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POLYCEPHALOUS ANATOMY OF THE EC IN THE WTO: AN ANALYSIS OF LAW AND PRACTICE

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I. INTRODUCTION

This Article aims at providing insight to the European Community's (EC) position within the General Agreement on Tariffs and Trade (GATT)[1] and the World Trade Organization (WTO).[2] We will see that the

1. Although the GATT, signed in 1947, was not formed at the Bretton Woods Conference that took place in Bretton Woods, New Hampshire (U.S.), in 1944, the participants at the conference contemplated the necessity of an international trade organization. The GATT, which set out a plan for economic recovery after World War II, by encouraging reduction in tariffs and other international trade barriers, is therefore one of the three mechanisms for global economic governance that comprise the Bretton Woods System, the other two being the International Monetary Fund and the World Bank. The GATT was a collection of rules applied temporarily,

EC's specific problems and challenges for the European Court of Justice (ECJ) are partly related to the EC's sui generis position in the WTO. In this sense, the opinion of Advocate General Tesauro with regard to *Hermès International* v *FHT Marketing Choice* is helpful for understanding the unitary character of the EC's external trade relations: "The Community legal system is characterized by the simultaneous application of provisions of various origins, international, Community and national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system."[3] We shall see more specifically the problem that the EC faces in its external trade relations by analyzing the so-called "duty of close cooperation" and unity in the Communities' external relations. We will also deal with the difficult and old issue of

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without an institutional basis, unlike the World Trade Organization (WTO), which is a permanent organization with a permanent framework and its own Secretariat. For almost fifty years, the GATT focused exclusively on trade in goods, leaving tariffs and quotas aside in the various rounds of negotiations of the world trading system. The GATT set the terms for countries who wanted to trade with each other. The GATT signatories were called "contracting parties." The Uruguay Round, completed in 1994, replaced the GATT with the WTO, a global trade agency with binding enforcements of comprehensive rules expanding beyond trade. The GATT has now become one of the eighteen agreements enforced by the WTO.

2. The WTO is a global trade agency that was established through the GATT Uruguay Round Agreement signed in 1994. The WTO provides dispute resolution, administration, and continuing negotiations for the seventeen substantive agreements that it enforces. The WTO and its underlying agreements set a system of comprehensive governance that goes far beyond trade rules. It is argued by some commentators (Lori Wallach being one of the most relevant activists in the public domain) that the WTO system, rules, and procedures are undemocratic and non-transparent. The WTO's substantive rules systematically prioritize trade over all other goals and values. Each WTO member is required to ensure "the conformity of its laws, regulations and administrative procedures" to the WTO's substantive rules. Marrahesh Agreement Establishing the World Trade Organization, art. XVI:4, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. National policies and laws found to violate WTO rules must be eliminated or changed; otherwise, the violating country faces trade sanctions. The economic, social, and environmental upheaval being suffered by many countries that have lived under the WTO regime since 1995 means that business-as-usual at the WTO is over. It remains to be seen whether the handful of powerful WTO members who have dictated WTO policy since 1995 will adapt to the new reality. By the same token, it is also unclear whether countries demanding changes to the WTO's current system of rules that are damaging their national interests may begin to withdraw if those changes do not take place. Regarding withdrawal from the WTO Agreement, although Article XV(1) is clear and reads that "Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO," the withdrawal from certain rules or agreements is not entirely clear. *Id.* art. XV(1).

3. Opinion of Advocate General Tesauro, Case C-53/96, Hermès Int'l v. FHT Mktg. Choice BV, 1998 E.C.R. I-3603, ¶ 21.

allocation of competences between the EC and its Member States in EC trade policy.

As a result of the allocation of competences, mixed agreements shall be analyzed in the latter part of this Article. In this sense, we shall first explain what is meant by a mixed agreement and will see what Dominic McGoldrick has said in this respect.[4] It will be shown that the EC appears "to be a unique creation from the perspective of international law."[5] A brief note on the importance of attempting to reach a proper conception of the mixed procedure shall be made. We shall see the various types of mixed agreements[6] that exist in the field of the external relations of the EC. We shall then look into the conclusion and effects of the EC's international agreements vis-à-vis third parties. Attention shall be paid to the fact that problems raised by mixed agreements do not exist within the context of exclusive EC competence. Some of these problems have to do with the functioning of the EC.[7] We shall see how the Member States have delegated their authority to negotiate international trade agreements to the supranational level.[8]

We shall also see that within the EC treaty-making, there is a tendency to sign mixed agreements rather than agreements of EC exclusive competence in areas dealing with the external relations of the European Union (EU). This shows their importance for the EC and for its position in the world.[9] Although the EC increasingly wants to become an international actor and somehow assert its international personality and identity, it also has to accept that Member States and third parties have

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4. DOMINIC MCGOLDRICK, INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION (1997).

5. *Id.* at 1.

6. For types of mixed agreements, see Allan Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 125, 128-33 (Martti Koskenniemi ed., 1998) [hereinafter INTERNATIONAL LAW ASPECTS]; *see also* Henry G. Schermers, *A Typology of Mixed Agreements*, *in* MIXED AGREEMENTS 23 (David O'Keeffe & Henry G. Schermers eds., 1983).

7. *See* Sophie Meunier, *What Single Voice? European Institutions and EC-U.S. Trade Negotiations*, 54 INT'L ORG. 103 (2000).

8. Supranational means "at a level above national governments"—as opposed to "intergovernmental," which means "between or among governments." Many EU decisions are taken at the supranational level in the sense that they involve the EU institutions, to which EU Member States have delegated some decision-making powers.

9. Claus-Dieter Ehlermann, *Mixed Agreements: A List of Problems*, *in* MIXED AGREEMENTS, *supra* note 6, at 3, 3.

legitimate interests.[10] EC Treaty practice[11] has become increasingly dominated by mixed agreements[12] for they reflect the legal and political reality that the EC is not a single State for the purposes of international law.[13] We shall see how the EC's membership and participation in

10. The relationship between the EC and Third States is a unique experience in international law and international relations.

11. Treaties are usually composed of articles, protocols, and declarations. As an example we have the Treaty of Amsterdam, composed of 15 articles, 13 protocols and 58 declarations. In the case of the EU, there are currently founding treaties, amending treaties, accession treaties, and budgetary treaties. There is also an EU Constitutional Treaty, which seeks to consolidate, simplify, and replace the existing set of overlapping treaties. It was signed in Rome on October 29, 2004 and is due to come into force in the near future, conditional on its ratification by all EU Member States. In the meantime, or if the EU Constitutional Treaty fails to be ratified by all EU Member States, the EU will continue to work on the basis of the current treaties. As for the founding treaties, there are four of them: 1) the Treaty of Paris (1952), establishing the European Coal and Steel Community (ECSC), which expired in July 2002; 2) the Treaty establishing the European Atomic Energy Community (Euratom); 3) the Treaty establishing the European Economic Community (EEC) (these last two treaties are known as the Treaties of Rome (1958); however, when the term "Treaty of Rome" or the acronym TEC is used, it is to mean only the EEC Treaty); and 4) the Treaty on European Union (TEU) (1993) (this Treaty changed the name of the EEC to simply "the European Community," and introduced new intergovernmental structures to deal with the aspects of Common Foreign Security Policy (CFSP), as well as police and judicial cooperation). The structure formed by these so-called three pillars (Community pillar; foreign and security policy; police and judicial cooperation) is the EU, whose scope then became more overtly political as well as economic. With respect to the amending treaties, there are also four of them, which are: 1) the Merger Treaty (1967), which provided for a Single Commission and a Single Council of the then three European Communities; 2) the Single European Act (1987), which provided for the adoptions required for the achievement of the Internal Market; 3) the Treaty of Amsterdam (signed in 1997), whose purpose was, inter alia, to simplify decision making in addition to further integrating the CFSP concept (it also amended and renumbered the EU and EC Treaties); and 4) the Treaty of Nice (signed in 2001), where qualified majority voting was again extended to more areas, abolishing the national right to veto in some policy areas. A concept of "enhanced co-operation" was introduced for countries—there must be at least eight of them—wishing to forge closer links in areas where other EU Member States disagreed or were unable or unwilling to join in at this stage. The outsiders must, however, be free to join in later if they wish. The accession treaties came into being for every enlargement of the EU. As for budgetary treaties, there have been two: 1) the Budgetary Treaty of 1970, which gave the European Parliament the last word on what is known as "non-compulsory expenditure"; and 2) the Budgetary Treaty of 1975, which gave the European Parliament the power to reject the budget as a whole, and created the European Court of Auditors.

12. *See* MCGOLDRICK, *supra* note 4, ch. 5.

13. This is also the case for the EU, where "it is difficult to see anything short of major war provoking a transition to statehood." Christopher Hill, *The Capability-Expectations Gap, or Conceptualising Europe's International Role*, 31 J. COMMON MKT. STUD. 305, 325 (1993).

international organizations[14] is highly variable for an organization, which pretends to act as a single actor.[15]

This Article does not deal with treaties that are entered into by the Member States alone (if that were the case, they would not be mixed agreements *stricto sensu*), but treaties which in substance cover matters of exclusive EC competence. If it is not possible to have Community adherence to such treaties (because the treaty is only open to States), the EC competence may be exercised "through the medium of the Member States acting jointly in the Community's interest."[16] Nor does this Article deal with treaties concluded in the framework of the Common Foreign and Security Policy (CFSP), where the EU technically lacks legal personality.[17] However, the situation with respect to the EU legal personality has fundamentally changed since the enforcement of the Treaty of Amsterdam,[18] although Article 24 of the TEU refers to the conclusion of CFSP agreements by the Council.[19] The final subtitle will be devoted to

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14. For the participation of the EC in International Organizations, see RACHEL FRID, THE RELATIONS BETWEEN THE EC AND INTERNATIONAL ORGANIZATIONS; LEGAL THEORY AND PRACTICE (1995).

15. *See generally* MCGOLDRICK, *supra* note 4, chs. 2 & 10.

16. Opinion 2/91, ILO Convention No. 170, 1993 E.C.R. I-1061, ¶ 5. *See also* MCGOLDRICK, *supra* note 4, at 82-83.

17. M.R. Eaton, *Common Foreign and Security Policy*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY 215, 224 (David O'Keeffe & Patrick Twomey eds., 1994) [hereinafter LEGAL ISSUES OF THE MAASTRICHT TREATY].

18. Allan Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS 200, 203 (Alan Dashwood & Christophe Hillion eds., 2000) [hereinafter THE GENERAL LAW OF EC EXTERNAL RELATIONS].

19. Treaty on European Union, art. 24, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 [hereinafter TEU]. Article 24 TEU reads:

> 1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.
> 2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.
> 3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2).
> 4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).

concluding remarks on the issue of mixity in the EC external relations.

This unique legal and political situation, in which the EC and its Member States participate, raises a number of research questions: is there more legal coherence by having exclusive EC competence[20] on all issues of EC trade policy? Does Article 133 EC after the Nice Treaty suffice to reach the aim of the EC's common commercial policy? Is Article 133 EC an adequate legal instrument for the purposes of the EC's common commercial policy? If the EC acts together externally, might it help to join internally within the EU? Would deeper integration of the internal market (for, say, services) strengthen the negotiating position of the EC in the international trade arena? How does the political context shape this legal issue? How does it impact the thinking about the legal solution, taking into account the fact that the EU is legally federal (i.e., it possesses a federal legal structure), but politically intergovernmental (i.e., it is an intergovernmental political structure)? What political consequences will the legal outcomes have? In Amato's view, no member of the EU is powerful enough to be taken seriously on its own in the international arena. Thus, in order to play an effective role in the world, Europe must join together. In this sense, coordinating its foreign trade policies and streamlining the process was one of Amato's major ambitions during the Convention on the future of Europe.[21]

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5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.

6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.

Id. See generally Esa Paasivirta, *The European Union: From an Aggregate of States to a Legal Person?*, 2 HOFSTRA L. & POL'Y SYMP. 37 (1997).

20. On the issue of coherence and external competences, see generally Pascal Gauttier, *Horizontal Coherence and the External Competences of the European Union*, 10 EUR. L.J. 23 (2004).

21. Interview by Renee Haferkamp and Professors J.H.H. Weiler and Martin Schain, With Giuliano Amato, former Prime Minister fo Italy and Vice President of the Convention on the Future of Europe, at NYU School of Law, NY (Mar. 26, 2002), http://www.jeanmonnetprogram.org/seminar/02/Amato_script.rtf.

II. THE PROBLEM OF THE EU IN ITS EXTERNAL RELATIONS

With two remaining Communities[22] (currently there are only two Communities[23] since the European Coal and Steel Community (ECSC) Treaty expired on July 23, 2002),[24] one Union, and three different pillars of competences and decision-making, it is no wonder that third parties are often puzzled.[25] In order to avoid this chaos, it was proposed at the Amsterdam Intergovernmental Conference (IGC) of 1996-97 to create a single legal entity, the EU, just like the United Nations or the WTO. This proposal was perceived as a possible transfer of sovereignty in the field of CFSP.[26] Unfortunately, this discussion focused on the question of the

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22. In the 1950s, six European countries decided to pool their economic resources and set up a system of joint decisionmaking on economic issues. To do so, they formed three organizations—the ECSC, the EEC, and the Euratom. *"European Communities"* was the name given collectively to these three organizations when in 1967 they first merged under a single institutional framework with the Merger Treaty. They formed the basis of what is today the EU. The EEC soon became the most important of these three communities, and was eventually renamed simply the "European Community" by the Maastricht Treaty in 1992, which at the same time effectively made the EC the first of three pillars of the EU, called the "Community (or Communities) pillar." Subsequent treaties added further areas of competence that extended beyond the purely economic areas. The other two communities remained extremely limited; for that reason, often little distinction is made between the European Community and the European Communities as a whole. Furthermore, in 2002 the ECSC ceased to exist with the expiration of the Treaty of Paris which established it. Seen as redundant, no effort was made to retain it. Rather, its assets and liabilities were transferred to the EC, and coal and steel became subject to the EC Treaty.

23. In fact, the two remaining Communities work as one entity which functions in the framework of two treaties, even if they are legally different. In this sense, legally binding agreements concluded by the EC are still signed on behalf of one or both of the existing Communities. To clarify it must be said that the EC, and not the EU, is a member of the WTO or regional fisheries organizations—to give just two examples. *See generally* Jörn Sack, *The European Community's Membership of International Organizations*, 32 COMMON MKT. L. REV. 1227 (1995).

24. See the decision of the Representatives of the Governments of the EU Member States, meeting within the Council, on February 27, 2002 on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel. 2002 O.J. (L 79) 234.

25. For a comprehensive study on the ramifications of the expiration of the ECSC, see generally Benedetta Ubertazzi, *The End of the ECSC*, 8 EUR. INTEGRATION ONLINE PAPERS (2004), http://eiop.or.at/eiop/texte/2004-020a.htm, and Nico Groenendijk & Gert-Jan Hospers, *A Requiem for the European Coal and Steel Community (1952-2002)*, 150 DE ECONOMIST 601 (2002). *See also* Pinot Meunier, *La Communauté européenne du charbon et de l'acier est morte, vive la fédération européenne*, 451 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 509 (2001); Walter Obwexer, *Das Ende der Europäischen Gemeinschaft für Kohle und Stahl, in* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 517 (2002); María Cervera Vallterra, *La disolución de la Comunidad Europea del carbón y del acero: estado actual*, 12 Revista de Derecho Comunitario Europeo 393 (2002).

26. *See generally* Maria-Gisella Garbagnati Ketvel, *The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy*, 55 INT'L & COMP. L.Q. 77

exercise of competence, and the idea of the EU as a single actor (legal person) does not prejudge the powers of the EU in, say, the CFSP.

At Maastricht, it was not possible for Member States to accomplish a CFSP in the framework of the traditional mechanisms of Community institutions and Community law.[27] The second pillar[28] of the EU does not presently provide for a real supranational decision-making by majority voting. It utilizes unanimity as a decision-making system with the possibility of common positions[29] and joint actions.[30]

(2006); *see also* Daniel Thym, *Beyond Parliament's Reach? The Role of the European Parliament in the CFSP*, 11 EUR. FOREIGN AFF. REV. 109 (2006).

27. These mechanisms are known in the Community institutions as those of the first pillar.

28. The so-called "second pillar" refers to the CFSP in the EU.

29. TEU art. 12. Article 12 TEU reads: "The Union shall pursue the objectives set out in Article 11 by: defining the principles of and general guidelines for the common foreign and security policy, deciding on common strategies, adopting joint actions, adopting common positions, strengthening systematic cooperation between Member States in the conduct of policy." *Id.* The common position in the context of the CFSP is designed to make cooperation more systematic and improve its coordination. The EU Member States are required to comply with and uphold such positions which have been adopted unanimously at the Council. For reasons of simplification, the EU Constitutional Treaty, which is in the process of being ratified, restricts CFSP instruments to European decisions and international agreements. Once the EU Constitutional Treaty enters into force, common positions and their implementation will be based on European decisions (non-legislative instruments) adopted by the Council of Ministers.

30. TEU art. 13. Article 13 TEU reads:

> 1. The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.
> 2. The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.
> Common strategies shall set out their objectives, duration and the means to be made available by the Union and the Member States.
> 3. The Council shall take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council.
> The Council shall recommend common strategies to the European Council and shall implement them, in particular by adopting joint actions and common positions.
> The Council shall ensure the unity, consistency and effectiveness of action by the Union. *Id.* Joint action, which is a legal instrument under title V of the TEU (or the CFSP), means coordinated action by the EU Member States whereby all kinds of resources (human resources, know-how, financing, and equipment) are mobilized in order to attain specific objectives set by the Council, on the basis of general guidelines from the European Council. For reasons of simplification, the EU Constitutional Treaty, which is in the process of being ratified, restricts CFSP

It is the Treaty of Amsterdam that attempts to strengthen these mechanisms without implying major changes in this respect.[31] One major change is that the Council of the EU may adopt joint actions or common positions by qualified majority if they are based on a common strategy decided upon by the European Council.[32] However, in adopting a common strategy, the European Council[33] must be unanimous, which diminishes the practical importance of this innovation. In addition, any Member State can declare that for "important and stated reasons of national policy" it will "oppose the adoption of a decision to be taken by qualified majority," in which case such decision shall not be taken.[34]

Another important result from Amsterdam is the Secretary-General of the Council will assist the Presidency of the Council in matters dealing with the CFSP.[35] It is still unknown whether the High Representative for the CFSP will bring more coherence to the EU. One wonders how much coherence can be found in a system in which the Presidency will continue to assert its own role, the High Representative wishes to play an important role, and the Commission continues to be the representative of the EC in the first pillar,[36] as well as fully associated with the second pillar and therefore, has its own voice.

The Amsterdam Treaty also implies that parts of the third pillar[37] have been transferred to the first pillar.[38] This means that Community competence and supranational Community law are growing. The matters

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instruments to European decisions and international agreements. Once the EU Constitutional Treaty enters into force, joint actions and the implementation of such action will therefore be based on European decisions (non-legislative instruments) adopted by the Council of Ministers.

31. *See* Jörg Monar, *The European Union's Foreign Affairs System after the Treaty of Amsterdam: A "Strengthened Capacity for External Action"?*, 2 EUR. FOREIGN AFF. REV. 413-36 (1997). The author concludes that, for the EU's foreign affairs system, the Treaty of Amsterdam "brings only fragments of a reform." *Id.* at 434.

32. TEU art. 23(2); Allan Rosas, *The External Relations of the European Union: Problems and Challenges* 62 (Paper prepared for The Forum for US-EU Legal-Economic Affairs, 1998).

33. The European Council is not to be confused with the Council of the EU. The European Council consists of the heads of state and government of the 27 EU Member States.

34. TEU art. 23(2).

35. TEU art. 18(3). Article 18.3 reads: "The Presidency shall be assisted by the Secretary-General of the Council who shall exercise the function of High Representative for the [CFSP]." *Id. See* EUROPEAN UNION, SELECTED INSTRUMENTS TAKEN FROM THE TREATIES (1999), *at* http://europa.eu.int/eur-lex/en/treaties/dat/treaties_en.pdf.

36. This is the so-called Community pillar.

37. The so-called "third pillar" refers to matters of police and judicial cooperation in the EU.

38. The first pillar contains title IV on "Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons."

transferred from the third to the first pillar cover the entry of third-country nationals (visas, asylum, and immigration policy). This shows that although the transfer of the second pillar to the first may still seem remote, a gradual merger in one form or another of the two pillars seems inevitable for the construction of Europe.

Instead of being faced with two "international organizations" (the remaining two Communities) and the EU as an umbrella concept for these organizations, as well as the second and third pillars, Third States are now facing two organizations (the Communities) and a third legal (?) person (the EU), which appears as a different entity from the Communities. This situation hardly corresponds to the basic institutional principles of the TEU, such as Article 1 TEU[39] or Article 3 TEU.[40] From this, we can deduce that there is a need for clarification and for more coherence to the institutional image of the EU in the outside world.[41]

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39. TEU art. 1. Article 1 TEU predicates that "The Union shall be founded on the European Communities." *Id.*

40. TEU art. 3. "The Union shall in particular ensure the consistency of its external activities as a whole." *Id.*

41. There is a vast body of literature on this matter. *See generally* Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 BRIT. Y.B. INT'L L. 111 (1970); JAMES J. ALLEN, THE EUROPEAN COMMON MARKET AND THE GATT (1960); EUROPE AND GLOBAL ECONOMIC INTERDEPENDENCE (Leonce Bekemans & Loukas Tsoukalis eds., 1993); Jacques H.J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession*, 32 COMMON MKT. L. REV. 763 (1995); Alan Dashwood, *External Relations Provisions of the Amsterdam Treaty*, 35 COMMON MKT. L. REV. 1019 (1998); Hermann Da Fonseca-Wollheim & Horst Krenzler, *Die Reichweite der gemainsamen Handelspolitik nach dem Vertrag von Amsterdam-eine Debatte ohne Ende*, 33 EUROPARECHT 223 (1998); PAUL DEMARET, RELATIONS EXTÉRIEURES DE LA COMMUNAUTÉ EUROPÉENNE ET MARCHÉ INTÉRIEUR: ASPECTS JURIDIQUES ET FONCTIONNELS (1986); KLAUS HEIDENSOHN, EUROPE AND WORLD TRADE (1995); STANLEY HENIG, EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY; ASSOCIATIONS AND TRADE AGREEMENTS (1971); RAMÓN TORRENT, DROIT ET PRATIQUE DES RELATIONS ECONOMIQUES EXTERIEURES DANS L'UNION EUROPÉENNE (1998); Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, 36 MKT. L. REV. 387 (1999); Ernst-Ulrich Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 COMMON MKT. L. REV. 397 (1983); Jean-Claude Piris, La Capacité de l'Union Européenne de s'engager et d'agir en Matiere de Relations Economiques Exterieures: l'example de l'OMC, Florence, Academy of European Law, Conference given by Jean-Claude Piris, Jurisconsult of the Council of the European Union, on the 15th July 1998; EDWARD L.M. VÖLKER, BARRIERS TO EXTERNAL AND INTERNAL COMMUNITY TRADE (1993); PROTECTIONISM AND THE EUROPEAN COMMUNITY (Edward L.M. Völker ed., 1987); STEPHEN WOOLCOCK, TRADING PARTNERS OR TRADING BLOWS?: MARKET ACCESS ISSUES IN EC-U.S. RELATIONS (1992).

A. *On Foreign Policy*

Under international law, international organizations can have international personality, that is, rights and duties under the public international system of law.[42] In this respect, the major international law precedent on the international personality of public international law institutions is the *Reparations for Injuries Suffered in the Service of the United Nations* Case.[43] Since the EC is an "international organization," it can be given explicit legal personality by the treaty that created it. Concerning Third States, what counts is the international practice of the organization and the links that such an organization creates with these Third States.[44] This practice and its links will, or will not, create the organization's international legal personality.

In September 1948, Count Bernadotte, the Chief U.N. Truce Negotiator in Jerusalem, was killed by a gang of private terrorists.[45] The U.N. General Assembly asked for an advisory opinion from the International Court of Justice to bring an international claim concerning injuries suffered by its employees in circumstances involving the responsibility of a State.[46] Although the U.N. Charter does not expressly confer legal personality on the U.N. Organization, the Court examined the Charter as a whole and concluded that the United Nations was an international entity holding international rights and obligations, and capable of maintaining its rights by bringing international claims.[47] The Court pronounced itself as follows:

> Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State . . . . Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its

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42. *See* HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 976-82 (4th rev. 2003); NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS (1996).

43. MCGOLDRICK, *supra* note 4, at 26.

44. *See generally* OPPENHEIM'S INTERNATIONAL LAW 117-329 (Robert Y. Jennings & Arthur Watts eds., 9th ed. 1992).

45. MCGOLDRICK, *supra* note 4, at 27.

46. *Id.*

47. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11); *see also* MCGOLDRICK, *supra* note 4, at 27.

> purposes and functions as specified or implied in its constituent documents and developed in practice.[48]

So the question is: what, then, is the EU? For the time being, it is just the institutional and political framework in which all the EC's, and certain Member States', competences are exercised. In the near future, once the EU Constitutional Treaty is implemented—or a similar legal document, if the Constitutional Treaty never sees the light of day—the Union will be more than just a simple framework and, therefore, will become an actor with its own legal personality and competences. Let me try to explain this argument by giving the example of former Yugoslavia.

First, if we think of sending military forces, then we are dealing with the 27 Member States of the Union, acting outside the institutional system of the Union. However, one should not exclude the possibility that sending troops to former Yugoslavia may have a link with the CFSP. The borderline between Member States acting on their own, outside the institutional framework of the Union, and Member States acting within the political and institutional framework of the Union is not very clear. Secondly, if we refer to the "European Administration" of the town of Mostar, then we are dealing with Member States' competences in the framework of the EU. Thirdly, if we look at the commercial regime applicable to the republics of former Yugoslavia, then we are dealing with the EC's competences.

These examples should illustrate the danger of an indiscriminate use of the expression "the European Union does . . . ." Such an expression does not let us know who really does what: what does the EC, as such, do? What do the 27 Member States together do in the framework of the Union? What do Member States and the Community together do? Obviously, it would be even worse to use the expression "European Union" when making reference to the Member States outside the EU's institutional framework. Again, knowing the precise answer to these questions is vital, since the nature, as well as the legal and political consequences of this action, is completely different, depending on who acts.[49] To defend this argument, allow me to suggest two examples:

Example 1: The European Union reacts to the Helms-Burton[50] and d'Amato Acts.[51] This statement could mean:

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48. U.N. Reparation Case, 1949 I.C.J. at 179-80.

49. TORRENT, *supra* note 41, ch. 1, subtitle 1.

50. The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (better known as the Helms-Burton Act) is a U.S. law that strengthens and continues the U.S. embargo against Cuba.

51. The d'Amato Act refers to the economic embargo by the U.S. government against

a.—that the Community and the Member States both react to these two legislations, each with their own legal and political means; or

b.—that Member States cede their responsibilities to appear behind a single action conducted by the Community. As a matter of fact, the Community has very limited competences regarding such issues as the Helms-Burton or d'Amato Acts. Therefore, its action has very little effect or repercussion.

Example 2: Agreements between the European Union and Mercosur,[52] and the European Union and the Andean Community.[53]

This expression does not reveal the main difference between both agreements. The agreement with Mercosur is an agreement signed between the EC and the Member States on the European side, and Mercosur and its Member States on the South American side, whereas the agreement with the Andean Pact and its Member States has been signed only by the EC on the European side. In other words, EC Member States have not participated in this second agreement. Therefore, the first agreement has a greater scope than the second one. The same difference exists between the Euromediterranean Agreements of the EC and its Member States with Tunisia,[54] Morocco, Israel and other countries, as well as the Euromediterranean Agreement with the Palestinian Liberation Organization.[55] The latter agreement was signed by only the EC (and not the EC and its Member States) and has a lesser scope than the former agreements since the EU Member States do not participate in the agreement.

It is thus of vital importance to make certain linguistic clarifications that will ease the understanding of what we are trying to explain:

a.—the expression "The Union does humanitarian work" actually means "The Community and/or its Member States, acting together in the framework of the European Union, do humanitarian work;"

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companies of third countries investing in gas or oil in Iran and Libya.

52. MERCOSUR stands for *Mercado Comun del Sur* (Common Market of the Southern Cone) and is composed of Brazil, Argentina, Paraguay, and Uruguay. On December 9, 2005, Venezuela was accepted as a new member, and was officialized in late 2006. It was founded in 1991 by the Treaty of Asuncion, which was later amended and updated by the 1994 Treaty of Ouro Preto. Its purpose is to promote free trade and the fluid movement of goods, peoples, and currency.

53. The Andean Community is a trade bloc comprising, until recently, five South American countries: Venezuela, Colombia, Peru, Ecuador, and Bolivia. In 2006, Venezuela announced its withdrawal, reducing the Andean Community to four Member States. Until 1996, the trade bloc was called the Andean Pact, and came into existence with the signing of the Cartagena Agreement in 1969. Its headquarters are located in Lima, Peru.

54. 1998 O.J. (L 97) 1.

55. 1997 O.J. (L 187) 1.

b.—the expression "The Union and its Member States" is rather confusing since the Union includes the Member States; however, we can speak of "the Community and its Member States." Here we mean 26 different legal entities, each one of them having legal personality;

c.—the expression "The Union and its Member States act individually," refers to activities carried out within the framework of the Union (by the Community and/or the Member States acting together) and activities carried out by the Member States outside the framework of the Union.

That said, the success of the EU on unity in commercial policy seems to be inextricably linked to its success with a coherent foreign policy.[56] In fact, as is evidenced in the famous bananas and hormones disputes, both the political and economic aspects of the EU's external relations are inseparable.[57] At what was called the European Summit[58] in The Hague, in December 1969, the heads of state and government of the six original Member States asked their ministers of foreign affairs to study how progress could best be made in the area of political unification.[59] Their report was a proposal for cooperation in the area of foreign policy, which became the basis of what, for 25 years, would be called European Political

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56. *See generally* PANOS KOUTRAKOS, TRADE, FOREIGN POLICY AND DEFENCE IN EU CONSTITUTIONAL LAW: THE LEGAL REGULATION OF SANCTIONS, EXPORTS OF DUAL-USE GOODS AND ARMAMENTS chs. 2-7 (2001); Christian Tietje, *The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy*, 2 EUR. FOREIGN AFF. REV. 211 (1997); Esa Paarsivirta & Allan Rosas, *Sanctions, Countermeasures and Related Actions in the External Relations of the EU: A Search for Legal Frameworks*, *in* THE EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL RELATIONS 207 (Enzo Cannizzaro ed., 2002); Riccardo Pavoni, *UN Sanctions in EU and National Law: The Centro-Com Case*, 48 INT'L & COMP. L.Q. 582 (1999); Monar, *supra* note 31, at 413; Ramses A. Wessel, *The International Legal Status of the EU*, 2 EUR. FOREIGN AFF. REV. 109 (1997); Ramses A. Wessel, *Revisiting the International Legal Status of the EU*, 5 EUR. FOREIGN AFF. REV. 507 (2000); Nanette Neuwahl, *A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam*, 3 EUR. FOREIGN AFF. REV. 177 (1998).

57. EC—Bananas III (WT/DS27/AB/R); EC—Hormones (WT/DS26/AB/R, WT/DS48/AB/R).

58. European (or EU) Summits are the meetings of heads of state and government (i.e., presidents and prime ministers, depending on what their national constitutions indicate) of all EU countries, plus the President of the European Commission. In today's EU politics, summits are embodied in the European Council, which meets, in principle, four times a year to agree upon overall EU policy and to review progress. The European Council is the highest-level policy-making body in the EU, which is why its meetings are often called "summits."

59. EUROPEAN FOREIGN POLICY: THE EC AND CHANGING PERSPECTIVES IN EUROPE (Walter Carlsnaes & Steve Smith eds., 1994).

Cooperation (EPC).[60] The procedure was purely intergovernmental and based on unanimity, a constraint reflecting a strong belief that foreign policy decisions remained under the sovereign competence of national governments.[61]

John Peterson and Helene Sjursen argue the move from EPC to the CFSP was propelled by ambitions to create a "common" EU foreign policy analogous to, say, the common agricultural policy or common commercial policy.[62] Yet, French national foreign policy decisions to test nuclear weapons in the Pacific, send troops to Bosnia, or propose a French candidate to head the European Central Bank could be viewed as far more momentous and consequential than anything agreed upon within the CFSP between 1995 and 1997. It is plausible to suggest, as David Allen does, that the EU simply does not have a "foreign policy" in the accepted sense of the term.[63] Going one step further, the CFSP may be described, perhaps dismissed, as a "myth."[64] It does not, as the Maastricht Treaty promises, cover "all areas of foreign and security policy."[65] Obviously, it is not always supported "actively and unreservedly by its Member States in a spirit of loyalty and mutual solidarity."[66]

That said, and knowing that the presumption in the EU is to have collective action, is there really a "common" European interest? If so, is this interest so great as to assume that in certain circumstances Member States will act with a single voice? Do Member States have enough proximity in their national interests to act with one voice in the international sphere?

According to the same authors, the EU has not yet reached its apogee in terms of its ability to act with power and unity in international affairs.[67] However, some competences are exclusively of the EC. Customs duties

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60. For a description and analysis of such foreign policy co-ordination, see EUROPEAN POLITICAL COOPERATION IN THE 1980S: A COMMON FOREIGN POLICY FOR WESTERN EUROPE? (Alfred Pijpers et al. eds., 1988).

61. L'UNION EUROPÉENNE ET LE MONDE APRES AMSTERDAM (Marianne Dony ed., 1999).

62. John Peterson & Helene Sjursen, *Conclusion: The Myth of the CFSP?*, *in* A COMMON FOREIGN POLICY FOR EUROPE? COMPETING VISIONS OF THE CFSP 169 (John Peterson & Helene Sjursen eds., 1998) [hereinafter A COMMON FOREIGN POLICY].

63. David Allen, *Who Speaks for Europe? The Search for an Effective and Coherent Foreign Policy*, *in* A COMMON FOREIGN POLICY, *supra* note 62, at 41.

64. John Peterson & Helene Sjursen, *Conclusion, The Myth of the CFSP?*, *in* A COMMON FOREIGN POLICY FOR EUROPE? COMPETING VISIONS OF THE CFSP 169 (John Peterson & Helene Sjursen eds., 1998).

65. *Id.*

66. *Id.*

67. A COMMON FOREIGN POLICY, *supra* note 62, at 170.

and protective non-tariff barriers (NTBs)[68] such as quantitative limits, safety norms, health, and hygiene standards, were, and are, fixed by the Union as a whole, not by the individual Member States.

Although the Single European Act in 1987 established a legal basis for EPC, it remained largely unchanged and intergovernmental. Only when the EC faced the challenge of Central and Eastern Europe and the Iraqi crisis in 1990 and 1991 was more thought given to increasing cooperation in foreign policy. The result was the "implementation of a common foreign and security policy including the progressive framing of a common defence policy . . ."[69] The fact that Title V of the Treaty on the European Union brought foreign policy under the umbrella of the EU represents a step forward in regards to clarity. Having more transparent instruments is the result of requiring Member States to conform to common positions with the Council of Ministers.[70] Through joint actions, the Member States are committed to acting in support of these common positions. Finally, provisions of the Treaty of Amsterdam give the CFSP a clearer character by creating a High Representative of EU foreign policy (title V of the consolidated version of the TEU), assisted by a new policy planning and early warning unit in the Secretariat of the EU Council.[71]

The whole purpose of creating the CFSP was to enable the EU Member States to speak with one voice by creating a new entity that would do this on their behalf.[72] The Amsterdam Treaty brought limited majority voting for implementing foreign policy once it has been agreed to in outline by unanimity (Title V of the consolidated version of the Treaty of Amsterdam),[73] and the definition and implementation of a foreign policy position have been helped further along by the existence of EC policy instruments—in particular, the budget.[74] For example, the EC instruments

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68. NTBs are government measures or policies, other than tariffs, that restrict or distort international trade. Examples are import quotas, discriminatory government procurement practices, technical and scientific barriers related to plant health, environmental labelling, codes and standards, inter alia.

69. TEU art. 2, Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community, Office Journal C 321 E, of Dec. 29, 2006.

70. A Council common position is the provisional position agreed by the EU Council after the first reading stage of legislation, that is, after taking account of any amendments proposed or opinions offered by the European Parliament.

71. Treaty of Amsterdam, declaration on the establishment of a policy planning and early warning unit, 1997 O.J. (C 340) 1, 132.

72. Ramses A. Wessel, The Multi-Level Constitution of European Foreign Relations 22 (Apr. 2002) (unpublished EUI Workshop Paper, on file with European University Institute).

73. TEU arts. 11-28.

74. For more details, see SIMON J. NUTTALL, EUROPEAN FOREIGN POLICY (2000); Uwe Schmalz, *The Amsterdam Provisions on External Coherence: Bridging the Union's Foreign Policy*

advanced external policy with respect to the Mediterranean and to the New Transatlantic Agenda[75] between the EU and the United States and enhanced cooperation with Asia through the Association of Southeast Asian Nations (ASEAN) Declaration Initiative of August 8, 1967.[76] In addition, the EU's political relations with Central and Eastern Europe have been focused through European Agreements negotiated under the EC's competence.[77]

The EC's achievements in assisting other nations have been significant. Under the CFSP in 1995, the EU gave Russia U.S.$ 1.5 billion to assist its transition to democracy.[78] In 1996, European humanitarian aid totaled almost U.S.$ 2 billion.[79] Because Member States have proved reluctant to contribute to CFSP action from national budgets, EC financing has become the norm, which means that de facto, there is an indirect

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Dualism?, 3 EUR. FOREIGN AFF. REV. 421 (1998); Brian L. Crowe, *Some Reflections on the CFSP*, 3 EUR. FOREIGN AFF. REV. 319 (1998); Iris Canor, *"Can Two Walk Together, Except They be Agreed?" The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia into European Community Law Through the Perspective of the European Court of Justice*, 35 COMMON MKT. L. REV. 137 (1998); Marise Cremona, *The Common Foreign and Security Policy of the European Union and the External Relations Powers of the European Community*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 17, at 247; Elfriede Regelsberger & Wolfgang Wessels, *The CFSP Institutions and Procedures: A Third Way for the Second Pillar*, 1 EUR. FOREIGN AFF. REV. 29 (1996); Roy Ginsberg, *Conceptualising the European Union as an International Actor: Narrowing the Theoretical Capability-Expectations Gap*, 37 J. COMMON MKT. STUD. 429 (1999); PARADOXES OF EUROPEAN FOREIGN POLICY (Jan Zielonka ed., 1998); Deirdre Curtin & Ige F. Dekker, *The EU as a "Layered" International Organization: Institutional Unity in Disguise*, *in* THE EVOLUTION OF EU LAW 83 (Paul Craig & Gráinne de Búrca eds., 1999); THE EUROPEAN UNION AND CONFLICT PREVENTION—POLICY AND LEGAL ASPECTS (Vincent Kronenberger & Jan Wouters eds., 2004).

75. The New Transatlantic Agenda, U.S. Department of State Dispatch, Vol. 6, No. 49, 894-96 (Dec. 4, 1995).

76. Association of South-East Asian Nations Declaration, Aug. 8, 1967, 6 I.L.M. 1233 [hereinafter ASEAN Declaration].

77. David Kennedy & David E. Webb, *The Limits of Integration: Eastern Europe and the European Communities*, 30 COMMON MKT. L. REV. 1095 (1993); Marc Maresceau & Elisabetta Montaguti, *The Relations Between the European Union and Central and Eastern Europe: A Legal Appraisal*, 32 COMMON MKT. L. REV. 1327 (1995); János Volkai, *The Application of the European Agreement and European Law in Hungary: the Judgment of an Activist Constitutional Court on Activist Notions*, (Jean Monnet Ctr. for Int'l & Reg'l Econ. L. & Justice Working Paper Group, Paper No. 8/99, 1999), *available at* http://www.jeanmonnetprogram.org/papers/99/990801.html#fn0; Kirstyn M. Inglis, *The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation*, 37 COMMON MKT. L. REV. 1173 (2000); Wolfgang Weiss, *The Chapter II on Establishment in the Europe Agreements*, 6 EUR. FOREIGN AFF. REV. 243 (2001).

78. Hugo Paemen, *The European Union in International Affairs: Recent Developments*, 22 FORDHAM INT'L L.J. 145 (1999).

79. *Id.*

communitarization of CFSP as the Commission presents the budget, and the European Parliament decides on non-obligatory expenditures. In theory, CFSP has augmented the EU's competence to act in external matters. In practice, without the political will necessary to adapt the decision-making machinery or to use it effectively, CFSP has done more to raise and to disappoint expectations than it has to enhance the EU's international role.[80]

However, unity in foreign policy is a dramatic step forward and has made it easier for the EC to unify on commercial issues. As mentioned earlier, there are several areas where this cohesion is likely to spill over and impact the international arena. One example is that of competition policy, an area in which the Commission has been active since the early 1960s. With increasing worldwide economic interdependency and the emergence of global markets for a large number of products, more competition cases involve actions that take place outside of the EU[81] like the Boeing and McDonnell Douglas merger. In this respect, the EC-U.S. Cooperation Agreement (which provides the background for the McDonnell Douglas case) is worth mentioning. Competition authorities on both sides of the Atlantic examined the issue, and came to different conclusions. This case shows that even in carrying out policies that have traditionally been domestic, the EU is increasingly influencing economic matters in other parts of the world.

In addition, nowhere is the effect of domestic policies likely to be as relevant as with the Economic and Monetary Union (EMU).[82] The EMU is essentially a domestic issue. However, EC authorities hope that the Euro will benefit *international* trade, having a major impact both on international markets, and on the weight attributed to the EU as an international actor. That said, the variable geometry of the EMU with its ins and outs poses a challenge for the unity of external representation in the economic sphere.[83] To better understand the implications of the unitary character of the EU (or lack thereof), we must look at the legal interpretation of its role and responsibility.

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80. *Id.*

81. *Id.* at 146.

82. *Id.*

83. THE EUROPEAN UNION AND WORLD TRADE LAW: AFTER THE GATT URUGUAY ROUND (Nicholas Emiliou & David O'Keeffe eds., 1996) [hereinafter THE EUROPEAN UNION AND WORLD TRADE LAW].

B. *The Case of External Economic Relations*

It is important to say a few words about what Torrent calls the "fourth pillar" of the EU's institutional structure. If the reader studies the Maastricht Treaty,[84] he or she will perceive that the CFSP has a very large scope, and it covers the actions of EU Member States in the areas of external economic relations.[85] In fact,

1. Article 12 (ex-Article J.2) of the Maastricht Treaty refers to "any matter of foreign and security policy" and to "action in international organizations and at international conferences" without exception (therefore, without excluding economic conferences);[86]
2. Article 13 of the Maastricht Treaty also has a general scope;[87]

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84. The numbering of the Maastricht Treaty Articles is not the original one, but follows the changes made by the post-Maastricht intergovernmental conferences (IGCs).

85. REFORMING THE TREATY ON EUROPEAN UNION: THE LEGAL DEBATE (Jan A. Winter et al. eds., 1996).

86. TEU art. 12.

> 1. Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that their combined influence is exerted as effectively as possible by means of concerted and convergent action.
> 2. Whenever it deems it necessary, the Council shall define a common position. Member States shall ensure that their national policies conform to the common positions.
> 3. Member States shall co-ordinate their action in international organizations and at international conferences. They shall uphold the common positions in such forums. In international organizations and at international conferences where not all the Member States participate, those which do take part shall uphold the common positions.

Id.

87. Consolidated Version of the Treaty on European Union, art. 13, Dec. 24, 2002, 2002 O.J. (C 325) 5 [hereinafter TEU Consolidated]. Article 13 of the Consolidated Version of the TEU reads:

> 1. The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.
> 2. The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.

and finally,

3. Article 3 of the Maastricht Treaty establishes that "[t]he Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies."[88]

However, no one has given such a broad interpretation of the CFSP. Why is this so? An authentic interpretation of the CFSP is one that addresses in the best of all possible ways, the interests of those civil servants who had to put the CFSP in action:

1. From the point of view of the EU's national Ministries of Foreign Affairs, the idea was to "keep" the CFSP for them, even if they did not like it so much;
2. From the point of view of the Commission, there was only one strategy concerning the external economic relations, i.e., to extend the exclusive competence of the European Community as far as possible. This strategy was incompatible with an efficient co-ordination of the external economic policies of the Member States in the framework of the CFSP.

It is this restrictive interpretation of the CFSP, which necessarily provokes the development of what Torrent calls the "fourth pillar" of the

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Common strategies shall set out their objectives, duration and the means to be made available by the Union and the Member States.

3. The Council shall take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council.

The Council shall recommend common strategies to the European Council and shall implement them, in particular by adopting joint actions and common positions.

The Council shall ensure the unity, consistency and effectiveness of action by the Union.

Id.

88. TEU Consolidated art. 3. Article 3 of the Consolidated Version of the TEU reads: The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis communautaire. The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

EU.[89] The term *restrictive* does not suggest a possible inclination of the CFSP toward the EC competences, but rather, toward the side of the Member States acting outside the institutional framework of the EU. The so-called "fourth pillar" shows how within the institutional framework of the EU, the *de facto* common exercise of Member States' competences is mainly, but not exclusively, on issues of external economic relations. We may illustrate this with two very significant examples taken from multilateral and bilateral relations:

1. When dealing with the management of the World Trade Organization Agreements, it is the Council of Ministers of the European Union that acts not only on behalf of the EC, but also on behalf of the Member States in the matters in which they are competent;
2. The Association Agreements with the republics of the former Soviet Union deal mainly with the agreed treatment to the enterprises. This issue reveals Member States' competences. Proof of it lies in Opinion 2/92 of the European Court of Justice of 24 March 1995,[90] which deals with the competence of the Community or of one of its institutions to participate in the third revised decision of the Council of the OECD[91] concerning national treatment. These agreements have been negotiated and are integrally managed after their conclusion by the Council of the European Union and the European Commission.

Torrent justifies the existence of a "fourth pillar" by saying that the exercise of Member States' external economic competences within the institutional framework of the EU does not show signs of being part of the "third pillar," "second pillar,"[92] or "first pillar."[93] Therefore, we must

89. One interesting point by Torrent is the fact that making reference to the "fourth pillar" of the Union shows how the language of "three pillars" does not let us comprehend correctly the nature of the EU. *See* Ramon Torrent, *Le 'Quatrième Pilier' de l'Union Européenne, in* LA COMMUNAUTÉ EUROPÉENNE ET LES ACCORDS MIXTES, QUELLES PERSPECTIVES?49-63 (Jacques Bourgeois et al eds., 1997).

90. Opinion 2/92, 1995 E.C.R. I-521.

91. The Organization for Economic Co-Operation and Development (OECD) is a forum of 30 countries for discussion of economic policies between industrialized market economies, sharing a commitment to democratic government and the market economy.

92. Even less so in the second pillar if we take into account the restrictive interpretation which has been given to the CFSP, which is the second pillar itself.

93. It could not be part of this pillar since we are dealing precisely with the exercise of Member States' competences, and not with that of the Community's.

speak of a "fourth pillar," if we wish to continue the linguistic usage of pillars.

However, there are at least three comments to make regarding what has been said so far:

> —First comment: a clear distinction between the scope of EC competences and the range of application of the EC Treaty must be made. Let us make use of two examples in order to explain this distinction.

Example one: Articles 149, 150 (education, vocational training, and youth), 151 (culture),[94] and 152 EC (public health)[95] limit the Community's competence. Any kind of harmonization of legal provisions of the Member States is excluded from the scope of these articles. However, this limitation does not mean that the national legislations in culture, education, or health exceed the range of application of the treaties. They must respect the general principle of nondiscrimination based on nationality and its specific translation in the field of the four freedoms in EU law.[96]

Example two: concerning the criminal legislation of Member States, the ECJ has established Member States must respect the general principles of EC law. If, for example, an infraction to customs regulations, before January 1, 1993—date of completion of the internal market—was liable to a fine applicable to intra-Community trade, it should respect the principle of proportionality. The conclusions by the Advocate-General Van Gerven in case 212/88[97] have a general appreciation for the Court's decisions over this issue.

The distinction made by these two examples shows that Community treaties have two different functions. On the one hand, one such function is typical of an international treaty, that is, to limit the exercise of the

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94. In cultural policy, the EC must contribute to the flowering of the cultures of the EU Member States, while respecting their national and regional diversity and bringing the common cultural heritage to the fore. EC Treaty art. 151.

95. The EC action, which complements national policies, must be directed toward improving public health, preventing human illness and diseases, as well as obviating sources of danger to human health. EC Treaty art. 152.

96. Let us remember for the non-specialized reader that the four freedoms are the free movement of goods, the free movement of persons, the free movement of capital, and the freedom to provide services. This is certainly one of the great achievements of the EU, which has been able to create a frontier-free area within which people, goods, services, and money can all move around freely.

97. Case 212/88, *Criminal Proceedings Against F. Levy*, 1989 E.C.R. 3511, 3523.

competences of the contracting parties (in other words, of the Member States when they are competent). On the other hand, the other function, which is transferring a competence to the Community is very specific. While this function of transferring competences to the Community is very specific, it is not exclusive to Community treaties. The fact of not making this distinction has generated very generalized mistakes in the analysis of the distribution of external competences between the Community and its Member States. There was no distinction between the range of application of the treaties and the scope of EC competences. This mistake had terrible consequences when combined with the also mistaken thesis by which non-exclusive EC competences become exclusive competences when there is a need to act at the international level. The combination of these two mistakes was the genesis of the thesis by which all the Agreements of the Uruguay Round were exclusive EC competence.

—Second comment: it should be underlined that there is a fine line between what EU Member States do outside and inside the institutional system of the EU. The earlier example of former Yugoslavia is helpful here. Certain EU Member States decided to send troops outside the institutional system of the Union. But to what extent have the diplomatic initiatives from the various EU Member States been inside or outside the framework of the CFSP? And who pays for what in this same example? The same case would apply *mutatis mutandis* to participation in the Middle Eastern peace process. The best example of Member States' activities which are borderline with the Union's institutional system is the EU's participation in the UN.

—Third comment: when analyzing the Schengen Agreement, we can observe how this agreement used to be based outside the institutional framework of the EU. Presently, it is inside the institutional framework of the EU. The issues dealt with in the Schengen Agreement are, therefore, treated inside the institutional framework of the EU, as Member States' competences. Some of these issues are also treated as Community competence. This is a very important point when it comes to external relations: very often a specific problem of international politics can be treated in various ways. The fact of being treated in one way or another has not only legal but also political consequences. The means taken and the foreseeable results are different.

Experience has proven that one of the bigger mistakes of the usage of pillars is that it prevents the same issue from being used in different ways. With the system of pillars in mind, people tend to ask to which pillar a specific issue belongs. Since a good number of national administrations (and certain services of the EU institutions) are organized by pillars instead of by issues, it is no surprise that this question causes internal conflicts of power and jealousy. This is why it is almost evident for national and Community civil servants that the political dialogue with Third States belongs to the "second pillar." However, joint declarations, which create this political dialogue, do not limit their scope to questions which, inside the Union, are treated within the framework of the CFSP. How can we then pretend to avoid Third States from raising questions which relate to EC exclusive competence in the framework of this dialogue?

It should not be necessary to underline that the right approach is precisely the opposite of the one that comes from asking the question to what pillar a certain issue belongs. The issue must be analyzed from all possible angles in order to obtain the best solution. When various possible angles provide different courses of action this approach implies a difficulty, namely it has to guarantee coherence among the various ways of action. But politicians, senior civil servants, and jurists are paid by taxpayers to resolve these kinds of difficulties and not to find the way (intellectually easy but the wrong way) of putting each issue in only one of the potential courses of action.

1. The EC in the World Trade Organization: An Overview[98]

Let us start with a historical introduction of the WTO and its evolution.

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98. MARY FARRELL, EU AND WTO REGULATORY FRAMEWORKS: COMPLEMENTARITY OR COMPETITION? (European Dossier ed. 1999); Jörn Sack, *The European Community's Membership of International Organizations*, 32 COMMON MKT. L. REV. 1227 (1995); Robert Reich, *Judge-Made 'Europe à la carte': Some Remarks on Recent Conflicts Between European and German Constitutional Law Provoked by the Bananas Litigation*, 7 EUR. J. INT'L L. 103 (1996); Pieter J. Kuijper, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 EUR. J. INT'L L. 222 (1995); Ulrich Everling, *Will Europe Slip on Bananas? The Bananas Judgments of the Court of Justice and National Courts*, 33 COMMON MKT. L. REV. 401 (1996); Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83 (1998); Pescatore, *supra* note 41, at 387; Sebastiaan Princen, *EC Compliance with WTO Law: The Interplay of Law and Politics*, 15 EUR. J. INT'L L. 555-74 (2004).

> At times it seemed doomed to fail. But in the end, the Uruguay Round brought about the biggest reform of the world's trading system since GATT was created at the end of the Second World War. And yet, despite its troubled progress, the Uruguay Round did see some early results. Within only two years, participants had agreed on a package of cuts in import duties on tropical products—which are mainly exported by developing countries. They had also revised the rules for settling disputes, with some measures implemented on the spot. And they called for regular reports on GATT members' trade policies, a move considered important for making trade regimes transparent around the world.[99]

There are three main purposes to the WTO:

> The system's overriding purpose is [(i)] to help trade flow as freely as possible — so long as there are no undesirable side-effects. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be "transparent" and predictable. Because the agreements are drafted and signed by the community of trading nations, often after considerable debate and controversy, one of the WTO['s] most important functions is [(ii)] to serve as a forum for trade negotiations. A third important side to the WTO['s] work is [(iii)] dispute settlement.[100]

It is a fact that in international trade negotiations, there is unequal balance of power between smaller states and bigger states.[101]

> Trade relations often involve conflicting interests. Contracts and agreements, including those painstakingly negotiated in the WTO

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99. WTO, Understanding the WTO: Basics. The Uruguay Round, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited June 12, 2007).

100. Information Centre SPS, WTO, http://www.sps-info.org. ua/en/wto/ (last visited Dec. 17, 2007).

101. This unequal balance of power is rectified in the WTO Dispute Settlement Understanding, where both parties have equal weight before the WTO Panel or Appellate Body and the party with stronger legal arguments (regardless of its negotiating capacity) will win the case. For a detailed analysis on the matter, see Andrew T. Guzman & Beth A. Simmons, *Power Plays & Capacity Constraints: The Selection of Defendants in WTO Disputes* (Int'l Legal Stud. Program, Working Paper No. 6, 2005), *available at* http://repositories.cdlib.org/ils/wp/6.

> system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO Agreements.[102]

> The WTO began life on 1 January 1995, but its trading system is half a century older. Since 1948, the General Agreement on Tariffs and Trade (GATT) had provided the rules for the system. . . . It did not take long for [it] to give birth to an unofficial, *de facto* international organization, also known informally as GATT. Over the years GATT evolved through several rounds of negotiations. The latest and largest round, was the Uruguay Round which lasted from 1986 to 1994 and led to the WTO's creation. Whereas GATT had mainly dealt with trade in goods, the WTO and its agreements now cover trade in services, and in traded inventions, creations and designs (intellectual property).[103]

As for the EC in the world trading system, it suffices to say that the EC was one of the signatories to the Uruguay Round Trade Agreement (Uruguay Round Agreement). Thus, the EC was committed to make certain changes to its policies. The text of the Uruguay Round Agreement, which in itself relates to tightening up the rules on preferential trade agreements,[104] offers more scope for conflict between the WTO and the EC

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102. Information Centre SPS, *supra* note 100.

103. WTO Understanding the WTO: Basics. What is the World Trade Organization?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Dec. 17, 2007).

104. Steve Peers, *Banana Split: WTO Law and Preferential Agreements in the EC Legal Order*, 4 EUR. FOREIGN AFF. REV. 195 (1994); Judson Osterhoudt Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting* (Jean Monnet Ctr. for Int'l & Reg'l Econ. L. & Justice Working Paper Group, Working Paper No. 3/98, 1998); Marise Cremona, *EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders*, *in* THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 5 (J.H.H. Weiler ed., 2000); Stefan Griller, *Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96 Portugal v Council*, 3 J. INT'L ECON. L. 441 (2000); Naboth van den Broek, *Legal Persuasion, Political Realism, and Legitimacy: The European Court's Recent Treatment of the Effect of the WTO Agreements in the EC Legal Order*, 4 J. INT'L ECON. L. 411 (2001); Piet Eeckhout, *Judicial Enforcement of WTO Law in the European Union—Some Further Reflections*, 5 J. INT'L ECON. L. 91 (2002); Piet Eeckhout, *The Domestic Legal Status of the WTO Agreements: Interconnecting Legal Systems*, 34 COMMON MKT. L. REV. 11 (1997); Eileen Denza, *The Community as a Member of International Organisations*, *in* THE EUROPEAN UNION AND WORLD TRADE LAW, *supra* note 83, at 3; Marise Cremona, *Rhetoric and Reticence: EU External Commercial Policy in a Multilateral Context*, 38 COMMON MKT. L.

than do any other areas of the agreement bearing more directly on individual EC policies, since the text challenges the essence of the EU.[105]

When looking at the history of the EC external trade relations, one sees the EC was not a contracting party to the GATT. European countries such as France, Belgium, Luxembourg, the Netherlands, and the United Kingdom (but not Italy and Germany) were founding contracting parties to GATT 1947. Subsequently, all EC Member States became full members. Over the years, the EC has become a full member and a contracting party to the GATT/WTO. Accession protocols and trade agreements negotiated in the GATT framework provided in their final provisions that the agreements were open for acceptance by contracting parties to the GATT and by the EC. In addition, the substantive and procedural provisions of these agreements treat the EC like a GATT contracting party.

Furthermore, since 1970, most agreements negotiated in the framework of GATT were accepted by the EC alone, without acceptance by EC Member States. The only exceptions are two agreements at the end of the Tokyo Round of multilateral trade negotiations and the part of the Tariff Protocol relating to ECSC products.[106] The EC exercised all rights and fulfilled almost all obligations under GATT law in its own name like a GATT contracting party. Since the 1960s, all GATT contracting parties have accepted such exercise of rights and fulfillment of obligations by the EC and have asserted their own GATT rights, even in dispute settlement proceedings relating to measures of individual EC Member States, almost always against the EC.[107] The EC has replaced, with the consent of other GATT contracting parties, its Member States as bearers of rights and obligations under the GATT.

Accordingly, the Agreement establishing the WTO, which recognizes the EC's membership alongside the EU Member States. Under Article XI of the WTO Agreement, the EC and its Member States became original members to the WTO of their own right.[108] The EC is, without a doubt, a

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REV. 359 (2001); Francis Snyder, *The Gatekeepers: The European Courts and the WTO*, 40 COMMON MKT. L. REV. 313 (2003).

105. MARY FARRELL, EU AND WTO REGULATORY FRAMEWORKS: COMPLIMENTARITY OR COMPETITION? 13 (1999).

106. Jacques H.J. Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International EEC Perspective*, 19 COMMON MKT. L. REV. 5, 21-22 (1982).

107. Ernst-Ulrich Petersmann, *The EEC as a GATT Member—Legal Conflicts Between GATT Law and European Community Law, in* THE EUROPEAN COMMUNITY AND GATT 23, 37-38 (Meinhard Hilf et al. eds., 1986).

108. WTO Agreement art. XI. Article XI of the WTO Agreement reads:

major actor in the WTO thanks to the fact that it speaks with a single voice in the world trading system and in the WTO. Facts speak for themselves: the EC of fifteen represented the world's largest trading bloc. In 2002, it amounted to 37.3% of exports and 34.9% of imports in world merchandise trade. With respect to services trade, the EC accounted for 43.2% of exports and 41.6% of imports. With the 2004 EU enlargement to 25 members, these figures have increased.[109]

In relation to voting rights inside the WTO—voting de facto never happens, since decisions in the WTO are taken by consensus—the EC has a number of votes equal to the number of its Member States.[110] The vote in areas of exclusive EC competence should not pose a problem in principle, whereas difficulties may arise in areas of shared competence, especially in the absence of a common position among the EU Member States together with the EC.

2. The Diagnosis: Polycephalous (and Polyphonic?) Anatomy of the EC in the WTO

During the Uruguay Round of multilateral trade negotiations, the EC was faced with the issue of the scope of its authority under the EC Treaty in the field of international economic relations, particularly with respect

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1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

109. *See* INTERNATIONAL TRADE REGULATION. LAW AND POLICY IN THE WTO, THE EUROPEAN UNION AND SWITZERLAND. CASES, MATERIALS AND COMMENTS 235 (Thomas Cottier & Mathias Oesch eds., 2005).

110. WTO Agreement art. IX. Article IX of the Agreement Establishing the WTO reads: "[W]here the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their Member States which are Members of the WTO."

to trade in services[111] and intellectual property rights.[112] Negotiations were conducted according to the normal procedures for GATT negotiations, albeit that the European Commission negotiated on behalf of both the EC and its Member States.[113] The assumption throughout was that EU Members States would continue to be members of the world trading system (and therefore WTO Members) and would not be completely replaced by the EC.

With regard to the latter point, two constraints of a political nature led the European Commission not to stand up and claim exclusive EC membership of the new organization. The first constraint was the fact that the matter was discussed in a meeting of the EU Council in November 1993, after the Maastricht Treaty had entered into effect with some difficulty and it was thought wise not to push the issue of replacing the EU Member States at that stage. The second political constraint was that around this time, the Council had not yet approved the Uruguay Round and Sir Leon Brittan thought it was preferable not to put on the table another contentious issue. A result was the creation of Article XI of the Marrakesh Agreement establishing the WTO, which states that the contracting parties to GATT 1947 and the European Communities shall become original Members of the WTO.[114]

This dual membership of the EC and its Member States in the WTO (which creates a European polycephalous approach to the WTO, that is, 27 EU Member States and the European Communities, but not polyphonic, since by the time they reach the WTO, European nations have found a common position to speak with a single voice) may be an open door for abuse by other WTO members, and a handicap for both the EC and its Member States.[115] The fact that the EC Member States are WTO Members together with the EC, and the fact that the representation of the EC and its

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111. Paulo Mengozzi, *Trade in Services and Commercial Policy*, in THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992, at 223 (Marc Maresceau ed., 1993) [hereinafter THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY].

112. *See* Inge Govaere, *Intellectual Property Protection and Commercial Policy*, *in* THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY, *supra* note 111, at 197; A. David Demiray, *Intellectual Property and the External Power of the European Community: The New Extension*, 16 MICH. J. INT'L L. 187 (1994).

113. Peter L.H. Van den Bossche, *The European Community and the Uruguay Round Agreements*, *in* IMPLEMENTING THE URUGUAY ROUND 23, 56-57 (John H. Jackson & Alan O. Sykes eds., 1997).

114. WTO AGREEMENT, art. XI.

115. *See generally* Mary E. Footer, *The EU and the WTO Global Trading System*, *in* 4 THE STATE OF THE EUROPEAN UNION: DEEPENING AND WIDENING 317 (Pierre-Henri Laurent & Marc Maresceau eds., 1998).

Members States in the WTO is unregulated poses questions in relation to the position of the ECJ to the WTO law. As far as GATT 1947 was concerned, and as a result of the substitution of the EC for the Member States in relation to commitments under GATT, the ECJ would have the final word on the interpretation of the GATT provisions, even in relation to the compatibility of Member States legislation with GATT.[116] However, this argument is no longer possible. In accordance with Article XI of the Agreement establishing the WTO, both the EC and its Member States signed the Final Act.

The ECJ has stated that the division of powers between the EC and its Member States is a domestic question in which third parties have no need to intervene.[117] In the minutes of the Council meeting on March 7-8, 1994, the Commission relied on this argument by saying that: "[T]he Final Act . . . and the [A]greements thereto fall exclusively within the competence of the European Community."[118] This argument does not allow a *sensu contrario* inference because the Member States and the EC are formally WTO Members, it is irrelevant for the division of powers within the EC legal system. On the contrary, the Agreement establishing the WTO and the agreements that form part of it were approved by the Council on behalf of the EC expressly "as regards matters within its competence."[119] Therefore, the need for a useful raison d'etre regarding the joint WTO membership of the EC and the Member States is inevitable. It must have something to do with the division of powers within the EC.

Certain trade agreements deal with matters in respect of which both the Community and its Member States have competence. In these cases, the ECJ has stressed the duty of cooperation that exists between the Community and the Member States. I shall explore some of the problems that this raises in practice.

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116. Joined Cases 267, 268, & 269/81, *Amministrazione delle Finanze dello Stato* v *Società Petrolifera Italiana* (SPI) and SpA Michelin Italiana (SAMI) 1983 E.C.R. 801, ¶¶ 15, 17.

117. Ruling 1/78, Nuclear Materials 1978 E.C.R. 2151, ¶ 35.

118. The European Commission, *Minutes from Meeting of March 7 & 8 of the Council of the EU, cited in* Opinion 1/94, *Int'l Agreements Concerning Intellectual Property*, 1994 E.C.R. I-5267, ¶ 5.

119. 94/800/EC: Council Decision of Dec. 22, 1994 (O.J. 1994 L 336/1).

III. ALLOCATION OF COMPETENCES BETWEEN THE EC AND ITS MEMBER STATES[120]

The issue of allocation of competences is an internal question for the EC.[121] Leaving aside trade policy (where the EC competences should be co-extensive with the WTO) and human rights (where the EC should be given a general competence to adopt any measure, which would increase the protection of human rights within the sphere of application of EC law),[122] the EC does not require any increase in its substantive jurisdiction. The issue of allocation of competences is nevertheless a central concern

120. For a general overview on division of powers, see RICHARD SIMEON, DIVISION OF POWERS AND PUBLIC POLICY (1985).

121. E. Freeman, *The Division of Powers Between the European Communities and the Member States*, 30 CURRENT LEGAL PROBS. 159 (1977).

122. Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, *in* THE EU AND HUMAN RIGHTS 3 (Philip Alston ed., 1999) [hereinafter THE EU AND HUMAN RIGHTS]. For further analyses on the external dimension of EU human rights policy, see ELENA FIERRO, THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE (2003); KAREN E. SMITH, EUROPEAN UNION FOREIGN POLICY IN A CHANGING WORLD ch. 5 (2003); Marise Cremona, *Human Rights and Democracy Clauses in the EC's Trade Agreements*, *in* THE EUROPEAN UNION AND WORLD TRADE LAW, *supra* note 83, at 62; Marise Cremona, *The EU and the External Dimension of Human Rights Policy*, *in* EC—INTERNATIONAL LAW FORUM III—A PEOPLE'S EUROPE: TURNING A CONCEPT INTO CONTENT 155 (Stratos Konstadinidis ed., 1998); Karen E. Smith, *The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?*, 3 EUR. FOREIGN AFF. REV. 253 (1998); Barbara Brandtner & Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 EUR. J. INT'L L. 468 (1998); Angela Ward, *Frameworks for Cooperation between the European Union and Third States: A Viable Matrix for Uniform Human Rights Standards?*, 3 EUR. FOREIGN AFF. REV. 505 (1998); Dominic McGoldrick, *The EU after Amsterdam: An Organisation with General Human Rights Competence?*, *in* LEGAL ISSUES OF THE AMSTERDAM TREATY 249 (David O'Keeffe & Patrick Twomey eds., 1999) [hereinafter LEGAL ISSUES OF THE AMSTERDAM TREATY]; Barbara Brandtner & Allan Rosas, *Trade Preferences and Human Rights*, *in* THE EU AND HUMAN RIGHTS, *supra*, at 699; Eibe Reidel & Martin Will, *Human Rights Clauses in External Agreements of the EC*, *in* THE EU AND HUMAN RIGHTS, *supra*, at 723; Dev-Chin Horng, *The Human Rights Clause in the European Union's External Trade and Development Agreements*, 9 EUR. L.J. 677 (2003); Pieter Jan Kuyper, *Trade Sanctions, Security and Human Rights and Commercial Policy*, *in* THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY, *supra* note 111, at 387; Holly Cullen, *The Limits of International Trade Mechanims in Enforcing Human Rights: The Case of Child Labour*, 7 INT'L J. CHILD. RTS. 1 (1999); Andrew Clapham, *Where is the EU's Human Rights Common Foreign Policy and How Is It Manifested in Multilateral Fora?*, *in* THE EU AND HUMAN RIGHTS, *supra*, at 627; J.H.H. Weiler & Sybilla C. Fries, *A Human Rights Policy for the European Community and Union: The Question of Competences*, *in* THE EU AND HUMAN RIGHTS, *supra*, at 147; Richard Youngs, *European Union Democracy Promotion Policies: Ten Years On*, 6 EUR. FOREIGN AFF. REV. 355 (2001); Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 J. INT'L ECON. L. 111 (2002).

and inflames high emotion among the general public,[123] who fear the encroachment of supranational action into areas of national heritage, power, and tradition.[124] As suggested by Griller and Weidel, it is "another manifestation of the struggle for power between the EC and its Member States."[125] Third States should not mind, but practice demonstrates they do: it is more difficult to communicate with 28 entities (27 EU Member States plus the European Commission) than with one single entity (the EC). Additionally, as argued by Lukaschek and Weidel, the "complicated system [of allocation of competences in the EU] is hardly ascertainable for the outside world and might entail uncertainty and confusion for third

123. Authors such as Weiler believe that the issue of competences in the EU remains highly sensitive. The post-Maastricht public debate demonstrated a clear public distrust in the ability of the EU institutions to guarantee the limits to EU influence on public life. Many people have tried to nail down EC competences. At the same time, efforts have been made to increase public confidence in the jurisdictional limits of the EC and EU. *See* J.H.H. WEILER, THE DIVISION OF COMPETENCES IN THE EUROPEAN UNION (1997).

124. Interestingly, German constitutional Judge Siegfried Bross has called for a separate court to judge on disputes over competences. In his opinion, the ECJ cannot do this as it may not rule on national constitutional law, and the equivalent national courts may not do it as they cannot rule on interpretation of European law. Cases on economics law, competition law, or health law will become more common in the future when the EU will claim more and more competences for itself. The subsidiarity principle—which says that the EU should only act if the goal cannot be better achieved by the EU Member States—offers no relief to the competence confusion, according to Judge Bross. This is so because once the EU Member States transfer powers to the supranational level, they implicitly acknowledge that it is better done at the EU level and cannot invoke the subsidiarity principle at a later stage. For instance, monetary policy in the EU. Weiler and Mayer have also proposed a similar idea: the creation of a Constitutional Council for the EU, modeled on its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted, but before coming into force. It could be seized by any EU institution, any EU Member State or by the European Parliament acting on a majority of its members. Its President would be the President of the ECJ and its members would be sitting members of the constitutional courts or their equivalents in the EU Member States. Within the Constitutional Council, no single EU Member State would have a veto power. The composition would also underscore that the question of competences is fundamentally one of national constitutional norms, but still subject to a Union solution by a Union institution. Although this idea of creating a Constitutional Council for the EU may seem as an attack on the ECJ, Weiler claims that such a view is myopic and fails to appreciate that the issue of competences is already bringing a shift in the position of the ECJ. *See* WEILER, *supra* note 123, at iii & 62. *See generally* Siegfried Bross, *Europäischer Gerichtshof für Kompetenzkonflikte*, 2001 VERWALTUNGSARCHIV 425; Franz Mayer, *The European Constitution and the Courts*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 281-333 (Armin von Bogdandy & Jürgen eds., 2006).

125. *See* EXTERNAL ECONOMIC RELATIONS AND FOREIGN POLICY IN THE EUROPEAN UNION 15 (Stefan Griller & Birgit Weidel eds., 2002) [hereinafter EXTERNAL ECONOMIC RELATIONS].

countries about the identity and authority of their negotiation partner."[126] Furthermore, being divided but united can give the EC an edge in international bargaining.[127] It is well-known that foreign trade policy and internal market policies require close coordination. However, in the case of the EC, its nature makes this obviousness more challenging from a constitutional viewpoint.[128] The separation of powers between the EC and its Member States, and among the EU institutions, remains an unsolved issue in external trade regulation. Oftentimes, the EU's institutional and structural peculiarities are more of a constraint than a strategic advantage.

A. *Principal-Agent Theory and International Negotiations*

The delegation of competences in the EC can be explained through the principal-agent theory. This theory has only recently been applied to the context of negotiations.[129] According to this theory, agency costs can be due, inter alia, to information asymmetries. In other words, agents know more about their duties than their principals do. In the context of negotiations, we would speak of agency costs because the negotiator knows more than the principal about the constraints of external negotiations.[130] Often, agency costs also may occur because the agent's interests may not be the same as those of her or his principals. "The . . . challenge is to create institutional arrangements to minimize such agency costs."[131]

The question to analyze is who should speak for the EC in international trade negotiations. According to Meunier and Nicolaïdis, the answer

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126. *See* Anita Lukaschek & Birgit Weidel, *Exclusive External Competence of the European Community*, *in* EXTERNAL ECONOMIC RELATIONS, *supra* note 125, at 113, 140.

127. Sophie Meunier, *Divided but United: European Trade Policy Integration and EU-U.S. Agricultural Negotiations in the Uruguay Round*, *in* THE EUROPEAN UNION IN THE WORLD COMMUNITY 193 (C. Carolyn Rhodes ed., 1998).

128. *See* Cremona, *The Common Foreign and Security Policy of the European Union and the External Relations Powers of the European Community*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 17, at 247.

129. Sophie Meunier & Kalypso Nicolaïdis, *Who Speaks for Europe? The Delegation of Trade Authority in the EU*, 37 J. COMMON MKT. STUD. 477 (1999); NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS, AND EVERYBODY ELSE (Robert H. Mnookin et al. eds., 1999) [hereinafter NEGOTIATING ON BEHALF OF OTHERS].

130. Kalipso Nicolaïdis, *Minimizing Agency Costs in Two-Level Games: Lessons from the Trade Authority Controversies in the United States and the European Union*, *in* NEGOTIATING ON BEHALF OF OTHERS, *supra* note 129, at 87.

131. Sophie Meunier & Kalypso Nicolaïdis, *EU Trade Policy: The Exclusive versus Shared Competence Debate*, *in* 5 THE STATE OF THE EUROPEAN UNION: RISKS, REFORM, RESISTANCE AND REVIVAL 325, 328 (Maria Green Cowles & Michael Smith eds., 2000).

depends both on the kind of relationship, which has been established between the spokesperson (European Commission) and its principals (EU Member States) and on the phase of the negotiation.[132] For the study of the allocation of EC competences in trade policy-making, we will first make a brief note on the evolution of EC trade policy, and then apply the principal-agent theory to understand the modes of control and the difference between exclusive and shared competence in the EU.

There is no definition in the treaties as to the areas that do lie within exclusive EC competence. Defining the respective boundaries of competence is compounded by the fact that in a number of areas the EC shares competence with its Member States. This difficulty of allocating competences is further compounded by the presence of the implied powers provision which appears in Article 308 EC[133] and the liberal construction given to this by the ECJ.[134] Also when one considers the division of competence between the EC and its Member States from an explicitly normative perspective, the difficulty becomes even more marked.[135] The criteria which ought to govern this issue[136] and its institutional ramifications[137] are controversial.

B. *Legislative Competence*

If it had been ratified by the EU Member States, the EU Constitutional Treaty would have brought significant changes to the system of competences in the EU. It would have looked like a competence catalogue, with the main advantage of being less vague than the current situation of not knowing clearly who does what. This catalogue approach would have

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132. *Id.* at 327.

133. Former Article 235 EC. For an analysis of Article 308 EC, see LUDWIG KRAMER, EC TREATY AND ENVIRONMENTAL LAW (2d ed. 1994); G. Close, *Harmonisation of Laws: Use or Abuse of the Powers under the EEC Treaty?*, 3 EUR. L. REV. 461 (1978).

134. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2445-46 (1991); Ami Barav, *The Division of External Relations Powers Between the European Community and the Member States in the Case-Law of the Court of Justice*, *in* DIVISION OF POWERS BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES IN THE FIELD OF EXTERNAL RELATIONS 29 (C.W.A. Timmermans & Emond L. Voelker eds., 1981) [hereinafter DIVISION OF POWERS].

135. Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 EUR. L.J. 125, 143 (2001).

136. *Compare* Frank Vibert, *How not to Write a Constitution-The Maastricht/Amsterdam Treaties*, 10 CONST. POL. ECON. 149, 152 (1999), *with* WEILER, *supra* note 123.

137. J.H.H. Weiler, *European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order*, 44 POL. STUD. 517 (1996).

resembled the German Constitution system.[138] The EC enjoys only those powers conferred on it by the Treaties.[139] Four types of legislative competence[140] are conferred upon the EC: exclusive; shared; complementary; and national competence. Since the EC Treaty does not provide a definition of the various kinds of competences, these may be defined as follows.

1. Exclusive EC Competence

The EC enjoys exclusive competence when it alone is able to adopt rules in an area. Any intervention by the Member States is excluded unless it has the authorization of the EU institutions or where there is a lacuna needing to be filled. The areas where the EC has exclusive competence are the following: common commercial policy (to the extent existing prior to the entry into force of the Treaty of Nice); living marine resources in the zones covered by the Treaty; establishment of the common customs tariff;[141] monetary policy for the twelve Member States in the euro area;[142] and those areas which become areas of exclusive competence because the EC legislates extensively in the area concerned on the basis of its shared competence.[143]

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138. In Germany, Article 73 of the Constitution enumerates the competences of the federal legislator. In addition, there is a catalogue of concurring competences and frame competences. Furthermore, there is a structural principle laid down in Article 72 of the Constitution. Concurring competences in the German model means that the Laender have competence so long as the federal legislator has not taken action. The catalogue of concurring competences is combined with a structural principle: the federal power is only allowed to take action in order to enhance economic and legal unity, as well as uniformity of social conditions. F.R.G. CONST. art. 72. The catalogue of concurring competences has to be read in conjunction with the rule that federal law overrules state law.

139. Treaty Establishing the European Community, art. 5, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

140. Legislative competence refers to the adoption of legislative texts in the literal sense or the creation of legal obligations by the EU institutions ("secondary legislation") based directly on the Treaties of the European Communities ("primary legislation").

141. John Usher, *Consequences of the Customs Union*, *in* THE EUROPEAN UNION AND WORLD TRADE LAW, *supra* note 83, at 105; Edwin Vermulst & Paul Waer, *EC Rules of Origin as Commercial Policy Instruments?*, 3 J. WORLD TRADE 55 (1990); Vander Schueren, *Tariff Classification: An Instrument of EC Trade Policy*, 2 EUR. FOREIGN AFF. REV. 255 (1997).

142. Chiara Zilioli & Martin Selmayr, *The External Relations of the Euro Area: Legal Aspects*, 36 COMMON MKT. L. REV. 289 (1999); Jacqueline Dutheil de la Rochère, *Constitutional Aspects and External Representation*, 19 Y.B. EUR. L. 441 (1999-2000); Christoph W. Herrmann, *Monetary Sovereignty over the Euro and External Relations of the Euro Area: Competences, Procedures and Practice*, 7 EUR. FOREIGN AFF. REV. 18 (2002).

143. European Convention, The Secretariat, Delimitation of Competence between the

Exclusive competence is the result of the complete transfer of competence from the Member States to the Community. When exclusive competence arises, the Member States are considered to have forfeited their legislative powers in that field. The mere existence of such competence prevents the Member States from acting in that field, irrespective of the existence of an actual conflict.[144] In other words, the exercise of concurrent powers by the Member States in the area covered by the Community's exclusive competence is impossible.[145] Furthermore, if the substantive provisions of an international agreement fall within Community competence, "the Community is also competent to undertake commitments for putting those provisions into effect."[146] The exact boundaries of Community competences are not set out in the Community treaties, but it is "generally accepted that Community powers are exclusive in so far as they cover areas which are strictly linked to the achievement of the essential objectives of European integration."[147] A power is also exclusive where it appears from the wording or the context of the Treaty provisions in question that any action by the Member States would conflict

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European Union and the Member States—Existing System, Problems and Avenues to be Explored, CONV 47/02, kin/MM/ac, at 6 (Discussion Paper 2002) [hereinafter Delimitation of Competence].

144. *See* Opinion 2/91, 1993 E.C.R. I-1061, ¶¶ 25-26.

> 25. While there is no contradiction between [the] provisions of the [ILO] Convention and those of the directives mentioned, it must nevertheless be accepted that Part III of Convention No 170 is concerned with an area which is already covered to a large extent by Community rules progressively adopted since 1967 with a view to achieving an ever greater degree of harmonisation and designed, on the one hand, to remover barriers to trade resulting from differences in legislation from one Member State to another and, on the other hand, to provide, at the same time, protection for human health and the environmental.
>
> 26. In those circumstances, it must be considered that the commitments arising from Part III of Convention No 170, falling within the area covered by the directives [. . .] are of such a kind as to affect the Community rules laid down in those directives and that consequently Member States cannot undertake such commitments outside the framework of the Community institutions.

Id.

145. Opinion 1/75, Draft OECD Understanding on a Local Cost Standard 1975 E.C.R. 1355, 1364.

146. Opinion 2/91, 1993 E.C.R. I-1061, ¶ 28.

147. Andrea Appella, *Constitutional Aspects of Opinion 1/94 of the ECJ concerning the WTO Agreement*, 45 INT'L & COMP. L.Q. 440, 442 (1996).

with it.[148] Exclusive external competence may arise expressly or by implication. There are very few examples of provisions in the Treaty or Acts of Association where there is explicit conferral of exclusivity. The most well-known provisions are Article 133 EC dealing with the Common Commercial Policy and Article 102 of the 1972 Act of Accession dealing with fisheries conservation.[149]

Although the EC competence

> is in principle allocated to it explicitly by the Treaties, the ECJ has taken the view that in some cases competence flows implicitly from the EC Treaty texts or their general structure. These tend to be cases in which competence is necessary to implement aims set by the Treaties, especially in the field of external relations.[150]

> [T]he EC only has the powers accorded to it under the Treaties. All other powers thus reside with the Member States. A clause to this effect, redolent of that to be found in the [Tenth Amendment of the] U.S. Constitution, could then be included within a European Constitution. This could undoubtedly be done. It would however only serve to mask, or push . . . further back, the issues that really serve to define the powers of the EU and the Member States.[151]

The idea of giving certain competences exclusively to the EC was a creation of the ECJ's case law.[152] The Court has specified that EU Member States were no longer allowed to adopt legislative measures or to independently conclude treaties with third countries since the EC power

148. Opinion 1/75, 1975 E.C.R. 1355, 1363-64.

149. Joined Cases 3, 4 & 6/76, Officier van Justitie v. Kramer 1976 E.C.R. 1279, Grounds ¶¶ 17-20; 2 C.M.L.R. 440, ¶¶ 9-13 (1976); Case 804/79, Comm'n of the Eur. Comm. v. United Kingdom 1981 E.C.R. 1045 Grounds ¶¶ 12, 17-18; 1 C.M.L.R. 543, ¶¶ 12, 17-18 (1982); *see* Opinion 2/91, 1993 E.C.R. I-1061, ¶ 8. *See also* Catherine Noirfalisse, *The Community System of Fisheries Management and the Factortame Case*, 12 Y.B. EUR. L. 325, 325-26 (1994).

150. Delimitation of Competence, *supra* note 143, at 9.

151. Craig, *supra* note 135, at 143.

152. Among the authors that have studied this issue are: Pierre Pescatore, *External Relations in the Case Law of the ECJ*, 16 COMMON MKT. L. REV. 615, 622-24 (1979); Jean Groux, *Le Parallelisme des Competences Internes et Externes de la CE*, 14 CAHIERS DE DROIT EUROPEEN 1 (1978); Robert Kovar, *Contribution de la Cour de Justice au developpement de la condition internationale de la Communauté européenne*, 14 CAHIERS DE DROIT EUROPEEN 527 (1978); Jean Boulois, *La Jurisprudence de la Cour de Justice des Communautés européennes relative aux relations extérieures des Communautés*, 160 HAGUE RECUEIL 335 (1978).

was exclusive.[153] However, in other cases, the ECJ held that certain competences were not exclusive EC competences, which means that it did not prevent EU Member States from acting.[154] This said, it is fair to acknowledge that the list of exclusive EC competence is very limited.[155] In any case, the debate in the legal literature over the meaning of exclusive EC competence seems to be inconclusive to date.[156]

Some scholars have suggested a common sense and pragmatic approach, limiting the prohibition to Member States' measures, "which demonstrably have a negative effect on common rules."[157] Others have argued "that exclusivity arising as a result of a Treaty provision is different from exclusivity arising as a result of the exercise by the institutions of their internal powers."[158] In the first case, the Community occupies the field and preempts Member State action whether or not it conflicts with Community legislation and whether or not the Community has actually

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153. Opinion 1/75 *Export Credits* [1975] E.C.R. 1355, at 1363-64. *See also* Case 41/76 *Donckerwolcke v Procureur de la Republique* [1976] E.C.R. 1921, ¶ 32, and Opinion 2/91 *Convention No. 170 of the ILO Concerning Safety in the use of Chemicals at Work* [1993] E.C.R. I-1061, ¶ 8.

154. *See* Nicholas Emiliou, *The Death of Exclusive Competence?*, 21 EUR. L. REV. 294, 305-07 (1996); J.H.H. Weiler, *The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle*, *in* THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? 130 (1999); David O'Keeffe, *Community and Member State Competence in External Relations Agreements of the EU*, 4 EUR. FOREIGN AFF. REV. 7 (1994); Christiaan Timmermans, *Organising Joint Participation of E.C. and Member States*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 239, 243; Stephen Hyett, *The Duty of Cooperation: A Flexible Concept*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 248, 251; Inge Govare et al., *In-Between Seats: The Participation of the European Union in International Organisations*, 9 EUR. FOREIGN AFF. REV. 155 (2004).

155. Pierre Pescatore, Les relations extérieures des communautés européennes: Contribution à la doctrine de la personnalité des organisations internationales, 103 RECUEIL DES COURS 1 (1961).

156. For a larger debate on the issue, see Gráinne de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam* (Jean Monnet Ctr. for Int'l & Reg'l Econ. L. & Justice Working Paper Group, Paper No. 7, 1999), *available at* http://www.jeanmonnetprogram.org/papers/99/990701.html.

157. G.L. Close, *Self-Restraint by the EEC in the Exercise of its External Powers*, 1 Y.B. EUR. L. 45, 64 (1981). *See also* JONI HELISKOSKI, MIXED AGREEMENTS AS A TECHNIQUE FOR ORGANIZING THE INTERNATIONAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES 40 (2001): "In a field or matter falling within the exclusive competence of the Community, any concurrent authority on the part of the Member States is, by definition, excluded; legal acts are either performed by the Community or they are not performed at all." *Id.* Member States may only take measures if Community competence is non-exclusive.

158. Takis Tridimas, *The WTO and OECD Opinions*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 58; Takis Tridimas & Piet Eeckhout, *The External Competence of the Community and the Case-Law of the Court of Justice: Principle Versus Pragmatism*, 14 Y.B. EUR. L. 143, 165 (1994).

exercised its competence. There is no question of Member State competence continuing or being held in suspension while the Community exercises its powers.[159] Exceptionally, Member States may act pursuant to a specific authorization by the Community.[160] In the second case, there is no *ab initio* preemption. Member States may continue to act but should not adopt legislation which affects the Community rules or alters their scope.[161] It would be a question of interpretation whether Community action has surpassed the threshold of peremptory preemption, which precludes even consistent national measures.

The ECJ often adopts a common sense approach, even if it finds the Community exclusively competent. Older case law certainly seems to accord with this analysis.[162] It has been argued that the ECJ has achieved a golden balance in that it is easy to find competence but difficult to find it exclusive.[163] The actual result might be further tempered by the pragmatic and political niceties of the situation, for the ECJ strived "to effectively meet its Treaty objectives and exert a coherent external policy, yet ensure the mutual coexistence of functionally independent legal regimes."[164] Nevertheless, the mixing up of the legal test pertaining to each type of competence and the reformulation of some tests are not conducive to legal certainty. Nor do they enhance the credibility of the Community to the outside world.

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159. Case 804/79, 1981 E.C.R. 1045, ¶ 20. *See also* Armin von Bogdandy & Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, 39 COMMON MKT. L. REV. 227, 237 (2002) (opining that when the Member States vest the Union with certain powers/competences the Member States do not necessarily lose "ownership" of those competences).

160. Opinion 2/91, 1993 E.C.R. I-1061, ¶ 30.

161. *See generally* Opinion 1/94, [1994] E.C.R. I-5267 and Opinion 2/92, [1995] E.C.R. I-521.

162. *See* Case 22/70, Comm'n of the Eur. Comm. v. Council of the Eur. Comm., 1971 E.C.R. 263, Grounds ¶¶ 86, 90. Here, the Court did not impede the advanced and still ongoing negotiation proceedings, as this would be very disruptive and would call into question the Members States' and the Community's credibility in the international scene. Compare with Opinion 1/94, Re: Competence of the Community to conclude international agreements concerning services and the protection of intellectual property—Article 228(6) of the EC Treaty, 1994 E.C.R. I-5267, Grounds ¶¶ 106-07, where the Court refused to sacrifice the correct legal analysis because of difficulties in implementing the WTO agreement.

163. Tridimas & Eeckhout, *supra* note 158, at 172; Charles T. Kotuby Jr., *External Competence of the European Community in the Hague Conference on Private International Law: Community Harmonisation and Worldwide Unification*, 15 N.Y. INT'L L. REV. 99, 110 (2002).

164. Kotuby Jr., *supra* note 163, at 110.

Since the then EEC founding fathers[165] chose a customs union as the way to proceed towards a unified Europe,[166] a common trade policy vis-à-vis the rest of the world was inevitable. The Community has retained exclusive competence in almost all issues in this field, and the European Commission acts on behalf of the EC with a qualified majority vote from the Council.[167] However, on some trade issues, Member States have competence (despite the "exclusive" EC competence in commercial policy). For example, in the concluding phases of the Uruguay Round the full stature of the EC in global trade affairs was displayed for the first time as the world spotlight fell on the EC and the United States, as they hammered out the final deal.[168]

It was at that moment that an internal debate arose between the EU Member States and the European Commission about the coverage of the existing commercial policy provisions of Article 133 EC in the areas of intellectual property and services. The Commission negotiated the Uruguay Round and the competence issue between the EC and its Member States had been bracketed. As we will see later in greater detail, when the ECJ was consulted, it stated in Opinion 1/94 that only certain aspects of the two sectors could be considered as falling under Article 133 EC, and thereby under the EC's exclusive competence.[169] During the IGC that produced the Treaty of Amsterdam,[170] the Commission, reacting against Opinion 1/94, made a proposal to enlarge the scope of the relevant treaty

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165. In the years following World War II, people like Jean Monnet and Robert Schuman dreamed of uniting the peoples of Europe in lasting peace and friendship. Over the following fifty years, as the EU was built, their dream became reality. That is why they are called the "founding fathers" of the EU.

166. A customs union, or CU, can be defined as full trade liberalization between two countries/regions, plus a single external tariff. The customs union is one of the key components of the EU, whereby non-EU countries exporting products to the EU are charged the same tariff regardless of which EU country is importing the goods. This makes life simpler for traders and cut down their paperwork. The EU also concluded a customs union with Turkey in 1995, aiming for the free circulation of manufactured goods between the EU and Turkey.

167. Kotuby Jr., *supra* note 163, at 104.

168. Rosas, *supra* note 32, at 59-71.

169. Opinion 1/94, 1994 E.C.R. I-5267, Summary ¶ XVI-5401; [1995] 1 C.M.L.R. 205 (1995).

170. The Treaty of Amsterdam is the result of the IGC launched at the Turin European Council on March 29, 1996. It was adopted at the Amsterdam European Council on June 16-17, 1997 and signed on October 2, 1997 by the Foreign Ministers of the then fifteen EU Member States. It entered into force on May 1, 1999 (the first day of the second month following ratification by the last Member State) after ratification by all the Member States in accordance with their respective constitutional requirements.

provisions to explicitly include services and intellectual property.[171] The Member States refused because they still wanted their participation in international trade agreements.[172] In this respect, one can argue that Opinion 1/94 represents a step backwards in what had been until then, the successful development of the EC common commercial policy.

However, the Community as a whole is greater than the sum of its parts. According to Mavroidis, even Germany, the EC's leading economy, has much more weight as part of the EC than it would by itself in international economic relations.[173] The general assumption seems to be that the EC combined as a single voice would be more powerful than divided into 26 voices[174] *A sensu contrario*, the old and successful military strategy "divide and conquer"[175] should be a sign for the EU to avoid disunity. The tendency in trade policy seems to be toward exclusive EC ("EU" after the Constitutional Treaty) competence with the changes brought by the EU Constitutional Treaty.

One important mechanism for coordinating a single voice is the creation of European "policy units."[176] Tony Blair, Prime Minister of the United Kingdom, initiated this idea. Academics from various European countries including Germany, France and Spain have been asked to participate in this initiative.[177] This shows that Britain is still committed to Europe. Authors such as Peter Mandelson and Bodo Hombach believe that

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171. Alan Dashwood, *External Relations Provisions of the Amsterdam Treaty*, 35 COMMON MKT. L. REV. 1019, 1021 (1998).

172. For a general discussion on this issue, see Jacques H.J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession*, 32 COMMON MKT. L. REV. 763 (1995).

173. Petros Mavroidis, *Lexcalibur: The House that Joe Built*, 38 COLUM. J. TRANSNAT'L L. 669,674 (1999) (reviewing JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE, "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER STORIES ON EUROPEAN INTEGRATION (1999)).

174. President Lincoln's injunction, "United we stand, divided we fall," can be extrapolated for the case of the EC's external trade relations to illustrate my argument. Abraham Lincoln used this idea in a speech before the American Civil War, when he referred to a Biblical statement that a house divided against itself cannot stand. Pascal Lamy often used this injuction when he was EU trade commissioner to justify a larger delegation of trade competence by the EU Member States to the EU supranational level. It implies that institutional rules, which allow the EU Member States to make decisions more quickly and the Commission to represent Member States internationally in a united manner, give the collective entity an edge in international bargaining.

175. Derived from the Latin saying *divide et impera*, it can mean in politics a strategy to gain or maintain power by breaking up larger concentrations of power into chunks that individually have less power than the one implementing the strategy. In reality, it often refers to a strategy where small power groups are prevented from linking up and becoming more powerful, since it is difficult to break up existing power structures. Effective use of this technique allows those with little real power to control those who collectively have a lot of power (would if they could unite).

176. *See London is Capital of Third Way*, INDEPENDENT (London), Jan. 10, 1999, at 2.

177. *Id.*

collaboration will increase the likelihood of a European federal superstate.[178] In the same line, Mark Leonard believes that the EU needs to have a single debate in the EU rather than 27 separate national debates, one for each Member State.[179]

That said, the progressive centralization of EC trade policy and its generally effective pursuit in international negotiations has not disguised vigorous differences of policy and priorities among the Member States. These differences do not make the EC an easy partner in negotiations.[180]

2. Shared Competence

Shared competence covers areas where Member States may legislate insofar as the EC has not yet exercised its powers by adopting rules.[181]

> Once the [EC] has legislated in such an area, Member States may no longer legislate in the field covered by this legislation, except to the extent necessary to implement it, and the legislative rules adopted have precedence over those of the Member States. [EC] competence thus becomes exclusive through its exercise.[182]

Shared competence also arises where an agreement includes provisions some of which fall within Community competence and some within Member State competence.[183] With respect to shared competence, Mény argues that "since the signing of the Treaty of Rome, the number of shared compentencies—often benefiting the Union—has increased considerably,

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178. *Id.*

179. *Id.*

180. *See* MICHAEL JOHNSON, THE EUROPEAN COMMUNITY TRADE POLICY AND THE ARTICLE 113 COMMITTEE (1998).

181. For example, with the common fisheries policy during the transitional period mentioned in Article 102 EC. *See* Joined Cases 3, 4 & 6/76, 1976 E.C.R. 1279, ¶ 39-40. *See also* Case 61/77 Comm'n v. Ireland 1978 E.C.R. 417, ¶¶ 64-65; Case 804/79 Comm'n v. United Kingdom 1981 E.C.R. 1045, ¶¶ 18, 20-21. *See generally* IAN MACLEOD ET AL., THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES: A MANUAL OF LAW AND PRACTICE 65, 236 (1996). In so acting, Member States are perceived as acting on behalf of the Community as custodians or guardians or trustees of the Community interest (Case 804/79, ¶ 28) in order to fill the legislative vacuum. They must not bind the Community in a way that is disruptive to its powers eventually coming into force. Joined Cases 3, 4 & 6/76, 1976 E.C.R. 1279, ¶¶ 39-45.

182. Delimitation of Competence, *supra* note 143, at 7.

183. Opinion 1/78, *Re: International Agreement of Natural Rubber*, 1979 E.C.R. 2871, ¶ 63; Ruling 1/78, *Re: the Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, 1978 E.C.R. 2151, Grounds ¶ 13, Ruling 1-2.

to the point that this is often seen as a creeping expropriation of the [M]ember [S]tates' powers."[184]

There seems to be a presumption that where the Community enjoys competence, competence is concurrent and not exclusive, unless there is a contrary indication from the text or context of the Treaty.[185] This is because Community powers are invariably of a general nature and pursue vague objectives. It is difficult to construe them as exclusive. In certain areas, Community and Member State competence can coexist without either displacing the other, such as, in the realm of intellectual property rights.[186]

The EC's legislative action in those areas is subject to compliance with the principles of subsidiarity[187] and proportionality.[188] Most EC powers fall

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184. Yves Mény, *The External and Internal Borders of the Great Europe*, 37 INT'L SPECTATOR 19, 21-22 (2002).

185. Case C-316/91, Eur. Parliament v. Eur. Union Council, 1994 E.C.R. I-625 ¶ 40 ("In the absence of any indication to the contrary, it can be accepted that the Community and the Member States share competence in that field."). *See also* Tridimas & Eeckhout, *supra* note 158, at 154-55; Panos Koutrakos, *The Interpretation of Mixed Agreements Under the Preliminary Reference Procedure*, 7 EUR. FOREIGN AFF. REV. 25, 30 (2002); Alan Dashwood, *The Relationship Between the Member States and the European Union/European Community*, 41 COMMON MKT. L. REV. 355, 369-73 (2004).

186. Demiray, *supra* note 112, at 187, 189.

187. The principle of subsidiarity regulates the exercise of powers. It is intended to determine whether, in an area where there is shared competence, the EC can take action or should leave the matter to the Member States. The principle of subsidiarity hence means that EC decisions must be taken as closely as possible to the citizen, and argues, as can be seen in Article 5 EC, that the EC should take action only if, and insofar as, the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved at the EC level. In other words, the EC does not take action (except on matters for which it alone is responsible), unless EC action is more effective than action taken at national, regional, or local level. The subsidiarity principle hence limits Community interventions. The implementation of this principle is subject to *ex ante* control through the assent procedure of national parliaments, but also *ex post* through the judicial remedy. Protocol on the Application of the Principles of Subsidiarity and Proportionality, art. 7, 2004 O.J. (C 310) 207. A protocol annexed to the Treaty of Amsterdam sets the conditions and application criteria of the subsidiarity and proportionality principles. This protocol specially provides for: the obligation to justify and legislative proposal by proving its compliance with the subsidiary principles; guidelines; the obligation to present an annual report; and a procedure of verification by the Council and European Parliament. In order to take better account of the subsidiarity principle, the Commission set out several rules in its annual reports "To Better Legislate" (1997-1999), in particular regarding consultation of interested parties, improvement in the drafting quality of texts, and simplification of existing legislation. The report "To Better Legislate 2000" introduced the implementation of principles on subsidiarity.

188. The principle of proportionality implies that any action by the EC should not go beyond what is necessary to achieve the objectives of the EC Treaty. It should not be confused with the principles of subsidiarity, which enables the resolution of the considered action's level (national

within the category of shared competence;[189] citizenship of the EU; agriculture and fisheries (except for the part under exclusive EC competence); the four freedoms (free movement of goods, persons, services, and capital);[190] visas, asylum and immigration;[191] transport;[192]

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or Community level), while the principle of proportionality concerns the size of the action. This principle has appeared in Court decisions since 1956, for example, see Case 9/55, Zolder v. High Auth. of the Eur. Coal & Steel Cmty., 1956 E.C.R. 311, 326-29.

189. The extent of the powers conferred on the EC by the relevant chapters of the EC Treaty varies depending on the area.

190. *See generally* Piet Eeckhout, *Constitutional Concepts for Free Trade in Services*, *in* THE EU AND THE WTO-LEGAL AND CONSTITUTIONAL ISSUES 211 (Gráinne de Búrca & Joanne Scott eds., 2001) [hereinafter THE EU AND THE WTO].

191. *See generally* Steve Peers, *The Visa Regulation: Free Movement Blocked Indefinitely*, 21 EUR. L. REV. 150 (1996); Castro Oliveira, *Immigrants from Third Countries under EC External Agreements: The Need for Improvement*, 4 EUR. FOREIGN AFF. REV. 215 (1994); Steve Peers, *Building Fortress Europe: The Development of EU Migration Law*, 35 COMMON MKT. L. REV. 1235 (1998); FREE MOVEMENT OF PERSONS IN THE EU (Dennis Martin & Elspeth Guild eds., 1996); THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 58-166 (Elspeth Guild ed., 1999); KAY HAILBRONNER, IMMIGRATION AND ASYLUM LAW AND POLICY OF THE EUROPEAN UNION (2000); Martin Hedemann-Robinson, *An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident Within the European Union, with Particular Reference to the Case Law of the European Court of Justice*, 38 COMMON MKT. L. REV. 525 (2001); Steve Peers, *Towards Equality: Actual and Potential Right of Third Country Nationals in the European Union*, 33 COMMON MKT. L. REV. 7 (1996); Gerhard Eisl, *Relations with the Central and Eastern Countries in Justice and Home Affairs: Deficits and Options*, 2 EUR. FOREIGN AFF. REV. 351 (1997); Fadi S. Hakura, *The External EU Immigration Policy: The Need to Move Beyond the Orthodoxy*, 3 EUR. FOREIGN AFF. REV. 115 (1998); Roman A. Petrov, *Rights of Third Country/NIS Nationals to Pursue Economic Activity in the EC*, 4 EUR. FOREIGN AFF. REV. 235 (1999); ANNALISA MELONI, VISA POLICY WITHIN THE EUROPEAN UNION STRUCTURE (2005); ELSPETH GUILD, IMMIGRATION LAW IN THE EUROPEAN COMMUNITY (2001); Steve Peers, *Implementing Equality? The Directive on Long-Term Resident Third-Country Nationals*, 29 EUR. L. REV. 437 (2004); Jörg Monar, *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation*, 23 EUR. L. REV. 320 (1998); Kay Hailbronner, *European Immigration and Asylum Law Under the Amsterdam Treaty*, 35 COMMON MKT. L. REV. 1047 (1998); David O'Keeffe, *Can the Leopard Change its Spots? Visas, Immigration and Asylum Following Amsterdam*, *in* LEGAL ISSUES OF THE AMSTERDAM TREATY, *supra* note 122, at 271; P.J. Kuijper, *Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration Under the Amsterdam Treaty and Incorporation of the Schengen Acquis*, 37 COMMON MKT. L. REV. 345 (2000); Catherine Phuong, *Enlarging 'Fortress Europe': EU Accession, Asylum, and Immigration in Candidate Countries*, 52 INT'L & COMP. L.Q. 641 (2003); Hélène Lambert, *The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 INT'L & COMP. L.Q. 161 (2006); ELSPETH GUILD, THE DEVELOPING IMMIGRATION AND ASYLUM POLICIES OF THE EUROPEAN UNION (1996); IMPLEMENTING AMSTERDAM: IMMIGRATION AND ASYLUM RIGHTS IN EC LAW (Elspeth Guild & Carol Harlow eds., 2001); INGRID BOCCARDI, EUROPE AND REFUGEES: TOWARDS AN EU ASYLUM POLICY (2002).

192. *See generally* J.M. Balfour, *Freedom to Provide Air Transport Services in the EEC*, 14

competition; taxation; social policy; the environment;[193] consumer protection; trans-European networks (interoperability and standards); economic and social cohesion; energy; civil protection; and tourism.[194]

Regarding the TEU, its title V which deals with the CFSP, with the exception of defense, also falls within the shared competence category.[195] Lastly, title VI of the TEU (police and judicial cooperation in criminal matters) falls within the shared competence category as well, apart from the provisions relating to the setting up of joint bodies.

In fact, authors such as Alfonso Mattera[196] claim that there is only one type of competence, that of shared competence, with different degrees of interference, depending on the policy. In this sense, Member States might interfere actively in cultural policy, but only minimally in common commercial policy.[197] The fundamental principles of democratic and "political accountability cannot be achieved if the constitutional order is fragmented and requires the use of metaphors to describe the interrelations of its parts."[198] Could one then argue that non-exclusive EC competence (i.e., shared competence) is translated as de jure and de facto EC fragmentation? From a national perspective, Schuppert argues that unity of administration is based on the unity of democratic origin of all sovereign power.[199] Hesse claims that all public authority originates with the people.[200] With the enactment, continuation, and development of the constitution, this authority is passed on to the various organs within the

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EUR. L. REV. 30 (1989); George Close, *External Relations in the Air Transport Sector: Air Transport Policy or the Common Commercial Policy?*, 27 COMMON MKT. L. REV. 107 (1990); Peter P.C. Haanappel, *The External Aviation Relations of the European Economic Community and of EEC Member States into the Twenty-First Century*, 14 AIR L. 122 (1989).

193. For a further analysis of external competence in environmental matters, see JAN H. JANS, EUROPEAN ENVIRONMENTAL LAW, at 69-100 (2d rev. ed. 2000).

194. The EC Treaty does not contain a specific legal basis covering the fields of energy, civil protection and tourism. The EC can therefore act only on the basis of Article 308 EC.

195. Title V of the TEU provides for consultation, cooperation or coordination of Member States' action in certain areas, as well as adoption by the EU Council of common actions and common positions. TEU arts. 11-28.

196. Mattera was Special Advisor to former President of the European Commission Romano Prodi, and Professor at the College of Europe, Brugges.

197. Information gathered from a conference at the Europaeische Rechtsakademie, Trier (Germany) (Apr. 10-11, 2003).

198. Armin von Bogdandy, *The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System*, 36 COMMON MKT. L. REV. 887, 909 (1999).

199. GUNNAR FOLKE SCHUPPERT, DIE EINHEIT DER VERWALTUNG ALS RECHTSPROBLEM 760 (1987).

200. KONRAD HESSE, GRUNDZUEGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND n.27 (19th ed. 1993).

constitutional framework.[201] All bodies exercising sovereign power continue to be dependent on the unifying origin of that power.[202] Can these arguments be made from a supranational perspective? Would they be valid for the purposes of the EC's common commercial policy?

Shared competence between the EC and its Member States implies the fragmentation of unity in the international representation of the EC and translates into less power for the EC in the international arena. On the other hand, EC exclusive competence facilitates international negotiations, since the European Commission is the only competent actor in any given matter. Experience has shown that mixed agreements can and do cause delays, which can actually worsen negotiation situations.[203] However, at present, the implementation and conclusion of mixed trade agreements is done at the national level.[204] Therefore, a system in which both the EC and its Member States are involved seems to be an optimal situation in terms of efficiency.

With the new balance between Brussels and national institutions and, to some extent, between national institutions and regional and local authorities, some kind of political rebellion has started in Europe. As Mény rightly points out, "any attribution of powers is arbitrary and therefore political; in fact, even if some criteria of efficiency and rationality are taken into account, it is mainly on the basis of political criteria that powers are distributed among the various decision-making [. . .] levels."[205] Even if there are expectations for eliminating overlap in competences between the EC and its Member States, one should not forget that economic and social reality is so complex that the hope of reaching a clear separation of powers is an illusion.[206] It is therefore important to establish the methods and instruments for exercising those competences. "In all existing constitutional texts—even in those based on a catalogue of powers—gray areas exist and constitutional courts are called on to resolve questions relating to the resultant conflicts of competence."[207]

Trade is one of the areas where EU Member States have politically agreed to delegate representation. However, EU Member States have started to question the transfer of sovereignty to the EC level, especially

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201. *Id.*

202. *Id.*

203. Interview with Richard Wyatt, First Minister of the Delegation of the European Commission to the United Nations, New York (June 2001).

204. Art. 133 (5 & 6) EC.

205. Mény, *supra* note 184, at 22.

206. *Id.*

207. Delimitation of Competence, *supra* note 143, at 11.

on issues such as services, investment, and intellectual property rights.[208] The famous Opinion 1/94 of the ECJ clearly acknowledged that the EC and the EU Member States actually share competence in these areas.[209] A few years later, the Amsterdam Treaty reinforced restrictions on transfers of sovereignty to the EC level in the area of trade by allowing EU Member States to decide what competence to delegate on a case-by-case basis at the end of a negotiation.[210]

The concept of shared competence should be distinguished from a case where the existence of an external legal or political impediment prevents the Community from becoming a party to a treaty, even though it enjoys exclusive competence in the field. This could be the case, for example, if the EC is not recognized by the other party, or if the international instrument is only open to States.[211] In such circumstances, Member States that enter into an international agreement with outside countries or international organizations[212] are effectively acting as trustees for the EC

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208. Intellectual property is a special example of shared competence. HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW ¶ 1557 (2d ed. 1980) (commenting on international organizations in general).

> The competence of international organizations to make agreements is related to the competence of their members to do so. Both may be competent at the same time. The best example is the case of a copyright convention to which an international organization accedes solely to protect its own publications. It then acts for the specific interests of the organization which are not at the same time covered by any legal provisions of the members.

Id. This category of shared competence may also extend to agreements establishing rules of international law, such as UNCLOS III or the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLTIO). The rules in such law-making agreements should be equally applicable to the Member States and the Communities as subjects of international law; the competence of one does not displace or undermine the competence of the other. In theory, the EC and its Member States should all be able to become parties to such agreements.

209. Opinion 1/94, 1994 E.C.R. I-5267.

210. *See* Consolidated Version of the Treaty Establishing the European Community, art. 133(5), 1997 O.J. (C 340) 173, 238.

211. The ILO Convention is an example of this. It was possible for the agreement to fall within the exclusive competence of the Community but to be concluded by the Member States. In such circumstances, the Community's external competence may be exercised through the medium of the Member States acting jointly in the Community interests. *See* Opinion 2/91, 1993 E.C.R. I-1061, ¶ 5; Case C-316/91, 1994 E.C.R. I-625, pt. IV. *See also* Tridimas & Eeckhout, *supra* note 158, at 148.

212. As to the relationship between the Community and international organizations, see Jörn Sack, *The European Community's Membership of International Organisations*, 32 COMMON MKT. L. REV. 1227 (1995).

in relation to matters of Community competence or as put in Opinion 2/91, 'jointly in the Community's interest.'[213]

As mentioned before, in the field of external trade relations by the EC, there are many examples where the Community's and the Member States' competence is shared; for instance, in the Food and Agriculture Organization, where Case 25/94, *Commission v Council,* can be viewed as evidence.[214] In this case, the ECJ made its most significant input about (or regarding) the duty of cooperation.[215] Competences in the EC are joint because Member States prefer not to allow Community competence, preferring instead to preserve their national competence.[216] This approach, which became apparent in the Court's Opinion 2/91 on the International Labor Organization (ILO),[217] weakens the constitutional position of the Community in the field of external relations. On the other hand, shared competence increases the leverage of the most protectionist EU countries. Shared competence also would imply a strong voice if the polyphonic "choir" (all the EU Member States and the Commission) sings. This will give the choir strength and independence.

With respect to shared competence, the second subparagraph of paragraph 6 of Article 133 of the Nice Treaty removes certain sectors from the scope of the first subparagraph of paragraph 5 of Article 133 of the Nice Treaty. The areas included are cultural and audiovisual services, educational services, and social and human health services.[218] According to Krenzler and Pitschas, "as the Community may not adopt any measures under Articles 150 IV, 151 IV(c) and 152 EC that result in the harmonization of national laws or regulations in these services sectors, the Community does not have exclusive competence."[219] This means that the competence is shared between the EC and its Member States. The second subparagraph of paragraph 6 of Article 133 of the Nice Treaty refers to it by using the locution "shared competence." This is the first time that this locution appears in the Treaty text. However, the concept of shared

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213. *See* Opinion 2/91, 1993 E.C.R. I-1061, ¶ 5. *See also* Case 22/70, 1971 E.C.R. 263, Grounds ¶ 80 & Case 804/79, 1981 E.C.R. 1045.

214. Case 25/94, Comm'n of Eur. Cmtys. v. Council of Eur. Union, 1996 E.C.R. I-1469, ¶ 48.

215. For a legal analysis of Case 25/94, see Joni Heliskoski, *The Internal Struggle for International Presence: The Exercise of Voting Rights Within the FAO, in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 79.

216. *The Aftermath of Opinion 1/94 or How to Ensure Unity of Representation for Joint Competencies*, 32 COMMON MKT. L. REV. 386 (1995).

217. Opinion 2/91, ¶ 36, 1993 E.C.R. I-1061.

218. Art. 133.6.2 EC.

219. Horst Günter Krenzler, & Christian Pitschas, *Progress or Stagnation?: The Common Commercial Policy After Nice*, 6 EUR. FOREIGN AFF. REV. 291, 309 (2001).

competence has existed for a very long time. Agreements in these services sectors must be concluded as mixed agreements and only enter into force after ratification by all EU national parliaments.[220] The legal ramification of shared competence explain the efforts made by the Commission and scholars to bring about exclusive EC competence and avoid the potential risk of Europaralysis. Yet, many trade agreements are signed as mixed agreements.

In mixed agreements, if there is more than one negotiator other than the European Commission, then the EC's negotiating position is weaker, though the same is not necessarily true for the Member States.[221] This is because as long as the external competence has not become exclusively EC competence, Member States, even acting collectively, remain free to enter into multilateral treaty relations.[222] The tensions created by the mixture of competences between the EC and its Member States are seen as an obstacle to the achievement of Community interests as a whole, and are a problem for Europe's trade partners.[223] Even though Article 133 EC gives exclusive competence in commercial policy to the EC, the treaty also limits this competence.[224]

According to Jean Groux, for Third States, it is preferable to have a mixed procedure because they are not familiar with dealing with the EC and lack sufficient knowledge of its competences and responsibilities.[225] For example, in the case of a third party like the United States, if it has complete information about the Member States' position, then it is easier to accept that the EC acts with a single voice. In this sense, there are at least three variables to take into consideration:

1) secrecy;
2) physical difficulty for a third party to obtain information; and
3) institutional processes.

In the case of the first variable, this would mean that having a single representation by the EC in international agreements obscures information about the Member States' actual position. Therefore, there is less

220. *Id.*

221. Interview with John Richardson, Head of the Delegation of the European Commission to the United Nations, New York, (June 2001).

222. Even if de jure, this is a plausible situation, de facto it has never happened.

223. Rafael Leal-Arcas, *Unitary Character of EC External Trade Relations*, 7 COLUM. J. EUR. L. 356 (2001).

224. Treaty Establishing the European Community, Feb. 7, 1992, O.J. (C 224/1) art. 44 (1992).

225. Jean Groux, *Mixed Negotiations*, *in* MIXED AGREEMENTS, *supra* note 6, at 87.

transparency and, consequently, it might be more difficult to reach an agreement. With regard to the second variable, it is highly linked to the first variable because having a single voice in the EC makes it harder to negotiate for a third party, since there is less transparency. As for institutional processes, this refers to the fact that sometimes exclusive EC competence involves various Directorates-General of the European Commission.

However, what has been the attitude of Third States when the EC has entirely taken over the responsibilities of the Member States in certain areas?

> It is only in this last case that [T]hird States overtly put pressure on the Community to use the mixed negotiation technique. Here one may cite the example of the negotiations begun in 1975 . . . between the EEC and the CMEA (Comecon) with a view to normalizing the relations of the Community with the East European countries.[226] These countries, which were in fact somewhat reluctant to envisage an official recognition of the Community, had much difficulty in accepting the decision of the Council of the Communities that the negotiations would be conducted by the Commission alone, and they tried in vain to ensure the participation also of the Member States.[227]

As a matter of fact, the EC was not recognized as an international organization by Comecon until 1988.[228] This position adopted by Comecon was rectified shortly before Comecon was dissolved.[229]

That said, and knowing that the presumption in the EC is to have collective action, is there really a "common" European interest? If so, is

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226. Comecon was an economic organization from 1949 to 1991, linking the USSR with Bulgaria, Czechoslovakia, Hungary, Poland, Romania, East Germany (1950–1990), Mongolia (from 1962), Cuba (from 1972), and Vietnam (from 1978), with Yugoslavia as an associated member. Albania also belonged between 1949 and 1961. Its establishment was prompted by the Marshall Plan. Comecon was formally disbanded in June 1991. It was agreed in 1987 that official relations should be established with the EC, and a free-market approach to trading was adopted in 1990. In January 1991 it was agreed that Comecon should be effectively disbanded. *See* Comecon, http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0006083.html (last visited Dec. 10, 2007).

227. Jean Groux, *Mixed Negotiations*, *in* MIXED AGREEMENTS, *supra* note 6, at 87, 91.

228. Council Decision 88/345, art. 1, 1988 O.J. (L 154) 34 (EEC). *See also* Wojciech Morawiecki, *Actors and Interests in the Process of Negotiations between the CMEA and the EEC*, 2 LEGAL ISSUES EUR. INTEGRATION 1 (1989).

229. MCGOLDRICK, *supra* note 4, at 28.

this interest so great as to assume that in certain circumstances Member States will act with a single voice? Do Member States have enough proximity in their national interests to act with one voice in the international sphere?

3. Complementary Competence

Complementary competence covers areas where EC competence is limited to supplementing or supporting Member States' action, or coordinating Member States' action.[230] The power to adopt legislative rules in these areas remains part of the Member States and intervention by the EC cannot have the effect of excluding intervention by the Member States.[231]

The fields where the Member States have exclusive competence to legislate, and the EC has no power to interfere upon their work are: economic policy; employment; customs cooperation; education, vocational training and youth; culture; public health; trans-European networks (excluding the interoperability of networks and technical standards); industry; research and technological development; defence policy (Title V of the TEU);[232] and development cooperation.[233]

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230. Delimitation of Competence, *supra* note 143, at 8.

231. *Id.*

232. For further details about defence policy, see Ramses A. Wessel, *The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice*, 8 J. CONFLICT & SEC. L. 265 (2003); Rory Keane, *European Security and Defence Policy: From Cologne to Sarajevo*, 19 GLOBAL SOC'Y 89 (2005); Frederik Naert, *European Security and Defence in the EU Constitutional Treaty*, 10 J. CONFLICT & SEC. L. 187 (2005); *The CFSP Under the EU Constitutional Treaty—Issues of Depillarization*, 42 COMMON MKT. L. REV. 325 (2005); Asle Toje, *The 2003 European Security Strategy: A Critical Appraisal*, 10 EUR. FOREIGN AFF. REV. 117 (2005); David Scannell, *Financing ESDP Military Operations*, 9 EUR. FOREIGN AFF. REV. 529 (2004); Jolyon Howorth, *The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility*, 9 EUR. FOREIGN AFF. REV. 483 (2004); Martin Trybus, *The Limits of European Community Competence for Defence*, 9 EUR. FOREIGN AFF. REV. 189 (2004); Sven Biscop, *Able and Willing? Assessing the EU's Capacity for Military Action*, 9 EUR. FOREIGN AFF. REV. 509 (2004); TREVOR C. SALOMON & ALISTAIR J.K. SHEPHERD, TOWARD A EUROPEAN ARMY: A MILITARY POWER IN THE MAKING? (2003); JOLYON HOWORTH & JOHN T.S. KEELER, DEFENDING EUROPE: NATO AND THE QUEST FOR EUROPEAN AUTONOMY (2d ed. 2005); EU SECURITY AND DEFENCE POLICY: THE FIRST FIVE YEARS (1999-2004) (Nicole Gnesotto ed., 2004); BEN SOETENDORP, FOREIGN POLICY IN THE EUROPEAN UNION: THEORY, HISTORY AND PRACTICE (1999); WILLIAM NICOLL & TREVOR C. SALMON, UNDERSTANDING THE EUROPEAN UNION (2001); Simon Duke, *CESDP: Nice's Overtrumped Success*, 6 EUR. FOREIGN AFF. REV. 155 (2001); Antonio Missiroli, *European Security Policy: The Challenge of Coherence*, 6 EUR. FOREIGN AFF. REV. 177 (2001); Antonio Missiroli, *Ploughshares into Swords? Euros for European Defence*, 8 EUR. FOREIGN AFF. REV. 5 (2003); Adrian Treacher, *From Civilian Power to Military*

4. Exclusive EU Member States' Competence

Member States' competence covers areas not referred to in the EC Treaty and therefore, not within the competence of the EC.[234] It remains within the Member States' areas where the Treaties expressly exclude EC competence, or expressly recognize the competence of Member States, as well as areas where the EC Treaty forbids the EC to legislate.[235]

The areas within the EU Member States' competence are: 1) those that are not within the EC competence and therefore remain Member States' competence, such as the internal organization of States, national identity, national military structure inter alia; 2) areas expressly reserved to the Member States by the EC Treaty,[236] such as public order and public security, the enforcement of criminal law and the administration of justice,[237] the right to strike and the right of association, the supply of health services and medical care, rules dealing with the system of property ownership; and 3) areas where the EC Treaty forbids the EC to legislate: education, vocational training, culture, employment and health.[238] The

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Actor: The EU's Resistible Transformation, 9 EUR. FOREIGN AFF. REV. 49 (2004); Catherine Gegout, *Causes and Consequences of the EU's Military Intervention in the Democratic Republic of Congo: A Realist Explanation*, 10 EUR. FOREIGN AFF. REV. 427 (2005); Richard G. Whitman, *NATO, the EU and ESDP: An Emerging Division of Labour?*, 25 CONTEMP. SEC. POL'Y (2004); Martin Reichard, *Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement*, 73 NORDIC J. INT'L L. 37 (2004); Ramses A. Wessel, *The EU as a Black Widow: Devouring the WEU to Give Birth to a European Security and Defence Policy*, *in* THE EUROPEAN UNION AND THE INTERNATIONAL LEGAL ORDER: DISCORD OR HARMONY? 405 (Vincent Kronenberger ed., 2001).

233. Delimitation of Competence, *supra* note 143, at 8. For further discussion of development cooperation, see generally JOSEPH A. MCMAHON, THE DEVELOPMENT CO-OPERATION POLICY OF THE EC (1998); Ibrahim F.I. Shihata, *Democracy and Development*, 46 INT'L & COMP. L.Q. 635 (1997); Joseph A. McMahon, *International Agricultural Trade Reform and Developing Countries: The Case of the European Community*, 47 INT'L & COMP. L.Q. 632 (1998); Carlos Santiso, *Reforming European Foreign Aid: Development Cooperation as an Element of Foreign Policy*, 7 EUR. FOREIGN AFF. REV. 401 (2002); Jan Orbie, *EU Development Policy Integration and the Monterrey Process: A Leading and Benevolent Identity?*, 8 EUR. FOREIGN AFF. REV. 395 (2003).

234. Delimitation of Competence, *supra* note 143, at 8.

235. *Id.* "In some cases, the [EC] Treaty limits the exercise of Member States' competence by imposing obligations upon them (e.g. the prohibition of discrimination on grounds of nationality [or] the prohibition on granting State aids incompatible with the common market)." *Id.* at 8 n.4.

236. The EC Treaty grants Member States various derogations from the four freedoms of movement on grounds of public order, public safety or other considerations of general interest.

237. For further discussion of enforcement of criminal law and the administration of justice, see generally STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (2000); Georgia Papagianni, *Free Movement of Persons in the Light of the New Title IV TEC: From Intergovernmentalism Towards a Community Policy*, 21 Y.B. EUR. L. 107 (2002).

238. Delimitation of Competence, *supra* note 143, at 9.

hypothesis of exclusive EU Member States' competence is somehow difficult to conceive in the framework of the EC external trade relations, at least from a conceptual viewpoint. The fact that we are dealing with the EC external trade relations explicitly implies the participation and inclusion of a supranational entity, that is, the EC. Therefore, this hypothesis has very little or no foundation at all on which to base the question whether there will be more legal coherence by having exclusive EC competence on all issues of EC trade policy. One could foresee, though, a situation where there is no polyphonic choir among the EU Member States. They would therefore be in danger of losing their sovereignty but they would still keep their independence.

C. *Non-Legislative or Executive Competence*

"Competence to implement and apply legislation in accordance with their respective constitutional rules . . . rests with the Member States . . . , subject to monitoring by the Commission, national courts and the [ECJ]. The [EC] exercises such competence in a subsidiarity capacity only."[239]

1. Implementation of Legislative Acts[240]

Implementation of legislative acts concerns the drafting of normative rules.[241] It will only be necessary for the EC to adopt regulations if the aims of the planned action cannot be adequately achieved by the Member States.[242] Should it be the case for the EC to adopt regulations, then the power of implementation by the EC of its legislative acts is conferred on the Commission by the European Parliament and the Council in the case of codecision and by the Council in other cases.[243]

2. Administrative, Material, or Budgetary Implementation of Community Acts

> This concerns administrative implementing measures . . . [and] sanctions to ensure compliance with [EC] law . . . . The adoption of such measures is a matter for EU Member States, which determine

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239. *Id.* at 9 (footnotes omitted); *see also* Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3, arts. 202, 211 [hereinafter EC Treaty].

240. *See generally* Jonas Bering Liisberg, *The EU Constitutional Treaty and its Distinction Between Legislative and Non-legislative Acts—Oranges into Apples?* 11-26 (Jean Monnet Ctr. for Int'l & Reg'l Econ. L. & Justice Working Paper Group, Paper No. 01/06, 2006).

241. Delimitation of Competence, *supra* note 143, at 9.

242. *Id.*

243. *Id.* at 9, n.4; *see* EC Treaty art. 202.

> . . . the proper bodies, procedures, and conditions for ensuring the correct implementation of [EC] law. The [EC] may nevertheless intervene in the . . . implementation of [EC] acts where the Treaty or the [EC] legislator gives [the EC] the power to do so.[244]

IV. MIXED AGREEMENTS[245]

Mixed agreements are agreements where both the EC and its Member States are contracting parties on the European side to an international agreement with a third party.[246] "The notion of mixed agreement is not . . . normally understood to cover [a] situation where an agreement falls . . . within the competence of the [EC] and partly within that of the Member States[,] but [rather a situation where Member States] are in a position to become parties to it."[247] "In such a case, the [EC's] competence may be exercised through the medium of the Member States acting jointly in the interest of the EC."[248] While it may be largely unknown to the general public, and even though the legal credentials of this type of agreements have been questioned by various scholars,[249] mixity (or mixed

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244. Delimitation of Competence, *supra* note 143, at 10.

245. In 1961, Pescatore spoke of "Accords mixtes, mi-gouvernementaux, mi-communautaires, conclus conjointement par les Etats membres et la Communauté. . . ." Pierre Pescatore, *Relations Extérieures Des Communautés Européenes: Contribution á la Doctrine de la Personnalité Des Organisations Internationales*, 103 RECUEIL DES COURS 1, 104 (1961).

246. *See* HELISKOSKI, *supra* note 157, at 6-7. Heliskoski disagrees with McGoldrick's contention in MCGOLDRICK, *supra* note 4, at 78 (stating that the concept of mixed agreements encompasses the situation where an agreement falls partly within Community competence and partly within Member State competence but only the Member State can become a party to it (Opinion 2/91 scenario)). In such case, the Community's competence may be exercised through the Member States acting jointly in the interests of the Community. *Id.*

247. HELISKOSKI, *supra* note 157, at 7 n.26. The possibility of mixed agreements is expressly recognized in Article 102 of the Treaty establishing the Euratom. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167, art. 102 [hereinafter Euratom Treaty]. The expression "mixed agreements" has been used by the ECJ. *See, e.g.*, Case 12/86, Demirel v. Gmünd, 1987 E.C.R. 3719, ¶ 8. *See also* MIXED AGREEMENTS, *supra* note 6; MAURITS J.F.M. DOLMANS, PROBLEMS OF MIXED AGREEMENTS: DIVISION OF POWERS WITHIN THE EEC AND THE RIGHTS OF THIRD STATES (1985); Nanette Neuwahl, *Joint Participation in International Treaties and the Exercise of Powers by the EEC and Its Member States: Mixed Agreements*, 28 COMMON MKT. L. REV. 717 (1991); MACLEOD ET AL., *supra* note 181, at 142.

248. HELISKOSKI, *supra* note 157, at 7 n.26 (citing Opinion 2/91, 1993 E.C.R. I-1061, ¶ 5 on the ILO Convention No. 170 on Safety in the Use of Chemicals at Work, which is only open to Members of the ILO (Art. 21)).

249. *See* John J. Costonis, *The Treaty-Making Power of the European Economic Community: The Perspectives of a Decade*, 5 COMMON MKT. L. REV. 421, 450 (1967-68). *See also* Marise Cremona, *The Doctrine of Exclusivity and the Position of Mixed Agreements in the External*

agreements) has become part of the daily life of the EC external relations. Mixity has also been a very complex topic for scholarly debate.[250]

Interestingly enough, mixed agreements, important as they are, were not foreseen in the Treaty of Rome.[251] However, the concept does appear in the Treaty establishing the Euratom[252] and is incidentally inscribed in the Nice Treaty in Article 133(6).[253] As Granvik correctly asserts, "the very same article [Article 102 of the Treaty establishing the Euratom] has later been accepted [by EC law-makers] as a suitable model for the EC."[254] In this same line of thought, MacLeod et al. point out that there is no doubt about the existence and legal validity of the concept of "mixed

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Relations of the European Community, 2 OXFORD J. LEGAL STUD. 393 (1982); Claus-Dieter Ehlermann, *Mixed Agreements: A List of Problems*, *in* MIXED AGREEMENTS, *supra* note 6; Neuwahl, *supra* note 247, at 717; Nanette A. Neuwahl, *Shared Powers or Combined Incompetence? More on Mixity*, 33 COMMON MKT. L. REV. 667 (1996).

250. Most of the relevant literature is in the more general context of the EC external relations. *See generally* DIVISION OF POWERS, *supra* note 134; MIXED AGREEMENTS, *supra* note 6; DOLMANS, *supra* note 247; JEAN GROUX & PHILIPPE MANIN, THE EUROPEAN COMMUNITIES IN THE INTERNATIONAL ORDER 57-88 (1995); ALBRECHT CONZE, DIE VÖLKERRECHTLICHE HAFTUNG DER EUROPÄISCHEN GEMEINSCHAFT 73-87 (1987); Neuwahl, *supra* note 247; Neuwahl, *supra* note 249; RACHEL FRID, THE RELATIONS BETWEEN THE EC AND INTERNATIONAL ORGANIZATIONS. LEGAL THEORY AND PRACTICE 111-16 (1995); MACLEOD ET AL., *supra* note 181, at 142-64; MOSHE KANIEL, THE EXCLUSIVE TREATY-MAKING POWER OF THE EUROPEAN COMMUNITY: UP TO THE PERIOD OF THE SINGLE EUROPEAN ACT 145-74 (1996); MCGOLDRICK, *supra* note 4, at 78-88; LA COMMUNAUTÉ EUROPÉENNE ET LES ACCORDS MIXTES, QUELLES PERSPECTIVES? (Jacques H.J. Bourgeois et al. eds., 1997) [hereinafter EUROPEAN COMMUNITY AND MIXED-TYPE AGREEMENTS]; Alan Dashwood, *Implied External Competence of the EC*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 113; Allan Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 125; Lena Granvik, *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 255.

251. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

252. It is precisely in Article 102, which reads:

> Agreements or contracts concluded with a [T]hird State . . . to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws.

Euratom Treaty art. 102.

253. Treaty of Nice amending the TEU, Feb. 26, 2001, O.J. (C 80) 1.

254. Lena Granvik, *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 256.

agreement."[255] Proof of this is Article 102 of the Euratom Treaty, which recognizes a form of mixed agreement and "makes explicit provision for treaties which are to be concluded by the Community and one or more of the Member States."[256] It is, nevertheless, unfortunate that the Constitutional Treaty did not take into account the express recognition of mixed agreements in the legal text.

The legal phenomenon of mixed agreements poses various complex issues, such as the fact that these agreements must be ratified by all the EU national parliaments of the countries which are contracting parties to that given mixed agreement. Consequently, this creates uncertainty as to the liability of the EC and its Member States to third parties, as well as the limits of the ECJ's competence to interpret such agreements. In addition, there are various important clarifications to be mentioned in this subtitle in order to facilitate the understanding of the issue. Here are some of them:

1. Since the early 1960s, the mixed procedure as a legal phenomenon has been used in a wide field of policy areas ranging from commercial policy to environmental policy[257] from cooperation to the management and conservation of the resources of the sea. The general trend towards

255. MACLEOD ET AL., *supra* note 181, at 143.

256. *Id.* at 143-44.

257. For further discussion of mixed procedure in the areas of commercial policy and environmental policy, see Panos Koutrakos, *I Need to Hear You Say It: Revisiting the Scope of the EC Common Commercial Policy*, 22 Y.B. EUR. L. 407 (2003); Geert Van Calster, *The EU, Trade, Environment and Unilateralism: Passing the Buck*, 5 EUR. FOREIGN AFF. REV. 9 (2000); JOANNE SCOTT, EC ENVIRONMENTAL LAW (1998); Paul Demaret, *Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMS) in the External Relations of the European Community*, *in* THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY, *supra* note 111, at 305; Damien Geradin, *Trade and Environmental Protection in the Context of World Trade Rules: A View from the European Union*, 2 EUR. FOREIGN AFF. REV. 33 (1997); Joanne Scott, *On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO* (Jean Monnet, Working Paper No. 3/99, 1999), *available at* http://www.jeanmonnetprogram.org/papers/99/990301.html (last visited Nov. 10, 2007); Halina Ward, *Common but Differentiated Debates: Environment, Labour and the World Trade Organization*, 45 INT'L & COMP. L.Q. 592 (1996); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268 (1997); Asif H. Qureshi, *Extraterritorial Shrimps, NGOs and the WTO Appellate Body*, 48 INT'L & COMP. L.Q. 199 (1999); Barbara Eggers & Ruth Mackenzie, *The Cartagena Protocol on Biosafety*, 3 J. INT'L ECON. L. 525 (2000); Horst Günter Krenzler & Ann MacGregor, *GM Food: The Next Major Transatlantic Trade War?*, 5 EUR. FOREIGN AFF. REV. 287 (2000); ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE (Francesco Francioni ed., 2001); SARA DILLON, INTERNATIONAL TRADE AND ECONOMIC LAW AND THE EUROPEAN UNION ch. 5 (2002).

the use of the mixed formula both in the multilateral and bilateral[258] contexts seems to be continuing.[259]

2. There should be no doubt about the general validity or actual practical significance of the mixed procedures since important EC and Member States' policy areas of international relations are organized based on the mixed agreements technique.[260] This, as a matter of principle, is not contested on any legal grounds any more.[261]
3. The ECJ has accepted the concept of mixed agreements[262] and recognized in its Ruling 1/78, Opinion 1/78, Opinion 2/91, and Opinion 1/94 (*Re WTO Agreement*) inter alia that some agreements require the participation of both the Community and the Member States.[263] From here one can deduce that not all Community competence is exclusive.[264] Furthermore, in the everyday practice of the Community institutions we see that the concept of mixed agreement is a well-established part of EC law.[265] An example of this is Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, in which the European Court of Justice used the term "mixed agreement" to describe the Association Agreement between the Community and Member States on the one hand and Turkey on the other.[266]
4. It is a fact of life that mixed agreements raise difficult and interesting legal and political issues about the role of the Communities and the

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258. Almost all the EC's association agreements under article 310 EC have been concluded as mixed agreements, being the only exceptions the agreements with Cyprus and Malta. HELISKOSKI, *supra* note 157, at 3. *See also* EC Treaty art. 310; 1973 O.J. (L 133) 2 (Republic of Cyprus); 1971 O.J. (L 61) 2 (Malta).

259. HELISKOSKI, *supra* note 157, at 2-3.

260. MACLEOD ET AL., *supra* note 181, at 143-44.

261. *Id.* For previous criticism, see G. Testa, *L'intervention des Etats membres dans la procedure de conclusion des accords d'association de la Communauté economique européenne* [The Intervention of the Member States in the Procedure of Conclusion of the Agreements of Association of the European Economic Community], 2 CAHIERS DE DROIT EUROPÉENNE 502 (1966); Costonis, *supra* note 249, at 451-53.

262. *See, e.g.*, Ruling 1/78, *Draft Convention of the International Atomic Energy on the Physical Protection of Nuclear Materials, Facilities, and Transports*, 1978 E.C.R. 2151; Opinion 1/78, *International Agreement of Natural Rubber*, 1979 E.C.R. 2871; Opinion 2/91, 1993 E.C.R. I-1061; Opinion 1/94, 1994 E.C.R. I-5267. *See also* Advocate General Jacobs, C-316/91, *European Parliament v. Council*, 1994 E.C.R. I-625, ¶ 48; Neuwahl, *supra* note 249, at 667-68 (referring to a "benevolent" attitude toward mixity illustrated in the WTO Opinion).

263. Ruling 1/78, 1978 E.C.R. 2151; Opinion 1/78, 1979 E.C.R. 2871; Opinion 2/91, 1993 E.C.R. I-1061, ¶ 5; and Opinion 1/94, 1994 E.C.R. I-5267.

264. *See* Opinion 2/91, *ILO Convention 170*, 1993 E.C.R. I-1061, ¶ 5.

265. MACLEOD ET AL., *supra* note 181, at 144.

266. Case 12/86, Demirel v. Gmünd, 1987 E.C.R. 3719, ¶ 8.

Member States in the international arena.[267] Despite the legal uncertainties, in practice, the Community and the Member States participate together effectively in various international agreements.[268] It is precisely in the field of international treaty law that mixed agreements show the changes that international law has undergone through the establishment of entities such as the EC.[269]

5. In this same line of thought, Allan Rosas argues that:
[t]he European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organisation, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements . . . offers a telling illustration of the complex nature of the EU and the Communities as an international actor.[270] We speak of complex nature since the circumstance which has to occur is to have an agreement which is a Community and a national agreement at the same time. This means that Europe has [27] voices (one for each Member State) plus one more voice coming from any of the European Communities.
6. The phenomenon of mixed agreements is, therefore, not only deeply interrelated to EC law and its division of powers doctrine but it is also interrelated to public international law. As for the division of powers, McGoldrick points out that "[e]ach international agreement will require consideration of its subject matter to determine the allocation of competence between the EC and the [M]ember [S]tates, and the nature of that competence."[271] This allocation of competence can evolve over the lifetime of an agreement [this is so even during the drafting of an agreement, as evidenced by Case C-24/95, *Comm'n v. Council* (FAO Fisheries Agreement)][272] or series of agreements. This has been the case with the GATT.[273] According to public international law, the rights and obligations which derive from an agreement form an

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267. MACLEOD ET AL., *supra* note 181, at 144.

268. *Id.*

269. Christian Tomuschat, *Liability for Mixed Agreements*, *in* MIXED AGREEMENTS, *supra* note 6, at 125-26.

270. Allan Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 125.

271. MCGOLDRICK, *supra* note 4, at 78-79.

272. Case C-25/94, Comm'n v. Council (FAO Fisheries Agreement), 1996 E.C.R. I-1469.

273. For further detail, see Ernst-Ulrich Petersmann, *Participation of the European Communities in the GATT: International Law and Community Law Aspects*, *in* MIXED AGREEMENTS, *supra* note 6, at 167. *See also* MCGOLDRICK, *supra* note 4, at 121.

undivided entity. This, however, does not necessarily mean that the EC and its Member States cannot respect the internal division of competence according to EC law.[274]

As for the inadequate explanation of mixed agreements, in his book *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, Heliskoski rightly points out the lack of adequate contextual legal principles among legal scholars who pursue legal analyses of mixed agreements.[275]

If the EC and its Member States both participate in international agreements, it is due to the limited scope of the EC's competence in international relations.[276] The international rights and obligations of an institution such as the EC depend on its functions and purposes. The EC is based on general and limited attribution of legal authority laid down by the EC Treaty.[277] Often times, a particular international agreement goes beyond the EC's competence or legal authority to act. In such cases, Member States assume the remainder of treaty commitments. This is the legal reason for having recourse to the mixed procedure.[278]

Quite frequently, the justification for the conclusion of an agreement as mixed relates to the nature of the EC's competence. The ECJ recognizes that EC competence does not necessarily exclude that of Member States' and it may be up to Member States to take part in the agreement together

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274. Giorgio Gaja, *The European Community's Rights and Obligations under Mixed Agreements*, *in* MIXED AGREEMENTS, *supra* note 6, at 137.

275. HELISKOSKI, *supra* note 157, at 7. For examples of works denouncing this fact, see which denounce this fact works by KLAUS D. STEIN, DER GEMISCHTE VERTRAG IM RECHT DER AUSSENBEZIEHUNGEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT (1986); DOLMANS, *supra* note 247.

276. The scope of the common commercial policy has been subject of political and legal debate for a long time. Claus-Dieter Ehlermann, *The Scope of Article 113 of the EEC Treaty*, *in* STUDIES OF RIGHT OF COMMUNAUTÉS EUROPÉENNES: MÉLANGES OFFERTS À PIERRE-HENRI TEITGEN 148 (1984); Jacques H.J. Bourgeois, *The Common Commercial Policy—Scope and Nature of the Powers*, *in* PROTECTIONISM AND THE EUROPEAN COMMUNITY 7(1st ed. 1983); Marise Cremona, *The Completion of the Internal Market and the Incomplete Commercial Policy of the European Community*, 15 EUR. L. REV. 283, 296 (1990); THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY, *supra* note 111; PIET EECKHOUT, THE EUROPEAN INTERNAL MARKET AND INTERNATIONAL TRADE: A LEGAL ANALYSIS (1994); Damian Chalmers, *Legal Base and the External Relations of the European Community*, *in* THE EUROPEAN UNION AND WORLD TRADE LAW, *supra* note 83; Marise Cremona, *Neutrality or Discrimination? The WTO, the EU and External Trade*, *in* THE EU AND THE WTO, *supra* note 190.

277. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J., at 180 (Apr. 11); Case 6/64 Costa v. ENEL, 1964 E.C.R. 585.

278. DOLMANS, *supra* note 247, at 95.

with the EC.[279] Most legal scholars tend to rely on non-contextual general principles when dealing with mixed agreements. This means that the criterion for the division of powers between the EC and its Member States has turned into a scheme of interpretation by which the different legal questions arising in relation to mixed agreements such as implementation or responsibility could be addressed. This means that the practice of mixed agreements is not analyzed since the conception is purely non-contextual.[280]

When giving a legal analysis of mixed agreements, one should also incorporate the EC's and Member States' treaty partners. Legal scholars have admitted that the various rules and principles to be applied do not only emanate from EC and national law but also from international law.[281] Why is it so important to include third parties when trying to reach a proper conception of the mixed procedure? Simply because without them there would be no international agreement. Any conception of mixed agreements without taking into account third parties would be a partial approach and, therefore inadequate, explanation of this legal phenomenon.

On the international law front, we perceive that neither the EC Treaties, nor Community legislation, nor the ECJ's case law is binding on the other contracting parties. If the practice of mixed agreements is neglected, then one could argue that the general principles of international law[282] seem to be transplanted to the specific context of the EC and Member States' external relations in general and mixed agreements in particular. In this line of thought, we can quote Albert Bleckmann: "In order to find a solution to [the] problem [of judicial positions of the different parties to a mixed agreement], we have necessarily to refer to the general principles of interpretation of public international law."[283] That said, the scope of such principles tends to be unclear and controversial. Quoting Bleckmann again, "[The] general principles to which we refer . . . have not, as yet,

279. Alan Dashwood & Joni Heliskoski, *The Classical Authorities Revisited, in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 17. *See also* HELISKOSKI, *supra* note 157, at 36-46.

280. STEIN, *supra* note 275, at 61.

281. While there is no international law treatise on the topic, this aspect has been discussed. *See, e.g.*, Phillip Allott, *Adherence To and From Mixed Agreements, in* MIXED AGREEMENTS, *supra* note 6, at 97; Christina Tomuschat, *Liability for Mixed Agreements, in* MIXED AGREEMENTS, *supra* note 6, at 125; Giorgio Gaja, *The European Community's Rights and Obligations Under Mixed Agreements, in* MIXED AGREEMENTS, *supra* note 6, at 133; Albert Bleckmann, *The Mixed Agreements of the EEC in Public International Law, in* MIXED AGREEMENTS, *supra* note 6, at 155.

282. Be them, *effet utile*, good faith, or equality, among others.

283. Albert Bleckmann, *The Mixed Agreements of the EEC in Public International Law, in* MIXED AGREEMENTS, *supra* note 6, at 157.

been clearly established by public international law."[284] The general principles might "be excluded if an analysis of the interests of the parties regulated by the treaty indicates a different solution."[285]

When dealing with legal analyses of mixed agreements, this is the current state of the art. It is, therefore, important to clarify the unlimited number of questions concerning the legal implications of the mixed procedure which constantly arise in the actual practice of the EC's external relations. That said, mixed agreements are favored by EU Member States as it allows them to preserve their presence and prestige in the international scene or their voting rights in an agreement.[286] They are also favored by the Commission for practical reasons. A mixed agreement does not usually delineate the allocation of competences.[287] Therefore, the arduous task of agreeing the nature of some Community competences is obviated. Politically, the Community also yields benefits, as its international presence is enhanced. Mixed agreements could arise when the Community wishes to ensure and/or increase the responsibility of Member States in a given field, for example, with environmental issues. It could also be the case that the Community is not able to fulfill a given objective independently, or as effectively as with the co-operation of Member States, for example with humanitarian or development aid.

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284. *Id.*

285. *Id.* at 160.

286. MCGOLDRICK, *supra* note 4, at 78; Neuwahl, *supra* note 247, at 726.

287. In fact, the ECJ is not particularly keen on express *ex ante* allocation of competences between the Member States and the Communities in an international agreement with third countries. As a matter of Community law, the Community and the Member States are under no obligation to provide how competences are divided in the agreement. This is an EU domestic question in which Third States need not intervene. *See, e.g.*, Ruling 1/78, 1978 E.C.R. 2151, ¶ 35. The inherent difficulty of delineating competences is obvious. Also, even the clearest division of powers is susceptible to change over time. *See, e.g.*, Commission Communication to the Council on Participation by the Community in the Third U.N. Conference on the Law of the Sea, at 3, COM (81) 799 final (Dec. 9, 1981): "[S]uch requirements would be bound to lead to serious disputes, quite apart from the practical difficulty of their application in the case of the Community, given the essentially evolving nature of the responsibilities assigned to the latter by the Treaty of Rome." Sometimes, a statement of the declaration of the respective competences of the Community and the Member States, what is called a "declaration of competence," is insisted upon as a pre-condition for Community participation in an agreement. *See, e.g.*, Third U.N. Conference on the Law of the Sea, 21 I.L.M. 1245, 1353 (1982); Vienna Convention Against Illicit Traffick in Narcotic Drugs and Psychotropic Substances (Art. 27(2), 1992 UKTS 26, Cm 1923); Vienna Convention for the Protection of the Ozone Layer (Art. 13 (3), 1988 O.J. (L 297) 8). The declaration, which invariably describes the allocation of competences in general terms, is without prejudice to the allocation under the Treaties and contains caveats as to changes over time. The Community usually reserves the right to make further declarations of competence as its powers increase. The legal credentials of such declarations are also debatable as they cannot override the legal position under the Treaties.

Needless to say, mixed agreements are a useful device in avoiding or hiding inter-institutional tension since there is no need to agree on the exact delimitation of Community powers in relation to Member States' powers.[288] They cater for the constantly evolving nature of Community competences.[289] The allocation of competences can evolve over the lifetime of an agreement.[290]

Since there are many different types of mixed agreements, depending on how they are categorized, the answer to the question they raise may vary dramatically.[291] Let us, see then, some ways of classification. Rosas makes a basic distinction between parallel and shared competences.[292]

A. *Types of Competence*

The terminology used in the doctrine is very unclear: non-exclusive, shared, parallel, joint, concurrent, and divided competence of the EC.

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288. As very vividly described by Weiler, they "diffuse at a stroke the explosive issues of the scope of Community competences (and treaty-making power) and the parameters of the preemptive effect." J.H.H. Weiler, *The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle*, *in* MIXED AGREEMENTS, *supra* note 6, at 75.

289. *See, e.g.*, Case C-25/94, *Comm'n v. Council* (FAO Fisheries Agreement) 1996 E.C.R. I-1469; Joined Cases 21-24/72, *Int'l Fruit Co. NV and Others v. Produktschap voor Groenten en Fruit (Int'l Fruit)*, 1972 E.C.R. 1219.

290. For example, in the *International Fruit* case, the ECJ held that the Community had assumed competence in the field of, inter alia, common external tariffs and trade policy, within which the GATT fell. Joined Cases 21-24,72, *Int'l Fruit Co.*, 1972 E.C.R. 1219, ¶ 14. The Community was therefore perceived as having succeeded the Member States in the GATT and the provisions of that agreement had the effect of binding the Community. *Id.* ¶ 18. *See also* Ruling 1/78 (Nuclear Material Case), 1978 E.C.R. 2151, ¶ 35. Here, the ECJ expressly recognized the continuous changing nature of Community law and refused to insist on a clear demarcation of powers between the Community and the Member States in the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports, noting that it was an internal Community question in which third parties had no need to intervene. *Id.* What was important was that the implementation of the Convention should not be incomplete. *Id. See also* Ernst-Ulrich Petersmann, *Participation of the European Communities in the GATT: International Law and Community Law Aspects*, *in* MIXED AGREEMENTS, *supra* note 6, at 167; Pierre Pescatore, *External Relations in the Case law of the Court of Justice of the European Communities*, 16 COMMON MKT. L. REV. 615 (1979); Ilona Cheyne, *International Agreements and the European Community Legal System*, 19 EUR. L. REV. 581 (1994).

291. Henry G. Schermers, *A Typology of Mixed Agreements*, *in* MIXED AGREEMENTS, *supra* note 6, at 22; DOLMANS, *supra* note 247, at 25, 39-42; Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 128-33; MACLEOD ET AL., *supra* note 181, at 143; Giulio Tognazzi, *Nozione e classificazione degli accordi misti*, 4 COMMUNITARIAN RT. & INT'L EXCHANGES 590 (1994).

292. Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 128-33.

These terms are used here to describe the same phenomenon, that is the potential powers which the EC may exercise if the Council so decides and which, when exercised, may turn into exclusive EC competence.[293] However, as we will see later, it is inappropriate to use the locution "parallel competence" to refer to a situation where non-exclusive EC competence turns out to be exclusive EC competence. Again, the doctrine is imprecise in its terminology.[294]

1. Parallel Competence

"Parallel competence . . . implies that the Communities may adhere to a treaty, with full rights and obligations as any other Contracting Party, this having no direct effect on the rights and obligations of Member States being parties to the same treaty."[295] However, this situation might have indirect effect on the rights and obligations of the Member States.[296] For example, the Agreement establishing the European Bank for Reconstruction and Development (EBRD),[297] which is open to States and

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293. The fundamental principle of EC law is the principle that the EC's powers are attributed to the EC by the Member States. *See, e.g.*, PAUL J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES, § 1.3, at 112 (2d ed. 1989); *see* René Barents, *The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation*, 30 COMMON MKT. L. REV. 85 (1993) (discussing the principle).

294. To make the terminological confusion ever greater, while international law uses the term power or jurisdiction, EC law has usually adopted the term competence. Furthermore, the ECJ has used both competence and power interchangeably. *See* Tridimas & Eeckhout, *supra* note 158, at 144; Neuwahl, *supra* note 247, at 718; MACLEOD ET AL., *supra* note 181, at 38-39.

295. Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 203.

296. For a discussion on the conclusion of external international agreements and their effect on Community law and the law of the EU Member States, see Nanette Neuwahl, *Individuals and the GATT: Direct Effect and Indirect Effects of the GATT in Community Law*, *in* THE EUROPEAN UNION AND WORLD TRADE LAW, *supra* note 83, at 313-14; Philip Lee & Brian Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law*, 30 J. WORLD TRADE 67 (1996); NATIONAL TREATY LAW AND PRACTICE (Monroe Leigh et al. eds., 1999).

297. Founded in 1991, the EBRD uses the tools of investment to help build market economies and democracies in 27 countries from central Europe to central Asia. *See* Wikipedia, *European Bank for Reconstruction and Development*, Http://en.wikipedia.org/wiki/ EBRD (describing the history and general information regarding the EBRD) (as of Dec. 31, 2007, 14:50 EST). The EBRD is owned by 60 countries and two intergovernmental institutions. *Id.* Despite its public sector shareholders, it invests mainly in private enterprises, usually together with commercial partners. *Id.* The EBRD provides project financing for banks, industries, and businesses, both new ventures and investments in existing companies. *Id.* It also works with publicly-owned companies to support privatization, restructuring state-owned firms, and improvement of municipal services. *Id.* The EBRD's mandate stipulates that it must only work in countries that are committed to democratic principles. *See* Wikipedia, *European Bank for Reconstruction and Development*, *supra.* The EBRD

the EC alike,[298] obliges "each Contracting Party to provide financial resources as a loan or grant to a Third State or international fund (assuming that the participation of the EC would be covered by the Community budget."[299] The given situation can be more complex if financial assistance does not come from the Community budget but from a separate fund, consisting of Member States' contributions and based on a separate internal agreement between or among the Member States.

An example could be the adherence to the 1989 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks prompted by the need to protect the Community trademark.[300] According to Article 10 of the Madrid Protocol, each Contracting Party, including the EC, has one vote.[301] This implies that the EC and its Member States may have altogether 28 votes, a principle contested by the United States, which has so far refused to adhere to the Protocol.[302]

2. Shared Competence

As for shared competence, it implies some division of the rights and obligations in the agreement between the Community and the Member States. According to Dolmans, one can distinguish between mixed agreements with coexistent competence and mixed agreements with concurrent competence.[303] Let us start with the latter case.

a. Concurrent Competence

A mixed agreement with concurrent competence implies that the agreement in question forms a certain whole or totality, which is indivisible or cannot be separated into two parts. Phillip Allot, when referring to concurrent competence, speaks of mixed agreements "in the

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is directed by its founding agreement to promote, in the full range of its activities, environmentally sound and sustainable development. *Id.* For more information on the EBRD, see MACLEOD ET AL., *supra* note 181, at 187-89.

298. Council Decision of 19 Nov. 1990 (EBRD), 1990 O.J. (L 372) 1.

299. Allan Rosas, Mixed Union—Mixed Agreements, in INTERNATIONAL LAW ASPECTS, *supra* note 6, at 129.

300. *Commission Proposal for a Council Decision Approving the Accession of the EC to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, COM (96) 367 final (July 22, 1996).

301. Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 27, 1989.

302. Rosas, *Mixed Union—Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 203 n.20.

303. DOLMANS, *supra* note 247, at 25, 39–42, 97.

strong sense," meaning that the Community and Member States participation is "inextricably confused."[304] Such a truly shared-competences situation may arise principally if there is a non-exclusive Community competence covering the whole and entire agreement. Articles 111, paragraph 5 (agreements relating to economic and monetary policy), 174, paragraph 4 (environmental agreements), and 181, paragraph 2 (agreements relating to development cooperation) of the EC Treaty provide that not only the Community, but also the Member States may negotiate in international bodies and conclude international agreements. Nevertheless, according to a Declaration on Articles 111, 174, and 181 EC contained in the Final Act of the TEU,[305] this (non-exclusive) competence is subject to the European Road Transport Agreement (ERTA) judgment of the ECJ, that is to say, the principle by which the adoption of common rules by the Community may create exclusive Community competences also on the fields covered by the said articles.

There are also other areas where the Community may have a non-exclusive competence to conclude agreements if it has a corresponding competence to establish internal rules and this specific competence has not yet been used. In this respect, we have as examples the joined cases 3, 4 and 6/76 (*Kramer*)[306] as well as Opinion 2/91 (*ILO Convention No. 170*)[307] and Opinion 2/92 (*OECD National Treatment Instrument*).[308] According to Rosas, even if this specific competence has been used, "the external competence may rest at least partly non-exclusive if the common internal rules are considered as minimum rules only or [if the common internal rules] do not cover the whole area regulated in the international agreement."[309] An example of the latter case is Opinion 1/94 (WTO Agreement).[310]

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304. Phillip Allot, *Adherence and Withdrawal from Mixed Agreements*, *in* MIXED AGREEMENTS, *supra* note 6, at 118-19.

305. TEU Final Act.

306. Joined Cases 3, 4, and 6/76, *Kramer*, 1976 E.C.R. 1303, 1308-09 (¶¶ 19-34). *See generally* Albert W. Koers, *The External Authority of the EEC in Regard to Marine Fisheries*, 14 COMMON MKT. L. REV. 269-301 (1977).

307. Opinion 2/91, *ILO Convention No. 170*, 1993 E.C.R. I-1061 at 1076-77 (¶¶ 7, 12).

308. Opinion 2/92, *OECD Nat'l Treatment Instrument*, 1995 E.C.R. I-521, at 558-60.

309. Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 131 (footnotes omitted).

310. Opinion 1/94, *WTO Agreement*, 1994 E.C.R. 1-5267, ¶ 82. *See also* Opinion 2/91, *ILO Convention 170*, 1993 E.C.R. I-1061. If the common rules are in fact "minimum requirements" or standards, the Member States are not precluded from concluding international agreements which establish higher standards so long as these international commitments are not an obstacle to the adoption of more stringent measures by the Community. *Id.* ¶¶ 18-21. It would seem, however, that as soon as a directive contains provisions which are more than minimum requirements, the

b. Coexistent Competence

As for mixed agreements with coexistent competence, since the agreements "contain provisions which fall under the exclusive competence of the Community and/or the Member States, respectively,[311] [it is] in principle possible to divide it into two separate parts, for which *either* the Community *or* the Member States are responsible."[312] Rosas suggests, as an example of this, "a treaty containing one chapter on trade in goods and another on military defence. This situation could . . . be seen as [if we were dealing with] two different treaties presented in one . . . document."[313] In this respect, Allot notes that for such mixed agreements "in the weak sense" it should not be possible to separate completely the Community and Member States parts of the agreement.[314]

If there are real national competences involved, which "coexist" with EC competences, then the nature of the agreement may make it difficult to separate the agreement into two parts.[315] In this respect, "the ECJ has . . . said that the Community and the Member States share competence where an agreement covers both matters within the exclusive competences of the Member States and matters within the exclusive competence of the [EC]."[316] An example, which gives evidence of this is Opinion 1/78 (National Rubber). There, the Court addressed a scheme where, under a commodity agreement,[317] Member States would have directly financed the

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Community would acquire exclusive competence and, therefore, an international agreement dealing with the same subject matter will necessarily "affect" these rules. *See* MACLEOD ET AL., *supra* note 181, at 59; MCGOLDRICK, *supra* note 4, at 76; David O'Keeffe, *Exclusive, Concurrent and Shared Competence*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 189; Nanette Neuwahl, Case Note on Opinion 2/91, 30 COMMON MKT. L. REV. 1185 (1991).

311. *See* Cremona, *supra* note 276, at 393; Marise Cremona, *External Relations and External Competence: The Emergence of an Integrated Policy*, *in* THE EVOLUTION OF EU LAW 137 (Paul Craig & Gráinne de Búrca eds., 1999); Panos Koutrakos, *The Interpretation of Mixed Agreements Under the Preliminary Reference Procedure*, 7 EUR. FOREIGN AFF. REV. 25 (2002).

312. Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 129.

313. Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 204.

314. Allot, *Adherence to and Withdrawal from Mixed Agreements*, *in* MIXED AGREEMENTS, *supra* note 6, at 118-19. *See, e.g.*, Ruling 1/78, *(Draft Convention on the Physical Protection of Nuclear Materials, Facilities, and Transports)*, 1978 E.C.R. 2151.

315. MACLEOD ET AL., *supra* note 181, at 131.

316. *Id.* at 65.

317. On commodity agreements, see FIONA GARDEN-ASHWORTH, INTERNATIONAL COMMODITY CONTROL: A CONTEMPORARY HISTORY AND APPRAISAL (1984); ERVIN ERNST, INTERNATIONAL COMMODITY AGREEMENTS: THE SYSTEM OF CONTROLLING THE INTERNATIONAL

agreement, with the pertinent implications for its decision-making procedures, even if the essential policy of such an agreement came within the Community's exclusive competence under Article 133 EC.[318] On the relevance of Member State financing of the agreement,[319] see Opinion 1/94 and Case C-316/91, *Parliament* v. *Council*[320] and Opinion of Advocate-General Jacobs, paragraphs 55-59.[321] This *Natural Rubber* case is related to Community participation in commodities agreements in pursuance of the common commercial policy.[322]

In the case of coexistent competence, there is what Rosas calls a "presumed 'horizontal' (sectorial) distribution of competences" (commercial policy, due to trade in goods, and defence policy, due to military policy).[323] One can also imagine a more "vertical" distribution of competences.[324] By this, Rosas means a situation in which "the Community would be competent to conclude the main substantive parts of the agreement, while Member State participation would be deemed necessary because of the nature of its obligations relating to the implementation and enforcement of those substantive parts."[325] As an example we can take into account the agreement considered in Ruling 1/78 (*Re the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports*), in which, as far as its provisions on penal sanctions and extradition were concerned, Member State participation was required.[326]

One more example is that of the 1995 U.N. Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly

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COMMODITY MARKET (1982); KABIR-UR-RAHMAN KHAN, THE LAW AND ORGANISATION OF INTERNATIONAL COMMODITY AGREEMENTS (1982).

318. *See* 1979 E.C.R. 2871, 2917-18 (¶¶ 57-60); Ruling 1/78, 1978 E.C.R. 2151, 2180 (¶ 36); MACLEOD ET AL., *supra* note 181, at 65.

319. Opinion 1/94 (*Re WTO Agreement*), 1 COMMON MKT. L. REV. 205 ¶¶ 19-20 (1995).

320. Case C-316/91, *Parliament v. Council*, 1994 E.C.R. I-625.

321. Advocate General Jacobs in Case C-316/91, European Parliament.

322. *See generally* Opinion 1/78, Draft International Agreement on Natural Rubber, 1979 E.C.R. 2871.

323. Rosas, *The European Union and Mixed Agreements*, THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 204; Rosas, *Mixed Union-Mixed Agreements*, INTERNATIONAL LAW ASPECTS, *supra* note 6, at 130.

324. Rosas, *The European Union and Mixed Agreements*, THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 204; Rosas, *Mixed Union-Mixed Agreements*, INTERNATIONAL LAW ASPECTS, *supra* note 6, at 130.

325. Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 130.

326. Ruling 1/78, (*Draft Convention of the International Atomic Energy Agency on the Physical Protections of Nuclear Materials Facilities & Transports*) 1978 E.C.R. 2151 ¶ 36.

Migratory Fish Stocks.[327] This agreement, mainly because of its provisions on compliance and enforcement (Part VI), has been defined by the Council of the EU as a mixed agreement.[328] Following this line of argument, in an EC Declaration submitted upon signature in accordance with Article 47, it is noted that, while the Community has exclusive competence with respect to the conservation and management of living marine resources, including the regulatory competence granted under international law to the Flag State in this respect, measures such as refusal, withdrawal or suspension of authorization to serve as masters and other officers of fishing vessels, as well as certain enforcement measures relating to the exercise of jurisdiction by the Flag State over its vessels on the high seas, are within the competence of the Member States.[329]

However, in many cases, "the provisions relating to possible 'coexistent' Member States competences may be of such a limited relevance that they should be seen as 'ancillary' (subsidiary) to the essential objectives of the agreement."[330] The ECJ has cases on subsidiary provisions, which are often related to Article 133 EC on common commercial policy. I would like to illustrate one case and two opinions from the ECJ as examples of what has been previously said: Opinion 1/78 (*Draft International Agreement on Natural Rubber*),[331] Opinion 1/94 (*WTO Agreement*),[332] and Case C-268/94 *Portugal* v. *Council*.[333] In this last case, the ECJ concludes in its paragraph 77 as follows:

> Furthermore, with regard to the linking of Article 10 of the Agreement [Cooperation Agreement between the European Community and the Republic of India on Partnership and Development] to commercial policy, it is sufficient to point out that the Community is entitled to include in external agreements

327. U.N. OFFICE OF LEGAL AFFAIRS, LAW OF THE SEA BULLETIN 32 (1996).

328. *Id.* at 26.

329. Commission's Proposal for a Council Decision on the Ratification by the European Community for the Implementation of the Provisions of the Law of Sea of Dec. 10, 1982, relating to the conservation and management of straddling stocks and highly migratory fish stocks, 1996 O.J. (C 367) 24.

330. Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 130.

331. Opinion 1/78, *Draft International Agreement on Natural Rubber*, 1979 E.C.R. 2871 ¶ 56.

332. Opinion 1/94, *WTO Agreement*, 1994 E.C.R. I-5278 ¶¶ 66-68.

333. Case C-268/94, Portugal v. Council, 1996 E.C.R. 6177, ¶¶ 75, 77. For an academic comment on the case, see Steve Peers, *Fragmentation or Evasion in the Community's Development Policy? The Impact of Portugal v. Council*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 100-12.

> otherwise falling within the ambit of Article 133 ancillary provisions for the organization of purely consultative procedures or clauses calling on the other party to raise the level of protection of intellectual property (see, to that effect, Opinion 1/94, [1994 E.C.R. 526], paragraph 68).[334]

MacLeod et al. assert that

> The principal consequence of shared competence is that the Member States still have power to enter into agreements and to take action in the areas in question . . . . Although the concept of shared external competence is well established in Community law and practice, it has not always been possible to persuade [T]hird [S]tates to recognize that the legal powers and interests of the Community and the Member States co-exist.[335] Third States have tended to insist that either the Community or the Member States should accept legal responsibility for a given matter, and that both cannot be responsible, or exercise rights at the same time, on the same matters. The extent to which international law recognizes the concept of "shared competence" is therefore open to debate.[336]

At the same time, it must be said that the fact Member States will have obligations concerning the implementation and execution of the agreement does not classify the agreement as mixed. As means of evidence, we have Opinion 1/75 (*Understanding on a Local Cost Standard*).[337] Here the Court held that "[i]t is of little importance that the obligations and financial burdens inherent in the execution of the agreement envisaged are borne directly by the Member States."[338] Another example is Opinion 2/91 (ILO Convention No 170).[339]

B. *Types of Mixity*

Mixity can also be classified as facultative (non-compulsory) and obligatory, that is, legally necessary.[340] "Where the competence of the

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334. Case C-268/94, *Portugal v. Council*, 1996 E.C.R. 6177, ¶ 77.

335. This is mainly the case in the World Intellectual Property Organization.

336. MACLEOD ET AL., *supra* note 181, at 63 (footnotes omitted).

337. Opinion 1/75, *Understanding on a Local Cost Standard*, 1975 E.C.R. 1355.

338. *Id.* at 1364.

339. Opinion 2/91, (*ILO Convention No. 170*),1993 E.C.R. I-1061, ¶ 34.

340. Rosas, *Mixed Union-Mixed Agreements*, INTERNATIONAL LAW ASPECTS, *supra* note 6, at 131.

[EC] is non-exclusive but there are no competences [specifically] reserved for Member States either, [then as a matter of EC law this] mixity becomes *facultative*, [optional, non-compulsory]."[341] This is illustrated in environmental agreements and development cooperation agreements. This means that you may have pure Community agreements with shared competence. The language of the EC Treaty makes it very clear that development cooperation is not exclusive EC competence, and yet the EC concludes international agreements on its own.[342] Thus, one must have a mixed agreement only when part of the agreement covers matters outside EC competence altogether, but EU Member States are free to insist on a mixed agreement whenever there is shared competence.

As Rosas argues, in cases of concurrent competences, mixity is facultative *ab initio*. However, if the Council and the Member States insist on mixity for political reasons, the question arises as to whether parts of the agreement become reserved for the Member States, in which case they should all become contracting parties.[343] We should also illustrate, in this same line of argument, the example of an Opinion (No. 20/1995) given on 30 November 1995 by the Constitutional Committee to the Foreign Affairs Committee of the Finnish Parliament.[344] This Opinion discusses problems "concerning the ratification of the 1995 Europe Agreement establishing an association between the European Communities and their Member States, on the one part, and the Republic of Estonia [before it was a member of the EU], of the other part."[345]

As far as obligatory mixity is concerned, it is understood that it is necessary to have the participation of both the Member States and the EC on a particular issue.[346] A classical example of obligatory mixity is the Law of the Sea Convention where it is highly difficult to have one voice representing the EU.[347] In such a case, we deal with what is called "subordination clauses,"[348] which provide that the EC can become a party only if one or more of the Member States have become parties.[349] For

341. *Id.*

342. PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 109 (2004).

343. Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 132 n.36.

344. *Id.* at 143 n.78.

345. *Id.*

346. MCGOLDRICK, *supra* note 4, at 78.

347. *Id.* at 87.

348. *See* G.L. Close, *Subordination Clauses in Mixed Agreements*, 34 INT'L & COMP. L.Q. 382-91 (1985).

349. MCGOLDRICK, *supra* note 4, at 87.

example, Article 3 of the Annex IX to the Law of the Sea Convention (1982), which advocates that the EC may become a party only if a majority of the Member States ratifies or accedes.[350]

This distinction between obligatory and facultative mixity is not always recognized in practice. Proof of this are the "discussions in the framework of the EU Council (including Coreper and the Working Groups) on the Community v. mixed character of a given agreement, [where] it is almost always taken for granted that the lack of exclusive Community competences . . . requires mixity [out of necessity]."[351]

However, it may sometimes be difficult to apply to certain cases, as can be deduced from uncertainties such as whether Opinion 1/94 implies that Member States' participation in the WTO Agreements on services[352] and intellectual property rights was legally necessary or simply legally possible. The Commission asked the Court to rule that the Community had exclusive competence to adhere to the GATS and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), either under Article 133 of the EC Treaty, the ERTA doctrine, implied powers in accordance with Opinion 1/76,[353] or Articles 95 and 235 of the EC Treaty.[354] In denying

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350. Article 3 of the Annex IX to the Law of the Sea Convention reads: "An international organization may deposit its instrument of formal confirmation or of accession if a majority of its Member States deposit or have deposited their instruments of ratification or accession." U.N. Convention on the Law of the Sea, Annex IX art. 3, Dec. 10, 1982, 21 I.L.M. 1261 [hereinafter Law of the Sea Convention]. Kenneth R. Simmonds, *The Community's Declaration Upon Signature of the UN Convention of the Law of the Sea*, 23 COMMON MKT. L. REV. 521 (1986). The Law of the Sea Convention (LOSC) entered into force on November 16, 1994. However, an agreement on Annex IX of the LOCS has meant that there is a much greater likelihood that more Member States will ratify. Ratification of the LOSC by the EC is under active consideration. A delay in ratification already announced by the UK in May 1996 may delay EC ratification. K.R. Simmonds, *The Communities Declaration Upon Signature of the U.N. Convention on the Law of the Sea*, 23 COMMON MKT. L. REV. 521-44 (1986). The Law of the Sea Convention (LOSC) entered into force on Nov. 16, 1994. However, an agreement on Part IX of the LOSC meant that there would be a much greater likelihood that more Member States would ratify, which eventually happened.

351. Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 132 n.34.

352. For an analysis of the General Agreement on Trade in Services (GATS) from a European perspective, see Elspeth Guild & Philip Barth, *The Movement of Natural Persons and the GATS: A UK Perspective and European Dilemma*, 4 EUR. FOREIGN AFF. REV. 395 (1999); Piet Eeckhout, *Constitutional Concepts for Free Trade in Services*, *in* THE EU AND THE WTO, *supra* note 190; Christoph W. Herrmann, *Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job*, 39 COMMON MKT. L. REV. 7 (2002); Margareta Djordjevic, *Domestic Regulation and Free Trade in Services—A Balancing Act*, 29 LEGAL ISSUES ECON. INTEGRATION 305 (2002).

353. Opinion 1/76, *Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels* (Rhine Navigation Case), 1977 E.C.R. 741. For an analysis of Opinion 1/76, see

their existence of exclusive competence for the whole subject area covered by these two treaties, the Court concluded that the GATS and TRIPS Agreement are mixed agreements.[355] Some of the Member States had argued that those provisions of the TRIPS Agreement fall within their competence. The Court replied that "[i]f that argument is to be understood as meaning that all those matters are within some sort of domain reserved to the Member States, it cannot be accepted. The Community is certainly competent to harmonize national rules on those matters. . . ."[356]

What has been said so far concerning the types of competences in the external relations of the EU can be graphically shown as follows:[357]

A. Types of competence	B. Types of mixity
1. Parallel competence	facultative mixity
2. Shared competence	
a. Concurrent competence	facultative mixity
b. Coexistent competence	obligatory mixity
1. Horizontally	
2. Vertically	

Lena Granvik denotes that "[m]ixed agreements are concluded especially in the field of the environment, entailing that both the [EC] and some or even all of its Member States individually become parties to an

Michael Hardy, *Opinion 1/76 of the Court of Justice: The Rhine Case and the Treaty-Making Powers of the Community*, 14 COMMON MKT. L. REV. 561 (1977).

354. Article 235 of the EC Treaty reads: "The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288." EC Treaty art. 235.

355. Opinion 1/94, *Article 228(6) of the EC Treaty*, 1994 E.C.R. I-5267, ¶¶ 53, 71.

356. *Id.* ¶ 104.

357. Rosas, *Mixed Union-Mixed Agreements*, INTERNATIONAL LAW ASPECTS, *supra* note 6, at 132.

international environmental agreement."[358] According to this author, there are two types of mixed agreements: complete and incomplete mixed agreements.[359] "[C]omplete mixed agreements means that both the EC and *all* of its Member States are treaty-parties, while the concept of incomplete mixed agreements indicates that only *some* of the EC Member States have acceded to the agreement in question along with the EC."[360] However, it must be said that incomplete mixed agreements bind all the Member States of the Community.[361] Member States, whether they are parties or not, "have an obligation to cooperate with the EC in the implementation of the Community's international obligations."[362] In addition to that, a mixed agreement, which does not distinguish between the rights and obligations of the EC and the Member States, gives obligations to both the EC and its Member States under all its provisions.[363]

It should be mentioned that the above given typology should only and merely be seen "as a tool to assist in the structuring of the discussion on the legal nature and implications of mixed agreements."[364] Some agreements may fall under several of these categories as can be seen from the ILO Convention No. 170 as interpreted by the ECJ in its Opinion 2/91.[365] In this Opinion, the Court seemed to hold that part III of the Convention belonged to exclusive EC competence and the other parts to non-exclusive EC competence because the relevant Community directives set minimum standards.[366] The representation of certain dependent territories belonged to the competence of some Member States.[367] However, this right of representation is, strictly speaking, not a question of mixity, as the Member States involved do not act in their capacity as EU Member States.[368]

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358. Lena Granvik, *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness* [hereinafter *Incomplete Mixed Environmental Agreements*], *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 255.

359. *Id.*

360. *Id.*

361. *Id.* at 269.

362. *Id.* at 270.

363. Granvik, *Incomplete Mixed Environmental Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 269.

364. Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 207.

365. Opinion 2191, *ILO Convention No. 170*, 1993 E.C.R. I-1061 ¶¶ 34, 36.

366. *Id.* ¶ 34.

367. *Id.* ¶ 35.

368. Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 207; MACLEOD ET AL., *supra* note 181, at 65-66.

Regarding the conclusion of mixed agreements, there seems to be uncertainty about the nature and legal implications of joint participation by the EC and its Member States in the conclusion of international agreements.[369] Rosas argues in this respect that "[t]he phenomenon of mixed agreements is still surrounded by a host of question marks, both of a theoretical and practical nature."[370] In this sense, within the legal scholarship, three main and divergent positions can be presented: 1) one part of the doctrine has tried to reduce the mixed procedure to only exceptional cases of some compelling legal reasons;[371] 2) another part of the doctrine has focused on the practical and theoretical problems of mixed procedure, limiting EU Member States' participation in the EC's international agreements to a minimum;[372] and 3) a third group of scholars has a more dogmatic approach to obtain normative propositions by interpreting the various provisions of international agreements or by extrapolation from the general schemes of EC law and international law.[373]

As for the implications of mixed agreements for third parties, we shall evaluate the validity and effects that the EC's international agreements have on non-Member States of the EU.[374] As we know, mixed agreements are, together with the exclusive Community agreements, "one of the two methods by which the Community undertakes contractual international obligations."[375] In fact, "[a]lthough no specific provision is made in the EC Treaty for joint participation of the Community and the Member States in international agreements, the practice of concluding mixed agreements is

369. *See* Trevor C. Hartley, *National Law, International Law and EU Law—How do they Relate?*, *in* ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES 65 (Patrick Capps et al. eds., 2003).

370. Rosas, *Mixed Union—Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 127.

371. Pescatore, *supra* note 290, at 642.

372. Rosas, *Mixed Union—Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 125; Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 200; Ehlermann, *Mixed Agreements—A List of Problems*, *in* MIXED AGREEMENTS, *supra* note 6, at 3.

373. Albert Bleckmann, *Der gemischte Vertrag im Europarecht*, EUROPARECHT 301 (1976); STEIN, *supra* note 275, at 23; Bleckmann, *The Mixed Agreements of the EEC in Public International Law*, *in* MIXED AGREEMENTS, *supra* note 6, at 155.

374. For a broader spectrum of the implications of international agreements on States, see a legal analysis by Andrew Guzman, *The Design of International Agreements* (Int'l Legal Stud. Program, Working Papers Series, Paper No. 8, 2004), *available at* http://repositories.cdlib.org/ils/wp/8 (last visited Nov. 15, 2007).

375. Ehlermann, *Mixed Agreements: A List of Problems*, *in* MIXED AGREEMENTS, *supra* note 6, at 3.

well established in the law of the [EC]."[376] This has been recognized by the ECJ on several occasions. The recognition of the practice by the Court was first implied in cases concerning the early agreements of association.[377] The first express reference which the Court made to the concept of mixed agreement is in Case 12/86 *Meryem Demirel* v. *Stadt Schwaebisch Gmünd*.[378] Another example is the dicta in Opinion 1/78 on the International Natural Rubber Agreement.[379]

The answer to specific legal problems arising from the issue of mixity may vary depending on the subject matter. In other words, "the jurisdiction of the [ECJ] in the field of mixed agreements [and] the responsibility and liability of the [EC] and its Member States *vis-à-vis* [T]hird [S]tates," inter alia.[380]

In relation to the liabilities of the EC and the Member States to third parties,[381] within the EC legal order, the Community and the Member States are responsible for the implementation of those parts of mixed agreement which fall within their respective competences. The only authoritative discussion of the liability of the Community and the Member States under a mixed agreement is in the opinion of Advocate-General Jacobs in Case C-316/91, where he said:

> The [Lome] Convention was concluded as a mixed agreement (i.e. by the Community and its Member States jointly) and has essentially a bilateral character. This is made clear in Article 1, which states that the Convention is concluded between the Community and its Member States, of the one part, and the ACP States, of the other part. *Under a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion.*[382]

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376. HELISKOSKI, *supra* note 157, at 2.

377. *See, e.g.*, Case 96/71, Haegeman v. Comm'n, 1972 E.C.R. 1005 (concerning the 1961 Agreement with Greece).

378. Case 12/86, *Demirel v. Gmünd*, 1987 E.C.R. 3719, ¶¶ 8-9.

379. Opinion 1/78, *Int'l Agreement on Natural Rubber*, 1979 E.C.R. 2871, ¶¶ 2, 29.

380. Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 207.

381. Stefano Nicolin, *Modalità di Funzionamento e di Attuazione degli Accordi Misti*, *in* LE RELAZIONI ESTERNE DELL'UNIONE EUROPEA NEL NUOVO MILLENNIO 177 (Luigi Daniele ed., 2001).

382. Advocate General Jacobs in Case C-316/91, *European Parliament v. Council*, 1994 E.C.R. I-625, ¶ 69 (emphasis added).

Generally, each party to an international agreement is responsible for performance of its own obligations, and joint liability under an agreement is not usually to be presumed.[383] However, the special circumstances of the EC and the Member States may lead to an exception to this rule. The EC and the Member States generally work together in pursuit of a common policy. Since it is very difficult to determine where legal powers lie between the EC and the Member States, for the third party the most convenient conclusion is that the EC and the Member States assume joint obligations and that they are required to assure these joint obligations. The ECJ, with its emphasis on the "requirement of unity" in the external representation of the Community, concurs. The ECJ also emphasizes this view in cases such as Ruling 1/78, (*Draft Convention on the Physical Protection of Nuclear Materials*)[384] and Case 104/81, *Hauptzollamt Mainz v. Kupferberg*.[385]

In agreements where the rights and obligations of the EC and the Member States are inter-linked, the problem of the respective liabilities of the Community and the Member States will arise quite clearly. In other words, we are dealing here with cases where the nature of the agreement is such that a third party is entitled to respond to Community or Member State action in one area covered by the agreement by retaliation of another area. The main example is the WTO Agreement and those agreements associated with it, but in principle, the issue could arise in any international agreement to which the Community and the Member States were parties. MacLeod et al. go further in the explanation by saying that:

> [i]f the action and retaliation take place in respect of matters entirely within the competence of the Community or entirely within the competence of the Member States, the problems are less intractable. If, however, the third party responds to action in an area of Member State competence by retaliation in an area within the competence of the Community, the need for close co-operation between the Community and the Member States is evident.[386]

When an agreement is covered by a general rule of the law of treaties, by which a party is responsible for all obligations of the treaty unless it makes a reservation, we are dealing with an agreement which is not mixed

383. MACLEOD ET AL., *supra* note 181, at 159.

384. Ruling 1/78, *Art. 103 of the EAEC Treaty*, 1978 E.C.R. 2151, ¶ 35.

385. Case 104/81, *Hauptzollamt Mainz v. c.a. Kupferberg & Cie KGA.a*, 1982 E.C.R. 3641, ¶¶ 13-14.

386. MACLEOD ET AL., *supra* note 181, at 159-60.

under a formal or under a substantive definition of mixed agreements. In extreme cases, as Schermers mentions, the position might be defended that, in such a case, adherence by the Community implies a tacit reservation in the sense that the EC cannot be held liable for matters which are outside its competence.[387] In these cases, Article 46 of the 1986 Vienna Convention on the Law of Treaties[388] Between States and International Organizations or between International Organizations (VCLTIO)[389] will apply. It reads:

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.
>
> 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.[390]

Concerning the effects on third parties of mixed agreements concluded in violation of EC law, despite the fact that the internal legal competence of the Communities and the Communities' procedures for concluding agreements are matters of EC law, both the validity and the effects of agreements in relation to third countries concluded in the framework of any rules of EC law must be taken into consideration in terms of

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387. Schermers, *A Typology of Mixed Agreements*, *in* MIXED AGREEMENTS, *supra* note 6, at 28.

388. The 1986 Vienna Convention on the Law of Treaties articulates the basic rules applied to the interpretation of treaties. These rules are increasingly important due in large measure to the growth in treaties that directly affect non-state actors, such as corporations and individuals. For example, there has been a proliferation of treaties that govern international economic relations, trade, and investment; enable the enforcement of foreign awards and judgments; protect human rights and regulate European integration. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986.

389. The 1986 Vienna Convention has not yet entered into force but it follows almost to the letter the 1969 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

390. *Id.*

international law, and not EC law.[391] As Brownlie points out, the rules of customary law on these issues are not easy to state with certainty.[392]

Within the doctrine, some argue that international law leaves the matter to the internal rules of the international organization to determine the procedures by which its consent to be bound has to be expressed. Therefore, any violation of the internal rules of the organization

> vitiates the expression of such consent, and renders the agreement which has been 'concluded' void or voidable. Others hold that the acts of a representative of an organization acting within his ostensible authority bind the organization in international law, even if the internal rules of the organization have not been complied with.[393]

As a matter of fact, the principles which appear in Article 46 of the 1986 VCLTIO fall somewhere between the two previously cited schools and represent the views of the majority of jurists.

When looking carefully at Article 46 of the 1986 VCLTIO, "agreements concluded in breach of an organization's internal rules are not *ipso facto* void. . . ." As MacLeod et al. argue, "the rule in Article 46 applies in principle in favor of the State or international organization which has acted in violation of its own internal rules, and amounts to a defence against a claim for performance of the agreement by the 'innocent' party."[394] Therefore, the rule in Article 46 would not apply to a state or organization which has concluded an agreement with the EC to claim that such an agreement was void because it had been concluded against a rule of the EC's internal legal order.[395] The rest of Article 46 reinforces this presumption in favor of the validity of agreements which have been duly concluded.[396] One of the parties in the agreement must show that the violation of its internal rules was "manifest" in order to invoke an expression of consent to be bound by that agreement.[397] In order to determine whether a violation is "manifest," Article 46(3) clarifies the situation: "the violation must have been 'objectively evident' to a party

391. *See* MACLEOD ET AL., *supra* note 181, at 129-32.
392. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 622-24 (4th ed. 1990).
393. MACLEOD ET AL., *supra* note 181, at 130.
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*

acting in accordance with normal practice and in good faith."[398] In addition to that, "the internal rule involved must have been 'of fundamental importance.'"[399]

Determining the extent to which the powers of the Communities relate to a given agreement is not always easy. Sometimes, the particular roles and competences of each of the Community institutions in the process of concluding agreements may not be so obvious. In this regard, irregularities result when concluding that an agreement may not be "manifest" to third parties. This is so because if an agreement which has been irregularly concluded is voided, it could be a problem for third parties.

The ECJ supported this view in Case C-327/91, *France v. Commission.*[400] This case concerned the Commission's power to conclude an agreement between the Community and the United States in relation to competition.[401] The Court's opinion was that the Commission had no such power, but this did not affect the validity of the agreement in international law: "[t]here is no doubt . . . that the [Competition] Agreement is binding on the European Communities . . . In the event of non-performance of the Agreement by the Commission, therefore, the Community could incur liability at international level."[402] Thus, an agreement concluded by, or in the name of, one of the Communities will almost always be binding on that Community as a matter of international law. In the light of this argument, Schermers comments that:

> [Foreign States] cannot be expected to know the extent of the competence of the Community. Whenever the Community concludes a treaty, [F]oreign States may presume that it is competent to do so. If the Community acted beyond its powers it will nonetheless be bound unless it or its Members can prove both its lack of competence and its manifest character. The latter especially will be difficult because of the complicated nature of Community Law.[403]

In this regard, it is pertinent to mention Article 230 of the EC Treaty, which suggests that international acts are unusual in that, unlike other acts,

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398. MACLEOD ET AL., *supra* note 181, at 130-31.

399. *Id.* at 131.

400. Case C-327/91, *France v Comm'n*, 1994 E.C.R. I-3641, ¶ 25.

401. *Id.* ¶ 28.

402. *Id.* ¶ 25.

403. Henry G. Schermers, *The Internal Effect of Community Treaty-Making*, *in* ESSAYS IN EUROPEAN LAW AND INTEGRATION 167, 173 (David O'Keeffe & Henry G. Schermers eds., 1982).

they cannot be voided.[404] From the reading of the first paragraph of Article 230 EC, however, one could interpret that it is possible to annul the conclusion of international agreements concluded by the EC.[405] An example of that could be the case mentioned earlier, France v. Commission, where the European Commission concluded an agreement vis-à-vis the United States on behalf of the EC on competition.[406] The French Republic argued that the Commission had no power to conclude agreements for it is only the Council of the EU the institution which has competence to conclude international agreements on behalf of the EC.[407]

Concerning the EC institutions and the Member States, it is not easy to see how they could be obliged as a matter of EC law to give effect to an agreement which was out of the demarcation of the EC's powers or which had been concluded in the framework of constitutional principles of EC law. However, as MacLeod et al. mention, "if . . . agreements concluded in violation of internal rules of Community law usually remain valid in international law and, binding on the Community *vis-à-vis* [T]hird States, the institutions and the Member States must ensure that the rights of the [T]hird State or international organization under the agreement are respected."[408] There are three ways by which the EU institutions and the Member States would have to

> take steps to align both the internal and external effects of the agreement[: 1)] by withdrawing from the agreement, [supposing this is possible, 2)] by rectifying the defect of [EC] law or practice which had rendered the agreement invalid, or, . . . [3)] by securing the participation of the Member States in the agreement along with the Community.[409]

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404. EC Treaty art. 230.

405. Article 230 EC reads:

> The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.

Id.

406. Case C-327/91, *France v. Comm'n*, 1994 E.C.R. I-3641.

407. *Id.* ¶¶ 20, 27.

408. MACLEOD ET AL., *supra* note 181, at 132.

409. *Id.*

A good example of the second method is the Commission's proposal for a Council decision concluding the Competition Agreement with the United States, which was the subject of annulment proceedings in Case C-327/91 *France* v. *Commission*.[410]

However, although the 1986 VCLTIO almost completely assimilates international organizations to States, its main weakness "is that it does not make a distinction as to treaties between an international organisation and one or more of its Member States and third parties."[411] Nevertheless, the International Law Commission proposed a new Article 36 *bis*, which reads:

> Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if: (a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and (b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations.[412]

This proposal of a new Article 36 *bis* came into existence mainly because Member States of an international organization appear as "Third States" in regard to treaties to which the international organization is a party.[413] Following the words of Riphagen, "this fiction is manifestly absurd in most cases" due to the fact that Member States are usually closely involved in the conclusion of a treaty by an international organization and also because the other party to that treaty expects

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410. Case C-327/91, *France v. Comm'n*, 1994 E.C.R. I-3641. *See also* Council Decision, 1995 O.J. (L 95) 45-46.

411. Granvik, *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 262-63.

412. *Report of the Commission to the General Assembly on the Work of the Thirty-Fourth Session*, [1982] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1982/Add.1/(Part 2).Vol. II (part 2).

413. Lena Granvik, *Incomplete Mixed Enviornmental Agreements of the Community and the Principle of Bindingness*, *in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 263 (Martti Koskenniemi ed., 1998).

performance of the Member States.[414] This proposed Article 36 *bis* followed very closely the idea underlying Articles 34 to 37 of the Vienna Convention on the Law of Treaties. In other words, it followed the requirement of consent of a Third State. In the eyes of Riphagen, Article 36 *bis* conserves the idea of consent, "be it possibly given (1) before the fact, i.e. before the determination of the rights and obligations by the Treaty concluded with the international organization, and (2) given collectively."[415] In addition, Member States are usually very involved in the performance of the treaty.[416]

The Vienna Convention on the Law of Treaties did not address the question of direct effect. According to Riphagen, this attitude of a system of general international law ignoring the domestic legal systems is remarkable in view of the emphasis nowadays placed on the international protection of human rights and fundamental freedoms.[417]

V. THE PANACEA: THE DUTY OF CLOSE COOPERATION

The origins of the duty of close cooperation may be tracked back to the treaties themselves, particularly to the duty of loyal cooperation[418] derived by the Court from Articles 86 ECSC,[419] 192 Euratom, and 10 EC.[420] A

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414. W. Riphagen, *The Second Round of Treaty Law*, *in* DU DROIT INTERNATIONAL AU DROIT DE L'INTÉGRATION: LIBER AMICORUM PIERRE PESCATORE 565, 568 (F. Capotorti et al., eds. 1987).

415. *Id.* at 568.

416. *Id.*

417. *Id.* at 569.

418. For further discussion on the duty of loyal cooperation, see KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 293, at 86-91. The principle of loyal cooperation concerns relations between the supranational and national levels. According to Article I-5(2) of the Constitutional Treaty, it means that "[t]he Member States shall facilitate the achievement of the Union's tasks and refrain from any measures which could jeopardise the attainment of the Union's objectives." Treaty Establishing a Constitution for Europe, Oct. 29, 2004, O.J. (C 310) 47.

419. Article 86 of the former ECSC reads:

> Member States undertake to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community's tasks.
>
> Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4.
>
> They shall make all appropriate arrangements, as far as lies within their powers, for the settlement of international accounts arising out of trade in coal and steel

similar duty is contained in Article 3 TEU, where the Council and the Commission are responsible for ensuring the consistency of the external activities of the Union as a whole in the context of its external relations, security, economic, and development policies.[421] This duty applies as much to mixed agreements as to any other area of the Union's activity. The EC and the Member States are under a legal duty to cooperate on the negotiation, conclusion, and implementation of mixed agreements.[422] This

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> within the common market and shall afford each other mutual assistance to facilitate such settlements.
>
> Officials of the High Authority entrusted by it with tasks of inspection shall enjoy in the territories of Member States, to the full extent required for the performance of their duties, such rights and powers as are granted by the laws of these States to their own revenue officials. Forthcoming visits of inspection and the status of the officials shall be duly notified to the State concerned. Officials of that State may, at its request or at that of the High Authority, assist the High Authority's officials in the performance of their task.

Treaty Establishing the European Coal and Steel Community, art. 86, Apr. 18, 1951, 261 U.N.T.S. 140 (expired July 23, 2002) [hereinafter ESCS Treaty].

420. Article 192 of the Euratom Treaty and article 10 of the EC Treaty lay out this duty in identical language:

> 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 the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Euratom Treaty art. 192; EC Treaty art. 10.

421. Article 3 TEU reads:

> The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.
> The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

TEU art. 3.

422. MACLEOD ET AL., *supra* note 181, at 145. *See also generally* ALASDAIR R. YOUNG, EXTENDING EUROPEAN COOPERATION: THE EU AND THE "NEW" INTERNATIONAL TRADE AGENDA (2002); MCGOLDRICK, *supra* note 4, at 86.

duty results from the requirement of unity in the international representation of the Community.[423] "Such cooperation is 'all the more necessary' if the EC cannot become party to the agreement."[424]

This duty to co-operate is an obligation imposed on Member States and EU institutions under Community law as a consequence of the competence situation for EC participation in the WTO. Formerly, the repealed Article 116 EEC was available for that purpose.[425] It obliged Member States to proceed within the framework of international organizations of an economic character on matters of particular interest to the common market only by common action.[426] However, ex-Article 116 EEC Treaty was regrettably deleted at Maastricht. It had proven to be a useful legal basis for coordination of actions of Member States and the Community in the no-man's-land of dubious demarcation between Community and national competences, or where the exercise of these competences was inextricably linked (for instance, the international commodities agreements in application of the so-called Proba 20[427]). Yet, in the view of EU Commissioner for Trade, Peter Mandelson, this coordination may need to go further still.[428]

Nonetheless, ex-Article 116 EEC Treaty was not one of the most transparent provisions of the Treaty. Where the Community was not able to act because it was not a member of the relevant organization, Member States would have to act on its behalf, and the necessary Community action was decided on the basis of Article 133 EC, not ex-Article 116 EEC

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423. *See, e.g.*, Ruling 1/78, 1978 E.C.R. 2151, ¶¶ 34-36; Opinion 2/91, *ILO*, 1993 E.C.R. I-1061, ¶ 36; Opinion 1/94, *WTO*, 1994 E.C.R. I-5267, ¶ 108. On cooperation obligations, see EC Treaty art. 5 and TEU art. C.

424. Rafael Leal-Arcas, *The EC in the WTO: The Three-Level Game of Decision-Making. What Multilateralism can Learn from Regionalism*, 8 EUR. INTEGRATION ONLINE PAPERS 18 (2004).

425. EEC Treaty art. 116 (repealed Jan. 11, 1993).

426. *Id.*

427. The informal administrative arrangement known as PROBA 20 is how Community coordination takes place in all commodities agreements covered by the UNCTAD's integrated program, except those under a common organization of the agricultural market. EECKHOUT, *supra* note 342, at 195. PROBA 20 was agreed upon by the Commission and its Member States in 1981, and "intended to improve the [EC's] external image and to strengthen its internal cohesion and solidarity." *Id.* PROBA 20 is "based on the understanding that all legal and institutional considerations regarding the respective competences of the [EC] and [its] Member States were to be set aside," and is important for formalizing an understanding shared with the EU Council that the EC should speak with a single voice. *Id.*

428. Peter Mandelson, Eur. Comm'r for Trade, An Action Plan for Trade and Development in 2005: the EU, WTO, the G8 (Feb. 7, 2005), *available at* http://europa.eu.int/rapid/pressReleases Action.do?reference=MEMO/05/39&format=HTM.

Treaty. There is a similar issue in Article 12 TEU in relation to matters falling within the scope of the CFSP[429] and Article 33 TEU[430] in relation to common positions in international organizations and at international conferences in various fields covered by title VI (Provisions on Police and Judicial Cooperation in Criminal Matters) of the TEU.[431] "It is thanks to the duty of cooperation between the EC and its Member States that consensus can be found. With regard to cooperation obligations, Article 5 EC and Article 3 of the TEU deal in the treaties directly with it."[432]

With regard to mixed agreements, the duty of close cooperation first emerged in Ruling 1/78[433] on an Euratom case.[434] The Court had to adjudicate on the division of powers between Euratom and the Member States with regard to a draft Convention on the Physical Protection of Nuclear Materials.[435] The Court said that "the draft convention . . . can be implemented as regards the Community only by means of a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into."[436] Regarding the implementation of the convention, the Court said that the Community would implement measures falling within its competence, the Member States would implement measures falling within their competence, and the Council would arrange for coordination of the actions of each.[437]

Since the essence of mixed agreements[438] is that some of their provisions fall within the competence of the Community, while others fall within the competence of the Member States, it is hard to precisely divide powers between the Member States and the Communities within an

429. TEU tit. 1, art. B, tit. V.

430. Article 33 TEU reads: "This title [Provisions on Police and Judicial Cooperation in Criminal Matters] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security." TEU art. 33.

431. TEU tit. VI.

432. Leal-Arcas, *supra* note 424, at 18.

433. Ruling 1/78, (*Draft Convention on the Physical Protection of Nuclear Materials, Facilities, and Transports*), 1978 E.C.R. 2151.

434. For an analysis of the ECJ case law on the matter, see Francis G. Jacobs, *Judicial Review of Commercial Policy Measures After the Uruguay Round, in* THE EUROPEAN UNION AND WORLD TRADE LAW, *supra* note 83, at 329.

435. Ruling 1/78, (*Draft Convention on the Physical Protection of Nuclear Materials, Facilities, and Transports*), 1978 E.C.R. 2151, ¶ 1.

436. *Id.* ¶ 34.

437. *Id.* ¶ 36.

438. Let us remember that a mixed agreement is an agreement signed by one, more than one, or all the 27 Member States of the EU and the EC, on the European side, with a third party.

agreement. The ECJ has discouraged attempts to allocate competence between the Member States and the Community.[439] Instead, when considering issues dealing with mixed agreements, the Court has emphasized the need for common action, or close cooperation, between the Community and its Member States in close association with each other in the negotiation and implementation of mixed agreements.[440] The duty of cooperation, which follows from what the Court calls the "requirement of unity in the international representation of the Community,"[441] is one of the fundamental principles of the external relations of the Communities.

In Opinion 2/91 (*ILO Convention 170*),[442] the Court had to deal with an agreement that covered matters falling within the exclusive competence of the Community, matters where both the Community and its Member States shared competence, and matters within the competence of the Member States.[443] The Court said:

> 36. At points 34 to 36 in Ruling 1/78 [1978] ECR 2151, the Court pointed out that when it appears that the subject-matter of an agreement or contract falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community.
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> 37. In this case, cooperation between the Community and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States.
>
> 38. It is therefore for the Community institutions and the Member States to take all the measures necessary so as best to ensure such

439. Ruling 1/78 *Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports* ¶ 35, 1978 E.C.R. 2151 (in relation to third parties).

440. MIXED AGREEMENTS, *supra* note 6, at 32.

441. Opinion 2/91, *ILO Convention 170*, 1993 E.C.R. I-1061, ¶ 5.

442. *Id.*

443. *Id.* ¶ 30.

> cooperation both in the procedure of submission to the competent authority and ratification of Convention No. 170 and in the implementation of commitments resulting from that Convention.[444]

The agreement under consideration in Opinion 2/91 was not a mixed agreement *stricto sensu*. The Community could not formally become a party to it.[445] This limitation may stem from ILO provisions restricting membership and participation only to States. However, the agreement did involve matters within the competence of the Community and of the Member States.

As we have already analyzed, the issue of cooperation between the Member States and the Community institutions was raised even more acutely in Opinion 1/94. The context of the WTO also shows that in areas of non-exclusive EC competence, it is necessary to have coordinated action in an EC framework.[446] It is important to note that non-exclusive EC competence does not mean nonexistent EC competence. In areas of non-exclusive EC competence, the EC can if the EU Council of Ministers so decides, enter into agreements with third countries without formal adherence of EU Member States to these agreements, thereby having a so-called pure Community agreement. However, Member States normally insist on the mixity of international agreements, even if mixity would not be legally necessary. Speaking with one voice in many domains has to be ensured through cooperation between the EC and its Member States, with the idea of achieving unity of representation.[447]

Therefore, the basic principle is that in all aspects of the negotiation, conclusion and implementation of a mixed agreement, the Member States and the Community are required to co-operate closely and act in close association. This duty of cooperation applies to agreements involving any of the European Communities, and is binding on the institutions of the Community as well as the Member States. Let us now examine the EU's interpretation of the concepts of coordination and cooperation.

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444. *Id.* ¶ 36-38.

445. *Id.* ¶ 1.

446. In this sense, Torrent speaks of a fourth pillar, meaning the use of national competences in a EU framework. *See* Ramon Torrent, *Le quatrième pilier de l'Union Européenne*, *in* EUROPEAN COMMUNITY AND MIXED-TYPE AGREEMENTS, *supra* note 250, at 49.

447. Allan Rosas, *The External Relations of the European Union: Problems and Challenges* 66 (Paper prepared for the Forum for U.S.-EU Legal-Econ. Aff., 1998) (on file with author).

A. *Community Coordination*

When engaged in proceedings involving a mixed agreement, both Member States and the EU institutions are obliged to inform each other of their positions, to seek to reach a common view on matters that fall within the scope of a mixed agreement, and to proceed by common action within the framework of international bodies.[448] This involves meetings between the representatives of the Member States and the institutions (usually the Commission) to seek a common position. These meetings are called Community co-ordination and take place within the framework of the Council, either in Brussels or in an international forum in which the Community and the Member States are participants.[449] Community co-ordination in the negotiation of international agreements is well established in practice. There are informal understandings between the Commission and the Council, such as co-ordination arrangements in international commodity agreements and in international organizations, particularly in the FAO and the United Nations.[450]

B. *Close Cooperation and Unity of Representation Principle*

Trying to reach an agreement on a common position will inevitably lead to difficulties and disagreements. For example, a Member State may wish to take a position inconsistent with that of the Community and its partners during the negotiation of an agreement. An agreement also may not be of equal relevance among all the Member States. Therefore, the question arises whether the duty of cooperation requires all the Member States to reach a common position or just to use their best effort to reach such a position. In the end, each Member State will have to defend its own interests.

It is important to distinguish between failure to agree on a position on matters falling within the exclusive competence of the EC, and failure to agree on a common position on matters where the Community and Member States share competences. With regard to matters exclusively

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448. David O'Keeffe, *Community and Member State Competence in External Relations Agreements of the EU*, 4 EUR. FOREIGN AFF. REV. 7-36 (1999).

449. *See* MACLEOD ET AL., *supra* note 181, at 148. When meetings between representatives of the EU institutions and its Member States take place within the framework of an international forum to seek a common position, they are known as *sur place* coordination.

450. Joni Heliskoski, *Internal Struggle for International Presence: the Exercise of Voting Rights Within the FAO*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 79 (proving through legal analysis the difficulty in finding a coordinated action between the EC and its Member States).

within the Member State competence, the EC Treaties have in principle nothing to say (although the provisions of titles V and VI TEU may be relevant).[451]

In those cases where a common position between the Community and the Member States cannot be reached, Member States will be able to express their own national views on matters within national competence and exercise their national powers. Support for this proposition may be derived from the practice of the EU Council.[452] In addition, there are instances in which a Member State might claim that its participation in an agreement was contrary to its national interests or for some other reason undesirable or even impossible.

Emphasis is often placed on the duty of cooperation between the Community institutions and the Member States and the need for Community solidarity.[453] This duty is traced back to the Community Treaties themselves.[454] The duty for cooperation is even more imperative in circumstances such as those of Opinion 2/91, in which the Community (albeit being exclusively competent) could not have entered into the ILO convention itself and had to do so through the medium of the Member States.[455] Allocation of competences cannot (and should not) depend on administrative issues.[456]

So what is entailed in Community cooperation? MacLeod et al. claim that "[a]s a minimum, the Member States and the institutions are obliged to inform each other of their positions, to seek to reach a common view on matters which fall within the scope of a mixed agreement, and to proceed by common action within the framework of international bodies and conferences."[457] The Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation.[458]

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451. MACLEOD ET AL., *supra* note 181, at 149.

452. *Id.*

453. *See, e.g.*, Opinion 1/76, *Draft Agreement for a Laying-Up Fund for Inland Waterway Vessels* (Rhine Navigation Case), 1977 E.C.R. 741. On the duty of solidarity in relation to the common commercial policy, see Opinion 1/76 *OECD Local Costs Understanding*, 1975 E.C.R. 1355.

454. *See* ECSC Treaty art. 86; Euratom art. 192: EC Treaty art. 5; KAPTEYN & VERLOREN VAN THERMAAT, *supra* note 293, ch. 3.5.2, at 148. Ruling 1/78, *Draft Convention of the International Atomic Energy Agency on the Physical Protections of Nuclear Materials, Facilities, and Transports*, 1978 E.C.R. 2151, ¶¶ 34-36; Opinion 2/91, *ILO Convention No. 170*, 1993 E.C.R. I-1061, ¶ 36.

455. Opinion 2/91, *ILO Convention No. 170*, 1993 E.C.R. I-1061, ¶ 37.

456. Opinion 1/94, *Int'l Agreements Concerning Intellectual Property*, 1994 E.C.R. I-5267, ¶ 107.

457. MACLEOD ET AL., *supra* note 181, at 148.

458. Opinion 2/91, *ILO Convention No. 170*, 1993 E.C.R. I-1061, ¶ 38; Case C-25/94,

> [O]nce the Community enters into [a mixed agreement,] the subject-matter of which falls within the [shared] competence of the Community and the Member States, the Member States are [bound by the obligations of Article 10 EC to] facilitate the fulfilment of the Community's obligations arising out of the agreement and may not act unilaterally in a way which would compromise their duty to proceed by common action within the framework of the agreement.[459]

C. *Some Preliminary Conclusions*

> [T]he legal position governing the participation of the [EC] and [its] Member States in [international trade agreements and negotiations] is flexible and . . . allows arrangements to be agreed which can suit the circumstances of the particular international organisation in question [while] recognising the positions of the [EC] and [its] Member States. . . . [W]ith good [political] will and common sense on all sides such arrangements can work.[460]

Proof of this can be found in successful outcome of the Uruguay Round and the conclusion of the financial services negotiations in the framework of the WTO in the summer of 1995.[461] In this last case, the EC took the lead during the negotiations as a result of combined efforts of the European Commission and the Member States: "the United Kingdom, given its position as the [EU] country with a major financial services industry, was better able to lobby in some parts of the world than the [European] Commission."[462] Finally, "it is in the interests of the [EC] and [its] Member States to use their combined weight to the best effect."[463] The practical application of the duty of co-operation must recognize that it is to their advantage to do so.

To better understand the Member States' perspective on mixed competences, we will look at one national court's interpretation of the EC's role.

Comm'n v. Council (FAO Fishery Agreement), 1996 E.C.R. I-1469, ¶ 48.

459. Advocate General Jacobs in C-316/91, *Eur. Parliament v Eur. Union Council* (EDF case) [1994] ECR I-625, at I-639, ¶ 48.

460. Stephen Hyett, *The Duty of Co-Operation: A Flexible Concept*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 253.

461. *Id.*

462. *Id.*

463. *Id.*

VI. CRITERIA FOR EVALUATING THE DISTRIBUTION OF POWERS AND ITS COMPLIANCE

Delimitation of competences is absolutely necessary in a federal[464] or a quasi federal set-up nature. This appears to be the case of the EU, depending on what policy we are analyzing—and that is certainly the case of trade policy—for the simple reason that if there was no such delimitation, there would be chaos within the system and no clarity among citizens as to who does what. Therefore, I do not think that the rationale of traditional States can be applied directly to the Union because the Union is itself a Union of sovereign States. An example of this is the fact that defence and foreign policy have not been clearly stated by the EU Constitutional Treaty to be within the Union's exclusive competence, which would be necessary in the traditional federal set-up.

Below is an analysis of the four main and non-exhaustive criteria for evaluating the distribution of powers: efficiency; transparency and clarity; coherence/consistency; and accountability.

A. *Efficiency in International Trade Negotiations*

One criterion is effective functioning. Power should be exercised by an authority at a level where it can be exercised most effectively. Since the distribution of powers is vague, it leaves immense scope for disputes between the Union and its Member States, which can only hamper an

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464. "Broadly speaking, [European federalism] means any system of government where several states form a unity and yet remain independent in their internal affairs." A Plain Language Guide to Eurojargon, http://europa.eu/abc/eurojargon/index_en.htm (last visited Dec. 18, 2007) [hereinafter Eurojargon]. People who are in favor of this system are often called "federalists."

> A number of countries around the world—e.g. as Australia, Canada, Germany, Switzerland, and the United States—have federal models of government, in which some matters (such as foreign policy) are decided at the federal level while others are decided by the individual states. However, the model differs from one country to another. The EU is not based on any of these models: it is not a federation but a unique form of union in which the [M]ember [S]tates remain independent and sovereign nations while pooling their sovereignty in many areas of common interest. This gives them a collective strength and influence on the world stage that none of them could have on their own. Part of the debate about the future of Europe is the question of whether the EU should or should not become more "federal."

Id.

efficient Union. The EC has become a more important and difficult trading partner. It started with six homogeneous Member States and then was enlarged to 9, 10, 12, 15, 25, and finally 27 countries. When demands are presented in the WTO by the EC as a common front, these inevitably carry more weight within the WTO than would be the case if an individual country were making the case.[465] A prime example is the EC's mandate for the Services Agreement negotiations prepared for the Seattle Ministerial Conference in October 1999.[466] This mandate included various cultural exceptions for individual EU Member States, originating from the French delegation.[467] France had concerns about its audio-visual services area.[468] The French wanted the EC to defend its national interests in the WTO.[469]

The reverse situation, demands from small EU Member States without much trade clout not being heard in the WTO forum may also happen. These demands can be lost as a result of the functioning of the EC and thereby never emerge in the WTO arena. An example would be the lack of action on the part of the EC on behalf of Member States in relation to agriculture.[470]

After negotiating the agreement, it must be ratified. Any EU Member State can prevent an agreement from being finalized.[471] WTO Agreements are subject to adoption by the EU Council of Ministers and, at times by the European Parliament.[472] Agreements may also be adopted through ratification by national parliaments.[473] Therefore, it is quite possible to have a delay in presenting ratification to parliament.

B. *Transparency and Clarity*

Another criterion is transparency.[474] In the Trade Policy Review of the

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465. Richard Senti, *The Role of the EU as an Economic Actor Within the WTO*, 7 EUR. FOREIGN AFF. REV. 111, 113 (2002).

466. *Id.*

467. *Id.*

468. *Id.*

469. *id.*

470. Senti, *supra* note 465.

471. *Id.* at 114.

472. *Id.*

473. *Id.*

474. The term "transparency" is often used [in a broad sense] to mean openness in the way the [Member States' and] EU institutions work. The EU institutions are committed to greater openness. They are taking steps to improve public access to information, and they are working to produce clearer and more readable documents. This includes better drafting of laws and, ultimately, a single, [simplified EU Constitutional Treaty]. Eurojargon, *supra* note 464.

WTO, it was impossible to discern who in the EC was responsible for negotiations, who made the actual decisions and with whom negotiations had to be conducted.[475] With EU enlargement, the current situation will deteriorate.[476] Thus, from the point of view of the WTO, the EC has become both a powerful but difficult negotiating partner.[477]

Given the lack of transparency of the current democratic system, accountability of the governing forces depends on their respective competences. Therefore, in a proper democratic forum, it is imperative for the populace to know the competences of the governments. There is a difference of competences in the national and the transnational level, and needs to be a clear transparent mechanism whereby the people are in a position to understand which government to hold accountable for which action.

As for clarity, any set-up which involves an exercise of power at two levels—national and supranational—by numerous bodies requires clarity and precision with which the powers have been delineated. By this, I do not mean that any overlap be avoided at all times, which is hardly possible, but that all efforts be made to avoid foreseeable clashes. The division as it stands in the Nice Treaty fails miserably on this criterion. There are no provisions in the treaties describing the principles governing the allocation of competence between the EC and its Member States. Furthermore, as a result of political compromises, the treaties are drafted in a complex manner. Moreover, there are misunderstandings and false ideas surrounding the extent of the EU's legislative competence due to lack of clarity. Along these lines, the French Government has initiated an internet campaign to explain, in a clear manner, what the EU process of integration is about.[478]

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475. World Trade Organization, Trade Policy Review of the European Union, PRESS/TPRB/198, July 26, 2002.

476. For general scholarly discussions about enlargement of the EU, see Guenther Burghardt & Fraser Cameron, *The Next Enlargement of the European Union*, 2 EUR. FOREIGN AFF. REV. 7 (1997); Barbara Lippert & Peter Becker, *Structured Dialogue Revisited: The EU's Politics of Inclusion and Exclusion*, 3 EUR. FOREIGN AFF. REV. 341 (1998); HEATHER GRABBE & KIRSTY HUGHES, ENLARGING THE EU EASTWARDS (1998); THE ENLARGEMENT OF THE EUROPEAN UNION (Marise Cremona ed., 2002); Christophe Hillion, *Enlargement of the European Union: A Legal Analysis*, *in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 401 (Anthony Arnull & Daniel Wincott eds., 2002); Andrew Williams, *Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction*, 25 EUR. L. REV. 601 (2000); Kirstyn M. Inglis, *The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible*, 41 COMMON MKT. L. REV. 937 (2004).

477. Senti, *supra* note 465, at 114.

478. For more detailed information on the French proposal, see Euractiv, France to Launch Internet Site Dedicated to Europe, Jan. 18, 2006, *available at* http://euractiv.com/en/future-

The steady evolution of the EU has resulted in a complex organization of competences in the treaties. The legal provisions covering the distribution of EC competences are dispersed over the EC Treaty. This renders the system opaque and difficult to understand. In turn, this lack of clarity hampers democratic control, as it is unclear where political responsibility lies. This is, perhaps, due to lack of political will. Political responsibility and democratic control would be made easier if power were not so dispersed. From a legal perspective, Opinion 1/94 of the ECJ gave some indications on issues of responsibility between the EC and its Member States in the WTO, but did not really clarify much, partly because of the intrinsically evolutionary nature of, say, the GATS.[479]

The Nice and Laeken European Councils requested the delimitation of competence between the EC and its Member States be examined in order to respond to criticism that the EC should take less action in certain areas and more in others.[480] The EC has a tendency to legislate in areas in which it is not competent or in which it is not appropriate for the EC to do so.[481] At the moment, the system of delimitation of competences between the EC and its Member States lacks clarity for various reasons: a) amendments to the EU Treaties of provisions drafted in a complex manner, as a result of political compromises; b) the fact that neither the system for delimiting powers, nor the principles governing such a delimitation, nor the types of competence available to the EU and the areas covered by each type of competence are clearly defined by the EC Treaty; and finally, c) the new methods of coordination, which set objectives without taking into account the allocation of powers.[482]

All of these reasons contribute to the lack of clarity and give the impression that the EC's powers are very broad, when in fact this is not the case. Thus, misunderstandings and false ideas about the extent of the EC's

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eu/france-launch-internet-site-dedicated-europe/article-151644 (last visited Dec. 18, 2007). Other related articles are: Euractiv, Transparency Initiative, June 8, 2005, *available at* http://www.euractiv.com/en/pa/transparency-initiative/article-140650 (last visited Dec. 18, 2007); Euractiv, French Civil Society Jumps into the Transparency Debate, June 19, 2006, *available at* http://www.euractiv.com/en/ pa/french-civil-society-jumps-transparency-debate/article-156200 (last visited Dec. 18, 2007).

479. Piet Eeckhout, *The EU and its Members States in the WTO—Issues of Responsibility*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 449-64 (Lorand Bartels & Federico Ortino eds., 2006).

480. European Convention, The Secretariat, Description of the Current System for the Delimitation of Competence Between the European Union and the Member States, CONV 17/02, dre/JD/mb, at 2 (Discussion Paper 2002).

481. *Id.* at 5.

482. *Id.* at 12.

legislative competence often exist.[483] The competences today appear in the EU Constitutional Treaty in a vague form. The concepts of exclusive and concurrent competences could be more clearly defined. This would clarify the fields for which the principle of subsidiarity applies (i.e., only concurrent competence).[484] It can be envisaged to combine this exercise with a re-ordering of the treaties along logical lines. This could increase the clarity of the text, making it easier to locate responsibility. In this respect, another main problem is the failure to comply with the principle of subsidiarity and proportionality. One should conceive the principle of subsidiarity as a mechanism to regulate the implementation of the EC's non-exclusive powers. Interestingly, the principle of loyal cooperation was not taken into account during the distribution of competences between the Union and its Member States at the time of the drafting of the EU Constitutional Treaty. However, the principles of subsidiarity, proportionality and the attribution principle do appear in the Constitutional Treaty (Article I-9).[485]

C. *Coherence/Consistency*

There is lack of precision of certain provisions of the EC Treaty: a minority has requested that the existing system be replaced by a

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483. Delimitation of Competence, *supra* note 143, at 12.

484. Article 5 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality states:

> For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by [the EU] Member States' action in the framework of their national constitutional system, and [these objectives] can therefore be better achieved by action on the part of the [EC]. The following guidelines should be used in examining whether [these two conditions are] fulfilled: [1)] the issue under consideration has transnational aspects which cannot be satisfactorily regulated by [Member States' actions]; [2)] actions by Member States alone . . . [would] significantly damage Member States' interests; [and 3)] action at the [supranational] level would produce clear benefits by reason of its scale or effects compared with action at the [national level].

2004 O.J. (C 310) 207. Of course, when speaking of benefits, one wonders: benefits for whom? The supranational elites? Or the national citizens? And how does one prove this benefit objectively?

485. "The limits of Union competences are governed by the principle of conferral." Treaty Establishing a Constitution for Europe, art. I-11(1), Oct. 29, 2004, O.J. (C 310). This means that Union competences are strictly conferral, they are laid down in the Constitutional Treaty, or they are established according to a specified procedure. Without this principle, "competences not conferred upon the Union in the Constitution remain with the Member States." *Id.* art. I-11(2).

"catalogue" of competences.[486] A large majority, however, argues for keeping the evolution of competences flexible and dynamic.[487] Also, a transfer of activities from the national to the supranational level would increase the coherence/consistency of the EC's position in world trade negotiations. Another way to explain the lack of coherence is the fact that the EC's powers do not match citizens' expectations.[488] "[C]itizens want the [EC] to play a greater role in certain areas, [but also] find that the [EC] intervenes too much in other [areas]."[489]

D. *Accountability*

Legitimacy (or accountability) and efficiency tend to go hand-in-hand. Ideally, each government should be able to make its policies in its own spheres of activity, without referring too much to other governments' activities. Each government would be accountable to its own electorate, and each voter would know precisely which government deserves the credit or blame for a particular output of public policy. However, and unfortunately, many practical reasons prevent this ideal from being achieved. Thus, for practical purposes, accountability must sometime be sacrificed for the sake of other criteria. A high request of accountability would reduce the margin of maneuver of EC trade negotiators and complicate their ability to conclude complex international agreements. So, is there a political and institutional mechanism whereby efficiency and accountability, two sides of the same coin, are complementary of each other?

In relation to checking the delimitation of competences, there is a poor system of ensuring compliance.

> At present, political monitoring of compliance with the delimitation of competence is . . . exercised [mainly] by the [EU institutions]. Legislative bodies at the national level [(national parliaments)] exercise that monitoring . . . to a lesser degree. There are currently

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486. For an analysis against the creation of a rigid competence catalogue, see Wilfried Swenden, *Is the European Union in Need of a Competence Catalogue? Insights from Comparative Federalism*, 42 J. COMMON MKT. STUD. 371 (2004).

487. European Convention, The Secretariat, Delimitation of Competence Between the European Union and the Member States—Existing System, Problems and Avenues to be Explored, CONV 47/02, May 15, 2002 (17.05), kin/MM/ac, at 3.

488. *Id.* at 17.

489. *Id.*

two types of checks to ensure compliance with the delimitation of competence and the subsidiarity principle:

> (a) political control: the question . . . rests . . . with the [EU] Institutions participating in the legislative process. Each Institution must act in accordance with the powers allocated to it. [National] governments . . . , national parliaments and public opinion also exercise such a control to the extent that they control the positions adopted by their government representatives in the Council;
> (b) judicial control: by appeal to the [ECJ] or national courts.[490]

After analyzing the criteria for the evaluation of the distribution of powers and its compliance, one must ask why we have a delimitation of competences. In the current system of EU foreign policy, there are several constitutional problems:[491]

1. Inadequate parliamentary control: The EU has constitutionally weak governance structures.[492] The EC's integration policy raises problems of democratic legitimacy to the extent that it is not effectively controlled by parliaments (for example, in the foreign trade policy area), and focuses more on the protection of powerful interest groups than on the general interests and equal rights of EU citizens (for example, consumers and taxpayers).[493] So the question arises: is it in the interest of the EU citizens to have a common commercial policy without a parliamentary control?
2. Constitutional limitations of government powers by rule of law, fundamental rights, separation of powers and democratic participation are not effectively applied in foreign policy powers.[494] Therefore, the rights of domestic citizens are less effectively protected against abuses of foreign policy powers of governments (for instance, EC Treaty art. 133) than vis-à-vis their domestic policy powers.[495] Certainly, these power-oriented EU foreign policies can undermine the rule of law within the EU. In this respect, it is relevant to mention the limited role of the European

490. *Id.* at 4.
491. Ernst-Ulrich Petersmann, *The Foreign Policy Constitution of the European Union: A Kantian Perspective, in* FESTSCHRIFT FÜR ERNST-JOACHIM MESTMÄCKER 435 (Ulrich Immenga et al. eds., 1996).
492. *Id.*
493. *Id.* at 434.
494. *Id.* at 435.
495. *Id.*

Parliament in the EC's common commercial policy, and hence, the importance of EU institutional reforms.[496]

3. The division between private powers of EU citizens and government powers seems to be more important than the division between national and EU government powers.

VII. CONCLUSION

To sum up this Article and following the line of thought of Timmermans and Völker (1981), mixed agreements are one of the most distinctive features of the external relations law and practice of the Communities as well as one of the most difficult.[497] Three types of competence are covered by an international agreement: 1) competence exclusively with the Community; 2) competence shared between the Community and the Member States; and 3) competence exclusively with the Member States.[498] "Where the Community is alone competent for matters covered by an agreement, . . . the Community alone should become party [to that agreement]."[499] However, there are some cases where the participation of Member States may also be necessary.[500] In such cases, it is important to distinguish between the theoretical situation and how it is in practice. Theoretically speaking, in these cases, Member States do not participate in the table of negotiations alongside the EC.[501] Nevertheless, in practical terms, the agreement itself may require the participation of Member States in the agreement so that the Community can exercise its competences and participate effectively.[502]

In the case where Member States and the Community share competence, there are several ways to carry out this task. Some of the obligations in the agreement may have to do with matters for which the

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496. It was at the Nice IGC that the then 15 EU Member States established framework guidelines in order to pursue EU institutional reforms. The European Council of Stockholm in March 2001 already reaffirmed this objective, and the various modalities were established in Laeken in December 2001 with the Declaration on the Future of Europe, and the decision to call for a Convention. *See* Presidency Conclusions, Stockholm European Council, Mar. 23 & 24, 2001.

497. *See generally* DIVISION OF POWERS, *supra* note 134; *see also* MACLEOD ET AL., *supra* note 181, at 142; MIXED AGREEMENTS, *supra* note 6.

498. MACLEOD ET AL., *supra* note 181, at 142.

499. *Id.*

500. *Id.*

501. This is so because Member States have transferred their competences to the Communities.

502. MACLEOD ET AL., *supra* note 181, at 142.

Community is exclusively competent.[503] Others have to do with issues for which the Member States are exclusively competent.[504] Sometimes it is so that, by virtue of the provisions of the Treaties, the agreement is related to an area in which the Member States and the Community share competence to act.[505] On other occasions, the agreement may deal with issues where the powers of the Member States and the Community run in parallel, so that each has a separate and independent interest in participating in [the agreement].[506] Explained in the words of MacLeod et al.,

> [w]here competence for the subject matter of an agreement is shared between the Community and the Member States, the full implementation of the obligations in the agreement will usually require the participation in the agreement of the Communities and the Member States together, each in respect of their powers and interests.[507]

In the view of Rosas,

> [p]ure Community agreements may be preferred not only by the Commission but sometimes also by some or all of the Member States, mainly in order to speed up the process and avoid complications of various sorts. There have been situations where third States, out of similar considerations, have expressed a preference for a pure Community agreement.[508]

A practical alternative seems to be the adoption of soft law instruments in the form of a declaration plan, which may be adopted by the Council and in some cases also signed by the Council Presidency and/or the Commission, but without the need of 27 national ratifications.[509] Examples are the Barcelona Declaration adopted at the Euro-Mediterranean Conference of November 27-28, 1995 and the New Transatlantic Agenda signed by President Clinton, Prime Minister González of Spain (representing the then Spanish Council Presidency), and President Santer

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503. *Id.*
504. *Id.*
505. *Id.* at 143.
506. *Id.*
507. MACLEOD ET AL., *supra* note 181, at 143.
508. Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 216.
509. *Id.* at 217.

of the European Commission.[510] It is important to note, however, that these are soft alternatives to treaty-making as a whole, not to the mixed form of treaty-making.

With regard to treaties, and notably bilateral agreements, one could

> try to devise the negotiation directives to be adopted by the Council, and to conduct the actual negotiations, so as to avoid areas of national competence. . . . Member States are often unwilling to authorise the Community alone to conclude bilateral agreements containing concurrent competences. An example . . . would be the existence of substantive provisions relating to intellectual property rights . . . . (as well as clauses on services [and] direct investment). Such [provisions] . . . in a draft bilateral agreement would almost inevitably lead to . . . mixity, as at least some Member States seem to interpret Opinion 1/94 as establishing exclusive national competence in this field.[511]

On the potential competence of the Community to conclude international agreements in the field of intellectual property rights, it is pertinent to see Case C-53/96 *Hermes International*.[512] The Commission may try to avoid provisions on questions such as intellectual property rights, services, and investment or monetary policy in order to avoid assertions of mixity.

Development cooperation agreements and environmental agreements often belong to the above mentioned category of concurrent competences. Concurrent competences are spelled out in the EC Treaty,[513] but a potential competence may exist in many other areas such as intellectual property rights, and investment or services. "It remains to be seen to what extent the [EU] Council will agree to the Community becoming a party to such agreements and conventions, without insisting on Member States

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510. Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS, *supra* note 6, at 143 n.80. See also the documents adopted at the EU-US Summit in London on May 18, 1998, with a view to resolve the so-called Helms-Burton dispute (Understanding with Respect to Disciplines for the Strengthening of Investment Protection, Transatlantic Partnership on Political Cooperation, Understanding on Conflicting Requirements). *See* Stefaan Smis & Kim Van der Borght, *The EU–US Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227 (1999); Stefaan Smis & Kim Van der Borght, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. Some Aspects from the Perspective of International Economic Law*, 1998 REVUE BELGE DE DROIT INTERNATIONAL 217.

511. Rosas, *The European Union and Mixed Agreements*, *in* THE GENERAL LAW OF EC EXTERNAL RELATIONS, *supra* note 18, at 217 (footnotes omitted).

512. Case C-53/96, *Hurmès Int'l v. FHT Mktg. Choice BV*, 1998 E.C.R. I-3603.

513. EC Treaty arts. 174, ¶ 4 & 181.

participation. In many instances this will presumably not be the case, and mixity will continue to [exist]."[514]

> The fact that the [Nice IGC] in December 2000 did not want to broaden Article 133 EC so as to cover all questions of services, intellectual property rights, and investment is a clear sign of the unwillingness of Member States to give up mixity even in areas of commercial policy. Another example is that of a trade and cooperation agreement negotiated with South Africa that Member States refused to accept in the spring of 1999 as a pure Community agreement, even if it was obvious that there was no legal need to conclude the agreement as a mixed agreement. The agreement was signed on October 11, 1999. While the Commission preferred a Community agreement, the great majority of Member States wanted the agreement to become mixed.[515]

514. *Commission Proposal to Conclude an Agreement on Trade, Development, and Cooperation Between the Community and South Africa*, COM (1993) 245 final (May 11, 1999).

515. Rafael Leal-Arcas, United We Stand, Divided We fall—The European Community and Its Member States in the WTO Forum: Towards Greater Cooperation on Issues of Shared Competence?, 1 EUR. POL. ECON. REV. 65, 72 (2003).