Articles

Beyond the Forms of Faith: *Pacta Sunt Servanda* and Loyalty

By Daniel Davison-Vecchione[*]

Abstract

The need to fulfil treaty obligations in good faith bases both the principle of *pacta sunt servanda* under Article 26 of the Vienna Convention on the Law of Treaties and the principle of loyalty under Article 4(3) of the Treaty on European Union. This article seeks to understand the precise relationship between the two principles. It argues that the principles are different embodiments of the same root concept. In particular, it argues that loyalty is a more sophisticated and specific version of the concept, since it establishes that the relevant states and institutions must take account of each other's efforts to fulfill their obligations faithfully. While the Court of Justice of the European Union has observed the consequent need for greater flexibility when determining Member State liability, it has not done so consistently, especially in the context of EU external relations. Lastly, this article proposes that the presented conceptualization of loyalty and *pacta sunt servanda* could help us understand how other international subsystems might develop the basic concepts in general international law.

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A. Introduction

One would be hard-pressed to find a more fundamental principle in public international law than *pacta sunt servanda*, the principle that agreements must be kept. As codified under Article 26 of the Vienna Convention on the Law of Treaties 1969 (VCLT), "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." In other words, it is through *pacta sunt servanda* that treaties create legally binding obligations upon those who are party to them. The principle therefore forms the bedrock of the law of treaties. The whole concept of binding agreements "can only rest upon the presupposition that such instruments are commonly accepted as possessing" legal enforceability.[1] The VCLT gives further acknowledgment to this basic principle in Article 27, which provides that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform." In other words, a state generally cannot rely on domestic law in order to excuse its failure to observe the obligations under international law created by a treaty.[2]

Pacta sunt servanda is not the only principle based on the faithful fulfillment of obligations embodied in a treaty provision. Under Article 4(3) of the Treaty on European Union (TEU), there is the principle of loyalty or "sincere cooperation"[3] under which the European Union and its Member States "shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." In order to achieve this duty of cooperation, EU Member States must "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."[4] While the principle of loyalty has received significant academic attention, comparative analyses of *pacta sunt servanda* and loyalty are surprisingly rare, considering their thematic connection.[5] In light of this connection, as well as the important manners in which *pacta sunt servanda* and loyalty have been used by courts to develop public

[1] MALCOLM N. SHAW, INTERNATIONAL LAW 103 (2008).

[2] For example, in Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 16 (Mar. 31), the U.S. was found to have violated its international obligations on consular relations by failing to allow Mexican prisoners to access consular assistance, irrespective of whether the domestic law on due process had been followed. An exception to this general rule exists under the Vienna Convention on the Law of Treaties, art. 46, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. This provision allows a state to argue that its consent to be bound has been taken in violation of its internal law to conclude treaties.

[3] For consistency, the term "loyalty" will be used predominantly, but "duty of cooperation" and "sincere cooperation" will be used where appropriate.

[4] Consolidated Version of the Treaty on European Union, art. 4(3), Feb. 7, 1992, 2012 O.J. (C 326) 13 [hereinafter TEU].

[5] For a recent, in-depth overview of loyalty in the EU legal order, see MARCUS KLAMERT, THE PRINCIPLE OF LOYALTY IN EU LAW (2014).

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international and EU law respectively, it appears worthwhile to ascertain the precise relationship between the two principles.

This article first provides a general overview of *pacta sunt servanda* and its elements. It then elaborates on how loyalty has been utilized by the Court of Justice of the European Union (CJEU) to achieve doctrinal developments in EU law. It draws particular focus to the "internal" use of loyalty as a legal basis for the doctrines of primacy and state liability, as well as its "external" use in restricting the unilateral action of EU Member States. In doing so, this article considers not only how each of these uses of loyalty can be related to *pacta sunt servanda*, but also the extent to which they truly reflect a reciprocal and cooperative relationship between the EU and its Member States. This article concludes that *pacta sunt servanda* and loyalty can be viewed as versions of the same root concept, with differing degrees of sophistication and specialization made possible by the EU's nature—a developed subsystem with a centralized, institutional framework. With this understanding comes two significant benefits: (1) The keener appreciation of EU legal development within the broader continuity of international law; and (2) the understanding of loyalty as an example of how other international, supranational, or transnational[6] systems can develop the root concept embodied in *pacta sunt servanda* as they become more institutionally centralized and sophisticated.

B. *Pacta Sunt Servanda* in Public International Law

As noted by Crawford, the validity of *pacta sunt servanda* has never been challenged in any international court or tribunal.[7] It is evident that the principle's central role in public international law enjoys universal, or near-universal, acceptance. The social expectation that agreements will be kept has enjoyed greater significance in international law because the failure to observe treaty commitments is often a source of armed conflict, even if one can argue that other values, such as state preservation, have come to eclipse it.[8] The wide acceptance of treaties as legally binding may thus amount to an acknowledgment by the international community that "[t]he only hope for peace and security is for those pacts, once made, to be performed."[9] As aptly summarized by Spiermann, states may perceive

[6] Although these terms overlap, for present purposes, a supranational system is one characterized by law-making institutions placed "above" the organization's constituent states, which integrate with the state legal systems and produce continuous restrictions upon state sovereignty. A transnational system is one that exists across state borders, irrespective of whether its constituent actors are public or private in nature.

[7] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF INTERNATIONAL LAW 450 (2013).

[8] Virginia L. Gott, *The National Socialist Theory of International Law*, 32 AM. J. INT'L L. 701, 713 (1938).

[9] Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L L. 405, 424 (1994).

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the binding nature of international instruments as a "lesser evil" than the "Hobbesian vision of the state subjecting other sovereign states to its national legal system."[10]

As for the relevant legal doctrine, as noted by the International Court of Justice (ICJ) in *Gabčíkovo-Nagymaros*, *pacta sunt servanda* under Article 26 of the VCLT combines two elements: (1) The binding nature of treaty obligations themselves; and (2) the duty to perform these obligations in good faith.[11] While "good faith" is an admittedly nebulous term, it is generally taken to entail honesty and fair-dealing between the parties concerned, such as truthfully representing their motives and abstaining from taking unfair advantage of an unintended interpretation of any agreement they come to.[12] Although the provision does not expressly refer to good faith, these underlying principles are reflected by Article 18 of the VCLT, which provides that prior to a treaty's ratification, a signatory must "refrain from acts which would defeat [its] object and purpose." Despite the binding nature of treaty obligations, there are circumstances in which a party can legally terminate or suspend the operation of a treaty. Where there is a material breach by one party,[13] where a supervening act renders performance impossible (*force majeure*),[14] or where there is a fundamental change of circumstances which was not foreseen at the time of the treaty's conclusion (*clausula rebus sic stantibus*), a party may terminate or suspend a treaty.[15]

In both *Nicaragua v. Honduras*[16] and *Cameroon v. Nigeria (Preliminary Objections)*,[17] the ICJ confirmed that good faith "is not in itself a source of obligation where none would otherwise exist."[18] In other words, the duty only arises within a state's existing obligations. Despite this approach regarding good faith, there have been occasions in which international courts have adopted a noticeably expansive interpretation of the concept. In proceedings brought by New Zealand and Australia against France (the *Nuclear Tests* cases) for atmospheric nuclear tests conducted by France in the South Pacific, the ICJ found statements made by France that it would no longer conduct nuclear tests of this

[10] Ole Spiermann, *Twentieth Century Internationalism in Law*, 18 EUR. J. INT'L L. 785, 789 (2007).

[11] Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7 (Sept. 25).

[12] Anthony D'Amato, *Good Faith*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 599 (Rudolf Bernhardt ed., 1992).

[13] VCLT art. 60.

[14] VCLT art. 61.

[15] VCLT art. 62.

[16] Border and Transborder Armed Actions, Jurisdiction and Admissibility (Nicar. v. Hond.), 1988 I.C.J. 105 (Dec. 20).

[17] Land and Maritime Boundary Between Cameroon and Nigeria, Preliminary Objections (Cameroon v. Nigeria), 1998 I.C.J. 275 (June 11), *available at* http://www.icj-cij.org/docket/files/94/7473.pdf.

[18] Nicar. v. Hond., 1998 I.C.J. ¶ 94; Cameroon v. Nigeria, 1998 I.C.J. ¶ 39.

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kind after the 1974 tests to be legally binding, as France's undertaking was subject to the principle of good faith.[19] A communique issued by the Office of the President of the French Republic, a speech in the UN General Assembly, and a letter from the French President to the Prime Minister of New Zealand contained the statements used by the ICJ in making its judgment.[20] The ICJ concluded that "[j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation."[21]

The *Nuclear Tests* cases demonstrate how an international court may extend good faith "to governmental statements which were considered retractable and not [capable of] giving rise to binding commitments," despite the aforementioned understanding that good faith is not an independent source of obligations.[22] As Thirlway notes, one possible explanation for this apparent inconsistency is that in its judgments, the ICJ inaccurately used "good faith" to refer to the creation of obligations by giving consent, rather than the duty to perform obligations fairly and honestly.[23] Whatever the case may be, it is unsurprising that this aspect of the *Nuclear Tests* judgments has been heavily criticized. It is true that good faith applies to international obligations in general, rather than treaties alone.[24] Nevertheless, as observed by Rubin, even if one were to assume that a unilateral declaration was able to give rise to a legal obligation, in the absence of another state being misled by the statement or believing it to create a direct obligation, "no significant question of good faith would seem to arise."[25]

Further potential difficulties arise regarding how this means of giving legal effect to a unilateral act can be differentiated from similar doctrines that operate in international law. For instance, where a state makes a clear representation that it relied upon another to its detriment or prejudice, an estoppel can be raised to prevent the state from going back on the representation.[26] Questions therefore arise as to which instances involving a unilateral

[19] Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

[20] The relevant extracts from these statements are included and discussed in N.Z. v. Fr., 1974 I.C.J. ¶¶ 35–44.

[21] Austl. v. Fr., 1974 I.C.J. ¶ 46.

[22] D'Amato, *supra* note 12, at 601.

[23] Hugh Thirlway, *Law and Procedure of the International Court of Justice 1960-89, Part One*, 60 BRITISH YEARBOOK INT'L L. 1, 10 (1989).

[24] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625, ¶ 1 (Oct. 24, 1970).

[25] Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 10–11 (1977).

[26] North Sea Continental Shelf (Ger. v. Den. & Neth.), 1969 I.C.J. 3, ¶ 30 (Feb. 20); Land and Maritime Boundary Between Cameroon and Nigeria, Preliminary Objections (Cameroon v. Nigeria), 1998 I.C.J. 275, ¶ 57 (June 11).

statement should be decided on estoppel grounds, and which should be decided on good faith grounds in a manner comparable to the *Nuclear Tests* cases; this distinction could prove significant because the former requires some meaningful act of reliance on the statement, while the latter does not appear to involve a requirement of reliance.

Despite how unsatisfactory these aspects of the expansion of good faith may be from a doctrinal standpoint, it is an expansion which remains capable of producing great benefits in international law's development. In a world where greater international cooperation has become expected, "[n]ations ought to be able to rely upon the pronouncement[s] of other nations, as well as to have their own declarations taken seriously and with the expectation of legal enforceability."[27] More importantly for present purposes, this expansive scope of good faith can place the use of loyalty by the CJEU within the broader context of increased expectations of states' international and supranational obligations. This point will be returned to over the course of this discussion.

C. Loyalty in EU Law

I. Primacy

In order to understand the principle of loyalty in EU law, one must look at how the concept has been used by the CJEU, particularly as a legal basis for developments in doctrine. Perhaps most famous among these developments is that of the primacy or supremacy of EU law. The primacy of EU law is the doctrine that where a Member State's domestic law prevents the application of EU law, the latter takes precedence over the former.[28] The application of primacy can be traced to the early cases of *Van Gend en Loos*[29] and *Costa v. ENEL*,[30] making it one of the first doctrines to be developed by the CJEU. Although the doctrine of primacy originated after *Van Gend en Loos*, here the CJEU pronounced that what was then the European Economic Community (EEC) constituted a "new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals."[31]

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[27] D'Amato, *supra* note 12, at 601.

[28] Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 588.

[29] Case 26/62, NV Algemene Transport—en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 105.

[30] *Costa*, Case 6/64 at 588.

[31] *Van Gend en Loos*, Case 26/62 at 129.

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In taking the opportunity to characterize the EEC as an entity that went beyond the conventional understanding of international organizations, with voluntary restrictions upon state sovereignty and rights directly conferred upon the nationals of its Member States, the CJEU set the stage for the entry of primacy in *Costa*. Here, the CJEU explicitly distinguished the EEC Treaty from "other international treaties" in how it "created its own order which was integrated with the national order of the member-States the moment the Treaty came into force."[32] The limitations on sovereignty caused by the transfer of powers from the Member States to the Community and the ineffectiveness of the obligations under the Treaty without that transfer required that domestic provisions be consistent with Community law.[33] In so holding, the CJEU drew attention to how the variation of Community law's force in deference to domestic legislation would endanger "the realization of the aims envisaged by the Treaty" under what is now Article 4(3) TEU.[34] That is, the CJEU expressly based the primacy of EEC law over domestic law upon the principle of loyalty.

The implications of *Van Gend* and *Costa* have been frequently noted in EU literature,[35] particularly with respect to the emergence of the EU as a constitutional legal order in its own right, rather than a multilateral treaty with established institutions. It is true that the EEC "would probably have succeeded in a rough and ready way without the supremacy doctrine."[36] Nevertheless, having taken account of the mindfulness of domestic courts regarding potential conflicts between EU and national law, the CJEU took the opportunity to formulate "a principle of precedence more appealing than simply *pacta sunt servanda*" by adopting an overtly constitutional analysis familiar to national lawyers.[37] Indeed, comparisons have been drawn between these developments in EU law and those in early U.S. constitutional law. First, the EU Treaties and the U.S. Constitution are identified as "basic empowering repositories" by their respective courts.[38] Second, just as the U.S.

[32] *Costa*, Case 6/64 at 455.

[33] *Id*.

[34] *Id*.

[35] For some of the many examples, see J.M. PRINSSEN & A. SCHRAUWEN, DIRECT EFFECT: RETHINKING A CLASSIC OF EC LEGAL DOCTRINE (2002); Bruno de Witte, *Direct Effect, Supremacy and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW 323 (Paul Craig & Gráinne de Burca eds., 2011); KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH (1999).

[36] Danny Nicol, *Democracy, Supremacy and the "Intergovernmental" Pillars of the European Union*, PUB. L. 218, 221 (2009).

[37] Spiermann, *supra* note 10, at 807.

[38] Markus G. Puder, *Supremacy of the Law and Judicial Review in the European Union: Celebrating* Marbury v. Madison *with* Costa v. ENEL, 36 GEO. WASH. INT'L L. REV. 567, 577 (2004).

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Supreme Court in *Marbury v. Madison*[39] granted itself the power to judicially review statutes for compliance with the "higher law" of the U.S. Constitution, the CJEU in *Costa* used a "bootstrapping statement"[40] to grant itself the power to judicially review domestic law for compliance with the "higher law" of the EEC Treaty. The comparison between the status of the Treaties within the EU's legal order and that of national constitutions within domestic systems becomes even stronger when one considers the subsequent CJEU case law on primacy. For example, in *Simmenthal II* the CJEU held that domestic provisions in conflict with EU law are to be automatically dismissed, without any need for a domestic court "to request or await the actual setting aside" of the provisions by the national legislature.[41]

It is with this line of development that loyalty's affinity with, and distinction from, the more general concept of *pacta sunt servanda* become apparent. On the one hand, the use of loyalty to justify primacy underscored the need for the EU Member States to understand what they had agreed to and perform their obligations faithfully, as "only together and in unison can the Member States act as treaty architects to change the direction of the integration project and create a revised common baseline."[42] In other words, that which is at the heart of *pacta sunt servanda* is also at the heart of loyalty: The observance of agreements in good faith. On the other hand, the use of loyalty to develop primacy in EU law marks a key distinction from *pacta sunt servanda*, namely that loyalty can be used as a legal basis for new doctrines. It is true that there has been a considerable expansion of *pacta sunt servanda*'s components and that some examples of this expansion appear to have created standalone obligations that were hitherto unrecognized in public international law, such as the use of good faith in the *Nuclear Tests* cases to make unilateral statements binding.[43] Nevertheless, even the most novel of these expansions have been understood as courts extending the application of *pacta sunt servanda* and good faith themselves; they have not been understood as courts producing entirely new doctrines with *pacta sunt servanda* or good faith providing the legal competence to do so. Additionally, none of the more novel treatments of *pacta sunt servanda* and good faith have implications as constitutionally significant as the supremacy of a particular treaty over domestic law.

[39] Marbury v. Madison, 5 U.S. 137 (1803).

[40] Kirk W. Junker, *Conference Conclusions ". . . And Beyond": Judicial Review in the European Union*, 45 DUQ. L. REV. 599, 611 (2007).

[41] Case 106/77, Amminstrazione delle Finanze dello Stato v. Simmenthal, 1978 E.C.R. 629, para. 26.

[42] Puder, *supra* note 38, at 579.

[43] Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

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It appears that, even if the principles share a common core, loyalty in EU law has evolved beyond even the most expansive understanding of *pacta sunt servanda* in public international law because of its role as source of legal competence within the European order. This realization only begins to illuminate the precise nature and extent of loyalty's function within EU law and its general relationship with *pacta sunt servanda*. In order to gain a more complete understanding, it is necessary to look at two areas in which loyalty has been used in recent decades. The first area is the governance of relations between EU institutions and Member States within the EU's legal system (the *internal* use of loyalty). The second area is governance of relations between the Member States, the EU, and third parties beyond the EU's legal system (the *external* use of loyalty). Such an examination becomes especially vital in light of one respect in which Article 26 of the VCLT and Article 4(3) of the TEU seem to differ; in its current form, the latter describes the principle of loyalty as one of "sincere cooperation," according to which the EU and its Member States must assist each other "in full mutual respect." Accordingly, while Article 26 of the VCLT and Article 4(3) of the TEU are both founded upon the faithful observance of agreements, loyalty in EU law possesses an additional emphasis on cooperation and reciprocity; as currently worded, the principle is a "two-way street."[44] As such, only by examining the internal and external uses of loyalty can one determine whether the CJEU has succeeded in fully realizing this aspect of the principle.

II. State Liability

Focusing first upon the internal use of loyalty, one doctrine that has more recently emerged in EU law with a basis in Article 4(3) of the TEU is state liability. Before discussing state liability itself, it is necessary to understand its relationship with more established aspects of EU law, particularly direct effect. As mentioned above, the CJEU in *Van Gend en Loos* emphasized the distinct nature of the EEC due to the voluntary limitation of Member States' sovereign powers, the incorporation of Member States' nationals as EEC subjects, and the Member States themselves.[45] With this in mind, the CJEU in *Van Gend* introduced the direct effect of EU law, meaning that EU law can confer rights that individuals can rely upon.[46] An EU provision can be directly effective where it is sufficiently clear and precise, is unconditional and not dependent on other provisions, and confers a specific right upon which a claim can be based.[47]

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[44] Andres Delgado Casteleiro & Joris Larik, *The Duty to Remain Silent: Limitless Loyalty in EU External Relations?*, 36 EUR. L. REV. 524, 526 (2011).

[45] Case 26/62, NV Algemene Transport—en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 105, 129.

[46] *Id.* at 129–30. The prohibition in question was "perfectly suited by its nature to *produce direct effects* in the legal relations between the member-States and their citizens." *Id.* at 130.

[47] *Id.*; Case 8/81, Ursula Becker v. Finanzamt Münster-Innenstadt, 1982 E.C.R. 53, para. 25.

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The direct effect of EU law has significant limitations in addition to these criteria. Perhaps most important among these is that EU Regulations are directly applicable, meaning that they immediately come into effect, while EU Directives must be implemented through national legislation.[48] As clarified by the case law following *Van Gend*, directives may still have vertical direct effect, which applies in situations where a party relies on an EU provision against the state, but they generally do not have horizontal direct effect, where such reliance is against a private third party.[49] Thus, direct effect is especially significant when considering directives because, in the absence of national implementing legislation, it is the only means by which an individual can enjoy the rights that a directive confers. Yet, in the overwhelming majority of circumstances, a private party cannot successfully rely on an unimplemented directive where the dispute is with another private party.

The CJEU has made efforts to circumvent this. First, there is the doctrine of indirect effect, or "duty of consistent interpretation." This means that domestic courts are obligated to interpret domestic law to give effect to the rights under EU law as far as it is reasonably possible to do so. Accordingly, it is possible for a private party to enjoy rights under an unimplemented directive where domestic law can be interpreted in a manner that would allow this.[50] Second, it is possible for a Member State's failure to comply with a directive to be considered an incidental factor in a private lawsuit, if doing so will not impose legal obligations. This is known as "incidental horizontal direct effect." To illustrate, in *CIA Security International*—where the concept was introduced—there was an attempt to market a burglar alarm in Belgium.[51] The alarm did not comply with the technical specifications under Belgian law, but Belgium had failed to report these specifications as required under an EU Directive. The CJEU held that, as the relevant Directive was aimed at protecting the free movement of goods and Belgium's failure to report its specifications substantially degraded its effectiveness, the Belgian regulations could not be enforced, meaning that they could not be applied by domestic courts in private disputes.[52]

[48] Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

[49] Case 152/84, Marshall v. Southampton & South West Hampshire AHA, 1986 E.C.R. 723, para. 48; Case 91/92, Faccini Dori v. Recreb Srl, 1994 E.C.R. I-3325, para. 20.

[50] Case 14/83, Von Colson v. Land Nordrhein-Westfahlen, 1984 E.C.R. 1891.

[51] Case C-194/94, CIA Sec. Int'l SA v. Signalson SA, 1996 E.C.R. 172.

[52] *Id.* at paras. 48–55.

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More recently, there has been an expansive use of incidental horizontal direct effect where the relevant directive involves EU primary law.[53] In *Mangold v. Helm*, there was a private dispute concerning a fixed-term contract of employment.[54] The fifty-six-year-old claimant argued that the contract breached an unimplemented EU Directive that prohibited various forms of discrimination, including age discrimination.[55] Under German law, fixed term contracts were only permitted for employees under fifty-two years of age in exceptional circumstances, while no such restriction applied to those over fifty-two.[56] The time limit for the Directive's implementation had not passed, which would ordinarily prevent it from being relied on by private litigants even in cases against the state, as the state would be able to argue that it still had time to implement the Directive and fulfill its obligations.[57] Despite this, the CJEU held that the national court had a duty to set aside domestic provisions that conflicted with the Directive.[58] This was because the prohibitions against discrimination covered by the Directive were grounded in the principle of non-discrimination on the basis of age, which—as an EU general principle—forms part of EU primary law.[59]

Although they provide certain means of circumventing the horizontal/vertical distinction, indirect effect and incidental horizontal direct effect are significantly limited in their scope of application. While indirect effect may allow a party to rely on the rights conferred by a directive in private litigation, this is only possible where domestic law can reasonably be interpreted to give effect to those rights. Very often, domestic provisions are simply too different from the EU Directive for such an interpretation. For example, in the UK case of *Duke v. GEC Reliance Ltd.*, indirect effect could not be used to allow a private employee to enjoy the rights under an EU Directive concerning equal treatment because the relevant UK statute could not be construed as doing so without distorting its meaning.[60] As for

[53] By "EU primary law," the author means the highest sources of EU law, as opposed to EU secondary law, which must derive from and comply with these sources. The Treaties are examples of EU primary law, whereas Regulations are examples of EU secondary law.

[54] Case C-144/04, Mangold v. Helm, 1 C.M.L.R. 43 (2006).

[55] *Id.* The Directive in question was Council Directive 2000/78, 2000 O.J. (L 303) 16.

[56] Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen [Law on Part-Time Working and Fixed-Term Contracts Amending and Repealing Provisions of Employment Law], Dec. 21, 2000, BGBl. 1 at 1966, para. 14(3) [hereinafter the TzBfG]. This provision had been amended by The First Law for the Provision of Modern Services on the Labour Market, Dec. 23, 2002, BGBl. 1 at 14607 [hereinafter the Law of 2002].

[57] Case 148/78, Pubblico Ministero v. Ratti, 1 C.M.L.R. 96, paras. 39–47 (1980).

[58] *Mangold*, Case C-144/04 at 43.

[59] *Id.* at 75–78.

[60] Duke v. GEC Reliance Ltd. [1988] A.C. 618 (HL) (appeal taken from Eng.).

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instances of incidental horizontal direct effect, such as that in *Mangold*, it should be kept in mind that such cases are not only highly controversial, but also doctrinally rationalized by a directive with contents rooted in EU primary law that is applicable in itself, such as a general principle or an EU Treaty provision.[61] With this in mind, it would be unwise to suppose that incidental horizontal direct effect will be successfully invoked with significant frequency.[62] The limits of direct effect, therefore, remain a meaningful obstacle where a Member State has failed to implement a directive.

Given these limits, the introduction of state liability in *Francovich v. Italy* presents an additional consideration.[63] The claimants were dismissed Italian workers whose employer was unable to meet redundancy payments because of insolvency.[64] Under an EU Directive, Member States were obligated to set up guarantee funds in case of such events, which the Italian government had failed to do.[65] In this case, the Directive in question did not identify "the person liable to provide the guarantee," so it was insufficiently precise to be directly effective without implementation.[66] The CJEU held that a Member State could be liable in damages for failing to implement a directive when three factors are present: The directive grants rights to individuals; it is possible to identify the content of those rights; and there is a causal link between the state's breach of its obligation and the loss suffered.[67] In reaching this conclusion, the CJEU drew attention to the need to achieve the full effectiveness of EU law and the duty upon Member States to "take all appropriate measures . . . to ensure fulfilment of their obligations" in accordance with the principle of loyalty.[68]

State liability is therefore significant both because it allows private individuals to circumvent the limits of direct effect and obtain redress where an EU Directive has not been implemented and because, like primacy, it is an example of loyalty being used by the CJEU as a source of competence for the production of legal doctrine and as a means of governing relations between the EU and its Member States. By citing the need for Member

[61] Filippo Fontanelli, *General Principles of the EU and a Glimpse of Solidarity in the Aftermath of Mangold and Kücükdeveci*, 17 EUR. PUBLIC L. 225, 229–30 (2011).

[62] For a more recent application of *Mangold*, see Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG, 2010 E.C.R. I-365.

[63] Case C-6/90, Francovich v. Italy, 1991 E.C.R. I-5357.

[64] *Id.*

[65] Council Directive 80/987, 1980 O.J. (L 283) 23 (EC).

[66] *Francovich*, Case C-6/90 at paras. 26–27.

[67] *Id.* at para. 40.

[68] *Id.* at para. 36.

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States to fulfill their EU obligations, the CJEU's application of state liability in this manner strongly reflects the common core of loyalty and *pacta sunt servanda*: The need for signatory states to observe their agreed international obligations faithfully. Additionally, by attributing liability to "the state," regardless of the specific public body directly responsible for the breach, the *Francovich* formulation appears to reflect the more general view in public international law on state responsibility. For the purposes of attributing liability, the CJEU views "the state" as indivisible and therefore liable for breaching its international obligations, irrespective of which branch of government the relevant state organ belongs to.[69]

State liability becomes most interesting as a point of comparison in the way that the *Francovich* criteria have come to be modified. In the conjoined cases of *Brasserie du Pecheur* and *Factortame*, the CJEU held that for state liability to be established, the Member State's breach of EU law "must be *sufficiently* serious."[70] To determine whether a breach is sufficiently serious, a court may consider numerous factors; the most important of these for present purposes are "whether the infringement and the damage caused was intentional or involuntary" and whether "the position taken by [an EU institution] may have contributed towards the omission."[71]

This position is noteworthy from a public international law perspective because the customary rules on state responsibility strongly suggest a stricter liability regime. As stated by the International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongful Acts, a state breaches an international obligation when its act is "not in conformity with what is required of it by that obligation, regardless of its origin or character."[72] A state may defend itself by demonstrating one of the circumstances that precludes liability for breaching a treaty or for international wrongfulness under the customary rules which have been codified in the VCLT and ILC Articles respectively. The circumstances which a state may demonstrate as a defense include *clausula rebus sic stantibus*,[73] *force majeure*,[74] distress,[75] and necessity.[76] Nevertheless, in contrast to other

[69] Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *in* Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, ch. IV.E.1, art. 4(1), U.N. Doc. A/56/10 (2001) [hereinafter ILC Articles].

[70] Joined Cases C-46/93, Brasserie du Pecheur SA v. Germany & C-48/93, R v. Secretary of State for Transport Ex parte Factortame Ltd., 1996 E.C.R. I-1029, para. 51 (emphasis added).

[71] *Id.* at para. 56.

[72] ILC Articles, *supra* note 69, art. 12.

[73] VCLT art. 62.

[74] ILC Articles, *supra* note 69, art. 23.

[75] ILC Articles, *supra* note 69, art. 24.

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forms of internationally wrongful acts, the breach of a treaty is understood to be actionable *per se* "without proof of special damage, unless the treaty otherwise provides," a point strongly implied by the very principle of *pacta sunt servanda*.[77]

Additionally, while states can raise defenses against an action for the breach of a treaty, these defenses have been narrowly construed in international adjudication. One example is that of *clausula rebus sic stantibus*, which has been described as the "major antagonist to the *pacta sunt servanda* rule."[78] In *Fisheries Jurisdiction*, the ICJ held that the threat posed to Iceland's interests by new techniques in fishing was not sufficient to "constitute a fundamental change with respect to the lapse or subsistence" of a jurisdictional clause in the contested bilateral agreement.[79] Similarly narrow interpretations are made of *force majeure* and distress, as seen from the *Rainbow Warrior* arbitration, where New Zealand brought proceedings against France after two French agents sank a Greenpeace vessel in Auckland Harbour, and France unilaterally removed them from where New Zealand was holding them on the South Pacific island of Hao.[80] Here, the tribunal found that France could not rely on *force majeure* to excuse its breach, as this requires a supervening act that renders performance of the obligation absolutely and materially impossible.[81] The tribunal also outlined that in order for France to successfully claim distress, there must have been an exceptional circumstance of extreme urgency, such as medical emergency, promptly recognized by the other interested party; the re-establishment of the original state of compliance with the treaty as soon as the reasons for the emergency had ceased; and an effort in good faith to obtain New Zealand's consent.[82] As such, the general regime of state responsibility in public international law for breaching treaty obligations remains noticeably strict, in contrast to the CJEU's position on state liability after *Brasserie*, under which a Member State is not *prima facie* liable for breaching an EU obligation.

The flexibility of the CJEU's post-*Brasserie* approach to state liability in the context of private enforcement also contrasts starkly with the CJEU's approach when the European Commission brings public enforcement proceedings against EU Member States under Article 258 of the Treaty on the Functioning of the European Union (TFEU) for an alleged

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[76] ILC Articles, *supra* note 69, art. 25.

[77] CRAWFORD, *supra* note 7, at 590–91.

[78] Christina Binder, *Stability and Change in Times of Fragmentation: The Limits of* Pacta Sunt Servanda *Revisited*, 25 LEIDEN J. INT'L L. 909, 912 (2012).

[79] Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 7, 65 (July 12).

[80] New Zealand v. France, 82 I.L.R. 500 (U.N. Secretary-General Arbitration) (1990).

[81] *Id.* at para. 77.

[82] *New Zealand*, 82 I.L.R. at ¶ 79.

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breach of EU law. Based on the CJEU's jurisprudence on incompletely transposed directives, a state in breach of an EU obligation will be liable in such proceedings even where the state has attempted to fulfill the obligation, albeit incompletely or incorrectly. For example, in *Waste Directive*, the CJEU found Ireland liable for its deficient implementation of a directive, which amounted to a "general and persistent" breach of its obligations.[83] Similarly, it is not sufficient for a state to argue that it was in the process of complying by the time the case was brought before the CJEU. In *Export Tax on Art Treasures*, Italy was found to have breached its obligations by continuing to levy against Member State taxes for the export of works of art, even though Italy claimed that it was about to abolish the contested domestic legislation.[84] The narrow scope of available defenses in these proceedings further reflects a stricter liability regime. Much like other international tribunals, the CJEU will not allow *force majeure* to be lightly invoked. This is evident in *Commission v. Belgium*, where the difficulties experienced within Belgium's political and administrative organization did not excuse its failure to implement a directive.[85]

There is a significant difference between the manners in which *pacta sunt servanda* and loyalty are outlined in their respective treaty provisions. Unlike *pacta sunt servanda,* loyalty is expressly linked to "sincere cooperation."[86] The comparative flexibility afforded to Member States under EU state liability reflects the more overtly reciprocal nature of loyalty, and the observance of loyalty does not merely require Member States to fulfill their obligations to the EU; EU institutions in turn must be willing to co-operate with the Member States. *Brasserie* importantly illustrates that a court can take account of whether the alleged infringement of EU law was intentional and whether the position taken by an EU institution was contributory because the court may accommodate Member States who failed to fulfill their obligations, but were attempting to observe them in good faith.[87]

In simple terms, the *Brasserie* formulation of state liability takes into account the attempts of Member States to be loyal. This approach to state liability is apparent in *ex parte British Telecommunications*, where British Regulations that implemented an EU Directive concerning the procurement of entities contracting in the telecommunications sector did so incorrectly, as the UK had exempted almost all entities in the telecommunications

[83] Case C-494/01, Comm'n v. Ireland, 2005 E.C.R. I-3331, para. 174.

[84] Case C-7/68, Comm'n v. Italy, 1969 C.M.L.R. 1.

[85] Case C-236/99, Comm'n v. Belgium, 2000 E.C.R. I-5657.

[86] TEU art. 4(3).

[87] Joined Cases C-46/93, Brasserie du Pecheur SA v. Germany & C-48/93, R v. Secretary of State for Transport Ex parte Factortame Ltd., 1996 E.C.R. I-1029, paras. 51–57. The CJEU lists factors for courts to consider at paragraph 56.

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sector from complying with its requirements.[88] As the UK's interpretation had been made in good faith and "was not manifestly contrary to the wording of the directive or to the objective pursued by it," the CJEU did not find the breach to be sufficiently serious and determined that the UK was not liable.[89] The current position on the liability of judicial bodies affirms the understanding of state liability as a manifestation of the reciprocal nature of loyalty in EU law. In *Köbler v. Austria,* the CJEU held that a court of last resort can be held liable for breaching EU law, but the seriousness of the breach must be "manifest," as opposed to "sufficient."[90] On the one hand, the liability of courts of last resort under EU law reflects the aforementioned position in public international law that "the state" as a whole is responsible for the breach of international obligations by its constituent bodies, regardless of whether they belong to the legislative, executive, or judicial branch.[91] On the other hand, the limitation of *Köbler*'s application to courts of last resort excludes much of the domestic judiciary from the scope of state liability, and the "manifest seriousness" standard to which courts of last resort are held renders them less likely to be found liable than other branches of the state. These factors contradict the normal view of "the state" as indivisible for the purposes of state responsibility.[92]

Although this development in state liability is irregular and, at first glance, creates a regime inconsistent with *Brasserie*, it can be explained as a manifestation of loyalty in EU law. Limiting judicial decisions regarding state liability to courts of last resort provides the domestic judiciary the maximum number of opportunities to rectify mistakes and properly apply EU law. In other words, it acknowledges that a national court system may be endeavoring to fulfill its obligations to the EU loyally. Accordingly, the CJEU can respond in the spirit of sincere cooperation by not imposing liability where there are remaining opportunities for the domestic courts to apply the law correctly, and where the court of last resort was not significantly at fault for misapplying EU law.

III. EU External Relations

Thus far, the relevant jurisprudence demonstrates that loyalty and *pacta sunt servanda* share the common core of ensuring the fulfillment of international obligations in good faith, but loyalty has been utilized in a considerably more sophisticated fashion by the

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[88] Case C-392/93, R v. HM Treasury Ex p British Telecommunications Plc, 1996 E.C.R. I-1631.

[89] *Id.* at para. 43.

[90] Case C-224/01, Köbler v. Austria, 2003 E.C.R. I-10239, paras. 53–59. These requirements have since been confirmed in Case C-173/03, Traghetti del Mediterraneo SpA (In Liquidation) v. Italy, 2006 E.C.R. I-5177.

[91] Helen Scott & N.W. Barber, *State Liability Under* Francovich *for Decisions of National Courts*, 120 L. QUARTERLY REV. 403, 406 (2004).

[92] Roy W. Davis, *Liability in Damages for a Breach of Community Law: Some Reflections on the Question of Who to Sue and the Concept of "the State"*, 31 EUR. L. REV. 69, 77–78 (2006).

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CJEU, including as a source of legal competence. The use of loyalty as a legal basis for EU doctrines has often resulted in responsibilities being imposed upon the Member States with the aim of increasing the effectiveness of EU law. Examples of this include the duty to set aside national provisions that prevent the application of EU law and the potential liability for damages where failure to observe an EU obligation results in an individual suffering loss. Nevertheless, more recent developments in state liability have shown some willingness by the CJEU to acknowledge how Member States may be attempting to act loyally to the EU and to afford them greater flexibility accordingly, reflecting the more overtly cooperative and reciprocal nature of loyalty than of *pacta sunt servanda*. These developments, however, relate to the *internal* use of loyalty; the question remains as to whether the same degree of flexibility and reciprocity can be seen from the *external* use of loyalty. One must, therefore, look to how the principle has been applied in EU external relations.

It is unsurprising that the EU has long been concerned that acts taken by individual Member States, such as entering into international agreements with third party states and organizations, may jeopardize the EU's ability to attain its objectives. In the *ERTA* case, the CJEU held that each time the EU "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."[93] This doctrine, known as the *ERTA* Principle, was expressly linked to the principle of loyalty because allowing Member States to undertake such obligations with third parties could affect the rules adopted by the EU in pursuance of the TFEU's aims.[94] The *ERTA* Principle has since been codified under the TFEU itself.[95] Thus, it is clear that when loyalty is used externally, it is integral to governing relations between EU institutions and Member States, both in terms of ensuring the faithful fulfillment of the EU's objectives and in terms of delineating the EU and Member States' respective areas of legal competence.

Bearing in mind the role played by loyalty in external relations, one must consider the increasingly strict constraints upon Member States in EU external relations in recent years. In the *Inland Waterways* cases, the European Commission received a mandate to negotiate a multilateral transport agreement in respect of inland waterways.[96] Meanwhile, Germany and Luxembourg were each in the process of making bilateral treaties with the same third countries with whom the European Commission was negotiating the EU agreement,

[93] Case C-22/70, Comm'n v. Council, 1971 E.C.R. 263, para. 17.

[94] *Id.* at paras. 21–22.

[95] TFEU art. 3(2).

[96] Case C-266/03, Comm'n v. Luxembourg, 2005 E.C.R. I-4805; Case C-459/03, Comm'n v. Germany, 2005 E.C.R. I-6985.

creating a conflict.[97] Germany and Luxembourg failed to discontinue making their respective treaties, and the European Commission brought separate proceedings against them before the CJEU. The CJEU held that, although the EU had not yet concluded its agreement, Germany and Luxembourg should have abstained from conduct likely to compromise negotiations that the EU had initiated and had thus breached their duty to cooperate. The duty of cooperation therefore applies once the European Commission has received a mandate to negotiate because the adoption of "a decision authorizing the [European] Commission to negotiate a multilateral agreement on behalf of [the EU] marks the start of a concerted [EU] action at international level." [98]

The *Inland Waterways* cases evidence a strong limitation upon what an individual Member State may do when the decision is made to enter negotiations at the EU level, but the CJEU did not go so far as to find a duty of outright abstention. Rather, it found that there was "at the very least a duty of close cooperation" between the Member States and EU institutions "to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation."[99] This could be understood to mean that a Member State will not be liable for failing to promptly abstain from taking action at the national level where negotiations have begun at the EU level, provided that the Member State makes its best effort to closely cooperate with the EU, such as by informing and consulting the Commission.[100] This possible interpretation is significant because, as with the flexibility afforded in state liability under *Brasserie*[101] and *Köbler*,[102] it would reflect the reciprocal nature of loyalty by acknowledging that Member States may be attempting to fulfill their EU obligations in good faith, even when their conduct amounts to a breach of EU law. It would support the CJEU's mindfulness of the "two-way street" created by Article 4(3) of the TEU in both the Court's internal and external use of loyalty.

Despite this apparent mindfulness, the CJEU's rulings since the *Inland Waterways* cases seem to confirm an even greater degree of restriction upon the Member States. In *MOX Plant*, Ireland initiated arbitration proceedings against the UK under the UN Convention on the Law of the Sea (UNCLOS), alleging that the UK had breached provisions of the Convention concerning the protection and preservation of the marine environment by

[97] *Luxembourg*, Case C-266/03; *Germany*, Case C-459/03.

[98] *Luxembourg*, Case C-266/03 at para. 60; *Germany*, Case C-459/03 at para. 66.

[99] *Id.*

[100] Casteleiro & Larik, *supra* note 44, at 531–32.

[101] Case C-46/93, Brasserie du Pecheur SA v. Germany, 1996 E.C.R. I-1029, para. 51.

[102] Case C-224/01, Köbler v. Austria, 2003 E.C.R. I-10239

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building facilities on the coast of the Irish Sea.[103] UNCLOS is a mixed agreement, which falls in part within the EU's competence.[104] The CJEU found that, by initiating proceedings between two Member States outside of the framework provided by EU law, Ireland had breached current Article 344 of the TFEU, which provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." The CJEU not only interpreted the need to respect its exclusive jurisdiction as "a specific expression of Member States' more general duty of loyalty,"[105] but also found that Ireland had breached what is now Article 4(3) of the TEU by failing to consult with and inform the relevant EU institutions before deciding to initiate the proceedings.[106]

Comparably, in *IMO* the European Commission brought proceedings against Greece, which had submitted a non-binding proposal to a committee of the International Maritime Organization (IMO) for consideration.[107] The proposal concerned maritime safety, which falls within the EU's exclusive competence.[108] The CJEU found that, by initiating a procedure which could lead to the IMO adopting new rules, Greece "took an initiative likely to affect the provisions" of the EU Regulation on enhancing ship and port facility security, thereby breaching the duty of cooperation.[109] This breach existed despite the fact that the EU is not a party to the IMO and the additional argument that the European Commission itself had failed to act in sincere cooperation, as it could have "endeavored to submit [the proposal] to the Maritime Safety Committee and allowed a debate on the subject."[110]

The use of loyalty in EU external relations to restrict Member State action reached its zenith in *PFOS*.[111] Here, Sweden had unilaterally made a proposal to include perfluoroctane

[103] Case C-459/03, Comm'n v. Ireland, 2006 E.C.R. I-4635.

[104] The principal areas of shared competence between the EU and Member States are listed under TFEU art. 4(2). A mixed agreement is an agreement "to which both the EU and the Member States are contracting parties on the basis that their joint participation is required, because not all matters covered by the agreement fall exclusively within" EU or Member State competence. PAUL CRAIG & GRÁINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 334 (5th ed. 2011).

[105] *Ireland*, Case C-459/03 at para. 169.

[106] *Id.* at paras. 179–82.

[107] Case C-45/07, Comm'n v. Greece, 2009 E.C.R. I-701.

[108] *Id.* The legal basis for this was the EU's objective of setting common transport policy. Under the current TFEU, arts. 90–91 & 100.

[109] *Greece*, Case C-45/07.

[110] *Id.* at paras. 25–26.

[111] Case C-246/07, Comm'n v. Sweden, 2010 E.C.R. I-3317.

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sulfonate (PFOS), a substance harmful to the environment, in the Annex of the Stockholm Convention on Persistent Organic Pollutants (the Convention).[112] As a mixed agreement, the Convention fell within the EU and Member States' shared competence.[113] There had been work at the EU level to identify control measures for PFOS, but no agreement had been reached at the time of Sweden's unilateral decision to make a proposal.[114] Nevertheless, the CJEU found against Sweden.[115] This was because, rather than the absence of a decision at the EU level, the CJEU interpreted the lack of action by the EU as a "common strategy not to propose."[116] Accordingly, Sweden had breached the duty of cooperation by acting unilaterally and dissociating itself "from a concerted common strategy within the Council," which would likely "compromise the principle of unity in the international representation of the Union and its Member States."[117]

This line of case law has profound implications. It not only confirms the role of loyalty in EU law as a means of delineating legal competence between the EU and Member States, but also demonstrates how loyalty can in and of itself provide a basis for liability when a Member State acts unilaterally and the act could interfere with a common strategy formulated at the EU level. It is also evident that loyalty operates preemptively in EU external relations; in other words, a Member State can be liable even where there is only a strong possibility of its unilateral act interfering with the EU's common rules at a later stage, rather than a certainty. Furthermore, this preemptive duty of loyalty is such that a Member State can be liable for taking unilateral action even where (1) it is arguable that the relevant EU institution has itself failed to act loyally; (2) the action involves an international organization to which the Member State belongs, but the EU does not; and (3) the common EU position with which the action interferes is not one that can be deduced from the EU's positive action, but from its consistent inaction.

It therefore seems that loyalty severely limits the extent to which an EU Member State can unilaterally act in relation to third party entities on the international plane, despite how the *Inland Waterways* cases could be interpreted as allowing Member States to avoid liability by endeavoring to inform and consult the Commission.[118] Indeed, De Baere has gone so far as to suggest that there are now two situations where Member States have an

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[112] *Id.*

[113] *Id.* at paras. 72-73; TFEU art. 4(1) & (2).

[114] *Sweden*, Case C-246/07 at para. 76.

[115] *Id.* at para. 105.

[116] *Id.* at para. 89

[117] *Id.* at paras. 103–05.

[118] Case C-459/03, Comm'n v. Germany, 2005 E.C.R. I-6985.

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absolute duty to abstain from acting.[119] These situations exist where it is clear that the EU's inaction is in fact its position, rather than "a sign of blockage of the Union decision-making process," and where "the independent action of the Member State is liable to damage the Union," such as by potentially leading to measures that bind it.[120] This line of cases also demonstrates that loyalty creates far stricter limitations upon Member State action than EU action, meaning that the external use of loyalty in EU law does not reflect the principle's nature as a "two-way street" to the same degree as the approach to state liability seen in the internal use of loyalty.

This state of affairs in EU external relations is important because it boldly illustrates how there are simultaneously deep connections and profound differences between *pacta sunt servanda* and loyalty. On the one hand, it remains true that both principles embody the broader concept that states who voluntarily assume international obligations must fulfill these obligations in good faith and that this remains a strong underlying rationale for the use of loyalty to constrain Member States from potentially jeopardizing the aims of the EU. On the other hand, the CJEU considers the duty of cooperation under EU law to take precedence to the extent of finding liability based on the concept of loyalty alone. This is true even if the EU Member State in question enjoys rights as a member of another international organization and the impact of the Member State's act upon EU legal rules is merely probable rather than actual, as was the case with Greece in the *IMO* decision.[121] Under the general rules of treaty interpretation in public international law, a treaty must be interpreted in good faith "in the light of its object and purpose,"[122] which may cause a signatory state's otherwise lawful act to amount to breaching a specific provision under the treaty.[123] Nevertheless, this falls significantly short of using good faith as a sole source of liability in the same manner that the CJEU uses loyalty.

It is understandable why the CJEU has come to use loyalty in such an extensive fashion. As the EU has evolved, it has become noticeably more driven towards achieving and maintaining its status as a player on the international scene.[124] Putting aside the question

[119] Geert 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*, 36 EUR. L. REV. 405 (2011).

[120] *Id.* at 417.

[121] Case C-45/07, Comm'n v. Greece, 2009 E.C.R. I-701.

[122] VCLT art. 31(1).

[123] In determining whether a provision has been breached, the treaty should be interpreted by reference to the circumstances prevailing at the time of its conclusion. Cameroon v. Nigeria, 2002 I.C.J. 303, 346 (Oct. 10).

[124] For one official acknowledgement of the EU's aim to strengthen its position as a global actor, see Presidency Conclusions, Laeken Council of the European Union, Laeken Declaration on the Future of the European Union, SN 300/1 ADD 1, Annex I, at 2 (Dec. 14, 2001), *available at* http://europa.eu/rapid/press-release_DOC-01-18_en.htm [hereinafter Laeken Declaration]. In particular, see the section headed "Europe's New Role in a Globalised World." *Id.* at 3.

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of whether it is empirically supported, there is a widespread assumption that "if the EU agrees on common positions and speaks with one voice, it will have influence."[125] The need to achieve such a level of perceived unity and coherency becomes especially problematic where the EU seeks to interact with international organizations in which the EU Member States have membership, but the EU itself does not—the UN being a prominent example.[126] By treating the principle of loyalty both as a means of delineating competence and as an independent source of liability, the CJEU can restrain Member States from unilaterally acting in a manner that could jeopardize not only the common rules within the EU legal order, but also the position the EU wishes to adopt on the international plane. This would allow the EU to be perceived by other international actors as possessing "one voice," thereby fulfilling its desired position as an independent and influential player, or so the EU hopes.[127]

Nevertheless, the use of loyalty to impose increasingly expansive constraints upon the Member States has left the Member States in the strange position of being sovereign nations with obligations to the EU that have severely restricted their external relations, even in areas outside of the EU's exclusive competence. In Casteleiro and Larik's words, "With the unfolding of the wide scope of the duty of cooperation and the strict duties that ensue from it, the Member States might well end up remaining masters of the EU Treaties, but of those only."[128] To summarize, while the CJEU's external use of Article 4(3) of the TEU reflects the general, thematic connection between the principles of loyalty and *pacta sunt servanda*, the resulting loyalty-based constraints upon EU Member States act as an independent basis of liability that goes far beyond the most expansive reading of good faith in the law of treaties. Furthermore, the CJEU relies upon Article 4(3) of the TEU in a manner that fails to express its acknowledgement of the reciprocal and cooperative relationship between the EU and its Member States, in which each should actively attempt to accommodate the other and acknowledge mutual ongoing endeavors to act loyally. This relationship makes loyalty more conceptually nuanced than *pacta sunt servanda*. The divergence between loyalty's internal and external use fails to realize the moral qualities of loyalty as a principle and jeopardizes the doctrine's overall coherency.

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[125] Karen E. Smith, *Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations*, 44 J. COMMON MKT. STUDS. 113, 116 (2006).

[126] For an extensive analysis of EU coordination at the UN, see Anne Degrand-Guillaud, *Actors and Mechanisms of EU Coordination at the UN*, 14 EUR. FOREIGN AFF. REV. 405 (2009); Anne Degrand-Guillard, *Characteristics of and Recommendations for EU Coordination at the UN*, 14 EUR. FOREIGN AFF. REV. 607 (2009).

[127] Laeken Declaration, *supra* note 124; Smith, *supra* note 125.

[128] Casteleiro & Larik, *supra* note 44, at 541.

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D. Broader Significance and Conclusion

From an examination of the relevant jurisprudence on *pacta sunt servanda* and loyalty, it appears that the two principles share a common, thematic core: The need for states to fulfill their agreed obligations in a faithful manner. Despite this common core and how the "good faith" component of *pacta sunt servanda* has occasionally been used in a noticeably expansive fashion, loyalty in EU law has been utilized to an extent that far exceeds *pacta sunt servanda*. Loyalty has been used as a legal basis for significant developments in doctrine within the European order, such as the primacy of EU law and state liability under *Francovich*.[129] It has also been used in EU external relations to delineate the EU and Member States' respective competences and to provide an independent basis for liability. A further level of sophistication which loyalty possesses in comparison to *pacta sunt servanda* is its express recognition of a relationship marked by reciprocity and cooperation, which has the potential to create a more nuanced and flexible regime of liability than in public international law. Nonetheless, while the CJEU's internal use of loyalty has reflected this aspect of loyalty to a degree, such as the approach to state liability under *Brasserie* and *Köbler*,[130] the same application has not occurred consistently across EU law. This is apparent from the use of loyalty to impose considerably more stringent constraints on the Member States in EU external relations than on EU institutions.

Considering this review of *pacta sunt servanda* and loyalty, questions arise as to why loyalty in EU law has assumed a more detailed and extensive nature compared to *pacta sunt servanda* and how this elucidates the precise relationship between the doctrines. To answer these questions, one must place the EU within the broader context of international law's development since the end of the Second World War. During this period, there has been a significant increase in international legal orders that possess high levels of institutional sophistication and competence in areas traditionally associated with sovereign states, such as economic integration and the protection of fundamental rights.[131] Prominent examples of such legal orders other than the EU include the Council of Europe and the World Trade Organization. Identifying the precise theory of international relations that best explains the introduction and operation of these transnational bodies would fall beyond the scope of this article.[132] What is important for present purposes is how the

[129] Case C-6/90, Francovich v. Italy, 1991 E.C.R. I-5357.

[130] Case C-46/93, Brasserie du Pecheur SA v. Germany, 1996 E.C.R. I-1029; Köbler v. Austria, 2003 E.C.R. I-10239.

[131] For an extensive analysis of such legal orders and the general debate over whether they are truly "self-contained" subsystems within international law, see Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L. L. 483 (2006).

[132] An early and prominent debate in this area occurred in the 1970s between scholars who supported a "state-centered" view of global politics and those who supported a "society-dominated" view. For examples of works that contributed to this debate, see TRANSNATIONAL RELATIONS AND WORLD POLITICS (Joseph S. Nye, Jr. & Robert

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existence of these systems challenges the Westphalian paradigm in international law of states independently interacting with other states.

As noted earlier, many of the more expansive treatments of good faith in public international law, such as those with respect to unilateral representations by states, reflect the greater expectations of international cooperation in modern times.[133] Furthermore, the rise of supranational and transnational bodies whose objectives necessarily touch upon substantial areas of domestic law and policy requires a greater degree of cooperation between the relevant states and international institutions. With a higher level of cooperation, a clear need emerges for a doctrinal embodiment of the general notion that obligations to which states agree must be faithfully fulfilled with a level of sophistication and nuance that goes beyond *pacta sunt servanda*. This need emerges because, as its very name suggests, *pacta sunt servanda* was initially understood and codified under the VCLT with the simpler Westphalian paradigm in mind of states directly contracting with each other.

In other words, perhaps the best understanding of the relationship between *pacta sunt servanda* and loyalty is one of differing degrees of conceptual specification or, more specifically, an understanding of how international subsystems make such specification possible. One model of conceptualization and classification that may be useful in this respect is Sartori's "ladder of abstraction."[134] For the purposes of comparative analysis, Sartori's ladder envisions that a root concept can either move "up" the ladder to increase generality, thereby granting the concept fewer defined attributes, or move "down" the ladder to increase differentiation, thereby granting the concept more defined attributes.[135] Accordingly, a concept that moves "up" the ladder applies to a wider range of cases because it is more abstract, while one that moves "down" the ladder applies to a narrower range of cases because it is more specific. Not surprisingly, international law is highly fragmented, consisting of a plurality of states, international organizations, and other actors involved in multiple treaty regimes, rather than one coherent global "legal system" per se. One consequence of this fragmented and decentralized multiplicity of legal systems is that the general rules of international law, particularly those derived from custom, are relatively broad and primitive. In contrast, a centralized subsystem with a more extensive institutional framework is in a better position to utilize the simpler, general concepts in international law with increased sophistication and specificity.

O. Keohane eds., 1972); RICHARD W. MANSBACH, YALE H. FERGUSON & DONALD E. LAMPERT, THE WEB OF WORLD POLITICS: NON-STATE ACTORS IN THE GLOBAL SYSTEM (1976).

[133] D'Amato, *supra* note 12, at 599.

[134] Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 AM. POL. SCI. REV. 1040 (1970).

[135] *Id.* at 1046.

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Applying Sartori's typology, one can say that within international law, there is a root concept that the obligations to which states agree must be observed in good faith. Higher up the "ladder of abstraction," this concept is the principle of *pacta sunt servanda* in public international law, as codified by Article 26 of the VCLT. Further down the ladder, the same root concept forms the principle of loyalty under Article 4(3) of the TEU, with the EU's centralized framework of institutions and competence in areas traditionally associated with sovereign states, allowing the concept to reach a degree of nuance and sophistication unseen in general international law. Examples of this nuance and sophistication include the use of loyalty as a basis for new legal doctrines aimed at ensuring the effective achievement of the EU's aims, as well as the CJEU's ability to diverge from the stricter regime of state responsibility standard in public international law when determining state liability under EU law.

The question remains of why it is valuable to take this view of loyalty and *pacta sunt servanda* as simultaneously connected to and divergent from each other. After all, even if the CJEU has acknowledged the validity of *pacta sunt servanda*[136] and good faith[137] in EU law, the CJEU continues to invoke "the constitutional language of 'autonomy of EU law' to preserve the character of the EU as an independent legal order."[138] With this consistent affirmation of the EU's identity as an autonomous and self-contained system in mind, it would appear that the potential position of *pacta sunt servanda* within the EU's legal order is largely occupied by loyalty, which does not form part of international law in general. It could thus be argued that the existing jurisprudence on *pacta sunt servanda* contributes little to understanding loyalty and vice versa, even if the principles truly exist on the same "ladder of abstraction."

In spite of the merits of this argument, there are benefits to be gained from this conceptualization of loyalty and *pacta sunt servanda* as variations of the same root concept. One more abstract benefit is realizing that one cannot understand the EU in complete isolation from the wider jurisprudence of international law, even if it is an autonomous system. Indeed, by demonstrating a strong, thematic connection between one of the EU's core constitutional principles and a long-established customary norm, the developments of loyalty within the EU context might not represent as sharp a break in continuity with the rest of international law as commonly supposed. A second, more specific benefit to be gained from this comparison is how the developments in loyalty can provide an insight into the evolution of *pacta sunt servana* outside the EU context.

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[136] Case C-162/96, A Racke GmbH & Co v. Hauptzollamt Mainz, 1998 E.C.R. I-3655, para. 49.

[137] Case T-115/94, Opel Austria GmbH v. Council, 1997 E.C.R. I-39, para. 90.

[138] Theodore Konstadinides, *When in Europe: Customary International Law and EU Competence in the Sphere of External Action*, 13 GERMAN L.J. 1177, 1179 (2012).

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While the EU is considered the paradigm example of a supranational body that challenges the state-centric, Westphalian conception of international law, it is not the only international legal order to make this challenge. Over the years, other regional systems have developed their own institutional frameworks to achieve quasi-state functions based on the model provided by their European counterparts. The Organization of American States (OAS), which has come to introduce its own General Assembly and Court of Human Rights, is an example of such a regional system.[139] Within this changing international landscape, need and opportunity arise for primitive, general concepts in international law to be refined into more sophisticated mechanisms. The view of loyalty as further "down" the ladder of abstraction in comparison to *pacta sunt servanda* is therefore valuable because it provides an example of how the root concept that states must keep their agreements and perform them in good faith may eventually be refined within other subsystems. More specifically, the development of loyalty within EU jurisprudence could provide an example to those subsystems that are yet to approach the EU's level of centralization and complexity, but are evolving in that direction.

There are admittedly potential objections to treating the CJEU's jurisprudence on loyalty as a possible model of how such systems should proceed when adding specificity to the abstract concepts in international law. After all, the scholarship on regional integration has experienced a noticeable rise in skepticism towards using the EU as a template for development.[140] This is due in large part to the fact that functional pursuits and differing sets of converging interests in regions in other than Western Europe mean that there can be no "universal 'law of integration' deduced from the European example."[141] The general problem created by these disparities in function and interest is compounded by how the political and economic crises suffered by the EU risk weakening "its legitimacy as a model for the rest of the world."[142] Overall, there is an understandable danger that using loyalty as a model for the development of *pacta sunt servanda* in other subsystems will only distract other organizations from their distinct considerations and perpetuate the EU's "integration snobbery."[143]

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[139] The General Assembly of the OAS was established under the Protocol of Amendment to the Charter of the Organization of American States, art. XIII, Feb. 27, 1967, 119 U.N.T.S. 3. The Inter-American Court of Human Rights was established under G.A. Res. 448, Statute of the Inter-American Court of Human Rights (Oct. 1, 1979).

[140] For some recent examples, see Philomena Murray, *Comparative Regional Integration in the EU and East Asia: Moving Beyond Integration Snobbery*, 47 INT'L POL. 308 (2010); Armitav Acharya, *Comparative Regionalism: A Field Whose Time Has Come?*, 47 INT'L SPECTATOR 3 (2012).

[141] E.B. Haas, *International Integration: The European and Universal Process*, 15 INT'L ORG. 366, 378 (1961).

[142] Archarya, *supra* note 140, at 11.

[143] Murray, *supra* note 140, at 309.

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Despite the suggested dangers, drawing from the jurisprudence on loyalty need not confine us to a blindly Eurocentric standpoint because drawing inspiration from the CJEU's developments of loyalty does not simply mean looking at uses of loyalty that reflect an overtly reciprocal and cooperative relationship between states and international institutions. It also means looking at those uses of loyalty that fail to do so. Putting it bluntly, there is as much valuable guidance in avoiding the EU's failures as there is in following its successes. Drawing from the examples discussed above, a regional system requiring a level of necessary coordination between its institutions and signatory states more sophisticated than the general law of *pacta sunt servana* could refine the principle to support a more flexible regime of responsibility, akin to EU state liability. At the same time, this regional system could avoid those problematic measures that have imposed unforeseeably extensive restraints upon the EU Member States in a manner that undermines the system's moral coherence and, by extension, the system's political legitimacy.[144] These undermining measures include the rigid constraints placed upon the Member States in EU external relations. As long as other international bodies are willing to view the relevant jurisprudence through this critical lens, the idea of loyalty as an evolved form of *pacta sunt servanda* remains valuable to the overall development of international law.

Although *pacta sunt servanda* and loyalty have experienced separate lines of development in public international and EU law respectively, the fact that they share a common core is more than a passing resemblance. It demonstrates that the two principles are embodiments of the same root concept, distinguished by the defined attributes that loyalty has developed, thereby allowing that root concept to develop greater nuance and be utilized in a more sophisticated fashion. Such applications of loyalty include its use as a source of legal competence and its nature as an independent source for establishing liability. Although the manners in which the principle has been applied by the CJEU do not always reflect its nuance, the EU jurisprudence on loyalty is valuable because of the potential example it provides for how other supranational bodies developing a similarly advanced institutional framework may eventually refine *pacta sunt servanda* within their own legal orders. By providing this insight into how the general concepts in international law can be refined into specific and sophisticated mechanisms, one could say that the EU is, in a sense, fulfilling its obligation to contribute to "the development of international law."[145] No matter how conceptually removed from *pacta sunt servanda* loyalty may seem,

[144] This connection between coherence in the sense of constructing an integrated whole that is consistent with itself and legitimacy is inspired by Dworkin's interpretivist concept of "law as integrity." RONALD DWORKIN, LAW'S EMPIRE 225 (1986).

[145] TEU art. 3(5).

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in observing loyalty, the EU and its Member States still "cling to Faith beyond the forms of Faith," or "good faith," as the case may be.[146]

[146] This quotation, which provided the title for this article, is from Alfred, Lord Tennyson's *The Ancient Sage*, line 39 (1885).

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