Se l'efficacia del diritto comunitario variasse da uno stato all'altro in funzione delle leggi interne posteriori, ciò metterebbe in pericolo l'attuazione degli scopi del Trattato *contemplata* nell'art. 5, secondo comma, e causerebbe una discriminazione vietata dall'art. 7' (emphasis added). That seems to indicate that 'intended by' is preferable to 'set out in', which is used in the official English translation. That appears to be confirmed by the French text of the judgment (traditionally the text drafted and deliberated by the judges), which reads: 'Que la force executive du droit communautaire ne saurait, en effet, varier d'un État à l'autre à la faveur des législations internes ultérieures, sans mettre en peril la réalisation des buts du Traité *visée* à l'Article 5(2), ni provoquer une discrimination interdite par l'Article 7' (emphasis added). The female 'contemplata' in Italian and 'visée' in French, which correspond, respectively, to 'l'attuazione' and 'la réalisation', clarify that the Court was referring to, respectively, 'l'attuazione degli scopi del Trattato' and 'la realisation des buts du Traité' as the expression used in art 5, not to any objectives in art 5 itself.

[56] *Costa* (n 39) 593–594. cf Lenaerts and Gutiérrez-Fons (n 29) 32, fn 197, citing this passage as an example of 'consequentialist interpretation'. Having established the primacy of EU law on that basis, the Court as a rule stopped referring to loyalty as a source for the binding character of provisions of (primary or secondary) EU law and now simply refers to the provisions themselves. Examples of judgments that rely on art 86 ECSC to establish the binding character of EU law measures include the judgments in *Groupement des Industries Sidérurgiques Luxembourgeoises* (n 13) 190; *Germany v High Authority*, Case 3/59, EU:C:1960:9, 60; *Humblet*, 6/60, EU:C:1960:48, 569; *Gerlach*, 239/84, EU:C:1960:48, para 12.

[57] eg J Weiler, 'The Transformation of Europe' (1991) 100 YaleLJ 2413–14.

[58] eg *Costa* (n 39) 593: 'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.'

[59] On the misleading character of that dichotomy, see eg Crawford (n 10) 218, pointing out that both terms 'are more appropriately framed as the ends of a continuum of domestic legal structuring, with much variation in between'.

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only looks at the result but leaves the Contracting Parties free as to the means to attain that result ('external primacy'). EU law primacy is said to be different, because it is also concerned with how the Member States implement their EU law obligations ('internal primacy'). The Court established internal primacy by presenting EU law as different from international law and as in some way part of national law. This was intended to convince national courts in dualist Member States not to treat EU law as they would allegedly treat international law, ie by transposing it, and applying the maxim *lex posterior derogat priori* in case of conflict with national law.[60]

However, De Witte has shown that, as to actual content, there is no such contrast between EU law and international law.[61] 'Internal primacy' is not specific to EU law but is inherent in the *pacta sunt servanda* principle applied in international law. International law simply does not have the same judicial tools (most importantly the preliminary ruling procedure) at its disposal fully to develop this consequence of *pacta sunt servanda*. In other words, States are obliged to ensure the internal primacy of international law, but they do so in accordance with their own national constitutions. As a consequence, the existing potential in international law is only rarely realized, as its effectiveness is at the mercy of municipal courts.[62] In the EU legal order, by contrast, the preliminary ruling procedure occupies a central and unique place.[63] This procedure allows for *ex ante* control over compatibility of national law with Union law,[64] in contrast with international law, which normally only acts *ex post*, by way of international responsibility. The purpose of the preliminary ruling procedure is that of harmonizing the interpretation of EU law.[65] This emphasis on uniformity, De Witte argues, was an additional reason for the Court to speak out on internal primacy as well. However, it is important to note that the ECJ framed the issue not as a conflict between municipal law and international law, but between two types of municipal law, one of which (viz EEC law) took precedence over the other. As Spiermann has pointed out, that does constitute a departure from international law, but only in the sense that the ECJ appears to have been

[60] See Spiermann (n 54) 763.

[61] B de Witte, 'Retour à "Costa". La primauté du droit communautaire à la lumière du droit international' (1984) Revue trimestrielle de droit européen 425. cf similarly Crawford (n 10) 241: 'With European as with international law, the *Grundnorm* (from the perspective of a national institution) is *pacta sunt servanda*'.

[62] C Leben, 'Hans Kelsen and the Advancement of International Law' (1998) 9 EJIL 297. See further H Kelsen, *Peace through Law* (The University of North Carolina Press 1944) 73.

[63] Weiler (n 57) 2403.

[64] Though only indirectly. See eg the judgment in *Essent Belgium*, C-204/12 to C-208/12, EU:C:2014:2192, para 51, recalling settled case-law holding that 'although the Court does not, in a reference for a preliminary ruling, have jurisdiction to give a ruling on the compatibility of a national measure with EU law, it does have jurisdiction to supply the national court with a ruling on the interpretation of EU law so as to enable that court to determine whether such compatibility exists in order to decide the case before it'.

[65] Judgment in *Bosch*, 13/61, EU:C:1962:11, 89.

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more deferential to State sovereignty than general international law would be.[66]

It is perhaps useful to examine some of the practical consequences of EU loyalty and primacy before comparing them with their equivalents from general international law. In emphasizing the duty of the Member States to ensure the effectiveness of EU law in their internal legal orders, the ECJ recalled the intertwinement of loyalty and primacy in *Confédération paysanne*:[67]

> It must be added that, in accordance with the principle of 'cooperation in good faith', it is for the national courts to apply, within the exercise of their jurisdiction, the [provisions of EU law at issue] and to give full effect to those provisions, refusing if necessary to apply any conflicting provision of national legislation, including any subsequent national provision.

EU loyalty also prevents Member States from relying on their own internal legal order to justify a breach of EU law. As the ECJ held in *Premiums for grubbing fruit trees*:[68]

> A Member State cannot plead the provisions or practices of its internal order in order to justify failure to observe obligations and time-limits arising from [EU measures]. It falls to a Member State in accordance with the general obligations imposed on Member States by Article [4(3) TEU], to recognize the consequences, in its internal order, of its adherence to the [Union]… .

The same counts as regards provisions of a constitutional nature, as the ECJ made clear in *Internationale Handelsgesellschaft*.[69] Furthermore, the obligations arising from primary or secondary EU law devolve upon the Member States as such and their liability under Article 258 TFEU arises whatever the agency whose action or inaction is the cause of the failure to fulfil its obligations under EU law, even in the case of a constitutionally independent institution.[70] EU law is generally unconcerned with the division of competences within the Member States but only looks at the State as a whole and whether or not it fulfils its obligations.[71]

[66] Spiermann (n 54) 773–5.

[67] Judgment in *Confédération paysanne*, C-298/12, EU:C:2013:630, para 37, citing to that effect the judgments in *Simmenthal*, 106/77, EU:C:1978:49, para 24 and *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para 45.

[68] Judgment in *Commission v Italy ('Premiums for grubbing fruit trees')*, 30/72, EU:C:1973:16, para 11. See also the judgment in *Commission v Italy ('Premiums for slaughtering cows')*, 39/72, EU:C:1973:13, paras 24–25.

[69] Judgment in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, para 3.

[70] Judgment in *Commission v Belgium*, 77/69, EU:C:1970:34, para 15. See more recently for example the judgment in *Commission v Belgium*, C-533/11, EU:C:2013:659, in which Belgium was ordered to pay a substantial lump sum as well as a penalty payment on account of a failure by the federated entities to comply with an earlier ECJ judgment and to implement a Directive.

[71] eg Judgment in *International Fruit Company*, 51 to 54/71, EU:C:1971:128, para 3.

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Similar duties in international law are not difficult to locate. Indeed, the link between the ECJ's statement, which it has repeated countless times, and Article 27 VCLT was explicitly acknowledged by AG Léger in his Opinion in *Köbler*:

> As we know, under international law, a State cannot rely on the particular characteristics of its constitutional organisation in order to escape liability. That situation is only a particular expression of the general principle that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty' [Article 27 VCLT]. It follows that 'the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State'.[72]

The AG concluded in a matter-of-fact way: 'The same is true under Community law.'[73] How far do such parallels with general international law reach?

First, while international law generally leaves it to the States to decide how to give effect to their international legal obligations, such is not always the case. One obvious example would be the 1949 Geneva Conventions, which oblige the High Contracting Parties to 'undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' of the Conventions.[74]

Second, one does not need to look very far to find a statement emphatically declaring international law to take precedence over municipal law.[75] For example, in response to an argument submitted by the USA that it had taken certain measures irrespective of any obligations under the agreement at issue, the ICJ held in *Obligation to Arbitrate*:[76]

> It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the

[72] Opinion of AG Léger in *Köbler*, C-224/01, EU:C:2003:207, point 88, referring to the Advisory Opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports (1998) para 63, where the ICJ held that the conduct of an organ of a State—even an organ independent of the executive power, in casu a court—'must be regarded as an act of that State'.

[73] ibid, point 89, referring to *Commission v Belgium* (n 70) para 15.

[74] Art 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; art 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; art 129 of the Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135; art 146 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287. cf K Keith, '"International Law is Part of the Law of the Land": True or False?' (2013) 26 LJIL 352.

[75] cf also *Elettronica Sicula SPA (ELSI) (Judgment)*, ICJ Reports (1989) 15, paras 71–73, where the Court responded to an argument by Italy that there was no breach of the relevant treaty because the relevant decision 'was issued by the competent authority on a regular legal basis' by patiently explaining that even if the State authority in question had 'held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the … Treaty'.

[76] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)*, ICJ Reports (1988) 12, para 57.

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> *Alabama* case between Great Britain and the United States, and has frequently been recalled since … .

The ICJ held in the *Nuclear Tests* cases that 'the very rule of *pacta sunt servanda* in the law of treaties is based on good faith'.[77] This close connection between both principles also finds its expression in the text of Article 26 VCLT, which states: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[78] The ILC has in that regard also stressed that 'the rule *pacta sunt servanda* is itself founded upon good faith' on several occasions.[79] In *Gabčíkovo-Nagymaros Project*, the ICJ clarified that Article 26 VCLT combines two elements of equal importance:

> It provides that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.[80]

The corollary of *pacta sunt servanda* is the prohibition for a State 'to invoke the provisions of its internal law as justification for its failure to perform a treaty', as laid down in Article 27 VCLT. That provision originates in an amendment proposed by Pakistan[81] at the Diplomatic Conference where the Vienna Convention was negotiated and agreed.[82] Article 13 of the 1949 Draft Declaration on Rights and Duties of States[83] makes explicit the basic idea that underpins this prohibition, ie one of fulfilling obligations in good faith. Allowing States to invoke their own law as an excuse for failure to fulfil their treaty obligations would amount to allowing them to determine themselves the extent of their obligations. As the PCIJ held in *Interpretation of the Convention between Greece and Bulgaria respecting reciprocal emigration*, it is 'a generally accepted principle of international law that in relations between

[77] *Nuclear Tests* cases (n 18) 268, para 46 and 473, para 49.

[78] cf also the Separate Opinion of Judge Ajibola in *Territorial Dispute (Libyan Arab Jamahiriya/Chad), (Judgment)*, ICJ Reports (1994) 6, para 79.

[79] UNYBILC (vol II) (1964) 8. For a summary, see WP Gormley, 'The Codification of *pacta sunt servanda* by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith' (1970) 14 St Louis University Law Journal 367. For an overview of scholarly writings on the matter: R Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit* (PUF 2000) 93–7. See further H Kelsen, *The Law of the United Nations* (Praeger 1951) 89 and Zoller (n 11) 338, 351.

[80] *Gabčíkovo-Nagymaros Project* (n 50) 7, para 142. See Koskenniemi (n 51) 588, arguing that the judgment provides an illustration of how sources arguments rotate around the poles of 'consent' and 'justice'.

[81] UN Doc A/CONF.39/C.1/L.181.

[82] United Nations Conference on the Law of Treaties, Vienna, Austria, First Session, 26 March–24 May 1968, UN Doc A/CONF.39/C.1/SR.72, 72nd meeting of the Committee of the Whole, at 427–428, paras 29–48. See Keith (n 74) 352, arguing that the amendment was added to the text prepared by the ILC to 'emphasize the pre-eminence of international law over national law'.

[83] Draft Declaration on Rights and Duties of States, UNYBILC (1949) 178.

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Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty'.[84] In *Certain German Interests in Polish Upper Silesia*, the Court further clarified that from the standpoint of international law 'and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures'.[85]

Like in EU law, the nature of these legal provisions does not matter. In *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, the PCIJ held that the same principle applies to a State's constitutional law.[86] The principle is also reflected in Article 3 of the Articles on State Responsibility,[87] which makes clear that the characterization of an act of a State as internationally wrongful is governed by international law: 'Such characterization is not affected by the characterization of the same act as lawful by internal law.' Or as the ICJ held in *LaGrand*:[88] 'the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be'.

Hence, while general international law may often lack the judicial machinery the EU has at its disposal, the binding nature of international law and the obligations flowing from it appear to be conceptually the same and based on the same premise of good faith or loyalty as those flowing from primacy in EU law. Equipped as it is with a formidable enforcement machinery mostly lacking in other treaty-based systems or indeed in general international law, EU law could perhaps accurately be described as 'successful international law'[89] or at least 'uncommonly successful international law'.

B. Obligations Prior to Ratification ('sub spe rati')

In *Inter-Environnement Wallonie*,[90] the ECJ deduced another key obligation from the duty of loyalty that is particularly relevant for the comparison between EU loyalty and international law good faith. It held that it follows from the duty of loyalty in conjunction with Article 288, third paragraph, TFEU and from the directive itself that during the period of transposition Member States 'must refrain from taking any measures liable seriously to

[84] *Interpretation of the Convention between Greece and Bulgaria respecting reciprocal emigration, signed at Neulilly-sur-Seine on November 27th, 1919*, 1930 PCIJ Series B, No 17.

[85] *Certain German Interests in Polish Upper Silesia (Merits)*, 1927 PCIJ Series A, No 7, 19. cf in that sense *Free Zones of Upper Savoy and the District of Gex* (n 18) 12.

[86] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 PCIJ Series A/B, No 44, 24; cf *Greco-Bulgarian 'Communities'*, 1930 PCIJ Series B, No 17, 32.

[87] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) UNYBILC (vol II, Pt 2).

[88] *LaGrand (Provisional Measures, Order)*, ICJ Reports (1999) 9, 16, para 28.

[89] Leben (n 62) 298.

[90] Judgment *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, para 45.

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compromise the result prescribed' by a directive. Addressed at the Member States, directives generally determine a transposition period and only require them to take the measures necessary to ensure that the result prescribed by the directive is achieved by the end of that period. Although the Member States 'cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period',[91] a directive 'has legal effect with respect to the Member State to which it is addressed from the moment of its notification'.[92] Indeed, where directives in principle leave the Member States complete discretion as to the transposition up until the deadline of transposition,[93] the duty of loyalty poses certain limits to this exercise of Member State power by prohibiting Member State action that would defeat the object and purpose of the directive. That would be the case, for instance, when certain provisions that are incompatible with the directive 'constitute [the] full and definitive transposition of the directive'. In such a scenario, their incompatibility with the directive 'might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time'.[94]

International law good faith has been used by courts and tribunals to do something quite similar to what the ECJ did in *Inter-Environnement Wallonie*, ie to limit the discretionary power of Contracting Parties between the signing of an international agreement and its entry into force.[95] The obligation not to defeat the object and purpose of a treaty prior to its entry into force is also codified in Article 18 VCLT. There is of course an important difference with the *Inter-Environnement Wallonie* case law. There, the directives *had* entered into force; it was just that the deadline for transposition had not yet passed. Nevertheless, both categories of cases arguably concern the obligations of contracting States between the expression of the will to be bound by a treaty or a specific obligation of a treaty on the one hand, and the definitive and full effectiveness of the treaty or the treaty obligation in question on the other hand.

[91] ibid para 43. [92] ibid para 41. [93] ibid para 49.

[94] ibid para 48. For an illustration, see the judgment in *Impact*, C-268/06, EU:C:2008:223. There, the ECJ also recalled the loyalty-based principle that national law must be interpreted in conformity with EU law, which requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognized by domestic law, with a view to ensuring that EU law is fully effective and achieving an outcome consistent with the objective pursued by the measure in question: ibid para 101. See the judgment in *Von Colson and Kamann*, 14/83, EU:C:1984:153, para 26. cf G Betlem and A Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 EJIL 569, demonstrating that the differences in application of the principle of consistent interpretation of EU law and international law are a matter of degree not of principle.

[95] See further Zoller (n 11) 68ff; W Morvay, 'The Obligation of a State Not to Frustrate the Object of a Treaty Prior to its Entry into Force' (1967) 27 ZaöRV 455.

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For example, in the 1928 *Megalidis* case,[96] Turkey had seized the content of a bank safe deposit box belonging to a Greek national in Smyrna. This had happened just weeks after Turkey had signed the peace Treaty of Lausanne, which provided *inter alia* for the protection of Greek minorities, but before the treaty's entry into force. The Greco-Turkish Arbitral Tribunal famously held that:

> [i]t is a principle of law that already with the signature of a treaty and before its entry into force, there exists for the contracting parties an obligation to do nothing which may injure the Treaty by reducing the importance of its provisions. … [T]his principle … really is only an expression of the principle of good faith which is the foundation of all law and all conventions ….[97]

Earlier, the Arbitrator in *German Reparations under Article 260 of the Treaty of Versailles* (1924), had applied similar reasoning. The Treaty of Versailles ordered Germany to cede to the Reparation Commission certain rights and interests it held in concessions and public enterprises. However, it was unclear what date had to be taken as the point of reference to determine these rights and interests. The Arbitrator had to decide whether it was the date of signature, of ratification, of entry into force or still some other point of reference, given that the parties had agreed that he was to disregard (most of) the *travaux préparatoires*.[98] He held that:

> si l'Article 260 se référait à la date de la mise en vigueur du Traité et non à la date de la signature, on aurait laissé au Gouvernement allemand la faculté de favoriser la disparition des droits et intérêts susceptibles d'être livrés et de doser ainsi l'importance de son obligation ou même l'annuler, ce qui serait juridiquement inadmissible …. Le Gouvernement allemand reconnaît que ce serait contraire à la bonne foi si, après la signature, il avait pris des mesures quelconques pour faire passer les droits et intérêts allemands en mains non allemandes.[99]

In the end, the Arbitrator recognized that it was the date of entry into force that had to be taken into account, thereby endorsing the German admission that any action to alienate the rights and interests at issue prior to that date would constitute a violation of the principle of good faith.

[96] *Megalidis* (n 53) 386.

[97] ibid 395.

[98] *German Reparations under Article 260 of the Treaty of Versailles (Reparations Commission v Germany)*, Recueil des Sentences Arbitrales, I, 429, 434–435.

[99] 'If Article 260 referred to the date of entry into force of the Treaty rather than to the date of signature, one would have left the German government with the power to favour the disappearance of the rights and interests that it could cede and thus to regulate the extent of its obligation or even to cancel it, which would be legally impermissible … The German government recognizes that it would be contrary to good faith if, after the signing of the Treaty, it would have taken any measures to transfer the German rights and interests into non-German hands' (our translation): ibid 522. For the English case report (which omits this passage), see Ann Dig (1923) 341–342.

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The PCIJ judgment in *Certain German Interests in Polish Upper Silesia* has been regarded as an implicit recognition of the same principle.[100] There, Poland argued before the Court that the transaction by which the German Reich sold property (the Chorzów factory) after the signing of the Treaty of Versailles but before its entry into force was contrary to international law 'which is essentially based on the good faith of the contracting parties'.[101]

Although the reasoning in the international law cases cited may be different from that in the ECJ judgments discussed, the mechanism at work is not. Indeed, the EU courts have treated international law good faith at least in some circumstances as similar in its effects to EU loyalty, which can be illustrated by the following three examples from the General Court of the EU, the ECJ, and an AG at the ECJ.

First, the General Court applied international law good faith in *Opel Austria*.[102] There, the applicant argued that by adopting the contested regulation[103] a few days before the EEA Agreement[104] entered into force, the Council had infringed the principle of good faith, according to which, pending the entry into force of an international agreement, the signatories to an international agreement may not adopt measures which would defeat its object and purpose. The General Court, referring to the PCIJ judgment in *German interests in Polish Upper Silesia*, held that the principle of good faith is a rule of customary international law whose existence is recognized by the ICJ and was *therefore* binding on the then Community.[105] However, presumably because the judgment essentially concerned not the interests of Austria directly, but of Opel Austria, a private party, the Court did not link the principle of good faith to EU loyalty, but to legitimate expectations, and held that principle to be infringed in the case at issue.[106]

[100] B Cheng, *General principles of law as applied by International Courts and Tribunals* (Stevens & Sons 1953) 110–11; Morvay (n 95) 455.

[101] *Certain German Interests in Polish Upper Silesia (Merits)* (n 85) 39–40; and see also the connection between good faith and abuse of rights: ibid 38–39 and 42, on which see O Spiermann, *International Legal Argument in the Permanent Court of International Justice* (CUP 2005) 218.

[102] Judgment in *Opel Austria v Council*, T-115/94, EU:T:1997:3.

[103] Council Regulation (EC) No 3697/93 of 20 December 1993 withdrawing tariff concessions in accordance with art 23(2) and art 27(3)(a) of the Free Trade Agreement between the Community and Austria (General Motors Austria), OJ 1993 L343/1.

[104] Agreement on the European Economic Area, OJ 1994 L 1/3.

[105] *Opel Austria* (n 102), paras 89–90.

[106] ibid paras 93 and 123. cf in that sense PJ Kuijper, 'Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law' in J Wouters, A Nollkaemper and E de Wet (eds), *The Europeanisation of International Law* (TMC Asser Press 2008) 94–5.

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Second, in *Intertanko* the ECJ gave proof (at least in principle)[107] of a similar approach.[108] After having established that the validity of Directive 2005/35[109] could not be assessed in the light of Marpol 73/78,[110] the Court noted that the fact that all Member States are parties to Marpol 73/78 was liable to have consequences for the interpretation of, first, the United Nations Convention on the Law of the Sea (UNCLOS)[111] and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78, concluding that in view 'of the customary *principle of good faith, which forms part of general international law, and of Article 10 EC*, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78'.[112]

Third, AG Sharpston explicitly made the link between EU loyalty and international law good faith in her Opinion in *Commission v Malta*.[113] That case concerned infringement proceedings against Malta for concluding a public service obligation contract for the provision of a regular high-speed ferry service between the islands of Malta and Gozo. In the period between the signing and the entry into force of its Accession Treaty to the EU, Malta had signed a six-year contract with a Maltese company without giving the opportunity to other EU shipowners to tender. The Commission claimed that Malta had violated an EU regulation containing an obligation to allow for EU-wide tenders.[114] However, the regulation did not yet apply to Malta at the relevant time, since its Accession Treaty had not yet entered into force. The Commission therefore also claimed that Malta had violated *inter alia* Article 26 VCLT (the obligation of good faith) in that it had defeated the Accession Treaty's object and purpose by engaging in this six-year contract just a few weeks before acceding to the EU. Even though the Commission claimed a violation of international law good faith (which, according to the AG, who referred to the ECJ judgment in *Brita,* 'forms part of the

[107] The Court's approach regarding the status of Marpol and UNCLOS in the EU legal order, and in particular its holding (at para 64) that UNCLOS 'does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States' has been the subject of much commentary, mostly critical: see eg P Eeckhout, 'Case C-308/06, The Queen on the application of Intertanko and Others v Secretary of State for Transport, judgment of the Court of Justice (Grand Chamber) of 3 June 2008, nyr' (2009) 46 CMLRev 2041–57; J Wouters and P De Man, 'International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Cooperation Committee, Lloyd's Register and International Salvage Union v Secretary of State for Transport. Case C- 308/06' (2009) 103 AJIL 555–61.

[108] cf also eg the judgments in *Kupferberg*, 104/81, EU:C:1982:362, para 18 and *Sevince*, EU:C:1990:322, C-192/89, para 23.

[109] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ 2005 L255/11.

[110] International Convention for the Prevention of Pollution from Ships, 12 ILM 1319 (1973); TIAS No 10,561; 34 UST 3407; 1340 UNTS 184.

[111] 10 December 1982, 1833 UNTS 3; 21 ILM 1261 (1982).

[112] Judgment in *Intertanko and Others*, C-308/06, EU:C:2008:312, para 52 (emphasis added).

[113] EU:C:2010:392.

[114] Council Regulation (EEC) 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ 1992 L364/7.

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Community legal order'[115]), the AG examined Malta's actions in light of the principle of sincere cooperation and the obligation to 'refrain from taking any measures liable seriously to compromise the result prescribed' that the Court established on the basis of that principle in *Inter-Environnement Wallonie*. In particular, the AG looked at whether a hypothetical Member State carrying out the exact same action in the period between the adoption and the entry into force of the regulation at issue, would have violated the duty of loyalty. Reaching the conclusion that this would not have been the case, she then concluded that the international law duty of good faith (Article 26 VCLT) would in any event not have imposed a greater obligation on Malta in the period after signing but before entry into force of the Accession Treaty. In other words, the AG treated the obligation on the basis of EU loyalty as an obligation that also flows from the international law principle of good faith.

C. Duties of Cooperation

A third key obligation that the ECJ has derived from loyalty is a mutual duty of genuine cooperation and assistance between Member States and Union institutions.[116]

One specific but rather important duty of cooperation is the duty to inform, which flows from the Member States' obligation to 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'.[117] For example, when a Member State decides, on the basis of Article 114(4) and (5) TFEU, to maintain certain national measures incompatible with a Union harmonization measure, it is obliged under Article 4(3) TEU to notify the Commission as soon as possible of what derogating provisions exactly it intends to maintain.[118] This is not a one-way obligation, since '[t]he Commission, for its part, must demonstrate the same degree of diligence and examine as quickly as possible the provisions of national law submitted to it'.[119] Likewise, within the common foreign and security policy (CFSP), Article 32 TEU obliges the Member States to 'consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach'. Perhaps more strikingly, that same provision provides that before undertaking 'any action on the international scene or entering into any commitment which could affect the Union's interests', each Member State must consult the others within the European Council or the Council.

[115] Judgment in *Brita*, C-386/08, EU:C:2010:91, paras 40 to 42 and the case law cited there.
[116] Judgments in *Hurd*, 44/84, EU:C:1986:2, para 38; and *Commission v Belgium*, 52/84, EU:C:1986:3, para 16.
[117] Art 4(3), second para, TEU; judgment in *My*, C-293/03, EU:C:2004:821, para 48. See also art 291(1) TFEU.
[118] Judgment in *Kortas*, C-319/97, EU:C:1999:272, para 35.
[119] ibid.

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Furthermore, although a Member State is not allowed to justify a breach of EU law on the basis of its internal law or internal difficulties, the ECJ has indicated that when, in giving effect to EU law, a Member State 'encounters unforeseen or unforeseeable difficulties or perceives consequences overlooked by the Commission', it can always '[submit] those problems for consideration by the Commission, together with proposals for suitable amendments'.[120] In such a scenario, loyalty imposes on the Commission and the Member State concerned a duty of genuine cooperation. In contrast with a case of 'absolute impossibility' to implement,[121] such 'unforeseen or unforeseeable consequences' do not constitute a valid justification for failing to execute Treaty obligations—Member States and Union institutions simply 'must work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions.'[122] Within the CFSP, Article 28 TEU explicitly provides for such a solution. The principles and objectives of a decision defining an action to be undertaken by the Union can be reviewed by the Council in case of a 'change in circumstances having a substantial effect on a question subject to such a decision'. This is an echo of the *rebus sic stantibus* doctrine present in many national laws of obligation, and equally in international law, where it was codified in Article 62 VCLT.[123] In cases of imperative need arising from changes in the situation with respect to a decision defining an action to be undertaken by the Union (failing a review of the decision by the Council), Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision. However, the Member State(s) concerned must inform the Council immediately of any such measures.[124]

A Member State violates its duty of cooperation when it adopts provisions affecting the application of EU law, without first consulting the Union institutions involved.[125] Likewise, the adoption of a decision authorizing the Commission to negotiate an international agreement on behalf of the Union marks the start of a concerted EU action at the international level. For that purpose it requires at the very least a duty of close cooperation between the Member States and the Union institutions 'in order to facilitate the achievement of the [Union's] tasks and to ensure the coherence and consistency of the action and its international representation'.[126] If a Member

[120] *Commission v Belgium* (n 116) para 16.

[121] Judgments in *Commission v Belgium* (n 116), para 14; *Commission v Germany*, 94/87, EU:C:1989:46, para 8; *Commission v Greece*, C-183/91, EU:C:1993:233, para 10; *Commission v Italy*, C-349/93, EU:C:1995:53, para 12; *Commission v Italy*, C-348/93, EU:C:1995:95, para 16; *Commission v Italy*, C-280/95, EU:C:1998:28, para 13; and *Commission v Italy*, C-6/97, EU:C:1999:251, para 34.

[122] *Commission v Belgium* (n 116), para 16.

[123] cf *Gabčíkovo-Nagymaros Project* (n 50) para 104, referred to by the ECJ in *Racke* (n 52) para 50.

[124] Art 28(4) TEU.

[125] Judgment *Commission v Belgium*, 186/85, EU:C:1987:208, paras 39–40.

[126] Judgments in *Commission v Luxembourg* (n 46) para 60 and *Commission v Germany*, C-433/03, EU:C:2005:462, para 66.

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State autonomously concludes an international agreement on the same subject matter after the Council has authorized the Commission to open negotiations, without consulting with the EU institutions, it infringes Article 4(3) TEU.[127]

The Member States and the EU institutions have a special obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement (ie agreements concluded by the Union and all or some of the Member States).[128] In the *Mox Plant* case, the Court held that this is so particularly when a Member State submits to an arbitral tribunal outside the Union framework a dispute essentially on undertakings resulting from a mixed agreement which relates to an area, in which the respective areas of competence of the EU and the Member States are liable to be closely interrelated.[129] In those circumstances, the obligation of close cooperation within the framework of a mixed agreement involves a duty to inform and consult the competent EU institutions prior to instituting dispute-settlement proceedings within the framework of UNCLOS.[130] By bringing proceedings under that system, without having first informed and consulted the competent EU institutions, Ireland had therefore failed to comply with its duty of cooperation under Articles 4(3) TEU and 192 EURATOM.[131] Indeed, as the Court clarified in Opinion 2/13, the obligation enshrined in Article 344 TFEU of Member States 'to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU'.[132]

The principle at work is vividly illustrated by the *PFOS* case,[133] which concerned infringement proceedings brought by the Commission against Sweden for having unilaterally proposed that perfluoroctane sulfonate ('PFOS') be added to Annex A to the Stockholm Convention on Persistent Organic Pollutants.[134] It had done so, regardless of the fact that a strategy had been agreed in the Council not to propose the addition of PFOS for the time being. Under EU law, Sweden is free to adopt measures providing for a higher level of environmental protection within its own jurisdiction.[135] However, proposing such measures within the framework of an international

[127] *Commission v Luxembourg* (n 46) paras 57–66 and *Commission v Germany* (n 126) paras 64–73.

[128] Judgment in *Parfums Christian Dior*, C-300/98 and C-392/98, EU:C:2000:688, para 36; *Mox Plant* (n 6) para 175. The ECJ clarified in *Commission v Council* (n 4) para 55, that the duty of cooperation imposed on the EU and the Member States in the field of mixed agreements cannot justify an institution (here the Council) setting itself free from compliance with the procedural rules and voting arrangements laid down in art 218 TFEU.

[129] *Mox Plant* (n 6) para 176.

[130] ibid para 179.

[131] ibid para 182 and see also the Opinion of AG Poiares Maduro, EU:C:2006:42, points 57–58.

[132] Opinion 2/13 (n 4) para 202.

[133] Judgment in *Commission v Sweden ('PFOS')*, C-246/07, EU:C:2010:203; on which see further De Baere (n 3).

[134] Adopted on 22 May 2001, 40 ILM 532 (2001).

[135] Art 193 TFEU.

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agreement to which the Union is a party, which would imply that the Union may be bound by a more stringent measure with which it did not express its agreement, is quite a different thing and does not fall within the scope of Article 193 TFEU.[136] It is important to appreciate in that regard that Sweden was exercising its own competence when it submitted the proposal to list PFOS. However, in doing so, the principle of sincere cooperation required that it take into account the fact that the Union too is competent in the matter and that a strategy had been agreed within the Council.

Although these obligations are particularly detailed in EU law, they are not a unique characteristic of EU loyalty. Rather, in a contractual context involving mutual obligations for the parties, duties of cooperation are the natural consequence of good faith.[137] Where good faith in general regulates the exercise of a State's power,[138] the duty to cooperate more specifically obliges States to consult, inform, and cooperate with other States whenever the exercise of their own powers risks having an impact on the powers of others.

For example, in *The Islands of Palmas Case* sole arbitrator Huber famously held: 'Territorial sovereignty involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States.'[139] This is particularly clear when the exercise of one State's territorial sovereignty leads to physical consequences on the territory of another State, as was the case for instance in the *Trail Smelter Case*.[140] A similar idea underlies Principle 19 of the Rio Declaration on Environment and Development,[141] which obliges States to 'provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and [to] consult with those States at an early stage and in good faith'. More generally, it is in certain circumstances essential to inform those whose sphere of interest may be affected by certain events or facts. For example, in the *Corfu Channel Case*,[142] the ICJ held the basis of responsibility to be Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters that had been laid by a third State.

Furthermore, the obligation to consult and collaborate in order to devise a solution for unforeseen circumstances also exists in international law.[143] For example, in the

[136] *PFOS* (n 133), para 102.

[137] See Kolb (n 79) 278–9.

[138] WTO Appellate Body, *United States—Import Prohibition of Shrimp and Certain Shrimp Products ('Shrimp-Turtle')*, WT/DS58/AB/R, para 158; Zoller (n 11) 89.

[139] *The Islands of Palmas Case (1928)*, 2 UNRIAA, 829, 839.

[140] *Trail Smelter Case (1938/1941)*, 3 UNRIAA, 1965.

[141] Annex I to the Report of the United Nations Conference on Environment and Development, held at Rio de Janeiro, 3–14 June 1992, UN Doc A/CONF.151/26 (vol I). See also Principle 27: 'States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.'

[142] *Corfu Channel (Judgment)*, ICJ Reports (1949) 4.

[143] See also eg the fourth principle ('The duty of States to co-operate with one another in accordance with the Charter') of the Declaration on Principles of International Law Concerning

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Rainbow Warrior case, the UN Secretary-General acted as an arbitrator to resolve the conflict between France and New Zealand. Part of his ruling consisted in France being obliged to hold the two agents on an isolated military base in the Pacific. However, when one of the agent's father was dying, France decided unilaterally to allow the agent to return to France, even letting her stay there for quite a while after her father had passed away. The arbitral tribunal held that the father's situation might indeed have been a humanitarian reason for making an exception from the isolation, but that France should have nevertheless consulted New Zealand on this point, informing it of the new situation and asking New Zealand's consent for allowing the agent to come to France. In other words, 'the French Republic did not make efforts in good faith to obtain New Zealand's consent'.[144]

International institutional law has likewise recognized mutual obligations between an organization and its members to cooperate in good faith, and may oblige States to exercise their own competences with caution. The Separate Opinion of Judge Rezek in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* put the basic principle as follows:

> There is no obligation on sovereign States to found international organizations, or to remain members of them against their will. However, the fact of membership – even in the case of an organization whose objectives are less essential than those of the United Nations, and in fields less salient than that of human rights – requires that every State, in its relations with the organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations between States.[145]

The ICJ held in that regard in the *Agreement between the WHO and Egypt* case[146] that the

> very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization. … Accordingly, … the Court takes as its starting point the mutual obligations incumbent upon Egypt and the Organization to co-operate in good faith with respect to the implications and effects of the transfer of the Regional Office from Egypt. The Court does so the more readily as it considers those obligations to be the very basis of the legal relations between the Organization and Egypt under general international law, under the

Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Annex to GA Res 2625 (XXV) of 24 October, 1970, 9 ILM (1970) 1292ff). And see the more specific duties of cooperation in the field of international economic relations listed in A Peters, 'International Dispute Settlement: A Network of Cooperational Duties' (2003) 14 EJIL 2.

[144] *Rainbow Warrior (1990)*, 10 UNRIAA, 217, para 94. See further Kolb (n 79) 280.

[145] Separate Opinion of Judge Rezek in *Immunity from Legal Process of a Special Rapporteur* (n 72) 109. Compare the Opinion of AG Bot in *Hungary v Slovakia* (n 30), points 58–59. See further the Separate Opinion of Judge Lauterpacht in *South-West Africa-Voting Procedure (Advisory Opinion)*, ICJ Reports (1955) 67.

[146] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)*, ICJ Reports (1980) 73.

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> Constitution of the Organization and under the agreements in force between Egypt and the Organization.[147]

The ICJ derived three concrete obligations from the duty to cooperate: (i) an obligation to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the WHO Regional Office from Egypt could be effected; (ii) in the event of a transfer, a duty to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt; and (iii) a duty on the party wishing to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the WHO Regional Office at Alexandria, taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office to its new site.[148] The ICJ considered that

> the paramount consideration both for the Organization and the host State in every case must be their clear obligation to co-operate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution; and this too means that they must in consultation determine a reasonable period of time to enable them to achieve an orderly transfer of the Office from the territory of the host State.[149]

Much like in EU law, good faith in international institutional law is therefore not exclusively an obligation incumbent upon the Member States, but entails duties for all the organs of the organization in question, and regulates the relationships between those organs. As such, it gives rise to 'a duty of fairness, respect and mutual co-operation, and a duty to take account of the juridical acts of the various organs between each other'.[150]

IV. BUNDESTREUE, EU LOYALTY AND GOOD FAITH

A. EU Loyalty as Bundestreue

As already mentioned, EU loyalty is often equated with 'federal good faith', in the sense of a constitutional law principle different from international law good faith.

That position is habitually supported by drawing a parallel between EU loyalty and the principle of *Bundestreue* in German constitutional law. Both principles play a role in the functioning of their respective legal orders as federal systems and, so the reasoning goes, that distinguishes them from the

[147] ibid 93 and 95. [148] ibid 95–96. [149] ibid 96.
[150] Simma (n 10) 93 (with respect to the UN); G Schwarzenberger, *International Law: As Applied by International Courts and Tribunals Volume III* (Stevens & Sons 1976) 215.

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application of the general principle of good faith in international law, which is said not to share any of these federal characteristics.[151]

Many of the obligations that the *Bundesverfassungsgericht* ('BVerfG', the German Constitutional court) has formulated on the basis of the *Bundestreue* principle do indeed correspond to obligations that the ECJ has construed on the basis of loyalty.[152] For instance, the prohibition for *Länder* to make use of their concurring powers from the moment that the *Bund* starts legislating the same subject matter[153] comes quite close to the ECJ's *ERTA* case law.[154] Just like in EU law, the principle plays a crucial role in the field of external relations. Both the *Bund* and the *Länder* have the capacity to conclude international agreements,[155] but since the *Bund* enjoys a presumption of external competence, the *Länder* have 'particularly serious' loyalty obligations towards the *Bund* in this area.[156] Another similarity is the prohibition for one of the 'parts' of the federal State to justify its refusal to perform its duties of federal fidelity by referring to another part's failure to do the same.[157] Nevertheless, unlike the German Constitutional Court, the ECJ never expressly founded this prohibition on the loyalty principle.[158] Although these are just a few examples of similarities between both principles, they elucidate why so many authors have highlighted the parallel between loyalty and *Bundestreue*.

That being said, the obligations of federal fidelity in Germany certainly are not always identical to those established by the ECJ. Both systems differ in their constitutional design and in many respects the former is clearly more integrated than the latter. As a consequence, the case law of the German Constitutional court contains different and occasionally more far-reaching obligations of federal good faith. For instance, because the *Bund* enjoys a presumption of external competence,[159] many of the *Bundestreue* applications in this area concern duties for the *Bund* to inform and consult the *Länder* early on when it acts internationally.[160] In the EU, on the other hand, loyalty mostly operates in the other direction, calling on the Member States (at the very least) to inform and consult with the European Commission from the moment there is a start of concerted Union action.[161]

Nevertheless, the distinction between federal and international law good faith is arguably artificial. Both are applications of the same general principle, which

[151] See the references in (n 40).
[152] For a recent comparison, see M Klamert (n 40) 55–8.
[153] BVerfGE 34, 9 (29).
[154] *ERTA* (n 37) para 22.
[155] See art 32(3) GG.
[156] BVerfGE 6, 309 (362).
[157] BVerfGE 8, 122 (140).
[158] Judgments in *Commission v Luxembourg and Belgium*, 90/63 and 91/63, EU:C:1964:80, 631–632; *Hedley Lomas*, C-5/94, EU:C:1996:205, para 20; and *Commission v Belgium*, C-11/95, EU:C:1996:316, paras 37–39.
[159] See art 32 GG ('Relations with foreign states shall be conducted by the *Bund*').
[160] See below (n 187).
[161] *Commission v Luxembourg* (n 46); *Commission v Germany* (n 126); *PFOS* (n 133).

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by its nature leads to different consequences depending on the level of integration of the legal relationship in which it applies.[162] A difference in legal consequences does not necessarily imply a different underlying principle.

B. Bundestreue *as Good Faith*

Could the comparison between EU loyalty and international law good faith be extended to *Bundestreue* on the basis of the same three applications used in the previous section? That is not a straightforward exercise. With regard to *pacta sunt servanda*, it has never been necessary for the German BVerfG to refer to *Bundestreue* to posit the binding character of federal law.[163] Like EU loyalty, *Bundestreue* is only relied on when there are no other, more precise rules that determine the outcome of the dispute.[164] Article 31 of the *Grundgesetz* (German Basic Law) unequivocally states: '*Bundesrecht bricht Landesrecht'* (literally 'federal law breaks state law'). That arguably made it abundantly clear that as long as the *Bund* acted within the sphere of its powers, federal law was binding on the *Länder*.[165] Thus, the German Constitutional court never needed to have recourse to an unwritten constitutional principle to establish this. For some, the fact that the court based its acceptance of a *rebus sic stantibus* doctrine on the *Bundestreue* principle[166] implies that the court views that principle as an expression of *pacta sunt servanda* as well.[167] However, the court arguably came closer to expressing this idea when it held that *Bundestreue* could require the *Länder* to respect international treaties concluded by the *Bund* as federal law.[168]

[162] A Bleckmann, 'Die Anerkennung der Hoheitsakte eines anderen Landes im Bundesstaat' (1986) Neue Zeitschrift für Verwaltungsrecht, 4.

[163] Bauer (n 40) 179.

[164] BVerfGE 42, 103 (section 40); BVerwGE 50, 137, (section 44). D Hanschel, *Konfliktlösung im Bundesstaat: die Lösung föderaler Kompetenz-, Finanz- und Territorialkonflikte in Deutschland, den USA und der Schweiz* (Mohr Siebeck 2012) 78–9.

[165] Despite this provision, scholars disagreed about whether the *Länder* legislatures were merely authorized or under an actual legal duty to pass legislation implementing federal framework legislation adopted pursuant to art 75 GG. As Halberstam notes, scholars such as Hans-Otto Heeger did argue that 'fidelity to federalism' implied such a legal duty on the part of the *Länder*. The disagreement was never resolved by the Constitutional Court—only an amendment of art 75 unequivocally affirmed the obligation to pass implementing legislation. See D Halberstam, 'Comparative Federalism and the Issue of Commandeering' in R Howse and K Nicolaidis, *The Federal Vision, Levels of Governance, and Legitimacy* (OUP 2001) sections 4 and 7. Framework legislation was abandoned as a legislative tool by way of a 2006 amendment of the German Constitution, which deleted art 75 GG in its entirety.

[166] BVerfGE 34, 216 (232).

[167] See eg RA Lorz, *Interorganrespect im Verfassungsrecht* (Mohr Siebeck 2001) 33; More nuanced, see Bauer (n 40) 363.

[168] BVerfGE 12, 205 (254–255), referring to BVerfGE 6, 309 (328, 361)—which actually merely held that *Bundestreue* duties of the *Länder* vis-à-vis the *Bund* 'had to be taken very seriously in the area of external relations', given that the *Bund* enjoyed a 'presumption of competence'. Unlike general (customary) international law, international treaties are federal law, because they are incorporated into German law by way of a consent act. In *Görgülü*, the BVerfG committed Germany to a dualist attitude towards international treaties (BVerfGE 111, 307). See DP

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By contrast, the *Bundesverwaltungsgericht* (the federal Administrative court) has referred to both *pacta sunt servanda* and *Bundestreue* to emphasize the binding nature, not of federal law as such, but of agreements between the *Länder* (so-called *Staatsverträge*).[169] The *Bundesverwaltungsgericht* thereby explicitly drew on the continuity between federal (constitutional) law and international law. As will be seen below, there was a time when the German constitution recognized international law as a subsidiary source of law in the relations between the *Länder*. However, ruling in 1976, the *Bundesverwaltungsgericht* emphasized that the relationship between the *Länder* was exhaustively regulated by constitutional law—partly by the *Grundgesetz*, partly by the principle of *Bundestreue*.[170] The constitutional court of one of the *Länder* had held that the *Land* statute approving an agreement between all of the *Länder* was incompatible with the *Land*'s constitution.[171] Other *Länder*, it had ruled, were obliged to respect this ruling.[172] The *Bundesverwaltungsgericht* disagreed.[173] The relationship between the *Länder* could only be governed by principles stemming from a legal order common to all of them, which usually meant principles of federal law.[174] Federal law did not explicitly provide a solution, but the *Länder*'s duty of *Bundestreue* required them to look for a mutually acceptable solution in case of disputes, if necessary by requesting a court ruling. Until then, the agreement had to be carried out.[175] Although constitutional law, not international law, applied between the *Länder*, the court nevertheless considered it apposite to refer to the fact that, under international law, even a treaty that was held to be unconstitutional remains binding.[176] It reasoned that what was true between independent States had to be true *a fortiori* between the more integrated states of a federation, thus using the continuity between both legal orders as an additional argument for the primacy of the agreement between the *Länder*.

Matters are equally nuanced with respect to the prohibition to frustrate a treaty or a directive after it has been signed or agreed upon, but before its ratification or the expiry of the period of transposition, respectively. Until 2006, the German *Bundesstaat* could legislate by way of framework legislation in much the same way as the EU,[177] though only with respect to a limited list of topics.[178] However, there does not seem to be a *Bundestreue*-based German analogue to the ECJ's *Inter-Environment Wallonie* case law.[179]

Kommers and RA Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 2012) 310–11.

[169] BVerwGE 50, 137, paras 36–50.

[170] BVerwGE 50, 137, para 40, referring to BVerfGE 34, 216 (232).

[171] BayVerfGH (1975) NJW 1733.

[172] See BVerwGE 50, 137, paras 34–35.

[173] ibid para 39.

[174] ibid para 40.

[175] ibid para 43.

[176] ibid para 49.

[177] I Härtel, *Handbuch Europäische Rechtsetzung* (Springer 2006) 173–4.

[178] See ex art 75 GG.

[179] The fact that, for a long time, disagreement existed about whether the *Länder* legislatures were obligated or merely authorized to pass implementing legislation might have contributed to this. See above (n 165).

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That being said, the central idea that underpins this second application, namely that it is possible for a state acting within the sphere of its powers to abuse those powers, is part and parcel of the case law on *Bundestreue*. In the very first case in which the BVerfG referred to the principle, for instance, the court held that the *Länder* could not arbitrarily withhold their constitutionally required consent to federal legislation. Because federal good faith required that they have regard for the interests of other *Länder*, some objective justification for their veto was required.[180] The similarity of this case to the ICJ's Advisory Opinion in *Admission of a State to the United Nations*[181] (discussed below) is striking. Both courts constrain a government's discretion in exercising a vote by requiring an objective justification for the voting decision, thereby effectively considering all votes lacking such justification abusive. It is not a coincidence that where *Bundestreue* mandated this outcome in German constitutional law, good faith did the same in international law.

The comparison is more straightforward with respect to duties of cooperation, the most far-reaching example of the application of good faith. In that regard, no strict conceptual distinction between the obligation to cooperate and the prohibition of abuse appears to exist. For the BVerfG, the former is often simply the flipside of the latter. Whenever the effects of *Land* legislation go beyond the *Land, Bundestreue* requires the legislator to 'take account of' the interests of both the *Bund* and the other *Länder*—a positive obligation.[182] A failure to have sufficient regard to these interests amounts to an abuse.[183] For instance, when a *Land* exercises its competence to transpose federal framework legislation and sets the wages of its officials, it has to take into account matters of common concern. Thus, a Land violates the principle of *Bundestreue* by setting the wages at such a high level that it risks upsetting the national budget.[184] The same is true, mutatis mutandis, for the actions of the *Bund* affecting *Länder* interests.[185]

The BVerfG has repeatedly held that *Bundestreue* requires mutual cooperation, not only between *Bund* and *Länder*, but also between *Länder*.[186] Just like good faith in international law or loyalty in EU law, the principle imposes duties to inform or consult. For instance, when the *Bund* intends to adopt legislation that touches on *Länder* interests—be it internally or at the EU level—it has to keep them duly informed, consult, cooperate and negotiate with them.[187] In doing so, the *Bund* also has to treat the *Länder*

[180] BVerfGE 1, 299 (315–316).
[181] *Admission of a State to the United Nations (Advisory Opinion)*, ICJ Reports (1948) 57.
[182] BVerfGE 4, 115 (140).
[183] BVerfGE 6, 309 (361); 4, 115 (140).
[184] BVerfGE 32, 199 (218); 4, 115 (140). cf similarly ex arts 105 and 107 EEC, which required Member States to treat their exchange policies as a matter of common concern. At the basis of this obligation lay considerations of solidarity based on the loyalty principle: *Commission v France* (n 196) paras 14–16.
[185] See eg BVerfGE 12, 205 (257).
[186] See eg BVerfGE 1, 299 (315); 1, 117 (131); 3, 52 (57).
[187] BVerfGE 12, 205 (257); 43, 291. To a large extent, this cooperation has now been regulated in legislation. See further M Suszycka-Jasch and H-C Jasch, 'The Participation of the German Länder in Formulating German EU-policy' (2009) German Law Journal 1215.

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equally.[188] Therefore, it cannot play the *Länder* out against one another in order to prevent them from having an actual impact on the content of the proposal.[189] Another example of this duty to consult can be found in Article 89(3) GG, which demands that '[i]n the administration, development, and new construction of waterways, the requirements of land improvement and of water management … be assured in agreement with the *Länder*', and has been described as an expression of *Bundestreue*.[190]

Bundestreue also imposes special duties of cooperation in exceptional circumstances. The BVerfG has used the principle as the basis for its doctrine of *rebus sic stantibus*: when circumstances have changed fundamentally, making it unreasonable for a *Land* to carry out the agreement concluded with another *Land, Bundestreue* can justify a modification of the agreement, a mitigation of the obligations it imposes, or replace it in kind by monetary payment.[191] It is for the same reason that the BVerfG has called the duty to renegotiate the respective shares of the *Bund* and the *Länder* in the revenue from the turnover tax 'whenever the ratio of revenues to expenditures of the *Bund* becomes substantially different from that of the *Länder*' (Article 106(4), first sentence, GG) a duty of *Bundestreue*.[192] The *Bundesverwaltungsgericht*, in the case discussed above, held that when all *Länder* have jointly adopted an agreement (*Staatsvertrag*) and a dispute arises over its execution, *Bundestreue* requires them to find a mutually acceptable solution. This obligation is reminiscent of the duty to negotiate in good faith, which the ICJ notably imposed on Hungary and Slovakia in *Gabčíkovo–Nagymaros*.[193]

Finally, some of these duties of cooperation go further than those existing in EU law. In Germany, 'the federal principle' entails a duty for the more affluent *Länder* to assist (within certain limits) the *Länder* facing financial difficulties.[194] The BVerfG has formulated a self-standing duty of financial solidarity between the *Länder* that goes beyond the equalization regime in Article 107 GG.[195] In case of an 'extreme budgetary crisis' in either the *Bund* or one of the *Länder*, the other members of the federation have a duty to assist financially. Moreover, they have to cooperate in order to coordinate their measures. In the EU, the link between financial solidarity and loyalty is not

[188] A similar *Bundestreue*-based prohibition to discriminate between the *Länder* was upheld in BVerfGE 84, 148 (271–276), when the *Bund* favoured one *Land* over the other in providing emergency assistance.

[189] ibid 255.

[190] DC Umbach and T Clemens (eds), *Grundgesetz: Mitarbeiterkommentar und Handbuch. Band II* (CF Müller Verlag 2002) 917.

[191] BVerfGE 34, 216 (232).

[192] BVerfGE 72, 330 (402).

[193] See the holding in *Gabčíkovo-Nagymaros Project* (n 50) 7, paras 136–142, 155 ('*Finds* that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation').

[194] BVerfGE 1, 117 (131). Although the BVerfG did not refer to *Bundestreue* but to 'das bundesstaatliche Prinzip' (the federal principle), it later referred to the duty in the context of a summary of its *Bundestreue* case law (see BVerfGE 12, 205 (254)).

[195] BVerfGE 86, 148 (258–270). See DP Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press 1994) 80.

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entirely absent. In an early case, the Court held that solidarity lies at the basis of 'the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty [now Article 4(3) TEU]'.[196] However, the ECJ appears to have used the term 'solidarity' in a broad sense,[197] because it saw expressions of it not only in the Member States' duty of mutual assistance where a Member State was seriously threatened with difficulties as regards its balance of payments as expressions of solidarity (Article 108 EEC), but also in Member States' duty to coordinate their economic policies and to treat their policies on exchange as a matter of common concern (Articles 105 and 107 EEC). Moreover, the duty of financial assistance, though described as an expression of loyalty by the Court, was in fact based on a specific (since repealed) EEC Treaty provision.

C. *The History of* Bundestreue *in International Law Good Faith*

That the distinction between federal and international good faith is artificial is further borne out by the legal history of *Bundestreue* which, rather than being a legal mechanism particular to States, has its origins in an application of the principle of *Treu und Glauben* (the general principle of good faith) to the international cooperation between independent States, a political agreement between the different *Einzelstaaten* that constituted the (then) German *Reich*.

While there had been primitive forms of a similar principle in German history,[198] the intellectual father of *Bundestreue* as an unwritten constitutional principle supplementing the (then recent) Constitution is widely regarded to be Rudolf Smend.[199] In a 1916 contribution to a *Festschrift*,[200] Smend argued that, independently of the *Reich*'s Constitution,[201] there was an unwritten duty for the parts and the *Bund* to

[196] Judgment in *Commission v France*, 6 and 11/69, EU:C:1969:68, para 16.

[197] The ECJ's loyalty case law has been described as an expression of (a broad conception of) solidarity. See A Marias, 'Solidarity as an Objective of the European Union and the European Community' (1994) Legal Issues of Economic Integration 85. Distinguishing loyalty from solidarity, see Klamert (n 40) 35–41.

[198] See B Kowalsky, *Die Rechtsgrundlagen der Bundestreue* (W Blasaditsch 1970) 9–16; and Bauer (n 40) 31.

[199] In the first place by the German Constitutional Court, which refers to Smend's seminal contribution (below n 200) as authority for a duty of '*bundesfreundliches Verhalten*' (BVerfGE 1, 299, para 60; BVerfGE 12, 205, para 169). Bauer (n 40) 49ff has shown that, by contrast to Smend's contribution, earlier formulations of the idea of federal fidelity (*inter alia* by Bluntschli, von Seyndel and Triepel) are less relevant to its development as a constitutional principle; Kowalsky (n 198) 18ff; R Steinberg, 'Grenzüberschreitende Informationsansprüche im Bundesstaat – untersucht am Beispiel des interstaatlichen atomrechtlichen Nachbarrechts' (1987) Neue Juristische Wochenschrift 2345.

[200] R Smend, 'Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat' in X, *Festgabe für Otto Mayer: zum siebzigsten Geburtstag* (Mohr Siebeck 1916) 247.

[201] Smend reacted against the legal positivism of Jellinek and Laband. See A Böhmer, *Die Europäische Union im Lichte der Reichsverfassung von 1871. Vom dualistischen zum transnationalen Föderalismus* (Duncker & Humblot 1999) 112–13.

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cooperate sincerely. Although the Constitution established a clear hierarchy between the central government and the states, he claimed that the constitutional and political reality of the *Reich* was based on an agreement between equal and independent *Einzelstaaten* to form a *Bund* together.[202] This was arguably a bit of a stretch,[203] as in December 1870 the North German Confederation (*Bund*) had made way for a unified German *Reich* led by *Kaiser* Wilhelm I, in whom the Constitution vested extensive powers. Moreover, dominated by the comparatively outsized Prussia, the states were far from equal in practice. However, right before the conversion of the *Bund* into the *Reich*, in November 1870, the North German Confederation and the south German states had indeed formally agreed to form a new German *Bund*. The German *Reich*, though different in some respects, took over most of the North German Confederation's Constitution (and even its flag). The combination of these elements with his reading of the political reality to Smend was proof of the continuity of the agreement between the states. In his eyes, the constitutional reality of this agreement between equal, sovereign states therefore supplemented the written Constitution, which envisioned a hierarchically structured *Reich*.

What is more, judging by the words he used, Smend arguably regarded this pact as an international treaty.[204] For instance, he saw the Constitution as 'in the first place a diplomatic act',[205] and argued that the *Einzelstaaten* had to carry out their duties vis-à-vis the *Reich*, not as subjects obeying a government's commands, but as equals, '*im diplomatischen Stil des völkerrechtlichen Verkehrs*'.[206] Crucially, Smend added that, like all agreements, this (international) agreement between the *Einzelstaaten* had to be carried out in good faith. Because the relationship between *Reich* and *Einzelstaaten*, rather than a hierarchical one, was one between *Verbündeten* and the *Bund* they create, good faith imposed a mutual duty to cooperate sincerely.[207]

Smend's ideas on *Bundestreue* as a legal principle have become part and parcel of German constitutional law. Even though he had developed them specifically for the monarchical Bundestaat, Smend continued to defend their validity after the German *Reich* was replaced by the Weimar Republic,[208] and many subscribed to his view.[209] The Bundesverfassungsgericht would

[202] Smend (n 200) 259, 260. See earlier M von Seydel, *Staatsrechtliche und politische Abhandlungen* (Akademische Verlagsbuchhandlung von JCB Mohr 1893) 57.
[203] See Kowalsky (n 198) 19ff (criticizing Smend on this point).
[204] Bauer (n 40) 205–6. This had earlier been argued by Von Seydel (n 202) 57.
[205] Smend (n 200) 248.
[206] 'In the diplomatic style of international legal relations' (our translation): ibid 266.
[207] ibid. [208] R Smend, *Verfassung und Verfassungsrecht* (Duncker & Humblot 1928) 269.
[209] See Kowalsky (n 198) 21ff; and see further: A Schüle, *Das Problem der einstweiligen Verfügung in der deutschen Reichsstaatsgerichtsbarkeit* (C Heymann 1932) 58; C Bilfinger, *Einfluß der Einzelstaaten auf die Bildung des Reichswillens* (Mohr 1923) 59; G Anschütz and R Thoma, *Handbuch des Deutschen Staatsrechts* (Mohr 1930) 368; see to a lesser extent also P Laband, *Das Staatsrecht des Deutschen Reiches Bd I* (Laupp 1911) 107; L Gebhard,

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later recognize that the constitutional theory developed with respect to the 1871 *Reichsverfassung* was relevant for the interpretation of the new, post-1949 *Bundesstaat*.[210] It would put Smend's ideas on *Bundestreue* in practice, on at least two occasions explicitly referring to Smend's 1916 contribution.[211]

The connection between international law good faith and federal fidelity, however, was made most clearly by the *Bundesverfassungsgericht*'s predecessor, the *Weimarer Staatsgerichtshof* (WSGH).[212] In the 1927 *Danube Sinkhole* ('*Donauversinkung*') case,[213] though not referring explicitly to Smend, the WSGH connected the international law duty of good faith with the principle of *Bundestreue* between the German *Länder*. In so doing, the court confirmed the parallel on which Smend had based his ideas. Imposing a constitutional duty of federal fidelity on the *Länder* essentially comes down to applying the general principle of good faith to an (implicit) international treaty. The identity of both concepts moreover was not just a purely academic discussion but had practical significance.

The Danube Sinkhole is an incipient underground stream capture that causes the water of the Danube at a particular spot to seep into the soil and flow through underground caverns, eventually resurfacing in the source of the river Aach. This natural phenomenon takes place mostly on the territory of what was then the Land of Baden. However, the sinkhole is located close to the border with what was then the Land of Württemberg and for a substantial part of the year the Danube riverbed dries up completely over a distance of 10 to 12 kilometres after the sinkhole in Württemberg territory.[214] This had serious consequences for watermills and other water-powered industry but also for water provision to Württemberg cities. Since the water that seeped into the soil for a large part ended up in the river Aach, it was not in Baden's interest to limit the sinkhole phenomenon. The *Länder* of Württemberg and Preußen claimed that Baden had contributed to the worsening of the phenomenon by not sealing holes in the dam of a weir and not carrying out maintenance works in the riverbed of the Danube, and took the case to the WSGH.

The 1919 *Weimarer Reichsverfassung* ('WRV') had made Germany a *Bundesstaat*—a confederation with *Länder* that formally still had independent statehood in the traditional sense.[215] Similarly to current Article

Handkommentar zur Verfassung des Deutschen Reiches vom 11. August 1919 (Schweitzer 1932); G Leibholz, *Die Gleichheit vor dem Gesetz* (CH Beck 1959) 153.

[210] BVerfGE 36, 342, para 54; BVerfGE 83, 89, para 31. See U Di Fabio, 'Der neue Art 23 des Grundgesetzes' (1993) 32 Der Staat 202.

[211] See the judgments above (n 199).

[212] ie the *Staatsgerichtshof für das Deutsche Reich*.

[213] German Staatsgerichtshof, 17–18 June 1927, *Donauversinkung*, RGZ 116, 18, and (1929) 1 ZaöRV 634. For an English summary and a translation of certain relevant fragments, see SC McCaffrey (Special Rapporteur), 'Seventh report on the law of the non-navigational uses of international watercourses' (1991) UNYBILC (vol II(1)) 45, 56–7.

[214] Both are now part of the Land Baden-Württemberg.

[215] ibid 639. cf BVerfGE 36, 342, para 45.

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25 of the *Grundgesetz*,[216] Article 4 WRV stated that '[*d*]*ie allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts*'.[217] However, contrary to Article 25 of the *Grundgesetz*,[218] Article 4 WRV applied both to the international relations of the Reich and the relations between the *Länder* to the extent that they were not covered by federal law.

Article 4 WRV allowed the WSGH to operationalize the connection between the international law duty of good faith and the principle of *Bundestreue* between the German *Länder*. After having determined that it could apply neither federal law (*Reichsrecht*) nor the law of any of the *Länder* involved (*Landesrecht*) to the dispute, the WSGH moved on to apply international law as a subsidiary source of law.[219] As mentioned, Article 4 WRV explicitly made 'the generally recognized rules of the law of nations' part and parcel of German federal law. At the outset, the WSGH remarked that it would look at international law in its new form—not a law of strict coexistence but a law of cooperation the starting point of which was the limitation of State sovereignty on the basis of the mere fact of being part of the international community.[220] It is on that basis, the WSGH stated, that '*eine Pflicht der Staaten zur gegenseitigen Achtung und Rücksichtnahme, eine Pflicht, einander nicht zu verletzen*'[221] was established in international law. Crucially, however, it considered this duty more exigent (limiting sovereignty to a larger extent) in a more integrated legal system such as the German *Bundesstaat* than in the worldwide community of States.[222]

Noticing that there were no specific treaty rules available to solve the dispute at hand, the WSGH remarked that this principle of '*gegenseitigen Achtung und Rücksichtnahme*'[223] also underpins the international law on rivers, as appears for instance from treaties regulating in detail the cooperation between States bordering larger international rivers.[224] Hence, the WSGH held, it is a generally recognized rule of international law that no State is allowed to take measures on its territory with regard to an international river that negatively affect the water stream on the territory of

[216] 'Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes.' (The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory) (translation by: Prof C Tomuschat and Prof DP Currie, available at <http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0135>).

[217] 'The generally accepted rules of the law of nations are to be considered as binding elements of the law of the German Reich' (our translation).

[218] See eg BVerfGE 34, 216 (231).

[219] *Donauversinkung* (n 213) 639. The WSGH went on to hold that the German *Länder* were still independent States, albeit constrained in their sovereignty by the WRV. However, the legislative power in principle still resided with the *Länder* (art 6 WRV) and *Länder* could conclude international treaties with third States (art 78 Abs 2 WRV).

[220] ibid 640.

[221] 'A duty for the States of mutual respect and consideration, a duty not to harm one another' (our translation): ibid.

[222] ibid 641.

[223] 'Mutual respect and consideration' (our translation).

[224] ibid 641.

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other States.[225] In assessing whether Baden had infringed this rule, the factual circumstances played a large role. Moreover, account had to be taken not just of the damage done by Baden to the other *Länder*. Rather, a balance had to be struck between the advantage for Baden and the damage to the other *Länder*. For this balancing exercise, the close relationship between the German *Länder* as part of the same *Bundesstaat* was of particular importance.[226] The Court left the definitive settlement of the dispute to an agreement between the parties, but held in an interim decision that both Baden and Würtemberg had to refrain from increasing or diminishing the natural sinking of water by artificial constructions such as dams and weirs. Baden did have to counteract the detrimental accumulation of sand and gravel in the riverbed but was not obligated permanently to improve the bed of the river.[227]

This German case law may very well have influenced international case law, not in the least with regard to the application of the principle of *Treu und Glauben* (good faith) to balance the sovereign powers of several states. An example may be the judgment in the *Territorial Jurisdiction of the International Commission of the River Oder* case, rendered by the PCIJ only two years after the *Danube Sinkhole* case. This case also concerned the cooperation of States bordering the same river and, though the legal problem at issue was quite different from that at stake in the *Danube Sinkhole Case* (and need not concern us here), the PCIJ phrased the duties of cooperation between such States in a remarkable passage:

> But when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.[228]

The *Danube Sinkhole Case*, especially when read together with the *Territorial Jurisdiction of the International Commission of the River Oder Case*, shows the clear link between *Bundestreue* and the application of the general principle of good faith in international law. It thereby appears to gainsay the idea that *Bundestreue* (*federal* good faith) is a completely different principle from *international law* good faith.

[225] ibid. [226] ibid 642. [227] ibid.
[228] *Territorial Jurisdiction of the International Commission of the River Oder*, 1929 PCIJ Series A, No 23, 5–46.

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It could be objected that the WSGH nowhere used the term '*Bundestreue*' in *Danube Sinkhole*. However, Smend himself rarely used the term '*Bundestreue*'[229] and certainly did not attach much value to a specific denomination. Next to terms like '*Vertragstreue*',[230] '*bundesfreundliches Verhalten*'[231] or '*bundesfreundlicher Gesinnung*',[232] Smend mostly described the obligations the principle imposed. Like the WSGH,[233] he spoke of a duty of *Rücksicht*—an obligation to take the interests and competences of other States into account and avoid harm to them.[234] More important than the semantics is the substantive continuity between the obligations imposed by good faith between sovereign States in the international community at large and the duties that same principle imposes between the entities of a federation. According to the PCIJ, the mere geographical fact of bordering the same river compels States to cooperate and, in that way, creates a 'community of interest'. Similarly, the WSGH reasoned that the fact of belonging to the international community created certain obligations of cooperation, of *Achtung und Rücksichtnahme*, of good faith. The *Danube Sinkhole Case* illustrates the functioning of the general principle of good faith (*Treu und Glauben*) as a principle that applies to all law, but whose consequences depend on the legal relationship to which it is applied.[235]

V. EU LOYALTY AS GOOD FAITH INTERPRETATION

Two questions may be asked at the end of this exploratory enquiry, which can be summed up in two words: 'So what?' First, even if one accepts that both EU loyalty and *Bundestreue* may be more closely related to international law good faith than is sometimes assumed, what difference does that understanding make? Second, does this at all contribute to understanding what 'good faith' in fact is?

With respect to the first question, if anything, an understanding of EU loyalty as a specific incarnation (albeit a particularly developed one) of international law good faith *and* of federal loyalty may contribute to a different conception of the Union beyond the dichotomy between 'a federation and hence not an international organisation (anymore)' and 'an international organisation and therefore not (yet) a federation'. The European federal tradition, with its emphasis on the absolute and indivisible character of sovereignty,[236] has led

[229] In his 1916 contribution, counting 24 pages, he only uses the term in a single paragraph: ibid 267.
[230] Smend (n 200) 261, 267.
[231] ibid 252.
[232] ibid 200, 261.
[233] *Donauversinkung* (n 213) 640–641.
[234] Smend (n 200) 250, 251, 265, 266.
[235] See further Bauer (n 40) 243–52, developing the argument for *Treu und Glauben* as the normative basis for the duty of *Bundestreue*.
[236] H Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (JCB Mohr 1920).

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to an artificial schism between federalism and confederalism,[237] or indeed between 'constitutional' and 'international' principles of interpretation.[238] According to that view, federalism is a national phenomenon, based on a constitution. Confederalism, by contrast, is an international phenomenon—cooperation between sovereign States on the basis of a treaty.[239] The European federal tradition as a rule perceives this distinction in terms of black and white.[240] Nevertheless, federalism need not be seen in such absolute terms: there is no specific point at which a society ceases to be unified and becomes diversified. The differences are of degree rather than of kind.[241]

This is in line with our understanding of good faith as evolving with and adapting to the society or the institutional environment in which it operates. As the WTO Appellate Body noted in *Shrimp-Turtle*, good faith is 'at once a general principle of law and a general principle of international law'.[242] That dual nature is also reflected in Article 38(1)(c) of the Statute of the ICJ, which provides for the Court to apply 'the general principles of law recognized by civilized nations'. Lord Phillimore, a member of the Advisory Committee of Jurists, clarified that the general principles referred to 'were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc'.[243] Yet its consequences vary. Good faith's strictures increase with the level of integration exhibited by the legal order in which it is applied. For example, bordering the same river makes States members of a riparian community, which gives rise to duties of cooperation that, other things being equal, non-riparian States do not share. In the EU, the more competences have been exercised at the federal level, the more the exercise of retained competences at Member State level risks to interfere with federal rules and the more loyalty limits Member States' scope of action.[244]

That increasing impact on the exercise of Member State competences has consequences for how democratic legitimacy is to be achieved in the EU. The strictures of loyalty increase with the extent to which competences are exercised at the federal level. In order to remain legitimate, that increase of

[237] R Schütze, 'On 'Federal' Ground: the European Union as an (Inter)national Phenomenon' (2009) 46 CMLRev 1069. [238] Spiermann (n 54) 764.

[239] See in the German context: H Triepel, *Unitarismus und Föderalismus im Deutschen Reich* (Mohr 1907) 29. Contra: Smend (n 200). [240] Schütze (n 237) 1089.

[241] WS Livingston, 'A Note on the Nature of Federalism' (1952) Political Science Quarterly 88. cf Leben (n 62) 292–3. [242] *Shrimp-Turtle* (n 138) para 158.

[243] Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th 1920 with Annexes* (Van Langenhuysen Brothers 1920) 335. See also G Ripert, 'Les Règles du Droit Civil Applicables aux Rapports Internationaux' (1933) 44 Recueil des Cours 637. R Dworkin, 'A New Philosophy for International Law' (2013) 41 Philosophy & Public Affairs 20, considers the principles mentioned in art 38(1)(c) ICJ Statute to be a 'fossilization' of a *ius gentium* of legal principles common to nations as inherited from imperial Rome.

[244] cf R Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 CMLRev 1048, identifying loyalty as the foundation of *pre-emption*.

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federal competences and the corresponding strictures imposed by loyalty must arguably be matched by an increase in the extent to which decisions at the federal level reflect the will of the people of the federation as a whole.[245] That accords with a conception of the principle of subsidiarity that not only requires decision-making to be distributed to the most appropriate level, but insists on levels of democracy appropriate to levels of decision-making.[246]

With regard to the second question, our enquiry also reveals something about what good faith is and about the role it can play in contemporary international law. The realization that good faith adapts to the normative context in which it is applied, its strictures increasing with the level of integration exhibited by the legal order to which it is applied, highlights the principle's importance for the development of international law by the judiciary. Judges may have recourse to general principles when written agreements are silent on a matter that was unforeseen at the time of drafting. Indeed, avoiding a *non liquet* in such circumstances was precisely the rationale for including 'the general principles of law recognized by civilized nations' as one of the sources of international law listed in Article 38(1)(c) ICJ Statute.[247] Good faith in particular is a principle that 'controls the exercise of rights by states'[248] or regulates the exercise of competences retained by a level of government when 'no strict rule on the point in dispute' exists.[249]

The WTO Appellate Body report in *Shrimp-Turtle*[250] offers a good illustration of the way in which judges might have recourse to good faith to develop international law when the text of the treaty offers little guidance. India, Pakistan, Thailand and Malaysia had jointly challenged measures adopted by the United States, which only allowed the import of shrimp products from countries whose fishing environments were certified to pose no threat to the incidental catch of sea turtles in the course of shrimp trawling, or that were certified to have adopted regulatory programmes to deal with this

[245] cf S Rummens and S Sottiaux, 'Democratic Legitimacy in the *Bund* or "Federation of States": the Cases of Belgium and the EU' (2014) 20 ELJ 568.

[246] N MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (OUP 1999) 135.

[247] The President of the Advisory Committee of Jurists, the Belgian Baron Descamps, professor of international law at the University of Leuven, had proposed the phrase 'the rules of international law as recognised by the legal conscience of civilised nations' (Advisory Committee of Jurists (n 243) 306). However, this was considered to leave too much scope for judicial discretion, and the final text was adopted as amended on the basis of proposals by Elihu Root (USA) and Lord Phillimore (UK) (ibid 307–351). Further: A Perreau-Saussine, 'Lauterpacht and Vattel on the Sources of International Law: The Place of Private Law Analogies and General Principles' in V Chetail and P Haggenmacher (eds), *Vattel's International Law from a XXIst Century Perspective/ Le Droit International de Vattel vu du XXIe Siècle* (Brill 2011) 167–86.

[248] *Shrimp-Turtle* (n 138) para 158.

[249] *Case concerning rights of nationals of the United States of America in Morocco* (n 18) 176, 211–212. In EU law see eg the judgments in *Rewe-Zentralfinanz* (n 19), para 5; *Thieffry* (22), para 16; *Lord Bruce of Donington*, 208/80, EU:C:1981:194, paras 13–14; *Asjes and Others*, 209 to 213/ 84, EU:C:1986:188, para 77; *Fromme*, 54/81, EU:C:1982:142, paras 5–8.

[250] *Shrimp-Turtle* (n 138) paras 158–159.

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environmental hazard. Before the Appellate Body, the central issue was whether the US measures, which were permissible under Article XX(g) of the General Agreement on Tariffs and Trade (GATT) since they related to 'the conservation of exhaustible natural resources',[251] were nevertheless applied in a discriminatory manner in the sense of the chapeau of that provision since the US State Department did not take into account local circumstances in the exporting States.

In reality, the legal issues concealed the deeper question of the place of environmental protection in WTO law. The GATT had always been construed as having trade liberalization as its single object and purpose.[252] While Article XX(g) allowed for unilateral measures relating to the conservation of exhaustible natural resources, allowing such measures could open the door to abuses ('green protectionism') and, since they have fewer resources to meet demanding environmental standards, have a discriminatory impact on developing countries—thus infringing the chapeau of Article XX GATT.[253] In a 'decisive shift in perspective',[254] the Appellate Body famously declared that beside trade liberalization, sustainable development and the protection of the environment were equal objects of the WTO. While the WTO Panel had been of the opinion that the above-mentioned unilateral measures would undermine the multilateral trading system,[255] the Appellate Body saw a way to allow them without sanctioning 'green protectionism'.

Good faith played a pivotal role in the Appellate Body's reasoning. It construed the chapeau of Article XX GATT to allow an import ban on shrimp products for environmental reasons if it was complemented with serious good faith efforts to negotiate a multilateral solution.[256] Characterizing the chapeau of Article XX as an expression of the principle of good faith, which prohibits abuse of rights, the Appellate Body said that provision essentially tasked it with

> locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (eg, Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.[257]

[251] ibid paras 135–142.

[252] L de la Fayette, 'United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia' (2002) 96 AJIL 689.

[253] P Kishore, 'Revisiting the WTO Shrimps Case in the Light of Current Climate Protectionism: A Developing Country Perspective' (2012) Journal of Energy and Environmental Law 84.

[254] de la Fayette (n 252) 689.

[255] WTO Panel, *United States—Import Prohibition of Shrimp and Certain Shrimp Products*, WT/DS58/RW.

[256] *Shrimp-Turtle* (n 138) para 166ff.

[257] ibid para 159. Unsurprisingly, this is also how the German BVerfG summarizes the role of the *Bundestreue* principle. See eg BVerfGE 32, 199 (114).

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Quoting from Cheng's seminal work,[258] the Appellate Body explained that good faith imposes this balancing exercise because it requires that when rights asserted by a State impinge on the field covered by a treaty obligation, these rights 'must be exercised bona fide, that is to say, reasonably'. This entailed, *inter alia*, a duty for the US to enter into good faith negotiations and seek a solution on the basis of consensus.[259] The principle of good faith thus enabled the Appellate Body to integrate environmental protection within WTO law and thereby to set a new equilibrium.

That good faith is instrumental in the judicial development of law in situations where there are no other more precise rules is understandable if one recognizes that it really is a principle of interpretation rather than a substantive rule of behaviour. Courts apply good faith through a mechanism of constructive interpretation, thereby connecting a specific practice or rule to its legal context. The ICJ did so, for example, in *Admission of a State to the United Nations*[260] after the UN General Assembly requested an advisory opinion on the discretion that a UN Member State enjoyed when voting on the admission of a State to membership in the UN. When, in virtue of Article 4 of the UN Charter, a Member State pronounced itself on the admission by way of its vote, either in the Security Council or in the General Assembly, was it entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph I of that Article? After holding that the text of the provision was sufficiently clear and exhaustive in nature, the ICJ held that it did not 'follow from the exhaustive character of paragraph I of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified':

> Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor – that is to say, none connected with the conditions of admission – is excluded.

As Koskenniemi noted, the reference to good faith is almost in passing, but nevertheless crucial in allowing the ICJ to reach its conclusion. However, no substantive decision or material rule emerges directly from it.[261] As the ICJ emphasized in *Land and Maritime Boundary between Cameroon and Nigeria*: 'although the principle of good faith is "one of the basic principles governing the creation and performance of legal obligations … it is not in

[258] See Cheng (n 100) 125.
[259] *Shrimp-Turtle* (n 138) paras 168–172.
[260] *Admission of a State to the United Nations* (n 181) 57.
[261] Koskenniemi (n 51) 378–9, arguing that the objective and subjective elements used by the ICJ in its interpretation lead to a type of infinite feedback loop without closure. Koskenniemi appears to regard good faith more as a justice-based objective standard, which obscures the unconscious shift between legal and moral obligations: ibid 515, referring to R Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press 1976) 214. Similarly, Zoller (n 11) 338–9.

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itself a source of obligation where none would otherwise exist"'.[262] The same is true for EU loyalty—it does not create new obligations,[263] but clarifies the full scope of the existing obligations by requiring that they be read in light of their legal context. Loyalty's consequences, like those of good faith, thus differ depending on the circumstances of the case. That is why in *Deutsche Grammophon* the ECJ held that Member States' duty under Article 4(3) TEU to abstain from any measure which could jeopardize the attainment of the objective of the Treaties 'lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treat[ies] or on the rules derived from [their] general scheme'.[264] In German constitutional law, too, *Bundestreue* has been described as essentially performing an interpretative function.[265]

In other words, good faith in its different guises in general international law and in more integrated legal orders, such as notably EU loyalty in the EU legal order, is not a substantive rule or principle, but a principle of interpretation. As such, it operates as a principle 'of logic and good sense'[266] that guides the interpreter in finding and justifying the meaning of the language in the text to be interpreted by connecting a rule or practice to its legal context.[267]

That is entirely in line with Article 31(1) VCLT, which provides for a treaty to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The obligation to interpret in good faith 'forms an integral part of the rule *pacta sunt servanda*':[268] interpretation is part of the performance of the treaty and precedes its application. Given that language is inherently limited in the guidance it can provide, interpretation is the unavoidable process of coming to the meaning of the treaty text, allowing it to be applied to a concrete situation.[269] Interpretation in accordance with good faith therefore is 'essential if the *pacta sunt servanda* rule is to have any real meaning'.[270]

The WTO Appellate Body has described the practical process of treaty interpretation in accordance with Article 31 VCLT as 'ultimately a holistic exercise that should not be mechanically sub-divided into rigid

[262] Above (n 18) para 39, referring to *Border and Transborder Armed Actions* (n 18) para 94.
[263] Temple Lang (n 19) 76; judgment in *Germany v Commission*, 8/88, EU:C:1990:241, para 22. The far-reaching duties of abstention imposed on Sweden in *PFOS* (n 133), though raising the question whether the position that loyalty does not create new obligations under EU law was still tenable (see eg M Cremona, 'Case C-246/07, Commission v Sweden (PFOS)' (2011) 48 CMLRev 1639), can arguably be explained by the particular circumstances of the case (see De Baere (n 3)).
[264] Judgment in *Deutsche Grammophon*, 78/70, EU:C:1971:59, para 5.
[265] HP Bull, 'Vorbemerkungen zu Art. 83 GG' in R Wasserman (ed), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* 2 (1989) nr 91. Contra: Bauer (n 40) 260.
[266] Draft arts on the Law of Treaties with commentaries (1966) UNYBILC (vol II) 218, para 4.
[267] cf I Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 EJIL 616–17.
[268] ILC Draft arts (n 266) 211.
[269] Van Damme (n 267) 616.
[270] ILC Draft arts (n 266) 219, para 5.

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components'.[271] Although it is undisputed that good faith interpretation essentially 'requires no more than that effect be given, in a fair and reasonable manner, to the intention of the parties',[272] this leaves unanswered 'questions such as whose intention, what was intended, and at what time that intention matters'.[273] At its most basic level, it precludes that the objective of the treaty be frustrated by leading to manifestly unreasonable or absurd results,[274] such as the démarche of the Spartans 'who, after arranging a truce for thirty days with the enemy, devastated the country of the latter by night, alleging that the agreement covered the days, but not the nights'.[275] In addition, good faith serves to safeguard the spirit of the treaty over its letter,[276] which involves ascertaining not the absolute but the relative meaning of its terms by looking for the '[parties'] intention as expressed in the words used by them in the light of the surrounding circumstances'.[277] Apart from to the text itself, regard should thus be had to the object and purpose both of specific provisions and of the treaty as a whole, and to the latter's intrinsic coherence.

In that regard, effectiveness (though not codified as such in Article 31 VCLT) is an important factor in good faith interpretation[278] by serving as a benchmark for reviewing a particular interpretation in a way that is best expressed by the Latin maxim *ut res magis valeat quam pereat*: any interpretation that would render a term or provision useless should be avoided. Nevertheless, if such was the intention of the parties, 'good faith may require that the effectiveness of the instrument should fall short of its apparent and desirable scope'.[279] At the same time, if an international judicial organ such as the ECJ or the WTO Appellate Body has the specific and exclusive jurisdiction over one or more treaties it has a particular responsibility to safeguard the treaty provisions' useful effect and ensure their 'continued relevance for the (distant) future'.[280] When those treaties serve as a constitutional charter the amendment of which has become increasingly cumbersome over time, a court in this situation might give added weight to effectiveness in its interpretation. This provides an additional reason for why the strictures of EU loyalty are greater than those of good faith in general international law. Although effectiveness is

[271] *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, para 197.

[272] H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 296.

[273] Van Damme (n 267) 618.

[274] A Aust, *Modern Treaty Law and Practice* (CUP 2013) 208–9.

[275] P Belli, *De Re Militari et de Bello Tractatus* (1563) (trans HC Nutting, Clarendon Press 1936) 25a.

[276] Cheng (n 100) 114.

[277] AD McNair, *The Law of Treaties* (OUP 1961) 365.

[278] As mentioned above, in the case law of the ECJ, effectiveness derives from the duty of loyalty. See the judgments in *Rewe-Zentralfinanz* (n 19) and *Comet* (n 19), and more recently *Commission v United Kingdom* (n 33) para 32. See also Neframi (n 3) 326 and M Ross, 'Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?' (2006) 31 ELR 476.

[279] Lauterpacht (n 272) 296.

[280] Van Damme (n 267) 644.

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difficult to define[281] and 'hard to conceptualise as a self-sufficient limit to interpretation',[282] it completes good faith interpretation by ensuring the necessary degree of continuity in the development of the international organization and the treaty or treaties on which it is based.

Crucially, good faith interpretation implies that international obligations be interpreted by reference to their entire normative environment, which includes other treaties, norms of customary international law and general principles. Article 31(3)(c) VCLT requires that 'any relevant rules of international law applicable in the relations between the parties' be taken into account, together with the context. In *Shrimp-Turtle*, the Appellate Body explicitly relied on this provision to bring international environmental law into the legal equation, even though it did not exist when the GATT was originally negotiated in 1947.[283] Hence, the Appellate Body did not apply good faith in a legal vacuum. It took into account other obligations incumbent on the parties under contemporary international law, as well as the language of the 1994 WTO Agreement[284] preamble, which mentioned the protection of the environment as a WTO object.[285] In requiring the US to seek consensus, to negotiate in good faith and, in doing so, not to discriminate between WTO members,[286] the Appellate Body moreover attached great importance to structural principles of the law of treaties, such as the consent and equality of all WTO members.[287]

Good faith, then, is a principle of interpretation to determine the extent of legal obligations by focusing on the functioning of the compact and the legal system as a whole.[288] In that sense, it is no more than a mechanism to focus the mind of the interpreter of the text on how to perform the obligation at issue in such a way that it contributes to the well-functioning of the legal order as a whole, regardless of whether it concerns a legal order established by a bilateral agreement, one established by a multilateral treaty or indeed the international legal order as a whole.[289] That function is arguably performed by EU loyalty as it is by good faith in international law and in the constitutional law of federal systems.

[281] ibid 637.

[282] Conway (n 3) 141 (with regard to the use of the principle of effectiveness in the case law of the ECJ).

[283] de la Fayette (n 252) 289.

[284] Agreement Establishing the World Trade Organization (1994), 1867 UNTS 154, 33 ILM 1144.

[285] *Shrimp-Turtle* (n 138) paras 129, 154 and 168.

[286] ibid para 172.

[287] See the above discussion of the case. The Appellate Body thereby explicitly relied on art 31(3)(c) VCLT. See *Shrimp-Turtle* (n 138) para 158 (fn 157).

[288] cf Dworkin (n 243) 22, offering such an interpretation without, however, mentioning good faith as such.

[289] cf Kelsen (n 236) 282–3 ('*Worauf es ankommt, ist nicht, ob der Vertrag eine Rechtsordnung setzt – das tut jeder Vertrag*').

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VI. CONCLUSION

This article has argued that EU loyalty is as much an expression of international law good faith as it is of federal (constitutional) fidelity. In examining the nature of this foundational principle of EU law, this article has thus sought to move beyond the dichotomy between international law and the constitutional law of federal systems that is often the starting point for discussing the nature of the EU legal order. A comparison between EU loyalty, international law good faith and *Bundestreue* with respect to a number of key obligations (*pacta sunt servanda*, the prohibition to frustrate one's obligations pending entry into force and certain duties of cooperation) brought to light significant parallels. It also evidenced that the strictures imposed on the German *Länder* by *Bundestreue* are more far-reaching than those imposed on the EU Member States by loyalty, which in turn are habitually more detailed and far-reaching than the duties imposed by good faith in international law more generally. That observation alone, however, does not merit the conclusion that the principles are conceptually different. This article has highlighted strong historical links between international law good faith and *Bundestreue*, both in the literature and in the case law. It has argued that both principles are really applications of a more general concept of good faith that applies in all areas of law and that can be characterized as, in essence, a principle of constructive interpretation. In turn, this explains why the strictures of the principle of good faith increase with the level of integration of the legal order to which it is applied. Thus, despite differences in how they are applied, *Bundestreue*, EU loyalty and international law good faith are all expressions of what is fundamentally the same concept.

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