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ARTICLES

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I. INTRODUCTION

The European Economic Community (EEC)[1] has increasingly exercised its power to act on the international scene as an equal with sovereign nation states. This phenomenon is an acknowledgement of the European Community's international personality[2] and its ability to negotiate

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1. The terms European Economic Community, European Community, Community and EEC will be used interchangeably in this paper. The EEC was established in 1958 by the Final Act of the Intergovernmental Conference on the Common Market and Euratom, Mar. 25, 1952, 298 U.N.T.S. 3 (*effective* Jan. 1, 1958) (as amended through 1976) [hereinafter cited as Rome Treaty, Treaty of Rome or Treaty]. The primary institutions of the Community are: the European Assembly, the Council of Ministers, the European Commission, and the European Court of Justice. By the conclusion of the Treaty establishing a Single Council and a Single Commission of the European Communities, *done* Apr. 8, 1965, [hereinafter cited as Merger Treaty], the Council and Commission were made a common institution for all three treaties: EEC, Euratom, and ECSC. The Assembly and Court of Justice had already been made into common institutions by a Convention on Certain Institutions Common to the European Communities, which was included among the annexes to the Treaty of Rome.

Other important Community organs include the Committee of Permanent Representatives (composed of representatives of the Member States appointed by the Council to serve as a liaison between Commission and Council) and various management committees.

2. For a discussion of the various theoretical bases for granting the Community international legal personality as well as arguments against that personality, see Feld, *The Competences of the European Communities for the Conduct of External Relations*, 43 TEX. L. REV. 891 (1965). For background material, see Rome Treaty, *supra* note 1, art. 210; Hohehveldern, *The Legal Personality of International and Supranational Organizations*, 21 REVUE EGYPTIENE DE DROIT INTERNATIONAL 35 (1965); Seyersted, *Objective International Personality of Intergovernmental Organizations*, 34 NORD. TIDSSKRIFT FOR INT'L REL 1 (1964). The view of the European Parliament is stated in *Resolution on the Position of the European Communities in International Law*, O.J. EUR. COMM. (No. C 239) 16 (1978). Wellenstein, *Twenty-Five Years of European Community External Relations*, 16 COMMON MKT. L. REV. 407 (1979) presents a general historical survey of Community external relations.

and sign legally binding international contracts with nation states, i.e., treaties. This paper will discuss the origin of this treaty-making power in the legal documents which form the basis of the European Community. In addition, it will set forth some situational models which outline various combinations of realistic situations facing a court at tempting to interpret the treaty-making powers of the EEC. These models will serve as a guide to understanding the development of the treaty-making power in the case law of the European Court of Justice (Court, European Court or Court of Justice) and will provide the framework for the examination of the theoretical development of the treaty-making power by the Court. The paper will also give an analysis and synthesis of the opinions and judgments of the Court as well as discuss specific problems created by EEC treaty-making theory and practice vis-a-vis non-Member States. Finally, an attempt will be made to contrast the theoretical development of the treaty-making power with the treaty-making procedure in practice. Future trends and problems for the EEC treaty-making power shall be examined in light of this conflict between present theory and practice.

This article shall demonstrate the extent to which the European Court of Justice has begun to act like a federal constitutional court in its theoretical development of a Community treaty-making power. This power permits the EEC to act dynamically and flexibly in concluding agreements in a changing international environment, but practical application of this theoretical development lags somewhat behind the Court's decisions.

The integration process of the EEC can be clearly measured by external affairs and treaties. A study of the treaty power is important because it shows the extent to which the Member States have learned to speak through a single spokesman, and it vividly demonstrates the constitutional problems resulting from the distribution of powers between the Community and its Member States. The EEC sets examples and illustrates potential problems for other states and economic communities which contemplate eventual political integration via economic integration.

II. THE TREATY POWER IN THE TREATY OF ROME

The Treaty of Rome mentions four main areas of external relations. These areas are:

a) Commercial Policy: Articles 113, 114 and 116, which apply after the end of the transitional period, confer on the Community the power to negotiate and sign commercial treaties. These articles also prescribe voting requirements and procedures for negotiating and signing commercial agreements with non-Member States.[3]

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3. Rome Treaty, note 1 *supra*. Article 113 provides:

1. After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff

b) Association: Association agreements are trade and aid agreements with non-European countries which were either colonies or dependent territories of a Member State at the time the Community was formed. Developing countries with a "special relation" to a Member State to whom the Community has decided to give preferential trade status are also included. While articles 131 to 136 discuss association status for the above class of countries, article 238, which grants a treaty-making power and gives procedural guidance for concluding association agreements, includes in its definition of "association" agreements with more than just the above few categories of states.[4]

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votes, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special Committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

Article 114 provides:

The agreements referred to in Article 111, (2) and in Article 113 shall be concluded by the Council on behalf of the Community, acting unanimously during the first two stages and by a qualified majority thereafter.

Article 116 provides:

From the end of the transitional perios onwards, Member States shall, in respect of all matters of particular interest in regard to the common market, proceed within the framework of international organisations of an economic character by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action.

During the transitional period, Member States shall consult each other for the purpose of concerting the action they take and adopting as far as possible a uniform attitute.

4. Rome Treaty, note 1, *supra*. Article 238 provides:

The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association embodying reciprocal rights and obligations, common action and special procedures.

These agreements shall be concluded by the Council, acting unanimously after consulting the Assembly.

Where such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236.

In Cohen, *The Association of Third Countries with the E.E.C. Pursuant to Article* 238, 26 U. PITT L. REV. 521, 527 (1965), the author defines the associative relationship based on article 238 as:

a bilateral relationship, possibly of permanent duration, between the Community acting as a separate personality and a third state, union of states, or international organization, involving fewer rights and obligations than accession to

c) International Agreements: Articles 229 to 231 require the Community to maintain good relations and cooperation with the United Nations, the Council of Europe, and the Organisation of European Economic Cooperation (now OECD). Article 228 establishes the general procedures for the negotiation and signing of all international agreements to which the Community is a party.[5]

d) Admission of New Member States and Amendments: Both articles 228 and 238 provide that an agreement or association may require an amendment to the Treaty of Rome. The amendment procedure is in article 236.[6] The powers of the Community can, of course, be increased at any time by the procedure in article 235.[7]

These articles indicate, as one writer has concluded, that the authors of the Treaty of Rome contemplated a scheme which would develop into

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full membership, but involving a higher degree of cooperation with and participation in the structure and methods of the Community, usually in the form of the eventual establishment of a customs union or free trade area, than an ordinary commercial agreement.

P.J.G. Kapteyn & P. Ver Loren Van Themaat, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 351 (1973) distinguish three types of association assistance: "[a]ssociation as a special form of development assistance, association as a preliminary to membership of the EEC, and association as a substitute for such a membership."

5. Rome Treaty, *supra* note 1, art. 228. Article 228 provides:

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the Assembly where required by this Treaty.

The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where an opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 236.

2. Agreements concluded under these conditions shall be binding on the institutions of the Community and on Member States.

6. Rome Treaty, *supra* note 1, art. 236. Article 236 provides:

The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty.

If the Council, after consulting the Assembly and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

7. Rome Treaty, *supra* note 1, art. 235. Article 235 provides:

If action by the Community should prove necessary to achieve in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the measures.

a Community foreign relations power.[8] Even so, some important constitutional restrictions must be emphasized. First, the association agreements under article 238 require unanimity. This effectively gives each Member State a blocking veto. The same veto power exists for amendments under article 236 and for admission of new members under article 237.

In contrast to association agreements, commercial agreements negotiated under article 113 and concluded under article 114 require only a majority vote of the Council for approval. Thus, based on the Treaty of Rome, the Community can conclude commercial agreements under its cognizance even in the face of some Member State opposition. This arrangement is a sign of supranationality and it is a step toward an independent foreign policy, at least in the commercial area.

Article 228 establishes the procedures for negotiating and signing all international agreements. It applies to both articles 113 and 238 unless specifically changed by those articles. Article 228 gives Parliament a limited consultative role before the agreement is finally approved by the Council. It gives the Court the opportunity, if requested, to determine the compatibility of any proposed agreement with the Treaty of Rome prior to signature. While article 228 provides the broad framework for international agreements, it does not determine whether the Council vote must be unanimous or by a majority. However, if article 228 is meant to be applied to a subject area such as commerce, where only a majority of Council votes is needed for approval, a treaty-making process exists under which article 228 provides for potential input by all of the organs of the EEC. Each organ acts independently within its respective area with the voting requirement determined by the subject area. Similar procedures are involved with association agreements pursuant to article 238.

Unfortunately, the above constitutional type of procedures which envisage a broad grant of treaty-making power have not been followed in practice. The source of many problems concerning the practice and procedure of the Community's treaty-making powers lies in the political conflict between the European Commission and the Council of Ministers (hereinafter referred to as Council). As a representative of the national interests of the Member States, the Council tends to act in a less Community-oriented fashion than the more integrationist Commission.[9] This attitude causes the Council to favor legal arguments requiring unanimity for Council votes, except in the most narrowly defined areas. The Council fears that an independent Community treaty-making power might be used to expand the powers of the Community in all areas, much as the U.S. federal government has used the commerce power to expand its au-

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8. Leopold, *External Relations Power of the EEC in Theory and in Practice*, 26 INT'L & COMP. L.Q. 54, 58 (1977).

9. Costonis, *The Treatymaking Power of the European Economic Community: The Perspectives of a Decade*, 5 COMMON MKT. L. REV. 421, 427-28 (1967-68); Leopold, *supra* note 8, at 59-60; Norton, *The Treaty-Making Power of the European Economic Community—A Constitutional Crisis Facing the EEC*, 7 INT'L LAW. 589, 589-92 (1973).

thority. Hence, the Council has looked for ways to enforce a rule of unanimity and to keep to it self any discretionary decision-making power over the compatibility of agreements with the Treaty of Rome, rather than surrendering such decisions to the Court. Having explored the origin of the EEC's treaty-making power, it is appropriate to discuss the theoretical legal development of the treaty-making power by the Court of Justice and the implications of this development.

III. SOME SITUATIONAL MODELS FOR AN ANALYSIS OF THE TREATY POWER

The purpose of this discussion is to set forth some situational models which present problems and questions concerning treaty interpretation, i.e., the scope of treaty powers. There are two objectives to this exercise. The first is to put aside the political conflict between Commission and Council and to focus attention on the judicial resolution of these situational models in order to understand better the future development of Community law. The second objective is to make it easier to understand the influence of the Court's opinions on the development of the Community's treaty-making powers.

The basic divisions among these models are between internal and external powers of the Community, implied and expressed powers in the Treaty, and internal powers exercised and internal powers unexercised:

Model #1 1. internal powers: expressed and exercised
2. external powers: expressed
Model #2 1. internal powers: expressed and unexercised
2. external powers: expressed
Model #3 1. internal powers: expressed and exercised
2. external powers: implied
Model #4 1. internal powers: expressed and unexercised
2. external powers: implied
Model #5 1. internal powers: implied and exercised
2. external powers: implied
Model #6 1. internal powers: implied and unexercised
2. external powers: implied

The situation presented by the first two models is exemplified by article 113, where the Community may or may not have exercised an express internal power to enact a uniform tariff rate between Member States. Article 113 also gives an express power to the Community to become a party to an international tariff agreement.[10] The first question presented to the Court in these begin ning models is whether the Court must link Community desire to exercise an express external power with an unexercised or exercised express internal power concerning the same subject matter. As the power to act externally is expressed in article 113, the linkage seems unnecessary. The Community appears to have the

10. Rome Treaty, note 1 *supra*. For text of article 113, see note 3 *supra*.

power to harmonize both its internal and external regulations concerning an article 113 subject. Thus it could enact the common external regulation first by international agreement and then at a later date harmonize the internal regulations. No linkage seems necessary because both powers are expressed.

A more difficult problem to resolve is whether the express external power of the Community in models 1 and 2 should be exclusive to the Community and denied to the Member States altogether. Because the external power over, for example, article 113 subject matter is expressly mentioned in the Treaty, the obvious argument is that the Member States have delegated exclusively to the Community all of their sovereignty over international affairs in article 113 subject matter. Any other decision would allow the individual Member States to set conflicting national tariff rates. Obviously, the avoidance of this chaotic situation was the very purpose behind the founding of the Community. Therefore, exclusive possession by the Community of external powers where these powers are expressed in the Treaty seems a necessity for carrying out the purpose of the Treaty.

Models 3 and 4 present an entirely new set of questions because external powers are implied from the Treaty rather than expressed. These models can be examined with reference to article 75,[11] which deals with transport, or those articles which concern Community agricultural and fisheries policy. In these articles, powers are expressly granted to the Community for the purpose of harmonizing internal laws and policies in these areas. No express mention is made of Community powers to negotiate external agreements concerning these subjects. Once again the same questions must be asked: Must a linkage be established so as to imply an external power as necessary and proper to effectuate an express internal power?; Does it matter if the express internal power has not yet been exercised?; Finally, in either of these situations is this implied external power of the Community exclusive for that subject matter?

Considering these problems, we can reflect on what could happen if an express power is not implied as being necessary and proper to give effect to a common internal policy. One Member State could ratify an international agreement with several non-Member States. At that point in time, the agreement could be in harmony with a common Community internal policy. Several years later, a majority of the Community could vote to change the internal policy, thus forcing the Member State either to break its prior harmonious, but now conflicting, international contract or to live with disharmonious internal and external Community policies in an area such as transport, fisheries or agriculture.

This awkward situation can be carried a step further with the result that several Member States refuse to vote to change or to advance Community internal harmonization because of previously made external

11. Rome Treaty, *supra* note 1, art. 75.

agreements that over the years have become extremely advantageous to their national interests. This situation could result in temporary "freezes" in the advancement of internal harmonization policies until the benefits of these prior external agreements were reaped by a few Member States. In such a case, the external policies of the Member States would be dictating the pace of progress toward intra-Community harmonization. This is exactly the reverse method of approach sought by the Community's founders.

The above situation would only be compounded if the internal subject area required unanimity for internal Community harmonization. In that case, a prior lucrative external agreement of only one Member State could force a "freeze" in internal development.

This "freezing" can only be avoided if external powers are implied from express internal powers both where the Community has already enacted a common internal policy, as well as where the Community has not yet acted. In the situation where the Community has not yet acted, it is necessary to imply an external power without linkage to an exercised internal power for two reasons. First, a previously made external agreement of a Member State or States could delay the creation of a common internal policy to which the desired external power must be linked. This would result in closing out some Community options on the type and method of both internal and external unification. The Community must be able to decide for itself whether first to unify its external or internal policies over subject matter within its cognizance. Second, requiring linkage of an implied external power to an exercised internal power would create a problem if at some future date the internal power is no longer exercised. Does that mean the external power lapses automatically? Does this result in voiding international agreements and contracts?

On the exclusivity issue, it is again conceivable to envision concurrent Member State and Community external policies. Nevertheless, while the external policies may be harmonious at a given point in time, the same problems of potential future disharmonization result as with models 1 and 2. Once the external policy is implied as covering a given subject area, the Community external policy must eventually move toward exclusivity or, at the very least, supremacy over conflicting national external policy.

Models 5 and 6 represent the highest level of legal powers of a constitutional community. In each case neither internal nor external powers of a specific nature are mentioned in the constitutional document. Yet, any constitutional court knows that a community must remain dynamic and responsive to events unanticipated when the founding documents of the community were drafted. In order for the Community to remain flexible, the Court may have to look to the purposes, general principles, or objectives sought to be achieved in the creation of the Community. From these objectives or general principles, the Court can imply a power in the Community in order for the Community to preserve itself as a dynamic international organism capable of achieving the purposes for which it was

founded. This power also enables the Community to act in a changing international or national environment.

If a constitutional court is incapable of implying either an internal or an external power to the Community as in models 5 and 6, it is only a matter of time before the problems of national interest will conflict with Community development and "freeze" any further integration. The changing factors of time and events acting on an inflexible government or Community constitution will produce these problems of conflict. It may not even be necessary to come to grips with any Member State nationalism. Chief Justice Marshall, writing in *McCullough v. Maryland*, addressed the same phenomenon.[12]

With these situational models in mind, the next part of the article examines the case law of the European Court of Justice. Since the issues involved in these cases relate to one or more of the situational models, it may be easier to analyze the Court's development of Community treaty-making power. Also, the previous discussion may have pointed out some realistic Community and constitutional dynamics operating beneath the political conflicts which are obvious on the face of each case.

IV. THE THEORETICAL LEGAL DEVELOPMENT OF THE TREATY POWER IN THE EUROPEAN COURT OF JUSTICE

A. *Commission v. Council*

Before analyzing the European Court of Justice cases concerning treaty-making, it should be pointed out that the Council-oriented procedures to be discussed were in use for over a decade. The fact that such a length of time passed before the Court decided a case in this most sacred of sovereign state power areas is a significant indication of the Commission's desire to avoid any violent confrontation with the Council. It also could be argued that this delay illustrated the Court's avoidance of such a confrontation until the Commission forced the issue.

The issue of the scope of Community treaty-making powers first reached the Court in 1971. In discussing foreign relations, the Treaty of Rome specifically mentions only commercial agreements, associations, and the admission of new members. The major issues in *Commission v. Council*[13] were whether the Community had an implied external affairs

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12. In McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819), Chief Justice Marshall stated:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

13. Comm'n of the European Communities v. Council of the Communities, 1971 C. J.

power beyond those external powers specifically expressed in the Treaty of Rome, and if so, whether the external powers were exclusive to the Community or concurrent with those of the Member States. Thus, the case was similar to situational model 3 of part III.

The dispute arose out of negotiations with third countries which aimed at creating uniform working conditions for crews on trucks engaged in international transport. The problem had been attacked by the International Labor Bureau, the International Labor Organization, and finally in 1962, by the Economic Commission for Europe in the United Nations. In 1962, this latter organization proposed to the governments of the European countries a European Agreement on Working Conditions in Road Transport (E.R.T.A.).[14] The agreement was signed by five of the then six Member States of the Community and several other governments, but did not come into force due to an insufficient number of ratifications.[15]

Meanwhile, the Community drafted its own regulation which was slightly different from E.R.T.A. This regulation was in effect within the Community, but the effective date regarding traffic between the Community and non-Member States was postponed because of a Community desire to reconcile the regulation with the continuing dis-cussions over E.R.T.A. by the U.N. Commission. Finally, the Council compromised by amending the Community regulation to bring it into alignment with the new E.R.T.A. At the same time, the Council coordinated the negotiating positions of the Member States so that each could sign the agreement in its individual capacity without violating a Community regulation.

The Commission adamantly opposed this procedure. It insisted that because there was a Community regulation on road haulage, the Community alone, and not the Member States individually, had the right to participate in the continuing E.R.T.A. negotiations and to sign the new accord.

The Commission argued that article 75, which gave the Community broad po wers to implement a common transport policy, must apply to relations with third countries.[16] This power was granted by paragraph 1(c) of article 75, which permitted "any other appropriate provisions" to be used by the Council acting by qualified majority, after the transition period, upon a proposal by the Commission to create a common transport policy. The Commission argued that a common internal transport policy

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Comm. E. Rec. 263; 10 Comm. Mkt. L.R. 335, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶8134 [hereinafter cited as Commission v. Council]. For discussions on this case see Collinson, *Foreign Relations Powers of the European Communities: A Comment on Commission v. Council*, 23 STAN. L. REV. 956 (1971); Malawer, *Treaty-Making Competence of the European Communities*, 7 J. WORLD TRANSNAT'L L. 169 (1973); Norton, *supra* note 9, at 602-10; Winter, *Annotation to Case 22/70, Re ERTA, Commission of the EC v. Council of the EC*, 8 COMMON MKT. L. REV. 550 (1971).

14. Commission v. Council, COMMON MKT. REP. ¶8134, at 7518.

15. *Id.* at 7521.

16. *Id.*

would be meaningless unless there was a coordinated common transport policy toward third countries.[17]

The Commission argued for a theory of "parallelism." Under this theory, once the Community has adopted a regulation creating a common internal policy in a given area, for example, road haulage in the transport area, the Member States are precluded from dealing with that matter not only internally, but also in negotiations with third states.[18] Thus, the competence of the Community would slowly expand externally and become exclusive as common policies in, for example, transport, were created internally. The Commission believed this development would insure that no conflict existed between internal and external agreements and that all common policies would be subject to the jurisdiction of the European Court.[19] The "qualified majority" rule in article 75 would also be preserved.

The Council replied that the only external powers given the Community were those powers specifically expressed in the Treaty of Rome.[20] Article 75 did not imply the powers given in the commercial area of articles 111 and 113. The Council argued that article 75 applied only to intra-Community measures. On the exclusivity issue, the Council maintained that Member States were free to negotiate individual external transport measures as long as no Community regulations were violated.[21] Even if article 75 did permit the Community to conclude external transport agreements, the Council felt the power would at most be concurrent with that of Member States and that the Council itself would decide in each case whether an international agreement should be concluded by the Community, by the Member States, or by both.[22] Naturally, the Commission denied the Council this discretion because such discretion would be at the mercy of the unanimity rule and would give the Council a function belonging to the Court.

Basically, the Court sustained the Commission's position. Recognizing that the Treaty did not contain specific provisions relating to the conclusion of external transport agreements, the Court stated that in such cases it becomes necessary to refer to the general system of Community law on relations with third countries.[23] A common transport policy was one of the principle objectives upon which the Community had been or-

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17. *Id.* at 7522.
18. *Id.*
19. *Id.*
20. *Id.* at 7522-23.
21. *Id.* at 7523.
22. *Id.*
23. *Id.* at 7524-25. The Court interpreted article 210 as follows:
> Article 210 provides that 'the Community has legal personality.' This provision, which is the first provision in Part Six of the Treaty, devoted to 'General and Final Provisions,' means that in external relations the Community has the power to establish contractual relations with third States in the *entire field of the objectives defined in the first part of the Treaty* . . . . (emphasis added).

ganized and was specifically mentioned in part one, article 3(e) of the Treaty.[24] Under article 75, common transport rules shall be applicable to "international transport from or to the territory of a Member State or passing across the territory of one or more Member States."[25] Since that provision applies for the part of the transport route to transport to or from third countries, the Court held that the design for a common transport policy, "presupposes that the Community's competence covers regulations governed by international law and to that extent implies the need for agreements with the third States concerned."[26]

In all cases where the Treaty fails to specifically grant external negotiating authority, the Court will decide whether a common objective merits granting such authority by considering substantive and other Treaty provisions flowing from acts adopted within the framework of those provisions.[27] Here the Court accepted the idea that the Community must necessarily have "implied" and/or "inherent" treaty-making powers, which flow from both the specific provisions and the general principles of the Treaty. Even though the transport articles 74[28] and 75[29] did not expressly provide for a Community power to conclude external agreements, the coming into force of a Community regulation establishing a common policy internally "necessarily had the effect of giving the Community the power to conclude with third states any agreements relating to matters governed by that regulation."[30]

With regard to the exclusivity of these external agreements, once the agreements are concluded, the Court grants the Community the exclusive right to regulate external transportation to implement Treaty policy.[31]

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24. Rome Treaty, *supra* note 1, pt. one, art. 3(e).

25. Rome Treaty, *supra* note 1, art. 75.

26. Commission v. Council, COMMON MKT. REP. ¶8134, at 7525.

27. *Id.* The Court stated:

> In order to determine, in a specific case, whether the Community has the power to conclude international agreements, the organization as well as the substantive provisions of the Treaty need be considered. This power results not only from an express attribution in the Treaty—which is the case for Article 113 and 114 dealing with tariff and trade agreements and Article 238 in association agreements—but can also flow from other Treaty provisions and from acts adopted within the framework of those provisions by the Community institutions . . . .

28. Rome Treaty, note 1 *supra*. Article 74 provides: "The objectives of this Treaty shall, with regard to the subject covered by this title, be pursued by the Member States within the framework of a common transport policy."

29. Rome Treaty, *supra* note 1, art. 75.

30. Commission v. Council, COMMON MKT. REP. ¶8134, at 7525.

31. *Id.* The Court said:

> Particularly where, in order to implement a common policy set forth in the Treaty, the Community has taken measures providing for common rules in any form, the Member States no longer have the right, either individually or collectively, to contract with third States for obligations that impair these rules. As these common rules are gradually introduced, the Community alone can assume and execute, for the entire field of application of the Community's legal

Thus, there was to be nonconcurrent power in the area of external transport policy once the common regulation of transport within the Community had been established.[32] Furthermore, article 5 of the Treaty requires Member States to abstain from any measures that could jeopardize the realization of Community goals.[33] The Court also interpreted article 5 as disapproving concurrent external agreements by Member States.[34]

The Court agreed with the Council on the merits of the case, but adopted the "implied powers" approach by accepting the parallelism doctrine. The case reflects the cynicism of *Marbury v. Madison*,[35] which set forth strong federal constitutional doctrine yet gave the decision to the party seeking to limit federal power. Pescatore called the judgment a "prospective ruling."[36]

The following rules seem to have been set forth in the European Court decision.[37] First, the Court accepted the idea that the Community had "implied" and "inherent" powers of treaty making that flow from both specific Treaty provisions and from the general principles of the Treaty.[38] Second, by accepting the theory of parallelism, the Court held that the scope of the treaty power depended upon the establishment of common rules which would implement a common policy envisaged in the Treaty. As these common rules are established, the Community becomes competent to have exclusive rights to negotiate internationally in the ar-

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system, contractual obligations vis-a-vis third States. It would therefore be impossible, in implementing the Treaty provisions, to separate the rules applicable to intra-Community measures from those applicable to external relations.

32. *Id.* "Any initiative taken outside the framework of the common institutions is incompatible with the unity of the Common Market and the uniform application of Community law."

33. Rome Treaty, *supra* note 1, art. 5. Article 5 provides:

> Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims. They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty.

34. Commission v. Council, COMMON MKT. REP. ¶8134, at 7523.

35. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

36. Pescatore, *External Relations in Case-Law of the Court of Justice of the European Communities*, 16 COMMON MKT. L. REV. 615, 625 (1979).

37. The distinction which common law countries make between dicta and holding is not made in civil law courts such as the European Court. Even though civil law courts profess not to give precedential effect to prior decisions, such statements which the European Court has made on the scope of treaty-making powers become important for future cases because civil law courts accord to a consistent line to decisions of the highest court a "jurisprudence constante" which closely resembles common law courts "stare decisis." *See generally* J.H. MERRYMAN, THE CIVIL LAW TRADITION 48-49 (1969); E.H. WALL, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 811 (1966) (considering the place of the Court in the Community structure as well as the civil law tradition, it is probably fair to give equal weight to dicta and holdings).

38. Commission v. Council, COMMON MKT. REP. ¶8134, at 7533-37.

eas of these common rules.[39] This exclusivity prohibits any form of coordination of common action by Member States themselves in those areas.[40]

There are several implications to be drawn from these rules which concern the practice of EEC treaty making. First, there was no legal basis for the Council's attempts to limit articles 238 and 228.[41] Second, use of the mixed agreement procedure was no longer necessary and was possibly an illegal breach of the exclusivity rule.[42] Third, the Community's external competence could grow according to the principle *in foro interno, in foro externo*. Article 235 also could be used to increase the external powers of the Community. Fourth, the power of the Commission should be enhanced because article 228 grants the Commission the power to negotiate agreements, usually on the basis of a proposal by the Commission.[43] Fifth, Community power should be increased because when the Community alone signs an agreement, national parliamentary ratification procedures are avoided and Member States are automatically bound.[44] Sixth, the transfer of some foreign affairs powers to the Community would create a dynamic "dialogue" within the Community between Commission and Council and would "augur a substantial weakening of the political power of the national governments."[45] Naturally, not all the rules derived from the opinion have been followed, nor have all the implications come to pass. But the Court has never reversed course in its inter-pretation of the treaty-making power as this interpretation was first enunciated in *Commission v. Council.*

The Court in *Commission v. Council* recognized the problem which was illustrated in situational model 3: namely, the problem between a Community external policy and a Member State external policy[46] on the same topic. However, the resolution of the issue was viewed in terms of the potential impairment of the achievement of a common internal policy, rather than of a statement regarding the "freezing" of any future Community development. Also, the Court attempted to find the power to conclude international agreements on transport in the Treaty text itself, using article 75(a), without attaching much relevance to a "necessary and proper" or an "all other appropriate means" type of clause.[47]

B. *No.1/75: Opinion of the Court of Justice*

In July 1975, the Commission submitted to the Court of Justice a

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39. *Id.*
40. *Id.*
41. *See* Pt. V, *infra.*
42. *Id.* In the mixed agreement procedure, both Community and Member States participate in signature and ratification of the agreement.
43. Rome Treaty, *supra* note 1, art. 228.
44. Collinson, *supra* note 13, at 971.
45. *Id.* at 970.
46. Commission v. Council, COMMON MKT. REP. ¶8134, at 7535-36.
47. *Id.* at 7534-35.

request for an opinion pursuant to the second paragraph of article 228(1) of the Treaty of Rome.[48] The object of the request was to obtain the Court's opinion as to the compatibility to the Treaty of a draft "Understanding on a Local Cost Standard," drawn up under OECD auspices for the purpose of establishing a pricing standard for governmental credit financing of export contracts.[49] The request asked the Court to comment on whether the EEC had the power to conclude such an agreement and if so, whether the power was exclusive.[50]

After accepting jurisdiction, the Court held that the subject matter of the agreement was within the sphere of the common commercial policy of articles 113 and 114; therefore, the subject of the agreement was within the ambit of Community power. The Court proceeded to uphold the power of the Community to make agreements with third countries, even where it had not previously possessed common internal rules.[51] This holding went beyond *Commission v. Council* by concluding that common internal rules were not a prerequisite for external power, at least in the commercial area. In transport and other non-commercial areas, the rule of parallelism presumably remained. Finally, the Court again remained firm regarding the issue of exclusivity and denied any right of concurrent Member State power in the field of export policy.[52]

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48. Re the OECD Understanding on a Local Cost Standard (Opinion 1/75), 1975 E. Comm. Ct. J. Rep. 1355, 17 Comm. Mkt. L.R. 85, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶8365 [hereinafter cited as Opinion1/75]. Rome Treaty art. 228(1) provides a consultative procedure, whereby the Commission, Council, or a Member State may request an Opinion from the Court as to whether the proposed agreement is compatible with the Treaty. If the Court decides against compatibility then the procedure in article 236 (amendment) must be used. For a review of the case, see Kapteyn, *The Common Commercial Policy of the European Economic Community's Power and the European Court of Justice's Opinion of November 11, 1975*, 11 TEX. INT'L L.J. 485 (1976); Maas, *The External Powers of the EEC with regard to a Commercial Policy: Comment on Opinion 1/75*, 13 COMMON MKT. L. REV. 379 (1976); Simmonds, *External Relations Power of the EECA Recent Ruling of the European Court*, 26 INT'L & COMP. L.Q. 208 (1977).

49. Opinion 1/75, COMMON MKT. REP. ¶8365, at 7638.

50. *Id.*

51. *Id.* at 7642. The Court said: "A commercial policy is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others. Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves."

52. *Id.* at 7643.

> It cannot therefore be accepted that, in a field such as that governed by the Understanding in question, which is covered by export policy and more generally by the common commercial policy, the Member States should exercise a power concurrent with that of the Community, in the Community sphere and in the international sphere . . . .
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> To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defense of the common interest.

When comparing *Opinion No. 1/75* to the situational models, the facts appear to fit model 2. The commercial power is clearly expressed in articles 113 and 114, but in the facts of the case this internal power remained unexercised. The case followed model 2 in not requiring linkage to an express exercised internal power before the express external power could be exercised. Common internal rules were not a prerequisite to external power, at least in the commercial area. After *Opinion No. 1/75*, however, the question remained whether common internal rules were still a prerequisite in other areas.

C. *In re Kramer*

In re Kramer[53] concerned a referral of a series of questions on external affairs from the Dutch district courts pursuant to article 177.[54] Certain criminal prosecutions had been brought against some Dutch fishermen for violations of Dutch national laws aimed at ensuring the conservation of sole and plaice stocks in the northeast Atlantic. The Dutch laws were enacted pursuant to commitments which had been entered into by the Dutch Government within the framework of a non-EEC convention designed to conserve fish stocks in the Atlantic.[55] Meanwhile in 1970, and again in 1976, the Council had passed regulations seeking to establish some common policy on fishing and fish conservation.

The principle issue was whether the Community now had exclusive authority to enter into such commitments as those that the Netherlands had previously entered into. In reaching its decision the Court once again considered the authority of the Community to enter into international commitments. As in *Commission v. Council*, the Court found an implied external affairs power in the Treaty.[56] Having established Community authority to enter into international commitments for the conservation of sea resources, the Court concluded on the facts of the cases before it that the Community had not yet fully exercised its authority in this area.[57] Therefore, Community policy was not yet exclusive, nor was there any existing conflict between the Community policy and national commitments by the Dutch Government. However, the Court pointed out that while the Community power was not yet exclusive, the authority of the Member States in this area was in transition and Member States concerned were "now bound by Community obligations in their negotiations within the framework of the Convention and of other comparable agree-

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53. In re Kramer, 1976 E. Comm. Ct. J. Rep. 1279, 18 Comm. Mkt. L.R. 440, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶8372.

54. Rome Treaty, *supra* note 1, art. 177.

55. North East Atlantic Fisheries Convention, Jan. 24, 1959, 486 U.N.T.S. 7078 (*entered into force* June 25, 1963). The Convention was signed by seven non-EEC countries as well as members of the EEC, saving only Italy and Luxembourg.

56. In re Kramer, COMMON MKT. REP. ¶8372, at 7741.

57. *Id.* at 7742.

ments."[58] Reference was made, as in *Commission v. Council*, to articles 5 and 116 of the Treaty.[59]

The case added little to the principles that had been set forth in *Commission v. Council*. The facts of the case fit neatly into situational models 3 and 4. The case points out that there is a sliding scale for determining when subject matter has come under Community cognizance during periods of transition.[60] At one end of the scale the Member States are free to enter international agreements. As Community policies are enacted, the Member States must harmonize their external acts with Community policy, and coordinate policies between themselves. Eventually, the other end of the scale will be reached. All Member State initiative on an international level will be forbidden.[61]

The question remains: What specific common internal policies create an external power requiring a prohibition of individual Member State external action? Advocate-General Trabucchi argued in *In re Kramer* that a functional relationship between activity taking place outside the Community's geographical area and activity arising within that area is an essential condition for recognition of the exclusively Community nature of external power.[62] If no "functional relationship" exists whereby internal rules are affected by external policy, and vice versa, then presumably the Community could not have an implied external treaty-making power in that area even though common internal rules existed. The Court did not comment upon this attempt by the Advocate-General to answer questions

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58. *Id.*

59. Rome Treaty, *supra* note 1, arts. 5, 116. Article 5 of the Treaty of Rome has been a favorite of the Court for requiring Member States to fall in line behind Community policy and for the Court to justify the exclusive power of the Community in external matters under its cognizance. Article 5 reads: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by institutions of the Community . . . and . . . shall facilitate the achievement of the Community's tasks."

60. Commission v. Council, COMMON MKT. REP. ¶8134.

61. In re Kramer, COMMON MKT. REP. ¶8372, at 7748. Advocate General Alberto Trabucchi expressed this very clearly:

> [T]he mere existence of Community legislative powers in a particular field does not suffice to deprive the States of power to negotiate internationally in that field. On the other hand . . . there must have been an exercise of this power and to this end Community rules must have been actually applied in this field: only, in this way can the international jurisdiction of the States be fully replaced by that of the Community.

Id.

Within the fisheries area, the Council had to act to create a common conservation policy before the end of the transition period; *see* article 210 of the Act of Accession. For more on how this point created problems in the Court's reasoning, see Koers, *The External Authority of the EEC in Regard to Marine Fisheries*, 14 COMMON MKT. L. REV. 269, 294-98 (1977).

62. "An essential condition for recognition of the exclusively Community nature of external powers is the existence of a functional relationship between activity taking place outside the Community's geographical area properly so-called, which is the subject of international rules, and the common rules governing activity arising within that area." In re Kramer, COMMON MKT. REP. ¶8372, at 7746.

raised by critics of the *Commission v. Council* decision on how to determine which internal rules create external Community powers. In practice, however the "functional relationship" test would probably not make much difference. The Court of Justice would have to determine whether a "functional relationship" existed, in the same manner in which the Supreme Court of the United States decides whether interstate commerce is affected. The Court's support of Community goals would probably be a more crucial factor in deciding close cases than would facts attempting to prove that a "functional relationship" existed.

On the other hand, if the "functional relationship" test was adopted as the test for determining implied external powers, the question would be: What happens when that relationship ceases to exist? For example, there may be a clear "functional relationship" between internal and external policy at point *A* in time. If five years later at point *B* the relationship no longer exists, does the Community automatically lose its legitimacy to act externally? The "functional relationship" test seems to raise almost as many questions as it resolves. If the test is adopted, it must be accepted in such a way that the Community's ability to change over time remains unimpaired.

D. *No. 1/76: Opinion of the Court of Justice*

The fourth important comment on external affairs was delivered by the Court in April 1977 in another opinion on a proposed agreement.[63] The Commission requested the Court's opinion as to whether a draft agreement establishing a laying-up fund for surplus inland waterway vessels in the Rhine and Moselle basins was compatible with the Treaty. The agreement involved both a new and an old issue for the Court.[64] First, the essence of the agreement was the establishment of the "Fund," which was to be an international public institution having legal capacity and personality. Therefore, the Court had to decide whether the Community could delegate certain of its decisional and judicial powers to bodies independent of EEC institutions. Second, as most Member States were already parties to two previous conventions on river traffic which would require amendment, the Court was asked to approve a multilateral agreement to which not only the Community and the third state, Switzerland, would be parties, but to which EEC Member States who were signatory to the Conventions on the navigation of the Rhine and the Moselle also would be parties.

On the first issue, the Commission said that "once external powers

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63. Re the Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels (Opinion 1/76), 1977 E. Comm. Ct. J. Rep. 741, 20 Common Mkt. L.R. 279, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶8405, at 7291.

64. *Id.* A third issue concerned the organization and powers of a tribunal that was to interpret and apply the agreement. The Court went on to hold that the proposed Fund Tribunal was too closely interwoven with the European Court to be able to avoid a conflict of interest.

are given by the Treaty to the Community the latter must necessarily be entitled to exercise those powers in the same conditions and according to rules which are as extensive as those governing the external powers of the Member States from which they have been withdrawn . . . .[65] The only limitation on this grant would be that the Community could not surrender powers given by the Treaty to the common institutions of the Community.[66] The grant must also be compatible with the common interests of the Community.[67] The Council of course argued that a transfer of powers from Community institutions, rather than a delegation of limited managerial functions, was in fact what the agreement envisaged.[68]

The Court opined that article 75(1)(c), which empowered the Council to lay down "any other appropriate provisions" for the establishment of a common transport policy, entitled the Community to cooperate with a third country in setting up a public international institution.[69] This conclusion increased the scope of the implied powers of the Community. It is significant that the Treaty article used was the transport article 75(1)(c), which was involved in *Commission v. Council*, and not the more specific commercial trade articles 111 and 113 of the Treaty, which contain specific grants of power.[70]

On the second issue concerning the mixed agreement process, the Commission noted that there were no common internal rules presently in existence within the Community on river transport laying-up. Again raising the question that had been left unanswered in *Opinion No. 1/75*, the Commission argued that, as with the commercial policy agreements in *Opinion No. 1/75*, transport and other agreements could be made with third countries even where the Community had not previously had common internal rules.[71] The Commission argued for the ability to choose between either setting forth common rules internally and then negotiating an agreement, or introducing both the common internal policy and

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65. *Id.* at 7296.

66. *Id.*

67. *Id.*

68. *Id.* at 7298.

69. *Id.* at 7301.

70. The Court went on to disapprove the agreement because the proposed Fund supervisory body gave Member States certain individual votes in an area of common Community policy that should have resulted in a single Community vote. There were other arrangements that the Court considered incompatible with the "requirements of unity and solidarity" expressed in *Commission v. Council.*

71. Opinion No. 1/76, COMMON MKT. REP. ¶8405, at 7297.

> [T]he Commission considers that it is possible to infer that such power exists once the Treaty provides for an internal power even if the latter has not yet been the subject of developments of secondary legislation. Thus, there is nothing to prevent the Community, as in the present case, from concluding the agreement with the third state and adopting the necessary internal measures at the same time. The procedure in two stages which was the hypothesis in the AETR Case (Commission v. Council) is not therefore mandatory as the only one applicable.

the international agreement at the same time, when implementing a common policy involving an agreement with a third county.

Looking at the situational models, one sees that *Opinion No. 1/75* resembles model 2. The Opinion states that the external powers of the Community in the commercial area flow directly from Treaty articles 113 and 114. They do not depend on the parallelism theory for their legal justification. A common external policy can be enacted at the same time, before or after common internal commercial rules are enacted.

On the other hand, when models 3 and 4 are applicable as in *Commission v. Council, In re Kramer*, and *Opinion No. 1/76*, the parallelism theory would not permit expansion of external power prior to the enactment of common internal rules. While the parallelism theory does not suggest that external power flows from common internal regulations, under the parallelism theory external power at the very least is controlled by the extent to which common internal policies have been established, i.e., "*in foro interno, in foro externo.*" Therefore, while at first sight the arguments made by the Commission in *Opinion No.1/76* appear to come close to opinions in the commercial area, there may in fact still be some legal distinction between external commercial agreements of a model 2 nature and agreements made in model 3 and 4 situations (noncommercial) which are justified on the parallelism theory.

Procedurally, the parallelism theory would permit transport policy to be established at the same time that common internal regulations had been established, or afterwards. However, to argue that an external transport agreement could be signed before an internal common regulation had been enacted would be to go beyond the strict theory of parallelism. To substantively argue that Community powers in external affairs flow directly from article 75, for example in the transport area, and are neither controlled nor limited by the enactment of a common internal policy would also serve to extend the theory of parallelism. It would be the same as arguing that article 75 alone supports an external power just as does article 113.

In its opinion on the second issue concerning the argument over the necessity of a mixed agreement process, the Court finally broke free from the constraints of the parallelism theory and decided squarely on the side of the Commission. The implications of this decision, therefore, carry the Court beyond the strict theory of parallelism. The external treaty-making power of the Community was held to be derived from and limited, if at all, by the implied powers of the Treaty. The external powers are not to be limited by the extent to which a common internal policy has been established.[72]

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72. *Id.* at 7301. The Court said:

> The Court has concluded, inter alia, that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority

With regard to the mixed agreement nature of the agreement, the Court made clear that that arrangement was due only to the uniqueness of having two previous arrangements in existence that would permit Member States also to participate as signatories in their capacities as parties to those previous conventions. Their signatures were not necessary to lend legitimacy to the Community's signature.[73]

In conclusion, *Opinion No. 1/76* once again takes Community treaty-making powers forward from *Commission v. Council.* The Community can now delegate certain of its managerial powers to international bodies created to implement common policy objectives of the Treaty. It is not bound to use the mixed agreement procedure unless special circumstances dictate, and most important, its external powers in all areas of common Community objectives derive from the Treaty by implication, regardless of the extent to which these common objectives have been achieved internally. The Court has permitted the Community to act flexibly and dynamically in model 4 type situations without the theoretical legal constraints of parallelism.

E. *No. 1/78: Opinion of the Court of Justice Concerning the Incompatability of International Agreements with the Treaty*

The most recent opinion concerning the treaty-making powers of the Community was delivered in October 1979.[74] The Commission asked the Court whether a draft agreement on natural rubber negotiated under the auspices of UNCTAD was within the exclusive competence of the Community to sign. The main feature of the agreement was the establishment of a buffer stock designed to stabilize world natural rubber prices. Two negotiating sessions were completed, and the UNCTAD negotiating conference planned to adopt the final text of the agreement at its next conference.

The Commission argued that the envisaged agreement came entirely

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to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.

4. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common politice. *It is, however, not limited to that eventuality. [T]he power to bind the Community vis-a-vis third countries . . . flows by implication from the the provisions of the Treaty creating the internal power . . . .* (emphasis added).

73. *Id.* at 7302.

The participation of these States in the Agreement must be . . . solely for this purpose and not as necessary for the attainment of other features of the system . . . . [T]he legal effects of the Agreement . . . result, in accordance with Article 228(2) of the Treaty, exclusively from the conclusion of the latter by the Community.

74. Re the Int'l Agreement on Natural Rubber (Opinion 1/78), 1979 E. Comm. Ct. J. Rep. 2871, 26 Common Mkt. L. R. 629, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶8600, at 8755.

within the context of article 113 relating to common commercial policy.[75] Hence, the Community alone was entitled to negotiate and conclude the agreement on the basis of its exclusive powers. While stating that the purpose of the request for an opinion from the Court was strictly limited to the instant facts, the Commission urged the Court to clarify the general question of the interpretation of article 113 of the Treaty.[76] The Commission stated that "the field of commercial policy cannot . . . be restricted to the non-exhaustive assertions of article 113" and that the Court itself had pointed out in *Opinion No. 1/75* that "the concept of commercial policy has the same content whether it is applied in the context of the international action of a State or to that of the Community."[77] For the Commission, a measure of commercial policy must be assessed "primarily by reference to its specific character as an instrument regulating international trade."[78]

The Council argued that the subject matter of the agreement fell partly outside article 113 and required the common coordination of Member States within international economic bodies mentioned in article 116. Therefore, a division of powers between the Community and the Member States was called for, requiring that the agreement be concluded by the mixed agreement process.[79] The Council believed there was such close interrelation between the Community's powers and the Member State's powers that the commercial interests of the Community were inseparable from the international political interests which rightfully belonged to the Member States.[80]

With regard to the general interpretation of article 113, the Council argued that the Commission was asking the Court to take a fixed position on article 113 for all future international commodity agreements, and to adopt a position against the mixed agreement procedure used in previous commodity agreements. According to the Council, this was a misuse of article 228.[81] In any event, the Council stressed that the definition of a commercial policy measure falling within the meaning of article 113 must depend upon whether the intent behind the measure is to influence the volume or flow of trade, not on the instrumental criterion of the Commission.[82]

The Court, in affirming both its own and the Community's power, faced all of the above arguments squarely. First, with respect to the

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75. *Id.* at 8760.
76. *Id.* at 8762.
77. *Id.* at 8764.
78. *Id.*
79. *Id.* at 8772.
80. *Id.*
81. *Id.* at 8762. The Commission acknowledged that no Community position existed as of that time. It asked the Court "to rule on the difference of opinion between it and the Council on the interpretation of Article 113 and, in addition, to adopt a position of principle against the practice of 'mixed-type' agreements . . . ."
82. *Id.* at 8772.

Council's argument that article 228 procedure does not lend itself to the settling of questions relating to the division of powers in matters of external relations or with regard to the general interpretation of article 113 and the mixed agreement procedure, the Court affirmed its own competence to act under article 228.[83] Where doubt arises regarding the division of powers in the matter of negotiation and conclusion of international agreements, past established practice was not to prevent the Council, the Commission or the Member States from resorting to the procedures in article 228.[84]

Second, the Court again dismissed any argument that the request for an opinion was premature. This time the Court emphasized that when a question of powers is at issue, it is of concern not only to Member States but also to non-Member countries that such a question be clarified as soon as negotiations are commenced.[85] This statement revealed the Court's sensitivity to the increasingly complex problem of third-country negotiations with the EEC.

Third, the Court addressed the central issue of whether the proposed agreement came totally within article 113. Here the Court considered the political ramifications of the developmental problems associated with a commercial policy toward third world producers of rubber, and then proceeded to set forth its expansive interpretation of what article 113 included.[86] The Court emphasized that the Community must have the ver-

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83. *Id.* at 8778. The Court said: "[U]nder the procedure of Article 228, like that of Article 103 of the EAEC Treaty, it is possible to deal with all questions which concern the compatibility with the provisions of the Treaty of an agreement envisaged . . . ." Referring to its previous case law, the Court held: "[A] judgment on the compatibility of an agreement with the Treaty may depend not only on provisions of substantive law but also on those concerning the powers, procedure or organization of the institutions of the Community."

84. *Id.* at 8778.

85. *Id.*.

86. *Id.* at 8780. The Court stated as follows:

> Following the impluse given by UNCTAD to the development of this type of control it seems that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged . . . . Although it may be thought that at the time when the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community's developing a commercial policy aiming at a regulation of the world market for certain products rather than a mere liberalization of trade.
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> . . . .
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> [T]he enumeration in Article 113 of the subjects covered by commercial policy . . . is conceived as a nonexhaustive enumeration which, must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade.

satility to regulate external trade and the power to effect more highly developed mechanisms of international trade. The Court applied both definitions urged by the Commission and by the Council in order to find the proposed agreement one of commercial policy. The Court, however, did not want to limit the scope of article 113 by any a priori technical legal definition of commercial trade.[87]

Finally, the Court held that participation in the agreement with the Community would be permitted only if the financing arrangements of the final agreement provided for financing by the Member States in their individual capacities, rather than by Community financing through Member State contributions to the Community.[88] A further exception was made for the French and British Governments, which could participate individually, but only in their capacities as the legal representatives of dependent territories which were not members of the Community and which had been called upon to participate in the international rubber convention.[89]

Opinion No. 1/78 is a refinement and consolidation of the broad view regarding what constitutes Community commercial policy under article 113. The Court first established this view in *Commission v. Council* and again in *Opinion No. 1/75*. In the earlier opinions the Court included in article 113 matters which were not specifically mentioned in the article, so long as the purpose of the agreement was to implement one of the objectives upon which the Community had been founded and which was stated in the Treaty. In the instant opinion, the Court further refined the definition of commercial policy by holding that matters, such as financing and the non-commercial effects of an international agreement, may also be covered by article 113, so long as those matters are subsidiary to the overall commercial objective of the agreement and the agreement is a "characteristic measure" for trade regulation. This conclusion, the Court stated, must naturally flow from the complex interaction of trade and politics in today's world, and from the impact of a consolidated then nine-nation economic unit at world trade negotiations.[90] The Court's realistic view of

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87. *Id.* at 8779. The Court stated: "Having regard to the fact that the essential *object* of the agreement envisaged is to stabilize prices for natural rubber, this appears to be a *characteristic measure* for regulating external trade and *thus an instrument* of commerical policy." (emphases added). *See* Steenbergen, *The Common Commercial Policy*, 17 COMMON MKT. L. REV. 229, 231 (1980). Professor Steenbergen takes the position that the Court accepted the Council's definition of article 113 while leaving the door open to use the Commission's criterion as well. Actually, it appears that in one sentence the Court accepted both the Council's criterion and the Commission's.

88. Opinion 1/78, COMMON MKT. REP. ¶8600, at 8783.

89. *Id.*

90. *Id.* at 8782-83.

> The Court takes the view that the fact that the agreement may cover subjects such as technological assistance, research programs, labour conditions in the industry concerned or consultations relating to national tax policies which may have an effect on the price of rubber cannot modify the description of the agreement which must be assessed having regard to its essential objective

the changing nature of the measures used to control world trade and of the problem of non-tariff barriers is demonstrated by its holding that "mere liberalization of trade was not the only commercial purpose behind the foundation of the Community nor the only instrument of achieving the Community's commercial objectives."[91]

With this opinion the Court has brought the Community forward into the realm of situational models 5 and 6. Internal powers that are not expressed, but ancillary to or implied from the expressed objectives of the Treaty can be enacted as well as can their implied external counterparts. The case stands as the farthest reaching construction of the Community's ability to act externally with a treaty-making power. In the interpretation of this power, both with regard to the implication of its existence and the limits on its use, the Court acted in the finest tradition of a constitutional court. It attempts to give the Community the flexibility necessary to achieve its objectives by means adapted to a changing international environment.[92]

Finally, the Court followed *Opinion No. 1/75* regarding the issue of delineation between articles 113 and 116 when the EEC is involved in international economic negotiations. When the EEC negotiates an agreement that will have binding force in international law and the EEC is recognized as an entity subject to international law, article 116 procedure will not apply to those negotiations.[93]

Also, the Court restated its previous stand on Member State participation in international agreements. Once the subject matter of the proposed agreement is found to be within the scope of the Community's power, this power to act externally is exclusive.[94]

V. A SUMMARY OF THE EUROPEAN COURT OF JUSTICE CASE LAW ON EEC TREATY MAKING

The following list is a summary of the major points of law resulting from the European Court's interpretation of the Community's external power:

1. The power of the Community to bind itself under international law flows from the implied and inherent powers of the Community as created by the Treaty of Rome;

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rather than in terms of individual clauses of an altogether subsidiary or ancillary nature.

91. *Id.* at 8781.

92. For example, if concurrent external powers were permitted and one of the Member States failed to become a signatory to the international buffer stock agreement, that country could easily defeat the purpose of the agreement by importing the goods cheaply through its national ports and then redistributing the same goods to other Member States at cut-rate prices. Since no intra-Community customs barriers exist, one state could force the prices down below the internationally agreed stability price.

93. *Id.* at 8782.

94. *Id.* at 8783.

2. The scope of this external power is not limited by the fact that no internal rules on that subject matter have been adopted or that no specific grant of external power was mentioned in the Treaty;

3. Community powers in external matters are exclusive, and Member States may participate in an agreement via a mixed procedure only if there are unique circumstances;

4. The Community can delegate certain of its managerial powers to international bodies to the same degree a Member State may do so;

5. Whenever a binding international agreement is involved and the Community negotiates with an international economic organization as a recognized legal entity, article 113 rather than article 116 applies;

6. Both the objective of a proposed agreement and the character of the agreement as an instrument for regulating international trade are factors in deciding whether the agreement falls within the scope of commercial policy under article 113. The objectives and methods of such an agreement need not concern traditional trade liberalization to fall within the scope of article 113;

7. Noncommercial measures may be included in proposed commercial agreements if they are subsidiary or ancillary to the objective of the proposed agreement;

8. Resort to the Court through article 228 is the correct method for determining the exclusive power of the Community, under the Treaty, to ratify a proposed agreement as well as to decide questions of power, procedure, and organization of Community institutions;

9. The Court's competence under article 228 is not limited by the fact that a proposed agreement is still in the negotiating stage as long as the final agreement will be binding. This is especially true in the case of Community powers involving a relationship with non-Member countries.

A primary issue that remains unresolved is exactly how far the Court has expanded the scope of the Community's power beyond the subsidiary and ancillary non-commercial measures permitted in *Opinion No. 1/78*. The question also remains whether subsidiary and ancillary measures will be permitted in transport and other areas.

As noted previously, the Court has gone beyond the "*in foro interno, in foro externo*" adage as a limitation on the scope of Community power. Nevertheless, it has been pointed out that the rationale behind the Commission's argument for an expanded definition of commercial policy continues to be the need to avoid exercise of extensive national powers by Member States that will lead to conflicts between internal and external policy.[95]

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95. Steenbergen, *supra* note 87, at 234-35. Steenbergen points out the problem of interpreting external economic relations as belonging to the field of Community powers alone: "[N]either Treaty provisions nor the case-law of the Court justifies such as extreme construction of Community power beyond the scope of a commercial policy . . . ." Further-

The opinions of the Court taken as a whole, however, do not seem to limit themselves to the above narrow legal interpretation of the possible scope of external Community power. There is a definite and much wider interpretation which includes exclusive Community power over all external economic relations of Member States regardless of the present stage of development of intra-Community matters. It appears from the case law that the Court has moved toward the creation of a legal basis for external agreements that are not limited by the development of intra-Community policy. The legal basis for such external power is to be found in the general principles and objectives upon which the Community was founded as well as in the Community's international legal personality.

The tenor of the Court's opinions in this area reflects the Court's desire to create an atmosphere for the growth of an external policy that will permit a wide variety of external agreements. This growth is not to be limited by failing to mention the subject matter of the agreement within the Treaty or by theories of parallelism and "*in foro interno, in foro externo.*" When it has been possible to use these latter theories to expand the external powers of the Community, the Court has made reference to them, but it has also pointed out that they were not to be a limitation on the scope of Community power.

Practical political necessity being what it is, it is likely that the Commission will have to present its argument to increase the scope of the Community power in terms that avoid internal v. external policy conflicts. There are also the political problems that must be solved internally before agreement can be reached on any coordinated common external policy. Thus, practical politics may force the Commission to wait until common internal rules are agreed upon before negotiating an external agreement. All of this, of course, evokes memories of the "functionalism" theory of the Advocate-General in *In re Kramer*. Nevertheless, it is unfair to dismiss the wider interpretation of the Court's opinions when the Court presently has clearly placed no limits on the scope of Community power over external affairs provided the subject matter of any proposed agreement clearly reflects an attempt to achieve a treaty objective.[96]

VI. THE TREATY-MAKING PROCEDURE IN PRACTICE

As mentioned in Section II, the Council has constantly attempted to enforce a unanimity rule and to keep to itself any discretionary decision making over the compatibility of international agreements with the Treaty of Rome. The main legal arguments used by the Council have cen-

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more, the phrase "*in foro interno, in foro externo,*" coined by Judge Pescatore, can be interpreted to extend the power of the Community, under article 113, "as far as, but not beyond the Community powers as defined according to the rules applied to the implied powers."

96. For the Commission's view on the external powers of the Community as a result of the cases and opinions of the European Court, see Supplementary Answer to Written Question No. 173/77 on the Community's External Powers and Activities, 21 O.J. EUR. COMM. (No. C 72) 1 (1978).

tered on articles 238, 228 and 113. The Council has defined the substantive coverage of article 238 very narrowly. Rather than considering that article 238 gives the Community power to conclude broad agreements encompassing all subjects over which the Treaty of Rome gives the Community internal competence, the Council has considered "association" agreements to be the same as the trade and tariff agreements of articles 111 and 113. Article 238 is also considered as containing the only procedure for implementing those agreements. The effect of this interpretation has been an attempt by the Council to subject all agreements, except the most narrowly defined trade and tariff agreements, to the unanimous voting requirements of article 238, without referring them beforehand to the Court of Justice, as envisaged in article 228. It permits the Council to decide when an agreement might exceed Community treaty-making power and when to resort to article 236.

The problem with this approach by the Council is that it becomes necessary to explain away the fact that article 113 has a majority voting procedure, whereas article 238, setting forth the amendment process, is unanimous and requires Parliamentary consultation.[97] Why would the provisions of article 238 have greater safeguards than article 113 if the scope of the types of agreements covered by both articles is considered coextensive? The answer the Council provides permits the use of majority voting only for the most narrow trade and tariff provisions. Any wider provisions even in the commercial area are voted on by the Council through article 238's unanimous procedure.[98]

The Council further limits the Community's power by often insisting, when resorting to article 238, that parts of a proposed agreement exceed the powers of the Community.[99] In effect, the Council avoids article 238 entirely and acts as the Court of Justice should under article 228(1). The Council engages in a legal interpretation of the Treaty of Rome and decides upon the compatibility of the agreement with the Treaty. Once it decides that the Community is powerless under the Treaty to conclude a given part of the proposed agreement, the Council resorts to the amendment process in article 236.

According to the Council the power to conclude an agreement which exceeds Community power is acquired by the use of the "mixed procedure."[100] Under this procedure both Member States and Community participate in the signing and ratification of the agreement. Once the Council determines that parts of a proposed agreement exceed the competence of the Community institutions, the Member States must sign and ratify the

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97. Costonis, *supra* note 9, at 444-49. Costonis describes the legislative history of article 238 and concludes that powers well beyond articles 111 and 113 were intended for article 238.

98. Rome Treaty, *supra* note 1, art. 238.

99. Costonis, *supra* note 9, at 443-48.

100. Costonis, *supra* note 9, at 449-50; Leopold, *supra* note 8, at 62-65; Norton, *supra* note 9, at 594-97.

agreement according to their respective national procedures. The Council approves the agreement when all Member States have ratified it. The Council asserts that this procedure satisfies the requirements of articles 228 and 236 for amending the Treaty. In other words, the Council considers each association agreement to be an amendment of the Treaty for the purposes of that association agreement only.

The most serious problem with this mixed procedure is the failure of the Council to identify which parts of a proposed agreement exceed the Community powers. This permits the Member States to consider all parts of the proposed agreement according to their national procedures during ratification, thus possibly vetoing a proposed agreement when the objectionable provisions are actually those of Community competence only. If the Court decided which parts of a proposed agreement exceeded Community power, then the procedure of article 235 could be resorted to in order to increase Community power for that particular agreement, or article 236 could be resorted to for an amendment that would cover all future agreements in that area. The latter procedure would be more in line with a true amendment process.

The above techniques have been used by the Council to undermine Community power and have evoked considerable comment.[101] The Political Committee of the European Assembly insists that the meaning of "association" under article 238 includes substantive arrangements beyond mere tariff and trade agreements.[102]

Since the Council apparently does not want to permit the Community to sign a "pure" Community agreement unless that agreement is limited strictly to the subject matter of article 113, the development of the mixed procedure can be said to reflect the political realities of power within the Community.[103] It also provides a somewhat practical solution until those political problems limiting further movement toward suprana-

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101. Norton, *supra* note 9, at 595-96. Norton says:

> Great difficulties inevitably arise in trying to make some legal sense out of the 'mixed procedure' system . . . . By use of the 'mixed procedure' the Council of Ministers has by passed the intended role of the Court of Justice, a violation of the Treaty of Rome which the Commission has been reluctant to press before the Court of Justice.

102. *Id.* at 597-98, quoting from the *Birkelbach Report* and P. Pescatore, *Les Relations Exterieures des Communautés Européennes*, 103 RECUEIL DES COURT DE L'ACADEMIE DE DROIT INTERNATIONAL 1 (1961).

103. The mixed procedure has been used on the International Coffee Agreement of 1976 ([1976] 19 J.O. COMM. EUR. L 309/28); the International Cocoa Agreement of 1975 ([1976] 19 J.O. COMM. EUR. L 321/29); Fifth International Tin Agreement, 1975 ([1976] 19 J.O. COMM. EUR. L 222/1); the International Cocoa Agreement of 1973 ([1973] 16 J.O. COMM. EUR. L 324/20); Fourth International Tin Agreement, 1971 ([1972] 15 J.O. COMM. EUR. L 90/2); International Wheat Agreement of 1971, 22 U.S.T. 821, T.I.A.S. No. 7144; and the Long Term Arrangement for Cotton Textiles ([1970] 13 J.O. COMM. EUR. 1225/29). As of 1977, all association agreements except those with Tunisia and Morocco in 1969, Malta in 1970, and Cyprus in 1972, were concluded by the mixed procedure. These non-mixed procedure agreements, however, dealt solely with matters falling with in article 113.

tionality can be resolved.

The ultimate elimination of the mixed procedure system in practice as well as in theory is necessary if the Community will ever truly possess competence as a distinct international entity capable of concluding international contracts on its own. Under the "pure" Community agreement procedure the Member States are automatically bound. Therefore, even though it may seem there is little difference in practical effect between resort to individual Member State ratification and an approval by the same state's ministers on the Council, the legal distinction is enormous. Bypassing Member State ratification and making Community agreements automatically binding within the Member States is a step toward supranationality.

Finally, the Council has used two procedural techniques to further restrict Community autonomy. First, under articles 238 and 228, the Council issues a negotiating mandate for the Commission.[104] The Commission should then conduct the negotiations independently and present its final proposal for Council approval or rejection. In practice, the Council has insisted upon the presence of "national observers" in the negotiating stage of association agreements.[105] Some coordination between the Council and the Commission was envisaged in article 113 for trade and tariff negotiations, but not for other agreements.[106] The Council transposed controls written into article 113 over to article 238. Since article 238 already modifies the general treaty-making procedures of article 228 by requiring Parliamentary consultation as well as unanimous voting, these additional controls are hardly necessary. The national observers may help gain later Council approval for an agreement, but that is hardly justification for their interference in the negotiating process. In truth, the presence of "national observers" indicates the Council's unwillingness to lose control over any aspect of the treaty-making process.[107]

Second, the Council has ignored the consultative rights of the European Parliament as required by article 238 association agreements.[108] In the past, the Council consulted the Parliament after the Council had already signed the proposed agreement. Thus, any productive suggestions for change that might have been made by the Parliament could not have been implemented without the Council changing what had already be-

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104. Rome Treaty, *supra* note 1, arts. 238, 228.

105. For a general discussion, see Bot, *Negotiating Community Agreements: Procedure and Practice*, 7 COMMON MKT. L. REV. 286 (1970); Costonis, *supra* note 9, at 429-39; Hallstein, *The EEC Commission: A New Factor in International Life*, 14 INT'L & COMP. L.Q. 727, 739 (1965); Leopold, *supra* note 8, at 65-66.

106. Bot, *supra* note 105, at 306; Hallstein, *supra* note 108, at 739.

107. Bot, *supra* note 105, at 309; Hallstein, *supra* note 108, at 739.

108. Rome Treaty, *supra* note 1, arts. 228(1), 113, 238. Article 228(1) states that Parliamentary consultation is necessary only where required by the Treaty. Article 113 agreements do not require Parliamentary consultation. Article 238 associations require Parliamentary consultation. *See generally* Costonis, *supra* note 9, at 438-42, and Leopold, *supra* note 8, at 66-67.

come an international contract. While the Parliament is now informed of the contents of proposed agreements before they are signed, formal consultation with the Parliament still takes place after Council signature under the "Luns" procedure.[109] The merits of an extensive prior consultation with the Parliament might be argued, but the fact remains that the present procedures are another indication of Council control over the treaty-making process.

As demonstrated by this article, all the above procedural methods have resulted in some substantive changes in the guidelines announced by the European Court regarding the treaty-making process. Of course, the factors motivating these procedural changes are political. Like the common law process, when the substantive changes cannot be made because of political reasons, the procedures are adjusted or distorted in order to permit the system to function. Hopefully, political solutions will be reached soon so that treaty-making procedures will be in harmony with the Court's decisions. Otherwise, a long-term distortion of the procedural process may result in permanent institutional change. A current study of treaty-making procedures is needed in order to assess the impact of the more recent opinions of the Court of Justice.

VII. PROBLEMS WITH THE PRESENT STATUS OF EEC TREATY MAKING FOR NON-MEMBER STATES

Other than the obvious intra-Community struggle between the Commission and the Council which is reflected in the differences between the theory of treaty making as viewed by the European Court and its actual practice, there are some serious problem areas with the present status of the EEC treaty power vis-a-vis non-Member countries. For example, what happens in a mixed procedure agreement if a Member State decides to denounce its obligations? Obviously, it is still bound to fulfill its Community obligations if the Community is a legally bound contracting party, but who determines which obligations are those of the Community and which obligations are those of the individual Member States? If this latter question is not resolved when the agreement is negotiated, then the non-Member State may find the agreement being submitted to the European Court for such a determination. As noted in *Opinion No. 1/78*, the European Court mentioned that it was aware of the problem for a non-Member State or a third party when they become involved in a mixed procedure agreement with the Community. Justice Pescatore has written that even though the Court has shown sensitivity towards allowing third parties to negotiate agreements with the Community, no third state would be allowed to intervene in the internal affairs of the Community or in the delicate relationship between the Community and its Member

109. Bersani Report, FURO. PARL. SER. 226, Manu. 1967. See also 1972-1973 EUR. PARL. Doc. (No. 226) 5 (1972) & (No. 300) 5 (1972) for resolutions by Parliament calling for greater consultation rights.

States.[110] Thus, to avoid involvement in a European Court dispute, the third party to an agreement must have these questions of delineation between Community responsibility and Member State responsibility determined initially in the agreement itself.

Delineating responsibilities has posed a major drafting and negotiating problem for non-Member States. When a non-Member State attempts to draft an international agreement in which both the Community and its Member States have areas of responsibility, two problems become apparent. First, it is impossible to list all of the powers and responsibilities of the Community. Second, it is often difficult to outline the relationship between the Community and Member States. The Community is a dynamic, evolving, and growing organization. An increase in its internal powers will certainly result in a shifting of external responsibilities within an international agreement from the signatory Member States to the signatory Community. The European Court has discussed this shift of responsibility within the context of an international agreement and organization with reference to the General Agreement on Tariffs and Trade (G.A.T.T.). The Court has concluded that since the Community has assumed the powers in the area governed by the G.A.T.T. which were previously exercised by the Member States, the provisions of the agreement bind the Community.[111] Only the European Court of Justice can determine whether the Community or Member State is bound at any given time by a specific obligation.[112]

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110. Pescatore, *supra* note 36, at 627. The Justice states:

> [I]t may be said that, on the one hand, the Court has shown itself to be sensitive toward the legitimate interests of third parties involved in the process of negotiating agreements with the Community. But at the same time, it would not allow any intervention by Third States in internal matters of the Community, and, more particularly, in the determination of the very complex and delicate relationship between the Community and its own Member States.

111. International Fruit Company NV v. Produktschap voor groenten en fruit, 1972 E. Comm. Ct. J. Rep. 1219, 2 Common Mkt. L. R. 1 (1972), [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶8194 (1975) (Eur. Ct. of Justice, Joined Cases Nos. 21 to 24/72). *See also* Kapteyn, *The Domestic Law Effect of Rules of International Law Within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules*, 8 INT'L L. 74 (1974); Riesenfeld, *The Doctrine of Self-Executing Treaties and Community Law: A Pioneer Decision of the Court of Justice*, 67 AM. J. INT'L L. 504 (1973); Waelbroeck, *Effect of GATT Within the Legal Order of the EEC*, 8 J. WORLD TRANSNAT'L L. 614 (1974). The Court states:

> Since the entry into force of the EEC Treaty and more particularly, since the setting up of the common external tariff, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the General Agreement and has been recognized by the other Contracting Parties . . . . [I]t therefore appears that, insofar as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community.

112. The United Nations Conference on the Law of the Sea (UNCLOS) is perhaps a good practical case for examination of the drafting problem. The draft assimilation clause

Perhaps the best a third-party state signatory can hope for in a mixed procedure agreement with the Community, is a listing in the agreement of those areas of responsibility which European case law has up to that point clearly established as belonging exclusively to the Community. In addition, a provision for Community notification to signatories when it has clearly accepted responsibility for new areas could be added. This latter proposal might encounter resistance in areas which, for internal political reasons, both the Community and Member States would prefer that responsibilities between themselves be kept nebulous.[113]

VIII. CONCLUSION

The major problem confronting the Community with respect to its treaty-making power continues to be the conflict between the progressive and forward-looking evolution of the treaty-making power as espoused by the European Court, and the practical application of that power. This conflict is the result of the continuing political struggle between Commission and Council. Increasingly, the advancement of Community policies is dependent upon the resolution of intra-Community political disagreements. This trend became inevitable once the purely economic issues were coordinated and resolved. The issues left to be resolved are not nearly so divisible into "pure" economic or "pure" political categories. The multi-lateralization of trade and the growth of economic organizations and coordinating committees has not made the Community's problems any easier. As the intra-Community political climate approaches the European Court's interpretation of the treaty-making power, the effects of the Court's decisions will begin to be felt in all areas, not just in commerce or transport.

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for the EEC reads as follows:

> Customs unions, communities or other regional economic integration groupings referred to in paragraph 1, shall, upon deposit of their instruments of approval or accession, become Contracting Parties with the same rights and obligations as State Parties under the provisions of the Convention *to the extent that these rights and obligations relate to an area where powers have been given to them by their Member States.* (emphasis added).

While the above proposed clause permits the dynamic growth of the Community to proceed unimpaired by a multilateral agreement, the position of the non-Member signatory state has not changed. In the new Law of the Sea Treaty, some subject areas are under the control of Member States and some matters belong to the Community. Since the responsibility for many subject areas is in transition, simple divisions of responsibility along territorial lines will not work. UN Doc. A/Conf. 62/L. 32 (Sept. 14, 1978). For discussions on the EEC and the UNCLOS problem, see Koers, *Participation of the European Economic Community in a New Law of the Sea Convention*, 73 AM. J. INT'L L. 426 (1979); Oxman, *Third United Nations Conference on the Law of the Sea: The Eighth Session*, 74 AM. J. INT'L L. 1, 40-42 (1980); Vignes, *The EEC and the Law of the Sea, reprinted in* 3 NEW DIRECTIONS IN THE LAW OF THE SEA 335, 339 (1973).

113. An example of this type of approach might be seen in the U.S.S.R.'s informal proposal at the UNCLOS conference. Conf. Doc. FC/3 (July 30, 1979), *discussed in* Oxman, *supra* note 112, at 40 n.148.

The case law of the Court indicates that the Court is bestowing on the Community an increased treaty-making power. Writers disagree as to whether the Court's cases should be interpreted narrowly or broadly, but they agree that the Court is leading both the Council and, at times, the Commission, toward the practical application of a treaty-making power that permits the Community to act as a fully independent international legal personality. The Court's judgments have at times been "prospective," as in *Commission v. Council* and *Kramer*, but the law established in these cases is being followed gradually. The exclusive nature of the Community's power under article 113 is no longer challenged. Instead, arguments have shifted to whether the proposed agreement falls within article 113. Also, the Council must seek to justify a mixed procedure agreement on the grounds that some of the responsibilities to be undertaken in the proposal still belong to the Member States. Concurrent powers are recognized as non-existent for both Community and Member States.

Nevertheless, the Commission and Council continue to use the powers given to them by the Court with restraint, although for different reasons. A new survey of treaty making in practice, much like the interviews conducted by Mr. Costonis in the 1960's and discussed partially in part VI of this paper, needs to be undertaken to see how many tactics used by the Council to control the treaty-making practice are still in effect. This writer suspects that most of the tactics are still used, and that while a purely Community agreement may no longer be signed by a mixed procedure process, the use of "national observers" at the negotiating table has continued to give the Council a powerful handle by which to control the treaty-making process.

Since so much of the future of the integration process in Western Europe is becoming dependent upon the resolution of intra-Community political disputes, the future of the process and hence the possibilities for the Community to exercise its treaty-making powers to their fullest potential will depend on the political climate. Traditionally, the stimulus to centralize power has come from an external threat such as invasion and the corresponding need for a centralized defense. This stimulus has been lacking in Western Europe, but there are signs that this situation may be changing.

Second, a favorable political climate is expected to develop in the foreign policy area. The Report on European Union by Leo Tindemans[114] urged the Community to create a united foreign policy front based on a common policy rather than on simple inter-governmental coordination. Any movement away from consensus opinions and toward majority voting in the foreign policy area should be watched as auguring a potential for increased use of the treaty-making power in new fields.[115]

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114. Bull., EC Suppl. 1/76.

115. *See* Resolution of the European Parliament on European Political Cooperation, 21

A third area with potential for creating the political climate necessary for full use of the treaty-making power is the commercial area itself. The Japanese are increasingly invading traditional Western European industrial areas such as automobile, watch, shipbuilding, steel and textile interests. The Member States may find that the only effective way to counter this invasion will be through action on the Community level. Their eagerness to avoid the internal social changes resulting from Japanese competition may prove to outweigh any reluctance to argue over increased exercise of centralized Community powers in external affairs.

While these areas favor the creation of the political climate and stimulus necessary for the Community to expand its treaty-making practice to the fullest extent envisaged by the European Court, it is important not to be overly optimistic. Political climates are no more predictable and maybe even less predictable than the meteorological climate. However, the political sensitivity of external affairs and treaties will continue to make the evolution of Community treaty-making power an area in which the Community integration process can be measured both theoretically and practically.

O.J. EUR. COMM. (No. C 36) 32 (1978). For a positive comment on the progress toward European political cooperation and foreign policy coordination, see Gablentz, *Luxembourg Revisited or the Importance of European Political Cooperation*, 16 COMMON MKT. L. REV. 685 (1979).