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The Division of Foreign Policy Authority Between the European Community and the Member States: A Survey of Economic Sanctions Against South Africa

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THE DIVISION OF FOREIGN POLICY AUTHORITY BETWEEN THE EUROPEAN COMMUNITY AND THE MEMBER STATES: A SURVEY OF ECONOMIC SANCTIONS AGAINST SOUTH AFRICA

I. INTRODUCTION

Both the European Community (EC) and the individual Member States within the EC have the power to implement foreign policy through agreements, debt relief, economic sanctions, and other measures. In some cases these powers are exclusive, in others they are concomitant. This Note examines the foreign policy powers of the EC and of individual Member States, using the enactment of economic sanctions against South Africa to eradicate apartheid as a historical example of these powers. This discussion necessarily incorporates an analysis of the specific powers delegated to the EC and those reserved by the Member States and how they may conflict. Although the EC recently lifted all sanctions against South Africa, the manner in which the EC and the individual Member States functioned between 1975 and 1987 in their relations with South Africa provides a good basis for an analysis of the individual and concurrent powers of each.

Part II of this Note examines the structure, allocation of responsibilities, and purpose of the EC. Part II also provides an introduction to the European Court of Justice and the internal and external economic relations of the EC. Part III focuses specifically on Articles 224 and 113 of the European Economic Community Treaty (EEC Treaty) and analyzes the exclusivity of the EC's actions under Article 113. Part IV presents a general background to South Africa and apartheid, followed by a detailed discussion of the EC's policies toward South Africa in four different time periods: 1975–1977, 1978–1984, 1985, and 1986. This part also includes discussion of the individual actions of Member States toward South Africa and how these actions affect the EC's unified position. Part V analyzes the actions that Articles 224 and 113 of the EEC Treaty allow Member States to take individually, as well as the possible consequences of these actions. Part VI concludes that in order to ensure the unity necessary to preserve the Common Market, actions against South Africa should be undertaken only by the EC as a whole, rather than by individual Member States. This Note considers how

Member State action or inaction in adopting individual and EC economic policy measures can retard the EC's progress toward a unified, effective foreign policy.

II. THE EUROPEAN COMMUNITY

A. *Introduction*

The EC is comprised of three distinct communities. Belgium, France, Germany, Italy, Luxembourg, and Holland established the European Coal and Steel Community (ECSC) in 1951, creating a common market in coal and steel.[1] In 1957, the aforementioned countries established the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), which encompass other areas of economic and industrial life.[2] From the beginning, these three bodies shared some common institutions, and since 1967, the EC Council and the EC Commission have governed all three.[3] In 1986, the Member States of the EC adopted the Single European Act (SEA), amending the existing treaties and calling for the progressive completion of the Internal Market by December 31, 1992.[4] According to Article 8A of the EEC Treaty, as incorporated in the SEA,[5] this "internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital [among the Member States] is ensured in accordance with the provisions of [the EEC] Treaty."[6]

Notwithstanding the enactment of the SEA, the treaties governing each community remain intact, therefore, some of the rules that regulate activity in each community remain distinct.[7] Similarly,

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[1] TREATY INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY].

[2] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY]; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY].

[3] TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES AND ANNEXED DOCUMENTS, Apr. 8, 1965, *reprinted in* ERIC STEIN & PETER HAY, DOCUMENTS FOR LAW AND INSTITUTIONS IN THE ATLANTIC AREA 194–207 (1967). For a complete discussion of the governing institutions, see WILLIAM RAWLINSON & MALACHY P. CORNWELL-KELLY, EUROPEAN COMMUNITY LAW 2–10 (1990).

Over the ensuing three decades, the EC gradually expanded to include twelve Member States. Denmark, Ireland, and Britain joined in 1972. *See* 1973 O.J. (L 2) 1. Greece acceded in 1979. *See* 1979 O.J. (L 291) 1. Spain and Portugal joined in 1985. *See* 1985 O.J. (L 302) 1.

[4] 1987 O.J. (L 169) 1, art. 13 [hereinafter SEA].

[5] *Id.*

[6] EEC TREATY art. 8A (as amended 1987).

[7] RAWLINSON & CORNWELL-KELLY, *supra* note 3, at 1.

the powers to legislate which the treaties confer upon the communities are different and, to some extent, so are the procedures and remedies of each treaty.[8] The communities, however, usually apply the EEC Treaty, with its catch-all provisions, when the ECSC or Euratom Treaties lack applicable provisions to govern a particular legal issue.[9]

Articles 1 through 8C of the EEC Treaty, as supplemented by the SEA,[10] embody the paramount goal of the EC: European unity.[11] The EC expects to achieve this goal through measures promoting the following: the free movement of goods within a customs union; a common agricultural policy; the free movement of persons, services, and capital; a common transport policy; a common commercial policy; coordination of economic and monetary policies; and a competition free of distortions and restrictions.[12] The fundamental principle behind these measures, as discussed in Article 7 of the EEC Treaty, advocates non-discrimination among nationals of the Member States.[13] Articles 8A through 8C provide for the completion of this internal market for movement of goods, services, persons, and capital by December 31, 1992.[14] The SEA expressly declares, however, that this date will not trigger automatic legal consequences.[15] In order to assist in the achievement of the EC's goal of a unified market, the SEA also facilitates the passing of additional legislation and introduces new, specific internal policy objectives regarding research and development as well as environmental protection.[16] Since the enactment of the SEA, the EC has integrated in many areas. However, there is still a great deal of work to be accomplished before the goal of complete European unity can be realized.

Most of the EC's integration achievements have resulted from domestic policy-setting. The EC has found it more difficult to integrate foreign policy.[17] The EC has had less success with foreign policy matters due to its limited power in this area under the EEC

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[8] *Id.*

[9] *Id.*

[10] SEA, *supra* note 4, at arts. 6, 13–15.

[11] EEC TREATY arts. 1–8C (as amended 1987); *see* RAWLINSON & CORNWELL-KELLY, *supra* note 3, at 2.

[12] EEC TREATY arts. 3, 7.

[13] *Id.* art. 7.

[14] *Id.* arts. 8A–8C.

[15] SEA, *supra* note 4, at Final Act.

[16] *See id.* at arts. 24–25.

[17] *See infra* part IV.

Treaty. Under the present structure of the EC, Member States retain all powers not expressly granted to the EC by treaty. Through these retained powers, the individual Member States have thwarted the EC's efforts to supplant Member State control over foreign relations.[18] The treaties establishing the EC delineate the powers of the EC and, therefore, govern the EC's foreign policy measures. These treaties form the limited basis for the EC's foreign economic relations. Foreign policies are often implemented through EC-wide or individual Member State agreements with another country. The validity and interpretation of these foreign policy agreements are decided by the Court of Justice of the European Communities (Court).

B. *Court of Justice of the European Communities*

According to Article 164 of the EEC Treaty, the role of the Court in the EC is to "ensure that in the interpretation and application of [the EEC] Treaty the law is observed."[19] Through its interpretations of the various treaties, the Court has played a key role in determining the relative authority of the Member States and the EC.[20]

The Court has original, consultative, and advisory jurisdiction.[21] In its original jurisdiction, the Court may hear cases brought by or against any of the EC institutions and cases among Member States.[22] The Court also has original jurisdiction to hear actions brought by the EC Commission against Member States seeking "declarations that [the Member States] have failed to comply with [EC] law."[23] In its consultative jurisdiction, the Court gives rulings on the proper interpretation of the treaties, EC legislation, and EC conventions.[24]

In addition to original and consultative jurisdiction, the Court has advisory jurisdiction to render "opinions" under Article 228(1) of the EEC Treaty.[25] Article 228(1) concerns the negotiation and conclusion of agreements by the EC or individual Member States

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[18] *Id.*

[19] EEC TREATY art. 164.

[20] *See infra* part III.B–C.

[21] RAWLINSON & CORNWELL-KELLY, *supra* note 3, at 8–9.

[22] *Id.* at 8.

[23] *Id.* at 9.

[24] *Id.*

[25] EEC TREATY art. 228(1).

with non-Member States or international organizations.[26] It provides that, where such an agreement is contemplated, the EC Commission or any Member State may seek, before the parties enter into the agreement, the opinion of the Court as to whether the agreement is consistent with the provisions of the EEC Treaty.[27]

Although this aspect of the Court's jurisdiction is advisory, whereby it gives only an "opinion" under Article 228, the Court has the authority to rule definitively on the vital question of the relative agreement-making powers of the EC and individual Member States.[28] The purpose of this advisory jurisdiction is to anticipate problems that might arise if, at the conclusion of an international agreement, someone questions the agreement's validity under and compatibility with the EEC Treaty.[29] The Court thus plays an important role in helping define the respective powers of the EC and the individual Member States within the realm of foreign policy through its analysis of the treaties.

C. *Foreign Economic Relations*

The treaties establishing the EC are the legal equivalent of a constitution,[30] and, as such, when EC law applies, it takes precedence over conflicting national statutes and constitutions.[31] Yet, despite this new legal order,[32] Member States actually retain a fair degree of sovereignty in the foreign relations area.[33]

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[26] *Id.*

[27] *Id.*

[28] *See* Opinion 1/75, Opinion of the Court Given Pursuant to Article 228 of the EEC Treaty of 11 November 1975, 1975 E.C.R. 1355, 1360–61, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8365 at 7637, 7641–42 (1976).

[29] *Id.* at 1360–61, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7641.

[30] Case 26/63, N.V. Algemene Transport-En Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie Der Belastingen, 1963 E.C.R. 1, 12, [1961–1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8008 at 7206, 7214 (1963) [hereinafter *Van Gend & Loos*]. "This Treaty [EEC Treaty] is more than an agreement which merely creates mutual obligations between the contracting states . . . . Community law has an authority which can be invoked by [Member States'] nationals before [national] courts and tribunals." *Id.*; *see also* Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 208–10 (1990).

[31] Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 593–94, [1961–1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8023 at 7384, 7390 (1964); Joseph Weilee, *Community, Member States and European Integration: Is the Law Relevant?*, 21 J. COMMON MKT. STUD. 39, 43–47 (1982).

[32] *Van Gend & Loos*, 1963 E.C.R. at 12, [1961–1966 Transfer Binder] Common Mkt. Rep. (CCH) at 7214. According to the Court, "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields . . . ." *Id.*

[33] *See, e.g.*, *infra* part IV.A.3–4.

As the EC derives its authority solely from the EEC Treaty, the EEC Treaty establishes the theoretical parameters of the EC's authority in the foreign relations arena.[34] The EC's authority in external relations is thus limited to the power to exercise its "legal personality,"[35] as delineated in the EEC Treaty, in international arenas. For example, in connection with its common commercial policy[36] or in other areas of EC competence,[37] the EC may negotiate treaties and agreements with non-Member States or international organizations.

However, it is unclear to what extent the EC's powers are exclusive. Generally, where the EEC Treaty grants the EC exclusive, internal authority over a particular subject area, the Court will interpret the EEC Treaty as also granting exclusive, international authority over the same subject area.[38] Thus, for example, the EC's exclusive authority to establish common commercial policy, including trade and tariff policy,[39] ostensibly prohibits Member States from concluding trade or tariff agreements in their own names, even if acting cooperatively.[40] In practice, however, the Court has not strictly enforced or uniformly applied this principle.[41] Concurrent negotiations are the standard in many areas where the EC theoretically maintains exclusive internal authority.[42]

The Member States' influence over the direction of EC foreign policy remains significant despite the fact that the EC is granted

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[34] *See* EEC TREATY art. 4(1). Article 4(1) provides that each Community institution shall carry out the powers of the Community acting "within the limits of the powers conferred upon it by this Treaty." *Id.*; *see also* EURATOM TREATY art. 3(1); ECSC TREATY art. 3; Lenaerts, *supra* note 30, at 207–08.

[35] EEC TREATY art. 210.

[36] *Id.* arts. 113, 228.

[37] *Id.* art. 238 (as amended 1987).

[38] *See* Opinion 1/75, 1975 E.C.R. at 1364, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7643; *see also* Pierre Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities*, 16 COMMON MKT. L. REV. 615, 622 (1979).

[39] EEC TREATY arts. 110–16.

[40] *See* Opinion 1/75, 1975 E.C.R. at 1364, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7637; *see also* Pescatore, *supra* note 38, at 622.

[41] Opinion 1/78, Opinion of the Court of 4 October 1978 Given Pursuant to the Second Subparagraph of Article 222(1) of the EEC Treaty, 1979 E.C.R. 2871, 2916–18, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8600 at 8755, 8782–83 (1979). Opinion 1/78 is discussed *infra* at note 63.

[42] For example, since the decision in Opinion 1/78, the EC and Member States negotiate all commodity agreements concurrently. *See* Eric Stein *in collaboration with* Louis Henkin, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution*, *in* 1 INTEGRATION THROUGH LAW bk. 3, 3, 47 (Mauro Cappelletti et al. eds., 1986).

exclusive jurisdiction over certain foreign economic issues.[43] As a result, the retention of some foreign economic policy sovereignty by the Member States limits the potential for Europe to speak cohesively with one voice.[44] Nevertheless, Member States do not retain unqualified independence in their foreign economic relations, even outside the areas of the EC's express external authority, because the EEC Treaty places broad restrictions on Member State activity. For example, in Article 116 of the EEC Treaty, the Member States, "in respect of all matters of particular interest to the common market, [must] proceed within the framework of international organizations of an economic character only by common action."[45] Moreover, Article 5 of the EEC Treaty requires Member States to "abstain from any measure which could jeopardize the attainment of the objectives of [the EEC] Treaty."[46] Therefore, although the Member States retain sovereignty over certain foreign economic areas, Member States' individual powers are not entirely unrestricted because their foreign relations activities will affect the EC objective.

It is apparent that economic decisions affect the foreign relations policies the EC implements.[47] It is also apparent that non-economic foreign relations policies are becoming more dependent upon economic means, such as sanctions.[48] Hence, given this interdependence between foreign relations and economic policy, coordination and integration of the authorities in these areas is crucial. Clearly, a proper understanding of the allocation of powers over foreign policy between the Member States and the EC is necessary in order to analyze the use of economic means to effect foreign policy.

III. Member State Action Under Articles 224 and 113 of the EEC Treaty

Two Articles of the EEC Treaty, Articles 224 and 113, delineate who may enact what policies under what circumstances.[49] Article 224 delegates to each Member State the authority to maintain peace

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[43] EEC Treaty arts. 67–74 (as amended 1987).

[44] *See, e.g., infra* notes 108–09 and accompanying text.

[45] EEC Treaty art. 116.

[46] *Id.* art. 5; *see also* Euratom Treaty art. 192; ECSC Treaty art. 86.

[47] *See, e.g.*, Roy H. Ginsberg, Foreign Policy Actions of the European Community 141 (1989) (discussing economic factors affecting foreign relations decisions made by EC).

[48] *See, e.g., infra* text accompanying notes 93, 134–140.

[49] EEC Treaty arts. 224, 113.

and international security.[50] Article 113 in turn delegates to the EC exclusive authority over "common commercial policy."[51] An analysis of each of these provisions will demonstrate that Article 224 trumps Article 113 when peace and international security are involved.[52] Interpreting these provisions first in a general sense, and second as they apply to the EC's apartheid policies, will illustrate how together these two provisions affect independent actions taken by the individual Member States.

A. *Article 224*

Article 224 of the EEC Treaty provides for a reservation of sovereignty on behalf of the Member States.[53] Article 224 stipulates that:

> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take . . . in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.[54]

If such measures distort competition in the common market, the EC Commission and the interested Member States will try to reconcile the measures with the EEC Treaty.[55] Article 224 makes clear that the Member States may, if they wish to comply with international legal obligations with respect to the maintenance of international peace and security, consider themselves, apart from procedural requirements, free from their obligations under EC law.[56]

B. *Article 113*

Article 113 of the EEC Treaty calls for a "common commercial policy" based on uniform principles as implemented by the EC.[57] The Court issued two opinions establishing guidelines for inter-

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[50] *Id.* art. 224.

[51] *Id.* art. 113.

[52] *Id.* arts. 224, 113.

[53] *Id.* art. 224.

[54] *Id.*

[55] *Id.* art. 225.

[56] HANS SMIT & PETER E. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY 6-216.85 (1989).

[57] EEC TREATY art. 113.

preting the scope of and applying Article 113.[58] On November 11, 1975, the Court, in its first opinion, examined the basis of common commercial policy.[59] The transaction discussed in Opinion 1/75 required the setting of minimum conditions for export credits.[60] The Court determined that Member States should apply the term "common commercial policy" set forth in Article 113 in a broad sense.[61]

The Court further recognized that the transaction at issue in Opinion 1/75 fell within the context of export policy mentioned explicitly in Article 113's delineation of "common commercial policy."[62] Therefore, the EC had the power to conclude the agreement.

In another opinion, 1/78, the Court again examined the scope of the common commercial policy and the interpretation of Article 113.[63] The Court supported a broad reading of Article 113 by stating that the power of the EC to implement a commercial "policy" based on "uniform principles" required the administration of external trade from a broad perspective.[64] The Court therefore held that the list of subjects under the heading of "common commercial policy" in Article 113 was not all-inclusive.[65] The Court refused to interpret Article 113 restrictively.[66] "A restrictive interpretation of the concept of common commercial policy," the Court reasoned, "would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-Member countries."[67] Opinions 1/75 and 1/78 establish the EC's power to create agreements in any area, whether listed in Article 113 or not, as long as they can be classified as furthering common commercial policy.

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[58] Opinion 1/78, 1979 E.C.R. 2871, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8600 at 8755; Opinion 1/75, 1975 E.C.R. 1355, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8365 at 7637.

[59] Opinion 1/75, 1975 E.C.R. at 1362–63, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7642–43.

[60] *Id.* at 1357–59, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7639–40.

[61] *Id.* at 1362, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7642.

[62] *Id.* at 1363, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7643 (discussing EEC TREATY art. 113(1)).

[63] Opinion 1/78, 1979 E.C.R. 2871, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8600. The agreement in question involved an attempt "to achieve a balanced growth between supply and demand for natural rubber" to stabilize prices in the long run for both exporters and importers, as well as to ensure a reliable supply for importers. *Id.* at 2903, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) at 8775–76.

[64] *Id.* at 2913, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) at 8781.

[65] *Id.*

[66] *Id.*

[67] *Id.*

C. *Exclusivity Under Article 113*

A second issue addressed in Opinion 1/75 was whether the EC retains exclusive power over "common commercial policy" actions it formulates.[68] In the opinion, the Court reasoned that "common commercial policy" under Article 113 should be interpreted in the context of EC operations, with a view toward protecting the interests of the Member States.[69] Under this analysis, each Member State must seek to accommodate the interests of the other Member States.[70] This interpretation of Article 113 demonstrates its similarity to Article 224: Member States must not act in ways that would adversely affect the EC or other Member States. If a Member State acts unilaterally to pursue its own interest in an external relation while the EC is concurrently enacting policies in that realm, there is a risk that the Member State will jeopardize the common interests of all EC Member States.[71] Therefore, in fields covered by common commercial policy, it is difficult if not impossible for the EC and Member States to exercise concurrent powers.[72]

In Opinion 1/78, the Court went beyond Opinion 1/75 and determined who maintains exclusive power, the EC or Member States, when the common commercial policy provisions are not the only provisions regulating an agreement.[73] The Court stated that if part of an agreement comes under common commercial policy, the agreement cannot be withdrawn from the exclusive competence of the EC in the name of general economic policy.[74] Therefore, the EC's power is exclusive over any area that falls in any way under common commercial policy.

D. *Application to EC's Apartheid Policies*

The use of economic sanctions in foreign matters best exemplifies how the concurrent and exclusive foreign powers of the

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[68] Opinion 1/75, 1975 E.C.R. at 1363, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7643.

[69] *Id.* at 1364, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7643.

[70] *Id.* at 1363–64, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7643.

[71] *Id.* at 1364, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7643.

[72] *Id.*

[73] Opinion 1/78, 1979 E.C.R. at 2914, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) at 8781. Absent any other implications, a Member State may act with regard to purely "general economic policies." *Id.* Opinion 1/78 considered who has competence when an agreement concerns both common commercial policy and general economic policies. *Id.*

[74] *Id.* The Court did note, however, that if a Member State was to bind itself financially in certain clauses in the agreement, separate participation by that individual Member State in the decision-making process would be justified, and exclusive EC competence would be precluded. *Id.* at 2918, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) at 8783.

Member States and the EC interact and at times conflict to frustrate the achievement of a unified foreign policy. As noted earlier, the EC's use of economic means to achieve foreign relations goals is widespread today.[75] The EC increasingly relies on economic policies to enable itself to negotiate with foreign governments.[76] The EC also uses economic policies in attempts to pressure other governments into acting in manners consistent with EC goals and objectives.

A relevant example of such pressure is the economic action taken by the EC against South Africa between 1975 and 1987 to persuade the South African government to abolish apartheid. To achieve this goal, the EC utilized various economic sanctions.[77] These sanctions demonstrate two phenomena: first, the relative feebleness of the EC's policies toward South Africa before 1986; and second, the ability of the Member States to hamper the achievement of a forceful, cohesive EC foreign policy through economic measures.[78] As will be demonstrated, Member States can impede the development of a cohesive policy in two ways.[79] When economic actions are taken unilaterally by a Member State, or without complete agreement among the Member States, the result may be the existence of multiple, incompatible measures, rendering the EC measures ineffective. Additionally, because of their sovereignty, Member States in some cases have been able to forestall a strong, unified EC foreign policy by preventing the implementation of certain economic sanctions.[80] The exercise of authority from 1975 through 1987 by both the EC and Member States in connection with South Africa clearly demonstrates the scope and limitations of each entity's power.

IV. EC's Foreign Policies Toward South Africa and Apartheid

A. *Apartheid*

Apartheid was the political platform of the South African conservative Nationalist party, which came to power in 1948, following

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[75] *See infra* notes 93, 134–40 and accompanying text.
[76] *Id.*
[77] *See infra* part IV.
[78] *Id.*
[79] *See infra* notes 108–09, 142 and accompanying text.
[80] *See infra* note 142 and accompanying text.

World War II.[81] The literal meaning of the term "apartheid" in Afrikaans is "separatehood."[82] Afrikaaner nationalism and racial superiority were the ideological bases for the apartheid program.[83] Under the apartheid order, the government consolidated existing racial laws and added new ones to create a unified system of racial subjugation.[84]

The South African legal system presents no effective recourse to bar the government from implementing racially oppressive policies, such as forced removal to homelands and denial of civil or voting rights for South African Blacks. The South African Constitution contains no preclusive proclamation of fundamental political rights and provides for no judicial review of statutes.[85] Rather, an extreme legal positivism controls the legal system in which no one can question or challenge Acts of Parliament, regardless of their content or consequences.[86] The South African Parliament has enacted statutes to control the most intimate aspects of Black people's lives, including their residence,[87] personal movement,[88] employment,[89] political expression,[90] and sexuality.[91] This web of apartheid

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[81] JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 7 (1978).

[82] *See* CLAUDE PHILLIPS, THE AFRICAN POLITICAL DICTIONARY 35–36 (1984).

[83] *See* Elizabeth S. Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71 YALE L.J. 1, 16–17 (1961).

[84] DUGARD, *supra* note 81, at 55; *see* Landis, *supra* note 83, at 1 (discussing legal structure of apartheid, which remains fundamentally accurate in spite of recent reforms).

[85] REP. S. AFR. CONST., S. Afr. Stat. No. 32 (1961), *amended by* S. Afr. Stat. No. 110 (1983). Section 68 provides that "[t]he judicial authority of the Republic is vested in a Supreme Court" of South Africa. *Id.* § 68. The jurisdiction of the Court is circumscribed by § 18. *Id.* § 18. Section 18(2) provides that "no court of law shall be competent to inquire into or pronounce upon the validity of a decision of the State President" where matters specifically or differentially affect a population group's maintenance of identity, life, culture, or traditions. *Id.* § 18(2). Section 18(1), however, does permit limited review of compliance with procedural questions of valid acts of parliament. *Id.* § 18(1); *see also* DUGARD, *supra* note 81, at 35 (discussing § 59 of 1961 Constitution, which is same section as § 18 of 1983 Constitution).

[86] *See* DUGARD, *supra* note 81, at 6.

[87] Group Areas Act, S. Afr. Stat. No. 36 §§ 1–42 (1966).

[88] *Id.* §§ 43–48.

[89] *See, e.g.*, Black Building Workers Act, S. Afr. Stat. No. 27 (1951) (repealed 1980). The nationalist government enacted legislation to reserve certain jobs in each industry for Whites. The 1951 Black Building Workers Act required the training and registration of Black building workers. *Id.* §§ 10–11. An employer in the building industry was not permitted to employ a Black in White areas without the written consent of the Minister. *Id.* § 13.

[90] *See* DUGARD, *supra* note 81, at 146–59. The nationalists have enacted an intricate web of censorship and security measures. The principal statute is the Internal Security Act, S. Afr. Stat. No. 74, §§ 18–29 (1982). This statute severely restricts basic freedoms of speech, press, movement, assembly and association, permits the detention of persons without a trial and authorizes the banning of persons and organizations. *Id.*

[91] *See, e.g.*, Immorality Act, S. Afr. Stat. No. 23 (1949) (repealed 1985) (making sexual intercourse between Blacks and Whites illegal); Prohibition of Mixed Marriages Act, S. Afr. Stat. No. 55 (1949) (repealed 1985).

statutes stands as one of the most intricate and intolerable systems ever devised for controlling the details of personal action through the legal system.[92]

B. *EC's Policies Toward South Africa*

1. 1975–1977

The primary objective of the EC's South African policy is the total abolition of apartheid.[93] On September 28, 1976, while addressing the United Nations, the President of the EC Council of Ministers issued the first EC statement on South Africa.[94] Within a year, the EC used this statement to create an EC-wide, voluntary Code of Conduct (Code) for EC firms operating in South Africa.[95]

In 1977, EC Foreign Ministers adopted the Code for EC companies with subsidiaries, branches, or other representation in South Africa.[96] The Code called on the companies to treat their employees equally and to do everything possible to support trade unions for Black South Africans.[97] This voluntary code also asked businesses to provide, among other things, the following: a minimum wage at least fifty percent above the amount required to satisfy the basic needs of a family; equal pay for equal work; training programs to help Black South Africans move out of inferior jobs; fringe benefits, including housing, health services, pensions, educational funds, and unemployment insurance; and desegregated work places.[98] As the aim of the Code was to help those suffering under the Apartheid regime, rather than to punish the South African government for allowing the regime to continue, the Code was an entirely positive measure taken by the EC.[99]

2. 1978–1984

From 1978 to 1984, the Code was the EC's only foreign policy measure used to achieve change in South Africa.[100] The EC de-

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[92] *See generally* DUGARD, *supra* note 81, at 53–55 (discussing law of apartheid).

[93] 1985–1986 EUR. PARL. DOC. (COM xx) 7 (1986) [hereinafter Working Documents].

[94] Martin Holland, *Three Approaches for Understanding European Political Cooperation: A Case-Study of EC—South African Policy*, 25 J. COMMON MKT. STUD. 295, 297 (1987).

[95] *Code of Conduct for European Community Companies with Subsidiaries, Branches or Representation in South Africa, reprinted in* 24 INT'L L.M. 1477–79 (1985) [hereinafter *Code*]. Compliance with the *Code* is voluntary.

[96] *Id.* at 1475.

[97] *Id.* at 1477.

[98] *Id.* at 1478.

[99] *See id.* at 1477–79.

[100] Holland, *supra* note 94, at 297.

signed the Code's provisions to attempt to alleviate the effects of apartheid legislation with regard to employment. In practice, however, the apartheid legislation constrained the operation of the Code's guidelines.[101] Until 1984, the EC's efforts did in fact help to improve the situation of the South African Blacks affected by apartheid.[102] Because the Code did not provide the South African government with any incentives to eradicate apartheid, the Code did little, if anything, toward ending apartheid.

In September 1984, escalating civil unrest, renewed Western media attention, and intensified anti-apartheid lobbying forced the EC to reevaluate "the Code as an instrument designed to eradicate apartheid."[103] In 1985, the South African government proclaimed a state of emergency in parts of the country and refused meetings with Bishop Tutu and other members of the Black majority.[104] These actions reinforced the Member States' belief that they must bring the apartheid system to an end.[105]

3. 1985 Policy

The EC's initial response to the state of emergency imposed by the South African government was to issue a Joint Declaration on July 22, 1985.[106] This Declaration reaffirmed previous statements made by the EC that urged the abolition of apartheid.[107] On July 25, a strict unilateral French action disturbed this seemingly unified EC position: France recalled its Ambassador, prohibited new investment in South Africa, and formulated a UN resolution calling for comprehensive international, negative sanctions.[108] This unilateral French action undermined the effectiveness of any unified EC actions taken against South Africa.[109]

On July 31, in an attempt to coordinate an "ostensibly floundering policy" and to maintain some measure of diplomatic unity, the EC recalled all of its Ambassadors in preparation for a meeting

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[101] *Id.*

[102] Working Documents, *supra* note 93, at 26, 31.

[103] Holland, *supra* note 94, at 301.

[104] *European Community: Actions and Statements of Foreign Ministers, reprinted in* 24 INT'L L.M. 1474 (1985) [hereinafter *Actions and Statements of Foreign Ministers*].

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Holland, *supra* note 94, at 301.

[109] Note, *A Community Within the Community: Prospects for Foreign Policy Integration in the European Community*, 103 HARV. L. REV. 1066, 1074 (1990).

of the Foreign Ministers to discuss the EC's response.[110] Even this act of collective planning ultimately lacked uniformity.[111] While Denmark officially closed its consulate, Britain, in contrast, insisted that the recall of its Ambassador "was just for 'consultation' and did not imply an alteration in Britain's policy of constructive dialogue."[112] To help counteract the negative effects of the Member States' divergent attitudes toward South Africa, the EC Committee on Development and Cooperation passed a resolution reiterating the EC's total condemnation of the apartheid system in all its forms.[113]

An EC investigative committee then conducted a three-day tour of South Africa on August 30, 1985.[114] On September 9, the Council of Foreign Ministers (Council) discussed the investigative committee's report about that visit.[115] The investigative committee successfully conveyed to the South African government the EC's "grave concern . . . at the lack of any specific steps towards abolishing apartheid and at the resulting deterioration of the situation in South Africa."[116] The investigative committee called for the lifting of the state of emergency, the release of Nelson Mandela and the other political prisoners, as well as a "commitment by the South African government to end apartheid and to dismantle discriminatory legislation."[117] The Council then discussed possible measures the EC could take to persuade the South African government to accede to its wishes.[118]

Although at this meeting the EC fell short of endorsing economic sanctions (despite French advocacy), the Council proposed a joint package of measures.[119] These new policies, among other things, called for the withdrawal of Member States' military attachés

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[110] Holland, *supra* note 94, at 301; *see also Actions and Statements of Foreign Ministers*, *supra* note 104, at 1475–76.

[111] Holland, *supra* note 94, at 301.

[112] *Id.*

[113] Working Documents, *supra* note 93, at 57.

[114] *Actions and Statements of Foreign Ministers*, *supra* note 104, at 1479. The EC Committee consisted of the Commissioner responsible for External Relations, Willy de Clerq, and the Foreign Ministers of Luxembourg, Italy, and The Netherlands—Jacques Poos, Giulio Andreotti, and Hans Van Den Brock, respectively. Holland, *supra* note 94, at 301.

[115] *Actions and Statements of Foreign Ministers*, *supra* note 104, at 1479. All Member States attended this meeting. Spain and Portugal attended as observers. *Id.*; Holland, *supra* note 94, at 301.

[116] *Actions and Statements of Foreign Ministers*, *supra* note 104, at 1480.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 1481; Holland, *supra* note 94, at 301.

to Pretoria, banned nuclear collaboration, and banned the sale of EC oil and sensitive technology.[120] France's unilateral actions in July 1985, demonstrated its determination to sanction South Africa and suggested France's agreement with the proposed joint package of economic sanctions. Subsequently, on September 4, 1985, Germany unilaterally withdrew export guarantees for exports to South Africa, thus suggesting Germany's agreement with the proposed joint package of economic sanctions.[121] Britain, however, continued to oppose such economic sanctions until September 25, 1985, two months after the imposition of the state of emergency.[122] At the September 9th meeting of the Council, Britain was, therefore, alone in objecting to the proposal, stalling any EC-wide policy for another few weeks.[123]

The lack of unanimity suspended the goal of a unified EC response beyond rhetorical condemnation. Faced with mounting EC and UN criticism, however, Britain finally adopted the new EC policy on September 25, 1985.[124] The announcement of a revised Code on November 19, 1985 strengthened the unified EC position.[125] The revised Code placed greater emphasis on promoting South Africa's relations with Black trade unions, training and promotion, and supplementary benefits.[126] Although this EC policy presented a united front to South Africa which, along with the revised Code, helped South African Blacks, it did not ease apartheid. Fighting apartheid required stronger measures, and the EC did not take any additional action until the second half of 1986.[127] This inaction was due in part to Britain's continuing opposition to more stringent economic sanctions.[128] Britain's successful strategy illustrates how the opposition of one Member State toward unified

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[120] *Actions and Statements of Foreign Ministers*, *supra* note 104, at 1481; Holland, *supra* note 94, at 301.

[121] Holland, *supra* note 94, at 302. Germany undertook this withdrawal of export guarantees in response to a moratorium on foreign loan repayments imposed by South Africa. *Id.*

[122] *Actions and Statements of Foreign Ministers*, *supra* note 104, at 1481.

[123] *Id.*

[124] *Id.* Nevertheless, the change in position was superficial rather than substantive. Britain's government already followed all but one of the provisions—the withdrawal of military attachés. Holland, *supra* note 94, at 302.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

economic action is sufficient to halt EC economic action that is geared toward affecting foreign policy.

4. 1986 Policy

Due to its opposition toward economic sanctions, Britain's membership in the EC effectively prevented the expansion of the EC's South African policy during the first half of 1986.[129] The EC could not impose more stringent sanctions on South Africa because Britain's opposition precluded a unified approach. The effect of Britain's refusal to join the other Member States in approving sanctions provided South Africa with a loophole to circumvent any sanctions actually imposed. Due to the lack of trade barriers among the Member States, goods could flow between South Africa and the EC through Britain, and the other Member States were powerless to prevent it.

Not until the Council meeting of June 26, 1986, did the EC, with Britain finally in agreement, decide that more unified actions were necessary.[130] The EC, however, granted a delay of three months before implementing any new measures.[131] In the interim, acting in his capacity as President of the Council, Sir Geoffrey Howe of Britain visited South Africa.[132] Following this visit, Britain adopted certain sanctions and agreed to implement any EC decision to ban the import of coal, iron, steel, and gold coins from South Africa.[133]

On September 15, 1986, due to Britain's acceptance of further economic sanctions against South Africa, "the EC finally moved toward affirmative limited measures."[134] On September 27, 1986, the EC agreed to ban both the importation of steel and iron[135] under Article 71 of the ECSC Treaty,[136] and new investment in South Africa[137] under Articles 67 and 235 of the EEC Treaty.[138] Furthermore, on October 27, the EC enacted legislation proscribing

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] ECSC TREATY art. 71.
[137] Holland, *supra* note 94, at 302.
[138] EEC TREATY arts. 67, 235.

the sale of kruggerands[139] pursuant to Article 113 of the EEC Treaty.[140] Although the EC proposed a coal embargo, Germany and Portugal both opposed it.[141] In order to continue to present a unified picture to South Africa, the EC did not introduce this sanction.[142]

The EC's actions with respect to South Africa through 1987 provide a good background against which one can study the relative powers of the EC and the Member States. Although the EC recently removed all sanctions against South Africa, an analysis of this period demonstrates the interaction between the EC and the Member States as it relates to the use of economic actions to achieve foreign relations goals.

5. Analysis

The 1975–1987 time period was selected because it was the height of EC activity relating to South Africa. Within this time frame, important aspects of the EC-Member State foreign policy powers relationship became apparent. This survey of recent EC action toward South Africa demonstrates how Member States can effectively prevent the EC from developing a cohesive and unified policy that is strong enough to accomplish the EC's goal of abolishing apartheid. There are several possible explanations for the Member States' actions including, but not limited to, disagreement with EC policy and desire to retain sovereignty. One Member State's inaction or opposition to a proposed foreign policy measure is sufficient to prevent the EC from implementing such a policy measure. Thus, Member State sovereignty in certain economic areas retards the EC's movement toward a unified foreign policy.

Notwithstanding this effect of Member State sovereignty, the EC has used its EEC Treaty powers to achieve some success in implementing limited sanctions against South Africa.[143] Once the EC has so acted, the threshold issue then becomes whether a Member State has the authority to pursue a policy concomitantly that either contradicts or differs from the EC policy. Specifically, what power remains with individual Member States when the EC has implemented economic sanctions against South Africa?

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[139] Holland, *supra* note 94, at 302.

[140] EEC TREATY art. 113.

[141] Holland, *supra* note 94, at 303.

[142] *Id.*

[143] *See supra* notes 124–39 and accompanying text.

V. EXCLUSIVITY OF EC ACTION TOWARD SOUTH AFRICA

A. *Power of Member States to Enact Sanctions Under Article 224*

In order to determine the validity of a Member State's adoption of unilateral measures, one must classify the measures involved, thereby establishing the allocation of powers between the Member States and the EC.[144] In the event the classification is trade measures rather than sanctions, the power to enact the measures would rest with the EC unless the power of the Member States continued to exist by virtue of an express provision of EC law.[145] If the sanctions do not fall under trade policy, and thus are not classified as trade measures, a Member State can implement sanctions individually in accordance with Article 224 after consulting with the other Member States.

The Security Council of the United Nations labeled apartheid a system that "seriously disturbs international peace and security."[146] If the EC regarded apartheid as a security rather than trade matter, Article 224 would permit unilateral action by a Member State in sanctioning South Africa to protect international peace and security.[147] A group of international law professors in Holland viewed apartheid in this manner.[148] Their analysis concluded that unilateral action against South Africa qualified as sanctions, not trade measures, because the intent was to foster international peace and security rather than affect commercial policy.[149] The group assumed, therefore, that while Article 224 prohibits Member States from individually enacting trade measures, it does not prohibit the Member States from individually enacting sanctions.[150] The issue of exclusivity under Article 224 thus necessarily turns on the classification of the measures involved.

B. *Power of Member States to Enact Sanctions Under Article 113*

Because the EEC Treaty does not expressly delegate authority over the adoption of economic sanctions, if any such measure falls

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[144] *See supra* part III.A–C.

[145] *Id.*

[146] S.C. Res. 473, U.N. SCOR, 35th Sess., 2231st mtg., at 18, U.N. Doc. S/RES/473 (1980).

[147] *See supra* notes 54–56 and accompanying text.

[148] Richard H. Lauwaars, *The Interrelationship Between United Nations Law and the Law of Other International Organizations*, 82 MICH. L. REV. 1604, 1614 (1984).

[149] *Id.* at 1615.

[150] *Id.*

under the rubric of "common commercial policy," Member States must defer to the powers of the EC pursuant to Article 113.[151] The justification for the broad interpretation given to Article 113, which precludes Member State action where the EC has acted in an area under common commercial policy,[152] is the potential damage that unilateral measures of the Member States could inflict upon the functioning of the Common Market. For example, the punitive measures taken by the French in response to the state of emergency imposed by South Africa in 1985 underlined the relative feebleness of the Joint Declaration issued three days earlier, which had supposedly been the product of a unified EC position.[153] Hence, in order to prevent Member States from undermining the effectiveness of the Common Market, it is entirely logical that the EC should retain exclusive control over all aspects affecting common commercial policy.

To determine if EC prior sanctions preclude unilateral Member State sanctions under Article 113, one must determine whether the EC's power is exclusive.[154] The first issue pertaining to exclusivity under Article 113 concerns the meaning of the "common commercial policy," and whether the EC's sanctions against South Africa fall into this definition.[155] If the sanctions are actually restrictions on trade with a non-Member State, they would appear to fall within the realm of common commercial policy under current Court opinions. Although the Article 113 list does not include agreements regulating external trade,[156] under the reasoning of Opinion 1/78 it may still fall within the scope of Article 113 if any part of the agreement falls under common commercial policy.[157] Thus, given the expansive interpretation of commercial policy adopted in Opinion 1/75[158] and Opinion 1/78,[159] any economic sanctions would appear to qualify as common commercial policy.

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[151] EEC TREATY art. 113.

[152] *See supra* part III.B–D.

[153] *See* Holland, *supra* note 94, at 301.

[154] *See supra* part III.C.

[155] *Id.*

[156] *See supra* note 65 and accompanying text.

[157] Opinion 1/78, 1979 E.C.R. at 2914, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) at 8781; *see also supra* text accompanying note 74.

[158] Opinion 1/75, Opinion of the Court Given Pursuant to Article 228 of the EEC Treaty of 11 November 1975, 1975 E.C.R. 1355, 1362, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8365 at 7637, 7642 (1976).

[159] Opinion 1/78, Opinion of the Court of 4 October 1978 Given Pursuant to the Second Subparagraph of Article 222(1) of the EEC Treaty, 1979 E.C.R. 2871, 2913, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8600 at 8755, 8781.

The possibility still exists, however, that a sanctions agreement among the Member States may include foreign policy measures enforceable under general economic policy rather than under common commercial policy.[160] Nevertheless, even if the sanctions are outside common commercial policy, the sanctions may disturb intra-Community trade by creating an imbalance in the degree of sanctions levied against South Africa. Given this prospect and the broad interpretation of common commercial policy, even if the sanctions agreement is deemed a foreign policy measure, it will probably fall within the scope of common commercial policy under Article 113.

In summary, the issue of whether a Member State may impose sanctions unilaterally will be addressed by examining whether the EC's action is exclusive. If the sanctions do fall within Article 113, this would appear to be an exclusive measure. The Court clearly stated in Opinion 1/75 that EC actions relating to common commercial policy bar unilateral actions by Member States.[161] In Opinion 1/78, the Court further stated that even if only a part of a measure falls under common commercial policy, the EC's authority will remain exclusive.[162] Therefore, it appears that pursuant to Article 113 any action by the EC precludes conflicting or different individual action by a Member State.

C. *Effects of Unilateral Action by the Member States on the EC*

Coordinated EC-Member State action is essential to successful and efficient unification. Economic integration, however, will hinder the Member States' ability to enact unilateral foreign policies, as individual economic measures, such as Member State sanctions, will be prohibited.[163] Additionally, if the trade barriers within the EC actually are removed, the EC foreign policy to emerge most likely will be the "least restrictive foreign policy" of any of the Member States—in reality if not officially.[164] For example, if Britain took a more relaxed stand toward South Africa, as it did in response to recent reforms made there, and therefore eased sanctions on mineral importation before the EC lifted its sanctions, it would be a

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[160] *See supra* text accompanying note 74.

[161] Opinion 1/75, 1975 E.C.R. at 1364, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7643.

[162] Opinion 1/78, 1979 E.C.R. at 2914, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) at 8781.

[163] Note, *supra* note 109, at 1078.

[164] *Id.*

formidable task for other Member States to enforce the sanction when there are no trade barriers within the EC.[165] This hypothetical situation demonstrates how individual action by a Member State could adversely affect the unity for which the EC constantly strives. Therefore, the allowance of individual economic action by the Member States in foreign policy areas jeopardizes commercial unity and the functioning of the Common Market and constrains the EC's ability to pursue integrated foreign policies.

D. *Potential Court Interpretation*

When either the EC or a Member State enacts foreign policies, the actions may be challenged before the Court. The validity of a sanctions agreement may be challenged on the basis of whether the sanctioner has *any* authority to enact such a sanction and, if so, whether such authority is *exclusive*. The purpose of the EC's sanctions agreements against South Africa during the 1970s and 1980s was to convey to the South African government that the EC would no longer tolerate the apartheid system. Accordingly, this was a foreign policy concern. Therefore, through their participation in the EC, the Member States had an interest in the EC's foreign policy rather than merely its commercial policy. If the EC's South African sanctions were challenged before the Court, the outcome would turn on whether the Court looks to the policies that the EC is setting forth, in this case a foreign policy, or looks to the mechanism through which the EC is imposing the policy—the economic sanctions.

If the Court chooses to view the matter solely as a foreign policy issue, then the Member States probably will be free to impose different or harsher sanctions on their own. If the Court instead chooses to consider the actual means utilized—the economic sanctions—then it must decide if the sanctions are trade policies or common commercial policies or if they are policies to protect international peace and security. Should the Court deem the sanctions to be at least in part common commercial policy, this determination would preclude the Member States from acting under Article 113. If the Court, however, finds the sanctions are implemented solely to protect international peace and security, then Article 224 will allow the Member States to act unilaterally.

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[165] *Id.*

VI. Conclusion

It remains unclear whether a Member State has the authority to act unilaterally in areas of foreign policy already governed by EC policy. The effects of such unilateral action on both the EC and other Member States are severe. This Note has revealed that a Member State's unilateral actions against South Africa can render harsher sanctions by one Member State relatively ineffective and can have a negative effect on the unity of the EC as a whole. Accordingly, to preserve both the Common Market—a main goal of the EC—and the current broad definition of common commercial policy, Member States should not be able to take individual action against South Africa. As noted earlier, although the EC recently lifted all sanctions against South Africa and, barring the South African government's retreat to any of the recently abandoned discriminatory policies, the necessity of future sanctions is unlikely, the entire experience conveys important lessons. Furthermore, the conclusions drawn from this survey of EC action against South Africa will remain valid for future situations where the EC and/or the Member States use economic means to attain foreign relations goals.

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