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The External relations of the
European Community
The development of the theory of implied
powers.

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Abbreviations

COREPER	Committee of the Permanent Representatives (of the Member States)
EEA	European Economic Agreement
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EMU	Economic and Monetary Union
ERTA	Agreement regulating the work of crews engaged in international road transport
EU	European Union
Euratom	European Atomic Energy Community
Euratom Treaty	Treaty establishing the European Atomic Energy Community
FAO	The Food and Agriculture Organisation
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILO	International Labour Organisation
OECD	Organisation for Economic Co-operation and Development.
OEEC	Organisation for European Economic Co-operation
TEU	Treaty on European Union (Maastricht Treaty)
UN	United Nations
UN charter	Charter of the United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

1 Introduction

1.1 Presentation of the subject

When the European Community was created, it was already quite clear that the organisation would be based on a co-operation that is quite different from other organisations. The aims behind the creation were to establish a common market for economic activity.¹ The Member States of the European Community had to permanently give up certain of their sovereignty to the Community. This is what distinguishes the Community from other international organisations. It is an intergovernmental organisation with extensive objectives where the work of the organisation is not based on an inter-governmental co-operation between the Member States, but on the Community itself, entrusted with a wide range of competencies.

By the achievement of a common market, it was clear that the European Community and its Member States had to represent one unit from an external point of view, which demands a consequently common policy within the definitions of that market. To attain a harmonised internal policy, the external policy had to be the same.²

The co-operation, implying the establishment of a common customs tariff, does, for reasons that are obvious, not stop at the borders, but has a great impact on the relations to the rest of the world, other states as organisations. For attaining the objectives set out in the Treaty of Rome (henceforth called the Treaty), the Community was given an international legal personality, signifying that it had the competence to act internationally and to enter into international commitments. The original Treaty of Rome explicitly recognised the Community's competence to enter into international commitments, which were covered by the common commercial policy and the so-called association agreements.³ The common commercial policy comprises, to a large extent, of internal provisions concerning the achievement of an inner market.⁴

Outside these express external competencies, the European Court of Justice (henceforth called the Court) has recognised the Community's competence to enter into international commitments even where the Treaty provisions do not give any express competence to do so. The Court has recognised that such external competence can arise where provisions of the Treaty, or internal measures adopted by virtue of the Treaty, give the Community an internal competence to act. This is what is called the theory of implied powers, or the parallel doctrine.

¹ See the Treaty establishing the European Economic Community (the EEC Treaty), part one, above all article 3 (now, after amendment, article 3 EC).

² Something that was discovered by the European Court of justice, see below.

³ See article 3 (B) the EEC Treaty

⁴ See chapter 5, below.

To examine the external competencies of the Community, it is not sufficient to study the express provisions of the EC Treaty, but also to see on what internal provisions an external competence can be founded. By understanding how and in what way such internal provisions can serve to recognise the external competencies of the Community, a careful examination of the case law of the European Court of Justice is required.

The Court has defined the extent to which the Community is competent to act in accordance with the theory of implied powers. Throughout the years, a case law has developed, recognising the Community's right to act internationally where it has the internal competence, but also limiting the way in which the Community is recognised the right to act alone.

The regime that governs the external relations of the Community is quite complicated and unclear. When examining the implied external competencies of the Community it is not sufficient to see where and under what circumstances the Community enjoys competence, but also in what way that competence is used when the Community regulates internally. When the Court first recognised the theory of implied powers, it stated that, when found to exist, those powers of the Community were exclusive in relation to the Member States. This statement was, however, soon to be modified by later case law. The Community and the Member States have a broad field where they are recognised to share external competence. When both the Community *and* the Member States share competence, the doctrine describes it as an agreement in which they enjoy a mixed competence. Thus, the resulting agreements are called "mixed agreements".

The sovereignty that the states give up when entering the Community also includes their possibility to enter into international agreements with other states or international organisations. To understand and examine the external relations of the Community, it is necessary to see in which way the Member States have given up their power to engage themselves with other states and to what extent that resignation has been done. Within certain areas, as we will see, the Member States have completely given up their sovereignty to enter into international agreements, and the Community has the exclusive competence to do so. However, areas in which the Member States remain competent, also cover most international agreements today according to which the Community enjoys a certain competence.

1.2 Definitions

This essay will present the competencies for the European Community to act internationally. The European co-operation today is called the European Union, however this essay will only treat the European Community. For understanding the differences, a general explanation is required concerning the legal definitions within the framework of the European Union and the European Communities.

In a purely legal aspect, there are three different communities: the European Coal and Steel Community (ECSC), the European Community (EC) and the European Atomic Energy Community (Euratom).

Six Member States signed the ECSC treaty in April 1951: France, Belgium, Germany, Italy, Luxembourg and the Netherlands. The duration of the Treaty was set out to be fifty years. The ECSC was given an international legal personality.⁵

The EEC Treaty, which was the origin of the EC, and the Euratom Treaty, were signed in March 1957. The contracting parties were the parties of the ECSC. The duration of the treaties was set out to be unlimited. Both communities were given a legal personality.⁶ While the Euratom Treaty mainly was to create conditions for nuclear industries,⁷ the EEC treaty had a much wider prospect namely, by virtue of the treaty of Rome, to establish a common market for economic activity.⁸

The European Union was created through the Treaty on the European Union signed in Maastricht in 1992. The nature of the European Union is quite unclear, and it seems that it is more a political concept, than a legal one.⁹ The aim behind the union is rather to achieve a closer co-operation between the Member States than to create another international legal body.

Article A of the Treaty on the European Union (henceforth called the TEU) (now, after amendment, article 1 EU), describes the union as a phase in the process of creating an even closer co-operation between the Member States. It does not seem as if there are any legal objectives behind it, but more an association within the framework of which the Member States have agreed to carry out certain objectives in common. Not possessing an international legal personality, the union is not capable of entering into international commitments, which the three communities are. The only possibility for the union to act internationally is to do so as a concerted body of its Member States or through the communities depending on what objectives the international act covers.

Article M of the TEU (now Article 47 EU) states that "...nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

The communities hence remain unaffected by the establishment of a union and so are the assignments that have been conferred upon each institution by virtue of the three Community treaties. As a consequence of that, it is still appropriate to use the terminology "competencies of the communities" even though the co-operation between the Member States now is called the European Union.

This essay will in large parts examine when and under what circumstances the European Community (that is, what originally was the European Economic Community) enjoys competence to adopt international acts and to undertake international commitments.

⁵ Article 6 of the Treaty establishing the European Coal and Steel Community states that: "The Community shall have legal personality".

⁶ Article 184 of the Treaty establishing the European Atomic Energy Community such as article 210 of the Treaty establishing the European Economic Community (now article 281 EC) states that: "The Community shall have a legal personality".

⁷ Article 1 of the Euratom Treaty.

⁸ See article 2 of the EEC Treaty (now, after amendment, Article 2 EC)

⁹ Macleod, etc. p 25

In this essay, when only using the term “the Community”, that might cause confusion as to which of the three communities is intended. This essay concerns the European Community, and thus, if nothing else is expressly declared, it is the European Community that is intended.

When referring to “the Treaty”, reference is made to the Treaty of Rome, being the original Treaty establishing the European Community, hereafter called the Community.

As will be seen below, there is a mixed use of the terms “capacity” and “authority” for the Community to enter certain agreements. Capacity might be used as a general ability. The term “authority” however, might imply the requirement of a specific legal basis for the authorisation.¹⁰ In literature, both terms are being used. However, the word authority has been criticised by some authors as not being appropriate and hence, the term capacity will be used.

The notion “competence” should properly be defined according to Community law.¹¹ Article 173 distinguishes that notion from the infringement of procedural requirements, from the infringement of the Treaty, and from the misuse of powers.

When referring to “third states”, that implies all states that are not members of the European Union.

1.3 Delimitation

1.3.1 The European Community in relation to the European Union

The European Community forms a part of the European Union.¹² The external relations of the European Union consist, except from undertakings made by virtue of the provisions set out in the three Community treaties, also of the common foreign and security policy. The European Union is often described as being composed of three pillars, of which the three Communities form one pillar. An important distinction between the pillar consisting of the Communities, and the other two, is that decision making in the latter two pillars is taken intergovernmentally, while actions within the Communities are taken by the Communities themselves, through their institutions. The common foreign and security policy forms a part of the second pillar, where decisions take place intergovernmentally, and is thus as such not a part of the Community law.¹³ To be able to act in international law, a subject must possess an international legal personality.¹⁴ The Union does not possess such a legal personality and therefore, such activity needs to take place intergovernmentally. This activity, taking place outside the

¹⁰ See further, Dashwood, Alan p. 117

¹¹ Bleckman, p. 3

¹² See above.

¹³ Van Dijck and Faber, p 21

¹⁴ See chapter 2.3 below

Community does therefore not affect the external relations of the Community.

The European Community has developed into a recognised international actor, whereas in issues of the foreign and security policy, the Union has had difficulties in stating its objectives.¹⁵ That is why, the external relations of the European Community present a more interesting subject.

This essay will only treat the external competencies of the European Community and will hence exclude the external relations entered into by virtue of the framework of the union.

1.3.2 Expressed and implied external competencies of the European Community

What is the meaning when we talk about the “external relations of the European Community”? Certain Treaty provisions confer the right to the Community to act on behalf of its Member States. This is what is called the Community’s external express competencies. However these are not the only external competencies that have been relied upon the Community. A further category of competence has been recognised through the case law of the Court; this competence does not find an express support in the Treaty.

That is the theory of the so-called “implied powers”, giving the Community the right to act externally within areas where it enjoys an internal competence.¹⁶

The concept of the Community’s external competence is large, and could make a subject for a significant, and most likely interesting, dissertation. However, to somehow limit this essay, there will mainly be an examination of the areas in which and the conditions under which, the European Community is competent to conclude international agreements even where the Treaty does not expressly authorise it to do so. How was it made possible that powers, originally under a state’s exclusive competence, have been taken over by the Community through the practise of the European Court of Justice? How can this development be agreed with the principle of subsidiarity, set out in article 3b of the EC Treaty (now Article 5 EC)? In what way has the theory of implied powers had an impact on the sovereignty of the Member States of the Community? In what way are they allowed to act internationally after the Court’s case law?

To understand the development of the theory of implied powers, its practice and consequences, it is impossible to leave out other areas of the Community law, such as the Community’s express external competencies and the important case law concerning those competencies. It is also interesting to examine that part of the Community’s external relations, since those external provisions also have been changed after the Court of justice’s judgements.

¹⁵ Van Dijck and Faber, p 21.

¹⁶ This definition is a pure simplification of the theory of implied powers the situation is more delicate than this, as will be seen below. However this definition serves only as a brief explanation of the word.

The express external competencies will be examined, not as a phenomenon in itself, but as a complement to show how arrangements are solved when an international agreement covers *both* issues on which the Community enjoys an external express competence *and* issues on which the Member States enjoys an exclusive competence. This has become known as “mixed agreements”.

The development of the Community’s external competencies has been large, due to the case law of the European Court of Justice. The exclusive external competencies of the Community are now rather an exception than a rule, and therefore it is interesting to examine some parts of the express external competencies. Again, not as a phenomenon in itself, but to show what great impact the case law of the European Court of Justice has had on the development of the external relations of the Community.

To some extent, this essay will leave out the internal procedure within the Community for adopting international acts, except from chapter four, describing the competencies between the different institutions when acting internationally. That is a more general and wide description, which neither describes the provisions completely, nor shows what problems might arise between the institutions when the division of powers is unclear. Chapter four is therefore not intended to show a full spectrum the different powers of each institution, but to serve as sufficient information to understand the main issues under discussion.

2 Legal personality of states and international organisations in international law

2.1 Introduction

The Community is an international organisation with specific objectives, competencies and characteristics, different from most other international organisations. It is in one way an international organisation, but enjoys competencies normally attributable to sovereign states, since the Member States have given up large parts of their sovereignty to the Community.

To understand the complexity of the legal nature of the Community, it is appropriate to examine the definitions in international law on international organisations versus the international law concerning states.

What is the status of the European Community in international law? Having expansive competencies clearly distinguishes it from other international organisations. However, the European Community can not, even with quite wide definitions, be considered to enjoy the same legal status as a state. Within some areas, the Community does enjoy the same competencies as states do. However, that is only within certain areas, and is not in any way comparable with the capacity that states have.

The Member States of the Community remain sovereign states and although they have given up parts of their sovereignty permanently to the Community, that has only been made within certain areas.

There are visions to create a European federal state from what today is the European Union, that vision is still quite controversial. To reach the definitions of a European federal state from what today is a union would demand a drastic development and considerable amendments to the treaties, which today constitute the constitution of the European Union. However, it is not enough to consider what the Community is *not*, however, but to see where in the international legal spectrum the Community can be placed.

When doing so, general explanations of the connotations in international law is required, such as definitions of states; including federal states, and then to draw a conclusion as to the status which can be given the Community, something that will be discussed in the chapter below.

2.2 International law and municipal law

International law, if compared to municipal law, is based on different principles and has other characteristics than the municipal legal system.

The definition municipal law involves the internal law of a state.¹⁷ The municipal law is addressed to a number of governmental bodies and private

¹⁷ Malanczuk, p. 63.

individuals and has got what can be recognised as a vertical system, with legislative powers and legal authority.

The international law comprises of relations between sovereign and equal states and is characteristic of having a horizontal system without a legal supremacy, based on legal personalities with equal status.¹⁸

Whether they work separately or not is a debated question and there are mainly two different theories. On the one hand, the dualist theory which considers that the two systems work separately and independently from each other, on the other hand, the monist theory, considering both forms of law to constitute two parts of the same system of law. As a consequence of the monist theory, international acts can immediately after adoption create rights, upon which individuals and companies can act. Where the dualist theory is applied, internal legislative measures must first be adopted before an international act can create rights for individuals and companies.

2.3 Legal personality in international law

To be able to act in law, either municipal or international, a subject needs to possess a legal personality. Having a legal personality signifies that the subject is able to enter into legal relations and have legal rights and duties. In municipal law, individuals and companies enjoy legal personality. In international law there has, during the past 100 years, been a development as to which subjects are recognised to have legal personalities.

From 1648 until 1918, what was called the period of the “classical” system of international law, the only subjects in the international law were States.¹⁹ Today the states are still the dominant actors within the international law. However, other subjects, such as international organisations have been recognised as having a legal personality to a certain extent.

2.3.1 States

In the 1933 Montevideo Convention on International Law and Duties of States, article 1 sets up certain criteria for a state:

“The State as a person of international law should possess the following qualifications:

- A) A permanent population;
- B) A defined territory;
- C) Government²⁰; and
- D) Capacity to enter into relations with other States.”

The first three of these conditions represents international customary law.²¹

2.3.1.1 Federal States

The basic definition of a federal state is that competence over internal affairs is under the authority of each member state, while foreign affairs are

¹⁸ Malanczuk, p. 3.

¹⁹ Supra, p. 10.

²⁰ A government that exercises effective control over a territory and over a population. This implies effective control both externally and internally.

²¹ Malanczuk, p. 75.

under the federal authorities' competence.²² International law does not consider the member states of a federal state as states in the international legal sense, although having authority over internal affairs. Only the federal state is regarded as a state, since for fulfilling the criterion of a state, the government of a state should control a territory both externally and internally.

2.3.2 International Organisations

The first form of international organisations emerged in the nineteenth century, as international trade developed.²³ A general requirement arose for international regulations and administrative unions. After the First World War the League of Nations was created. This was the first international organisation with a universal political aim.

The United Nations (UN), created after the Second World War, was the first universal organisation. The aim behind the UN was to create a design to introduce law and order and effective collective security in the international legal order.²⁴ The organisation should act as a guarantor for peace and international security and as a sort of "supra national organisation" to the extent that was possible in international law. The importance of the UN is not only the creation of a universal organisation, but also of the installation of the International Court of Justice, the ICJ, which is close to a "supranational" court, still respecting the sovereignty and equality of all states. In its case law, the ICJ has confirmed and examined a large area of the international customary law.

2.3.2.1 The reparation for injuries case

The leading authority on the international legal status of international organisations is the advisory opinion of the ICJ in the "reparation for injuries case".²⁵

The case was referred to the ICJ by the General Assembly after Count Bernadotte, mediator for the United Nations, was killed in the performance of his duties. The Assembly asked whether the United Nations as an organisation would have the capacity to bring a claim under international law against the responsible government.

For making a claim under international law, a subject must possess an international legal personality. Such a capacity certainly belongs to a state, but the ICJ had to consider whether or not the United Nations as an organisation also could be regarded to possess a legal personality. In its judgement, the ICJ made reference to the UN Charter, according to which the United Nations has been conferred rights and obligations different from those of its members. The political assignments of the organisation, to maintain international peace and security, are of a considerable importance. The United Nations has the capacity to operate on an international plane,

²² Malanczuk, p. 81.

²³ Supra, p. 22.

²⁴ See the UN charter the preamble and article 1 i.e.

²⁵ Reparations for Injuries Suffered in the Service of the United Nations. Advisory Opinion of 11 April 1949 ICJ Rep. 174.

which, in combination with the rights and obligations that it possesses, results that it does have a large measure of international legal personality.

As a consequence of this, the UN can bring an international claim against a State. The ICJ emphasises, however, that although the UN possesses an international personality, it is certainly not a super-State.

Moreover, the ICJ was asked to answer to the question whether the organisation had the capacity to obtain reparation in respect of the damages caused to both the United Nations and the victim.

The UN has powers, which are essential to the performance of its functions, such as to send agents with important missions to be performed in disturbed parts of the world. By this the right follows that these agents must be ensured an effective protection. Hence the UN has the capacity to exercise functional protection in respect of those agents and thus the right to obtain reparations after being damaged under international law.

2.3.2.2 Consequences of the judgement

After the Reparations for injuries case, it is settled law that international organisations can have a legal personality. By stating that the UN was in no way a “super-State” the ICJ emphasised that organisations, when possessing a legal personality, do not enjoy it in the same way, and to the same extent, as states do. A state possesses a complete international legal personality, meaning a complete set of rights and duties, while the personality of an organisation to a large extent depends on its purposes and functions.

Organisations possess competence to act internationally only with respect to certain rights and obligations given to it, powers necessary for the most efficient performance of its functions. Those powers can be either specific, expressly mentioned in their constitutionally treaty, or implicit, necessary to carry out the express assignments given in their treaty. When determining to what extent the legal personality of an organisation is limited it is therefore suitable to examine the organisation’s treaty.

2.3.3 Supranational organisations

Most international organisations are governed by their member states through an inter-governmental co-operation in which those members retain the decision making and financing. There are, however, organisations that work more independently, which are known as “supranational organisations”. The difference between those organisations and the more traditional international organisations is the clear transfer of sovereignty from the Member States to the organisation in the former.²⁶

To what extent that transfer of sovereignty must be made for an organisation to be considered as a supranational organisation is not obvious. Even in more traditional international organisations, the organisation is entitled to carry out certain assignments, which originally derive from the member states’ sovereignty.

²⁶ Malanczuk, Peter p. 95.

However, there is a clear difference in transfer of sovereignty between international organisations and supranational organisations. That transfer is much more extensive in the latter.

Moreover, there are also certain distinguishing elements for the supranational organisations:²⁷

1. The organs of the organisation are composed of persons who are not government representatives;
2. The organs can take decisions by majority vote;
3. They have the authority to adopt binding acts;
4. Some of which have direct legal effect on individuals and companies;
5. The constituent treaty of the organisation and the measures adopted by its organs form a new legal order; and
6. Compliance of member states with their obligations and the validity of acts adopted by the organs of the organisation are subject to judicial review by an independent court of justice.

The only existing supranational organisation that meets all of the above mentioned criteria is the European Community. The Rome Treaty and the secondary legislation of the Community form an independent legal order, which can not be grouped with general international law.²⁸ The European Community is often described as an entity *sui generis* in international law.

²⁷ Malanczuk, Peter p. 95-96

²⁸ On the status of Community law in the Member States, see case 6/64, Flaminio Costa v E.N.E.L., below.

3 The Community as an actor in international law

3.1 Introduction

The objectives behind the European Community were from the beginning to create a long-term co-operation between the Member States. The aims behind the creation were to be achieved through economic measures.²⁹ The Schuman declaration spoke about “common foundations of economic development as a first step towards a European Federation”.³⁰ The aspiration of creating a federal state from what is today the European Union still remains, amongst certain member states, as the discussions on an enlargement and further steps towards federalising take place.

The Community enjoys an international legal personality, both according to an analogue reasoning of the reparation for injuries case³¹ and according to the EC treaty, article 210 (now article 281 EC). According to explicit Treaty provisions, the Community can be a member of international organisations. Article 228 the EC treaty (now, after amendment, article 300 EC) expressly confers the right to the Community to enter into agreements “between the Community and one or more States or international organisations”.

The Community does not enjoy the right of legation, the right to send and receive diplomats. When the Community practises diplomatic relations, as other rights, it is bound by the treaty provisions and the objectives set out in the treaties. There are no treaty provisions providing for a power to send diplomatic representatives on behalf of the Communities.³² Representatives from the Community in third countries are not representing the Community as such, but the Commission, and are bound to the Commission.

As any international actor, the Community is, when negotiating and adopting acts on an international level, bound by international customary law and must therefore exercise their powers in accordance with those customary rules.³³ In event of a non-performance of an obligation arising from international customary law, it could incur liability at international level.³⁴

As a consequence of its unclear international legal status, the attitude of some third countries and international organisations have shown a lack of certitude of the extent to which the Community and Member States are

²⁹ See the EEC Treaty.

³⁰ Macleod, etc. p. 7

³¹ Reparations for Injuries Suffered in the Service of the United Nations. Advisory Opinion. See chapter above.

³² Macleod etc. p. 209

³³ Case 286/90. *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*

³⁴ Case 327/91 *France v. Commission*. Para. 9. This case concerned the international law of the sea.

competent actors. To what extent these third countries and international organisations accept the Community as a party of agreements is quite varied.

3.2 Case 6/64 Costa v. ENEL³⁵

According to the EC Treaty article 164 (now article 220 EC), the European Court of Justice (henceforth called the Court) shall ensure the interpretation and application of the Treaty. It is therefore important to take the case law of the European Court of Justice into consideration when examining Community law, since that case law explains how the Treaty provisions should be interpreted.

The case *Costa v ENEL* has clarified many principles concerning the legal status of the Community, that is why this judgement will be described in a special chapter

The case was brought to the Court, on demand of the Italian national court. A request on the interpretation of the Treaty as to its compatibility with Italian law was made. Moreover, an explanation for the interpretation of certain Treaty articles, and to whether or not they had a direct effect, was requested.

The Court recalled the special character of Community law. As distinct from ordinary international treaties creating international organisations, the EC treaty creates its own legal system, which, in each Member State forms an integral part of the legal systems of those states and which their courts are bound to apply. The Member States have also bound themselves not to allow their legal system to be inconsistent with the legal system of the Community.³⁶

When creating such a Community with an unlimited duration, the Member States have limited their sovereign rights. The Community as such has its own institutions, its own legal personality, its own legal capacity of representation on the international plane, and real powers which are stemming from a limitation of sovereignty or a transfer of powers from the States to the Community. The limitation of the Member State's sovereignty might be within limited fields, nevertheless it has thus created a body of law which binds both the Member States and their nationals.³⁷

The legal system of the Community is capable of producing a direct effect on the relations between Member States and individuals. There is a great importance of a uniform interpretation and application of the Community law. For the maintenance of the EC, the force of Community law cannot vary from one State to another.³⁸

If the Member States could renounce their obligations rising from the Treaty by means of ordinary law, Treaty provisions granting the States to act unilaterally or granting them the right to derogate from treaty provisions, would completely lose their purpose. The Community law is an independent

³⁵ Case 6/64, *Flaminio Costa v E.N.E.L.* 15 July 1964 ECR 585.

³⁶ *Supra*, para 3.

³⁷ *Supra*.

³⁸ *Supra*, para. 3.

source of law and cannot because of its special and original nature be overridden by domestic law, without being deprived of its status as Community law.³⁹

The case does not only bring out important statements as to the status of Community law *vis à vis* national law, but does also bring out the conditions for a treaty provision to have a so called direct effect, implying that certain articles create rights for individuals.

Community provisions can have a direct effect, i.e. creating rights for individuals. Since the Community has got the competence to enter international agreements, such agreements can come to be directly applicable. Regard must be taken to the wording and the purpose of the agreement itself. If the provision contains a clear and precise obligation, which is not subject, in its implementation or effects, to the adoption of any subsequent measure, provisions arising from the agreement can have a direct effect.⁴⁰

3.3 The Community in international organisations

The practice from international organisations to accept the Community as a party in agreements and multilateral treaty making has not been uniform. Whether the Community will be accepted as a member of an international organisation or not, highly depends on whether or not an organisation might be a member in the organisation in question.⁴¹

Under certain conditions, the Community has been accepted as being a representative of its Member States. However, most international organisations only accept states as members, while the Community, at most, can enjoy the status as an "observer", usually implying a quite limited right to participate in the work of the organisation, rarely with a right to vote.⁴²

If an organisation does not accept the Community as a member, the Community needs to act through its Member States.⁴³ The consequence can be that the Member States will retain the right to vote within areas where the Community enjoys an exclusive competence, as is the case with many international organisations created for regulating fisheries.

Such practise is not unusual, and therefore there is a great demand for a close co-operation between the Community and its Member States. This importance and requirement of co-operation in representing a unity in the international performances have repeatedly been emphasised by the Court.⁴⁴

³⁹ Case 6/64, *Flaminio Costa v E.N.E.L.*

⁴⁰ Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*. Para 14.

⁴¹ An organisation that accepts other organisation is for example The Food and Agriculture Organisation, of which the Community is a member.

⁴² For example, the Community only enjoys the status of an observer within the work of the United Nations.

⁴³ *Macleod etc.* p. 172. Something that has also been recognised by the Court. See Opinion 2/91 (Re ILO convention 170) chapter 7.2.3, below.

⁴⁴ See for example, opinion 1/78 and Opinion 2/91 below.

The legal support for that demand can be found in the so-called loyalty-principle, article 5 of the EC Treaty (now article 10), stating: “Member States shall take all appropriate measures to ensure fulfilment 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.”

By constantly appearing as a unit towards the rest of the world, the international uncertainty on the status of the Community as an international actor will be avoided.

3.3.1 The International Fruit Company Case⁴⁵

For a wide range of the matters covering the General Agreement on Tariffs and Trade, the GATT, the Community enjoys the internal legislative competence. That is certainly so concerning matters covered by the common commercial policy. Regardless of what the legal status of the GATT might have had within the Community, it was the Member States who were contracting parties. This made the relation between the GATT and the Community somewhat complex. In the so-called International Fruit Company case, the Court had the opportunity to declare what it considered the position of the Community in relation to the GATT was.

The GATT agreement was mainly covered by the definitions of the common commercial policy, set out in Article 113 (now, after amendment, Article 133 EC) of the EC Treaty. The Court stated that since the Member States had conferred those powers on the Community, they showed their wish to bind themselves by the obligations entered into under the general GATT agreement.⁴⁶ It did so by stating that: “It therefore appears that, in so far as under the EEC Treaty, the Community has assumed the powers previously exercised by Member States in the area governed by the general agreement, the provisions of that agreement have the effect of binding the Community”.⁴⁷

Even though the Court considered the Community to be bound by the agreement, the other Member States of the GATT have never accepted the Community as a member of the agreement in the place of its Member States. It is an international customary rule that a third party can not be bound by an agreement between two parties. Although the Member States might accept the Community to take their part of the agreement, there is an uncertainty as to whether that acceptance can be bound towards the other contracting parties of the agreement.

The consequences of the International Fruit Company case might have effects in Community law, having reference to the specific characteristics

⁴⁵ Joined Cases 21 to 24/72 International Fruit Company et al v. Produktschap voor Groenten en Fruit. 12 December 1972, ECR 1291.

⁴⁶ Supra.

⁴⁷ Supra, para 18.

that the GATT has, but may not be taken as a general principle, applicable in international law.⁴⁸

3.3.2 The Community in the World Trade Organisation

The above-mentioned International Fruit Company case was judged in 1972. Since then development has taken place both within the Community and the GATT. By the Uruguay Round in 1994, the GATT, not much more than an agreement between states, turned into the World Trade Organisation (WTO). As a difference to its predecessor, the WTO is open to acceptance by the Community and the Member States as members.⁴⁹

The Member States and the Community have, through the Commission, jointly signed the final act. In the work of the WTO and when exercising the right to vote, the Community has the number of votes equal to the number of Member States member of the WTO.⁵⁰ The number of votes may not exceed the number of Member States being member of the WTO.

Concerning the Court's case law on the WTO, see below.⁵¹

3.4 International acts adopted by the Member States or the Community before accession

When a new State applies for membership in the Community and gets accepted, problems might arise as a consequence of international acts already entered into by the Community. Problems can also arise as to the non-compatibility between international agreements concluded by the new Member State with third countries, before its membership in the Community.

Before the Treaty of Rome entered into force, the Member States to be, had already entered into international commitments with third countries and organisations regarding topics that later would be covered by the Community policy. That is why, article 234 of the EC Treaty (now, after amendment, article 307 EC) states that: "agreements with third countries or international organisations concluded before the entry into force of the Treaty shall not be affected by the provisions therein". To carry out obligations arising from commitments, the principle *pacta sunt servanda*, is a fundamental principle of international customary law of which both the Community and its Member States are bound.⁵²

Another basic principle of international, and most domestic laws, is that an agreement should not create rights or obligations for subjects that are not parties of the agreement.

As a consequence of article 234 and of international customary law the Member States could, by carrying out its international obligations act contrary to Community law. Probably, the only protection against such

⁴⁸ Macleod, etc. p 235-36.

⁴⁹ Art XIV of the Agreement establishing the WTO.

⁵⁰ Art IX (1) WTO Agreement.

⁵¹ Opinion 1/94, on the WTO agreement, chapter 7.2.4.

⁵² See case 6/64, *Flaminio Costa v E.N.E.L.* in the previous chapter.

consequences would be the second part of article 234, emphasising that it is important for the Member States to carry out their obligations from these agreements in, as far as possible, accordance with the provisions of the Treaty. “The Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.”

Article 234 is of a general scope and applies on all international agreements, which are capable of affecting the application of the Treaty.⁵³

This principle of Community law only permits Member State to perform their international obligations and is in no way a measure to bind the Community *vis a vis* the non-member country or international organisation in question.⁵⁴

Maintaining international agreements in accordance with article 234, does not only imply a duty on the Member States, but also an obligation on the institutions of the Community not to hinder the performance of the Member States’ obligations.

According to Community law, an international agreement entered by only one or some Member States outside the Community, does not allow those Member States to maintain their rights under the agreement, if that would violate the obligations under the Community law.⁵⁵ This is the case when an agreement allows, but does not require an action contrary to Community law. When the case is so, Member States must not act.

3.5 Accession of new Member States

According to article O of the Treaty on European Union (now, after amendment, Article 49 EU), any European State can apply for membership in the Union. The acceptance as such, is not an exercise of the Community but an international agreement ratified by the existing and new Member States.⁵⁶

New Member States join the European Union and can not become members of only one of the Communities. However, by joining the Union they automatically become members of all the Communities. Agreements already entered by the Community form a part of Community law. When becoming a member of the Community, the new Member State will be bound by Community law and principles, which implies that it will also be bound by the international agreements entered by the Community.⁵⁷ If those international acts are agreements of a mixed nature, the new Member State will undertake the accession of that agreement.

New Member States are required to “adjust their positions” in relation to international organisations and international agreements to which the Community or the Member States are already parties.⁵⁸

⁵³ Case 812/79, Attorney General v Juan C. Burgoa , para 9.

⁵⁴ Supra.

⁵⁵ Macleod etc. p. 230.

⁵⁶ Supra p. 226

⁵⁷ Each Member State’s act of accession might, of course be modified by amendments and reservations made by the new Member State including temporary transitional exemptions.

⁵⁸ Macleod, etc. p. 228.

3.6 International acts adopted by the Member States within their competence

The Community has only got the authority to adopt international acts where the Treaty, either expressly or implicitly, confers such power. The Member States still keep the power to enter into international agreements in areas where they have not given up their sovereignty to the Community.

One of the basic principles of the Community is the principle of subsidiarity. Article 3b of the EC Treaty (now Article 5 EC), states that: “In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.” This principle also applies concerning the external relations of the Community. It should therefore be born in mind that international action by the Member should be a rule, and Community action should be an exception.

As will be explained below, the Member States are allowed to enter into international agreements when the Community has not yet used its competencies.⁵⁹ In areas where the Community and the Member States share competence, the freedom for the Member States to engage themselves internationally, is restricted. The Member States are under a duty to respect the provisions deriving from Community law, and to co-operate as far as possible, to present a common Community-policy in the international sphere.⁶⁰

Although not all international agreements are drafted in terms that allow the Community to be a party, certain agreements might nevertheless bind the Community directly by succession so that, under certain circumstances, the Community can succeed to the obligations of its Member States under an international agreement.

3.7 International acts adopted by the Community

In the above-mentioned case *Costa v ENEL*, the Court set out the conditions under which a Community act can have direct effect.⁶¹ As with internal measures, external commitments entered by the Community will be binding upon the Member States. The Court has emphasised that the regulations in those agreements form an integrated part of the Community law once they are in force.⁶² The Community seems to have a rather monist approach to the status of international agreements. Legislative measures do not necessarily have to be adopted for an international act entered by the

⁵⁹ See chapter 7. About the ERTA-case and the following up cases, in particular the Kramer-cases.

⁶⁰ On this duty of co-operation, see chapter 8.

⁶¹ Case 6/64, *Flaminio Costa v E.N.E.L.* See chapter 3.2, above

⁶² Opinion 1/91

Community to be recognised as having a legal effect on the institutions of the Community and the citizens of the Member States.⁶³

Provisions in international agreements entered into by the Community can be given a direct effect under more or less the same conditions as an internal Community act. A provision in an agreement that the Community has entered with a third state, or international organisation, shall be considered to be directly applicable if it, with regard to its wordings and purposes, signifies a precise and clear duty whose consequences need not depend on the implementation of further acts.⁶⁴

The Court has not recognised a direct effect of the GATT agreement, since the agreement was considered to be too flexible in its wording.⁶⁵ There has not yet been a decision as to whether the WTO agreement can have a direct effect.⁶⁶

3.8 Conclusion

The EC Treaty, albeit concluded in the form of an international agreement, constitutes the constitutional charter of a Community based on the rule of law. The Community Treaty establishes a new legal order for the benefit of which the Member States have limited their sovereign rights, and the subjects of which comprise not only of Member States but also their nationals.⁶⁷ When the first Community, the European Coal and Steel Community, was created after the Second World War, the organisation that arose was quite clear matching the definitions of an International Governmental Organisation.

Throughout the development from the first co-operation until today, we can see that the European Union, of which the Community forms a part, has clearly passed the definitions of an international organisation. Then again, it is not a Federal State, since the Member States of the union still possess a large part of their sovereignty and since the Community only enjoys competence within certain areas.

The Community possesses a legal personality. To exercise its competencies on the international plane, there are certain explicit provisions, giving the Community competence to act internationally within specified areas. However, the Community also has, as will be seen, so called implied powers.

The fact that an organisation has been recognised as having the right to exercise implied powers is nothing new, but was admitted already by the ICJ in the Reparation for injuries case.⁶⁸ However, the theory of implied powers developed by the Court admits *external* competencies on the basis of

⁶³ Bernitz & Kjellgren, p 168

⁶⁴ Case 162/96 A Racke GmbH & co V Hauptzollamt Mainz.

⁶⁵ Joined Cases 21 to 24/72 International Fruit Company et al v. Produktschap voor Groenten en Fruit.

⁶⁶ Bernitz & Kjellgren, p 169

⁶⁷ Opinion 1/91.

⁶⁸ Reparations for Injuries Suffered in the Service of the United Nations. See above, chapter 2.3.2.1.

internal provisions conferring such powers. That shows that the Community is not only a significant organisation with important objectives and aims, but also a self-governing organisation. Does that imply that the Community is going from being a supranational organisation to closer towards resembling a federal state?

The legal system within the Community represents both the aspects from international law and national law, without completely satisfying any of the two definitions. It does have a legal authority, and a legislative institution. But the Member States remain sovereign states in international law. The provisions set out in the above mentioned Montevideo convention set out that a state should have a government that exercises effective control over a territory and over a population which implies effective control both externally and internally.⁶⁹ The Community only exercises effective control over a limited area, and when doing so, often with the participation of its Member States. According to that convention, which reflects international customary law, the Community does not match the definitions of a federal state.

⁶⁹ See chapter 2.3.1.

4 The procedure

4.1 Introduction

When the Community desires to negotiate and adopt international acts with third states or international organisations, there are certain procedures that should be respected within the institutions of the Community. This chapter will briefly explain the different roles of the institutions when acting on an international level.

The procedure to negotiate and adopt international acts is set out in article 228 of the EC Treaty (now, after amendment, Article 300 EC). The article states that the agreements are to be negotiated by the Commission and concluded by the Council, after having consulted the Assembly (the parliament) when required by the Treaty.

The expression “agreement” in article 228 is used in a general sense, indicating any undertaking entered into by entities subject to international law has binding force, whatever its formal designation.⁷⁰

Moreover, the article states that the Commission or a Member State may obtain the opinion of the court before entering into an agreement. This is a practice, as will be seen below, that has been of great importance.

4.2 The responsible institutions

The EC Treaty gives four bodies in the European Union the status of “institution”: The European Parliament, the Council, the Commission and the Court of justice.⁷¹ Each institution has its own specific assignments, and can only act within the areas that the Treaty confers to it. Each of those institutions plays important roles in the process of entering into agreements with third countries and/ or international organisations. Each institution has a limited competence in order to ensure the establishment of a balance between the institutions.⁷²

4.2.1 The European parliament

The Parliament has only got an advisory role in the negotiating and adoption of international acts. Nevertheless, that role warrants a mention. According to, article 228 of the EC Treaty (now, after amendment, Article 300 EC), the Parliament must be consulted before the Community can conclude an agreement where the Treaty requires it. It must be consulted, yet that consultation is only advisory.

Even where the Treaty does not expressly require consultation with the Parliaments it is nevertheless often made in practise.⁷³

⁷⁰ Opinion 1/75

⁷¹ Article 4 of the EC Treaty (now Article 7 EC).

⁷² Case 327/91 French Republic v Commission.

⁷³ Macleod, etc. p. 10

4.2.2 The Council

According to the above-mentioned article 228 of the EC Treaty (now, after amendment, Article 300 EC), it is the Council that shall conclude international agreements, after a proposal from the Commission. The fact that it is the Council that concludes the agreement does not imply that it enjoys an international legal personality. When concluding international agreements; the Council does so on behalf of the European Community.⁷⁴

The Council is, in its work, assisted by a committee, the COREPER (Committee of the Permanent Representatives of the Member States), which prepares and carries out the assignments that are being conferred to it by the Council.⁷⁵ The COREPER is not an institution of the Community, something that clearly can be discovered from article 4 of the EC Treaty (now Article 7 EC). That has also been emphasised by the Court: “It is clear from those [article 4 EC] provisions that COREPER is not an institution of the Communities upon which the Treaty confers powers of its own but an auxiliary body of the Council, for which it carries out preparation and implementation work.”⁷⁶

4.2.3 The Commission

The Commission gives proposals on international agreements, which the Council should enter. It is also the Commission that negotiates agreements with non-member States and international organisations.⁷⁷

Moreover, on the international level, the Commission is empowered to conclude agreements of an administrative character, see article 229 of the EC Treaty (Now, after amendment article 302 EC). According to this article the Commission is to ensure the maintenance of all appropriate relations with the organs of the United Nations and other international organisations. However, to any other international agreement, the role of the Commission is purely for negotiation. The agreements on which it is competent to conclude are limited to agreements for the recognition of Community laissez-passer and conclusion of agreements which are administrative or working agreements.⁷⁸

Although the Commission has the power to take individual decisions on the rules of competition, that does not apply on international measures of the same character. Thus, the theory of implied powers does not apply on the work of the institutions.

⁷⁴ See Case C-327/91, *France v Commission*, at para. 24.

⁷⁵ Article 151 of the EC Treaty (now, after amendment, Article 207 EC).

⁷⁶ Case 25/94, *Commission of the European Communities v Council of the European Union*, para 26.

⁷⁷ Article 113 of the EC Treaty (now, after amendment, Article 133 EC), Article 228 of the EC Treaty (now, after amendment, Article 300 EC).

⁷⁸ See Case C-327/91, *France v Commission* at para. 29

4.2.4 The Court of Justice

According to article 164 of the EC Treaty (now, article 220 EC), the Court of Justice shall ensure that the interpretation and application of the Treaty the law is observed

There are no treaty provisions stating that the Court has to be informed or consulted before the Community enters into an international agreement. However according to the second subparagraph of article 228 (1), there is a possibility for the Commission, the Council or one of the Member States to request the Court for an opinion. An opinion should concern the compatibility of the provisions of the Treaty with agreements to be concluded with third countries or an international organisation. If the Court has an unfavourable opinion, the agreement may not be entered until after the treaty has been amended.⁷⁹

Since the Court, according to article 164 EC, shall ensure the interpretation of the Treaty, an opinion should be requested when and where doubts arise as to the compatibility with an agreement with the Treaty and Community law.

According to the Court's case law: "the compatibility of an agreement with the provisions of the Treaty must be assessed in the light of all the rules of the Treaty, that is to say, both those rules which determine the extent of the powers of the institutions of the Community and the substantive rules".⁸⁰

The aim of the procedure for an opinion under Article 228 of the Treaty, which is an exceptional procedure, is to enable the Court to resolve all questions relating to the substantive or formal compatibility of the agreement. Such questions are envisaged in order to avoid any subsequent challenge which might undermine the international standing of the Community.⁸¹

Thus by referring to the Court, when questions on the competence are uncertain, complications that would arise later, such as a later discovery that the Community lacks competence, can be avoided. The possibility to make a request to the Court is not used frequently, but where opinions have been given, an important case law has been created.⁸²

The Court has, in an indirect way and to a great extent, influenced and developed the international sphere of the Community. Not only in opinions, as mentioned above, but also in a great number of judgement, where it has set out the rules for the Community's external competencies.

The theory of implied powers that will be examined below, is a pure judicial construction, which shows the great impact of the Court in the international relations of the Community.

The Court can, according to international agreements be conferred new powers, such as to interpret provisions of those agreements. This provided

⁷⁹ Article 228 of the EC Treaty, read in conjunction with article 236 of the EC Treaty.

⁸⁰ Opinion 1/75.

⁸¹ Opinion 2/92 (Re OECD national Treatment Instrument).

⁸² In this essay following opinions are being presented because of their importance in case law: Opinion 1/75, Opinion 1/76, Opinion 1/78, Opinion 2/91, Opinion 1/92, Opinion 2/92, Opinion 1/94, Opinion 2/94 and Opinion 1/00

that in so doing it does not change the nature of the function of the Court as conceived in the EEC Treaty, namely that of a Court whose decisions are binding. Thus, according to the agreement establishing the European Economic Area, the EEA agreement, the Court has the jurisdiction to interpret the provisions of an agreement.⁸³ According to the same agreement, a joint committee was to be introduced to ensure the interpretation of the agreement. The Court stated that such an installation of a committee was not incompatible with Community law as long as decisions taken by the Joint Committee were not to affect the case law of the Court of Justice. The powers, which the EEA agreement conferred on the Joint Committee, did not call in question the binding nature of the case law of the Court of Justice or the autonomy of the Community legal order. If it was allowed for the Joint Committee to disregard the binding nature of decisions of the Court of Justice within the Community legal order, that could have serious effects on the Community law. Respect for which must be assured by the Court pursuant to Article 164 of the EEC Treaty, and would be incompatible with that Treaty. However, the Contracting Parties and the Joint Committee would be bound by the Court's interpretation of the rules at issue. Consequently, the jurisdiction conferred on the Court was compatible with the EEC Treaty.⁸⁴

⁸³ Opinion 1/92.

⁸⁴ *Supra*

5 The express external competencies of the Community

The Community was, according to the original version of the Treaty of Rome, from the beginning entrusted with external competencies. The Community has, throughout the years, acquired a wider external competence, not only through case law, but also through amendments with the Single European Act, the Treaty of Maastricht, and respectively the Treaty of Amsterdam. Political developments caught up with the Court's approach to extending the international competence of the Community. The Community has gradually acquired express (usually not exclusive) competence across a scope of policy areas.

The Single European Act amended provisions concerning agreements on co-operation in research and technological development, article 130m and r (now article 170 and, after amendment, article 174 EC). There were also amendments made to the EC Treaty by the Maastricht and the Amsterdam Treaties, of which the former is of more importance than the latter.

5.1 Express competencies in the Treaty of Rome from 1957

Already in the original version of the Treaty of Rome, article 3.1.b, it was stated that one of the fundamental principles of the Community would be to establish a common customs tariff and a common commercial policy towards third countries. The provisions for the common commercial policy-objective was set out in article 113 EC (now article 133). According to that article, the Community enjoys the competence to enter into international commitments covered by the common commercial policy.⁸⁵

Within the area of the common commercial policy there has been a complete transfer of competencies to the Community,⁸⁶ which has resulted in, as we will see, an exclusive external competence for the Community.⁸⁷

The original EC Treaty also provided for the Community to establish association agreements. Article 238 of the EC Treaty (now article 310 EC) states that "the Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures." The Community has entered into so-called association agreements with a number of third states. The most advance of the association agreements is the agreement creating the European Economic

⁸⁵ To the definitions of the Court of Justice's interpretation on the Common Commercial Policy in its case law, see cases see below.

⁸⁶ Bernitz & Kjellgren, p 157

⁸⁷ See chapter 10.1.1.

Area, the EEA agreement. Another important agreement is the Lomé convention.

5.2 Amendments to the EC Treaty after the Treaty of Maastricht

The Treaty of Maastricht was signed in 1991. That Treaty set out the principles for a process of European integration, which should take place in a three-pillar construction.⁸⁸ It was with the Treaty of Maastricht that the common foreign and security policy-objective was set out. As has been mentioned above, that co-operation is to take place inter-governmentally, and thus not within the Community. That is why that external objective of the Union will be left out here.

One of the more important amendments made with the Maastricht Treaty was the competence for the Community to enter into international monetary agreements for the introduction of a single currency, the ECU, article 111 of the EC Treaty.

Another important amendment made with the Maastricht Treaty concerns provisions conferring competencies for the Community to co-operate with third states and international organisations in areas such as culture, article 151.3, public health, article 152.3, trans-European networks, article 155.3, and the environment, article 174.4. Another amendment was made within the field of development co-operation, article 177.

After the amendments made with the Treaty of Maastricht, the union is competent to act internationally on the basis of its internal attribution of powers in practically all areas, which are covered by the domestic policies of the Union.⁸⁹

It is important to state that the pre-existing case law from the Court of Justice concerning the theory of implied powers of the Community is still valid and thus not affected by these provisions. This means that, although these amendments give the Community express competencies that were earlier recognised by the Court, there might arise new areas in which the Court will recognise implied external competencies of the Community.

5.3 Amendments to the EC Treaty after the Treaty of Amsterdam

The objectives of the intergovernmental organisation in Amsterdam were to bring the union closer to the citizens, to improve the Union's capacity to act internationally and to reform the institutions.⁹⁰

The amendments to the Treaty cover several areas of the external policy making of the Community. The most important change, that concerns this essay, was the amendments made to the common commercial policy. Due to the Court's opinion 1/94, where the Court refused an exclusive external

⁸⁸ Steenbergen, p 116. On the three pillars, see chapter 1.3.1. above.

⁸⁹ Supra, p. 118

⁹⁰ Supra, p 115

competence for the Community, an amendment was put to article 133.⁹¹ The new article 133.5 provides that the Council can enlarge the Community's external competence within the common commercial policy to cover agreements on services and intellectual properties. Except from this amendment, it is not likely that the direct impact of the Treaty of Amsterdam to the foreign economic policy of the Union is of great importance. On the other hand, the Treaty of Maastricht was of a more significant importance.⁹² Neither has the Amsterdam Treaty has changed the provisions in the Maastricht Treaty concerning the monetary agreements or the EC Treaty provisions.

⁹¹ Opinion 1/94 on the WTO agreement. See below.

⁹² Steenbergen, p 123

6 Principles of Community law

6.1 Principles of institutions and the Treaty

The powers of the Community are set out in, and deriving from, the EC Treaty. Since powers can be derived from the Treaty, it is impossible, just by referring to the Treaty, to understand and see the entire scope of the Community's competencies. Although the Treaty provisions constitute the "skeleton" of the powers of the Community, attention must also be drawn to material legislation adopted on the basis of the Treaty as to the practice of the Court, which is the authority to interpret the Treaty.

Being an organisation created by sovereign states, the Community only has the powers that the Member States have given it. This is clearly set out in article 3b of the EC Treaty (now Article 5 EC), where, in the first sentence, it states that: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein".

By creating or acceding the European Community, the Member States have limited their powers permanently by transferring them to the Community.⁹³

According to the principle of subsidiarity, which is of fundamental importance in Community law, the Member States should adopt legislative measures unless a Community action is necessary for the fulfilment of the objective. Thus, the Community will not always act when it has the authority to do so, but only when a measure on the Community level is necessary to obtain the aim envisaged by the Treaty provisions.

The principle of subsidiarity is set out in the same article 3b, in the second and third phrases: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

In several judgements, when interpreting Treaty provisions, the Court has emphasised the importance of looking beyond an article, examining the aims and the objectives laying behind that article and judging thereafter and not using a literal approach.

Community law is in a constant state of evolution. New objectives and strategies are set out in summit meetings and other conferences. The objectives that lay behind the 1957 Treaty of Rome are not the same as they are today. It is necessary to adjust the interpretation of the articles to the objectives that are valid in the present position, and what the future objectives of the co-operation set out.

⁹³ Case 6/64, *Flaminio Costa v E.N.E.L.*

6.2 How implied powers were made possible

Certain articles of the EC Treaty explicitly provide a competence for the Community to negotiate and adopt international acts with third states or international organisations.⁹⁴ The area of the express provisions remains. However, external competence relating to all internal objectives of the Community were not given in the Treaty.

The Court did however through its' case law develop a broad and often controversial and complex theory. This by interpreting the internal Treaty provisions resulting in an enlargement of the external competencies of the Community, to cover more topics than the ones envisaged expressly in the Treaty. A very important step in that evolution was the case 22/70, ERTA⁹⁵, in which the Court for the first time set out the theory of implied powers, also called the parallel-doctrine. The connotation of that theory is that there should be parallelity between the internal and external competencies of the Community. The range of such parallelity is somewhat unclear. However, it is clear that although those competencies are wide they do not completely cover the internal competencies.⁹⁶

Already in its early case law, the Court considered that where an express power existed, an implied power also arose, where it was considered as necessary to fulfil the objectives of the express powers.⁹⁷ Later, the Court went further, by stating that when a given objective existed, it also implied existence of powers necessary to fulfil the objectives.⁹⁸

A basic principle of Community law is the principle of attribution of powers, signifying that the Community only has the powers that have been given to it. Does the development of the external competencies of the Community, which could not find any explicit support in the Treaty, show that this principle is eliminated? Probably not, the main consequence of the implied powers is that the increased Community powers have allowed it to work in a more efficient way. Letting the Community act internationally when necessary has simplified the achievement of the objectives set out in the Treaty, being that in some areas it is almost impossible to run an internal policy without an external one.

A possible conclusion could be that the Community should not be allowed to act in areas where the Treaty is silent, however, that could make the objectives of the Treaty seriously inhibited in their attainment. The theory of implied powers, as will be seen later, does not allow the Community to act where the Treaty is completely silent, but it does only give the Community an wider possibility to act internationally where internal competencies already exist according to the Treaty.

For a further discussion on whether the theory of implied powers is compatible with Community law, see next chapter.

⁹⁴ See chapter 5

⁹⁵ See chapter 7.1.

⁹⁶ Bernitz & Kjellgren, p 158

⁹⁷ Early set out in the case 8/55, *Fédération Charbonnière de Belgique v. High Authority*.

⁹⁸ Macleod, etc. p. 18

7 The theory of implied powers

The Community enjoys the competence to enter into international relations with other States and/ or organisations according to provisions in the Treaty. Those express powers are, however, limited to cover only certain matters concerning commercial and trade-policy, exclusive powers given expressly to the Community in the Treaty.⁹⁹

By admitting the Community's implied powers, the Community has now got the competence to enter into international relations within areas that are not covered by the express Treaty provisions. The Court has declared that the Community enjoys external competence in areas where it already has an internal competence. This development was made possible due to a purely judicial construction and shows that the Community is a self-governing international organisation, creating its own capacities without interference from its Member States.

The theory of implied powers developed in the 1970s, starting with the case 22/70 *Commission v Council*, more famous under the name the ERTA case, which was the opening of the new theory. The case has been confirmed and modified by later case law, defining and giving it more content. In this chapter a description will follow on the cases that made this development possible.

7.1 The ERTA-case¹⁰⁰

The first case in which the Court admitted that the Community enjoys implied external competencies was the ERTA-case. The Court here set out the principles for what was to become a new legal basis for the Community's ability to act in its external relations, by setting out the principles of implied powers for the first time.

7.1.1 Background

The international agreement regulating the work of crews engaged in international road transport (ERTA) was signed in 1970. The question arose whether it was the Community or the Member States that were to conclude the agreement.

The Commission brought the case to the Court, by claiming that the Community had the necessary competence to enter the agreement in question. The Community could, according to the Commission, do so, even if the Treaty did not explicitly give the authority to conclude the agreement, being an international one. The absence of a Treaty provision did not,

⁹⁹ For example article 113 of the EC treaty (now, after amendment, article 133 EC) and article 238 of the EC treaty (now article 310 EC) regulating tariff and trade agreements, respectively association agreements. See chapter above.

¹⁰⁰ Case 22/70, *Commission v Council* (ERTA), 31 March 1971, ECR 263.

according to the Commission, exclude the possibility for the Community to enjoy the competence to act.

The agreement concerned regulations on transport, a subject of which the Community enjoys the internal competence, article 75 of the EC Treaty (now, after amendment, Article 71 EC). The Commission considered that since the Community enjoys the internal competencies, an international action taken by the Community could not be excluded from those provisions, as that action would complement the achievement of a common transport policy, an aim for which the Community is responsible.¹⁰¹

The Council, on the other hand, claimed that such power could only arise from an express power in the Treaty, referring to the important principle of Community law, the principle of attributions of powers, according to which the Community only has the powers that have been conferred to it.¹⁰²

7.1.2 The Court's reasoning

In its judgement, the Court starts by referring to article 210 of the EC Treaty (now Article 281 EC), providing that "The Community shall have a legal personality".

This article belongs to chapter six, devoted to "general and final provisions". Being a supplement to chapter one, that article must, the Court emphasised, be read in conjunction with the "general provisions" set out in the Treaty. Being a transport regulation, the Court made reference to chapter one, article 3 of the EC Treaty (now, after amendment, article 3 EC), in which transport is expressly mentioned as being one of the areas in which a common policy shall be adopted. In this case, it is consequently that specific provision that should be read in conjunction with article 210 of the EC Treaty (now Article 281 EC), that the Community has a legal personality.

The consequence is that in its external relations, the Community enjoys the capacity to enter into agreements with third countries necessary to fulfil the obligations listed in part one of the Treaty.

When determining whether or not the community has the competence to enter into an external agreement, the Court states, it is important to take into consideration not only express provisions, but the whole scheme of the treaty.¹⁰³

The Court states that "In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these might take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules."¹⁰⁴

The importance of this judgement is not only the fact that the Court discovered new areas where the Community was competent to act, but also the consequences thereof. According to the Court, the Community is not

¹⁰¹ p. 6-8 Case 22/70, Commission v Council (ERTA).

¹⁰² Supra, para 13

¹⁰³ Supra, para 15

¹⁰⁴ Supra, para 17.

only competent to enter into an agreement even without having express competencies to do so in the Treaty. It also states that when and if the Community uses its competencies to do so “with a view to implementing a common policy,”¹⁰⁵ the Member States are no longer allowed to enter international agreements that could affect the Community’s engagement. Thus, each time that the Community uses its implied powers, they turn exclusive.

The Court bases its reasoning on the loyalty principle, set out in article 5 of the EC Treaty (now article 10 EC), providing that the Member States have a duty of loyalty towards the Community. It seems like the Court considers that any action taken by the Member States, when the Community has already used its implied competence, could constitute a threat to the Community legal order. It seems that finding a legal basis for the Community to act, implies the legal basis for not allowing the Member States to act.

7.1.3 Consequences of the Case

This case brings up not only one, but two, interesting issues. Namely the theory of implied powers, and derived from that one, the theory of the Community’s exclusivity to act in areas where it is found to have implied external competence.

7.1.3.1 The theory of implied powers

The Court admitted that the Community does enjoy competence to act externally even where the Treaty provisions do not confer those rights. Thus, by a purely judicial procedure, the Community was recognised the right to act externally in a broader area than was originally provided. The Court considered that the Community had the competence to act internationally, when it had the internal competence to do so. This competence existed each time that an international measure was considered to be necessary to fulfil the objectives set out in the Treaty.

By referring to article 210 of the EC treaty (now article 281), the Court seems to find that that article would not make sense if reference was made to only the few cases where the Community enjoys an express external competence. The Court, as certain authors, seems to consider that by enjoying an international legal personality, it must be recognised that a competence for the Community might arise even implicitly.¹⁰⁶

The external competencies can flow from express Treaty provisions, providing internal competence, but also from measures adopted by the Community within the treaty’s internal sphere.¹⁰⁷

It is not correct to interpret this case as if the Court more or less “gave” a new legal basis in which the Community can act. The use of the word “give” competence seems to be a misleading term, since the term “giving” implies a “taking”. What the Court did, was to admit external competence for the

¹⁰⁵ See the quoted paragraph 17 of the Case 22/70, *Commission v Council (ERTA)*.

¹⁰⁶ Dashwood, Alan p. 116,

¹⁰⁷ Craig De Burca p. 116

Community to act in areas of which it already has competence on the internal area. That is, in areas where the Member States have already given up their competencies to the Community, albeit not in their international commitments.

Member States were already before the judgement bound by article 5 of the Treaty (now article 10 EC), which provides that the Member States must act loyal towards the Community. Thus, theoretically, the Member States would not have been able to act internationally if that could affect the Treaty provisions even before the judgement.

The Court states that the Community only enjoys such implied competencies when an international act “is necessary to achieve an objective set out in the Treaty”. By stating so, the Court emphasises that competence is not the case in any agreement covering areas of which the Community is competent, and thus the Court recalls the important principle of subsidiarity. If the action is not necessary to achieve an internal objective, the Community does not enjoy the competencies, and thus the Member States should act.

The competencies that the Member States had before, were of a quite limited art, and are not as such affected by the statement of the Court. Instead of being a daring statement, it seems like a logical judgement, giving the Community the possibility to better carry out its obligations and fulfil the objectives for which it was created. This by giving it powers to act externally in the same way as it can internally.

The external competence of the Community has by this judgement developed to more or less being a parallel of its internal competencies, that is why the theory of implied powers also has been given the name “the parallel doctrine”. Whether the connotation “the parallel doctrine” is an adequate name of the theory of implied powers is unclear. It has been criticised by certain authors as not being correct¹⁰⁸, as the term parallel implies something that run parallel without ever meeting, which might not be the case between the external and internal competencies of the Community. Other authors, on the other hand, consider that parallelity is the proper definition when describing how the internal competencies of the Community relate to the external ones.¹⁰⁹ Since the connotation parallelity is debated but not the term implied powers, the latter will be used ongoing.

7.1.3.2 The exclusive external Competencies of the Community

The ERTA case did not only broaden the external competencies for the Community, but as well, which follows by its own logic, reduced the area in which the Member States are allowed to act. However, that reduction was of a rather dramatic scope, giving a quite wide area in which the Community would acquire an exclusive external competence just by acting once. This can be read out by the using of terms such as: “each time” and “whatever form these might take” when in the judgement referring to on which occasions and in what way, the Community was allowed to act externally.

¹⁰⁸ See for example Dashwood, Alan

¹⁰⁹ See for example Bernitz & Kjellgren. See also Bleckmann.

There was not only an obstacle for the Member States to enter into an international agreement that could affect Community measures, but they were also forbidden to take any international measures who could “affect those rules” or “alter their scope”.¹¹⁰

As will be examined later, the Court has, in other judgements, changed its mind on this point. Today the exclusive external competence of the Community is a rather rare phenomenon.

7.2 Development, a wider competence recognised for the Member States

In this chapter, several later cases and opinions will be described. By doing so, it will be shown in what way and how the theories of implied powers have been changed and modified after the ERTA-case. The material will be brought up in a chronological order, to demonstrate how the theory of implied and exclusive power has developed throughout the years.

7.2.1 Joined cases 3, 4 & 6/76 Kramer¹¹¹

The case relates to an international convention on fisheries, signed by six Member states. The legal question in the case concerned the Community’s external competencies to enter international commitments and to participate in the carrying out of decisions of an international organisation.

The case is of interest since it deals with the possibilities for the Community to enter into an international agreement even where no express Treaty provision confers that right on the Community. The lack of express treaty provisions made it compulsory for the Court to make reference to the above mentioned ERTA-case and its principles.¹¹²

The general treaty provision that in this case gave the Community an internal competence was article 3 (d) of the EC Treaty (now, after amendment, Article 3 EC). Article 3(d) recognises the authority for the Community to establish a common policy in the sphere of agriculture, of which fishing is a part. The Court confirmed the theory of implied powers by recognising the Community’s external competence in this specific case.

As the case was brought to the Court, the Community had not yet entered into any international agreement on the matter in question. Because of that the Court stated that as long as the Community has not yet entered into international agreement (although being competent to) the Member States are free to engage themselves in its international relations, as long as those engagements were compatible with the community law.

The Court emphasised that such powers were only of a transitional character. When and if the Community carries out actions within the sphere, the Member States had an obligation to use all the measures to ensure the participation of the Community in agreements that would affect the Community action. Moreover, the Court stated, that when entering into an

¹¹⁰ Case 22/70, *Commission v Council (ERTA)*. Para 17

¹¹¹ *Joined Cases 3, 4 & 6/76, Kramer*, 14 July 1976 ECR. 1279.

¹¹² See chapter 7.1.

agreement on fisheries, the Community has an exclusive external competence.

By this ruling, the Court made the wide scope of the Community's external exclusivity given in the ERTA case, to some extent, a more narrow definition.

After having set out the rules in the above-mentioned Kramer case, the Community is a member of several international organisations covering agriculture. In almost all of those organisations, the Community participates alone.¹¹³

Further on, it is interesting to note that in the Kramer case, the principles of the ERTA-case were quoted a second time. However, since then, the Court has only referred to the case when reaffirming the principles. It seems that it is now taken for granted that the principles of implied external competence are compatible with the fundamental principles of Community law.¹¹⁴

7.2.2 Opinion 1/76¹¹⁵

The opinion concerned an international agreement on navigation on the Rhine. Six Member States and one Non-member State, Switzerland concluded the agreement. The fact that Switzerland, a non-member State, was part of the agreement gave the agreement an international character.

The Community enjoyed the internal competence to regulate the matter, but had not yet used those powers. The Court had to answer whether implied external competence could arise in circumstances, other than where the corresponding internal competence had already been used. Could the agreement be negotiated and concluded by the Community on the basis of implied powers even if it had not used the internal express powers? Or were both Community and Member States competent, resulting in a so-called mixed agreement?

In the Kramer case, the Court held that the very existence, on an internal level, of express duties and powers, even if not yet used, was enough to give the Community competence to enter into international agreements. This principle was now repeated.

When the Court was demanded to give its opinion on the agreement, it started its judgement by referring to the ERTA-doctrine, confirming the theory of implied powers. The Court affirmed that implied powers were not limited to adopt measures within the common policy only.

The Court repeated that external powers could flow implicitly from measures adopted by the institutions as well from express provisions of the Treaty. That it is certainly the case when Community measures have already been adopted. However, it is not limited for those areas only. "The power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and

¹¹³ Macleod, etc. p. 186

¹¹⁴ Dashwood, Alan p. 117,

¹¹⁵ Opinion 1/76, (Re the Draft agreement for the laying up Fund for Inland Waterway vessels) 26 April 1977, ECR 741.

in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community.”¹¹⁶

The Court makes reference to article 228 of the EC Treaty (now, after amendment, article 300 EC) when examining the legal effects of the agreement. Participation of the six Member States does not, the Court states, infringe the external powers of the Community. Thus, that aspect of the agreement does not in itself make the agreement incompatible with the Treaty.

Since the action was to be seen as a common one, there could not be a complete exclusion of Member States from any participation in the agreement. Not even if that exclusion would be voluntary.

The Court bases its conclusions on the fact that Community participation in the agreement was “necessary for the attainment of one of the objectives of the Community”. The issue could not be solved throughout an internal measure, since the agreement necessary had to involve Switzerland, a non-member country, and thus the measure had to be an external one.

Moreover, this case is important because the Court expressly recognises the right for the Community to participate in the establishment of international organisations and to be a member of them.

7.2.3 Opinion 2/91¹¹⁷

7.2.3.1 The case

The Commission requested an opinion from the Court regarding the convention on the international labour organisation (ILO) concerning the safety of the use of chemicals at work. The Court had to decide whether or not the Community had competence to conclude such an agreement and, if so, whether that competence was exclusive.

Having already established the theory of implied powers in the above mentioned ERTA-case and following judgements, the Court had to consider whether the Community would have had the competencies to regulate the question if it were an internal regulation.

The Court states that “whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision”¹¹⁸

The agreement fell within the scope of “social provisions”. Thus, the Community would have had the internal authority to regulate the matter. From that it follows that if the external action would be necessary in order to attain the internal objective, the Community should also have the external authority.

¹¹⁶ Opinion 1/76, (Re the Draft agreement for the laying up Fund for Inland Waterway vessels), para. 4.

¹¹⁷ Opinion 2/91 on the Convention No 170 of the international Labour Organisation. 19 March 1993, ECR I-1061

¹¹⁸ Supra

However, it is not only important to see whether or not the Community enjoys an internal competence and if the external action would be necessary, but also to examine the ways in which the Community uses such competencies when regulating in the internal sphere.

According to article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), the Community enjoys an internal legislative competence in the area of social policy. However when the Community exercises its internal competence it does so by adopting so called minimum measures. The Court therefore states that, since the Community lets the Member States regulate such questions to a wide extent, when internal measures are to be adopted, there can be no question of an exclusive external competence.

7.2.3.2 Consequences of the case

According to the principle of subsidiarity, the Community regulates matters by minimum measures within a number of fields. The consequence of this judgement is a great decrease of exclusive external competence of the Community. There cannot be an exclusive external competence for the Community within areas such as social policy, consumer protection and environmental protection.

This opinion shows the importance that when deciding on issues about competence, it is essential to divide the matter into two questions. First, when examining a certain topic to ask whether the Community, either explicitly or implicitly, is competent to enter into an international agreement. When finding that an implicit competence exists, it has to be established from where that competence arises. The second question is whether (when found to exist) that competence is exclusive or to be shared with the Member states.¹¹⁹ To understand the doctrine of the external powers, it is very important to distinguish these two concepts.

The case also confirms that the ERTA principle is not restricted to instances where Community action has been enacted in areas where there is to be a common policy, such as agriculture, transport etc, but that it applies in all the areas corresponding to the objectives of the Treaty.¹²⁰

7.2.4 Opinion 1/94¹²¹

The Court was, once again, requested to give its opinion on whether or not the Community enjoyed an exclusive competence. More specifically, the opinion concerned the WTO agreement, where discussions arose concerning provisions introducing the right of establishment and on freedom to provide services. This opinion is the latest case upon which the more recognised doctrines have had the opportunity to give their comments, and after this opinion, the area of the Community's exclusive external competence has become even narrower.

¹¹⁹ The importance of these two questions also arises in the essay of Alan Dashwood.

¹²⁰ Dashwood, Alan p. 118

¹²¹ Opinion 1/94, on the WTO agreement, 14 November 1994, ECR I-5267.

The Commission maintained that if the Court would recognise a shared competence that could be a threat against the image of presenting the Community's unity towards the rest of the world. If the Community exclusively would be engaged in the agreement, that would be an appropriate way to point out the unity of the Community towards the rest of the world. This unity *vis à vis* the rest of the world is of such an importance, the Commission considered, that it could in itself serve as an argument for an exclusive competence of the Community.

The Court rejected that idea and stated that problems arising as a consequence of a non-uniform representation of the Community and its Member States internationally, could not in itself serve as an argument to recognise the exclusive competence of the Community.¹²² The demand for a unit representation can be solved in a more uncomplicated way, namely by reassuring and following the Courts demand for a close co-operation.

The Court confirmed that the Community does enjoy an exclusive competence within certain spheres, nevertheless, the Member States might also enjoy some competence. There is no exclusive competence for the Community on issues where the international action is not "necessary for the attainment of some internal Community objective".¹²³

The provisions establishing the right of establishment and on freedom to provide services are different from the provisions in the chapter on transport (as concerned in the opinion 1/76 for example). In opinion 1/76, the Community objective could not be achieved by internal Community legislation (since Switzerland was a member of the agreement), thus, in that case, external powers should be exercised, and could even become exclusive, even in the absence of internal legislation.

In this case however, the aims with the provisions concerning the right of establishment and the right to provide services do not have any specific internal market objectives. The provisions concern liberalisation for the nationals of the Member States of the agreement, not only the Member States of the Community.

The provisions cannot as such serve as a legal basis for adopting international legislation measures, having as objectives the liberalisation of establishment and services for nationals of third countries. Thus, such an agreement, whose aim is to facilitate the establishment and to provide services by nationals from third countries, cannot flow implicitly from the legal provisions in the Treaty.¹²⁴

There are provisions regulating the treatment of third country-nationals in Community directives, adopted under the chapters of the Treaty concerning establishment and services. This decision however, was based on the fact that in those directives the external provisions have the purpose to facilitate the establishment and services within the internal market, and the external provisions are designed to serve that purpose.¹²⁵

¹²² Opinion 1/94 on the WTO agreement.

¹²³ Here, the Court clearly repeats the important statement made in Opinion 1/76 (Re the Draft agreement for the laying up Fund for Inland Waterway vessels).

¹²⁴ Opinion 1/94 on the WTO agreement.

¹²⁵ Dashwood, Alan p. 122

This opinion modified the rules set out in opinion 1/76 in the following way: first, it is to determine whether there is an internal provision on which the Community may act. Secondly, to see whether the external action in question could contribute to achieve the objective set out in the internal provisions. If that were the case, there would be an implied power for the Community to act.

7.2.5 Opinion 2/92 ¹²⁶

The principles set out in opinion 1/76 and modified by opinion 1/94 were given a further clarification in opinion 2/92. It would seem that the principles set out in Opinion 1/76 are that an external measure can only be exclusive when the participation of a third State in a particular situation is necessary to enable the Community to fulfil its objectives.

7.2.5.1 Background

A request for an opinion was put for the Court, in accordance with article 228, from a number of Member States. This request was demanded as a consequence of the controversial so called “Third Decision”, an agreement that was to be adopted within the Organisation for Economic Co-operation and Development, OECD, which is the successor of the Organisation for European Economic Co-operation ('OEEC'). The agreement covered trade in services, and one of the main questions in the request for an opinion was whether or not the Community enjoyed competence, and if the answer was to be in the affirmative, on what legal grounds.

The Council proposed that the legal basis for the Community’s participation should be article 57 of the EC Treaty (now, after amendment, Article 47 EC) and article 113 of the EC Treaty (now, after amendment, article 133 EC). The Member States questioned this. If the Council’s proposition would be to be incorrect, they asked on what legal basis the Community could act, and whether that action should be exclusive, or jointly with the Member States. The Council considered that the possibility of a joint participation of the Community and its Member States in the Third Decision could not be called in question. According to the Council, the subject matter did not belong either to the exclusive competence of either the Community or the Member States.

The question is, regard being had to the earlier case law of the Court, ¹²⁷ whether it can be considered that the Third Decision is covered by one of the internal objectives of the Treaty and, whether that international action is necessary to achieve one of the internal objectives. ¹²⁸ Focus must be made on whether or not the adoption of the Third Decision can be considered as being necessary to achieve the common commercial market.

A discussion arose, whether the legal basis should be article 57 of the EC Treaty (now, after amendment article 47 EC), applying the theory of implied powers, or article 113 establishing the Common commercial policy.

¹²⁶ Opinion 2/92, (Re OECD national Treatment Instrument), 19 March 1993, ECR I-521

¹²⁷ See Case 22/70, Commission v Council (ERTA), Opinion 1/76, Opinion 2/91 and Opinion 1/94 above.

¹²⁸ Regard being had especially to Opinion 1/76.

For clarifying the interpretation on article 113 of the EC Treaty, the Court recalls that there are three main schools.

The extreme view, which does not have much support, is that article 113 is limited to trade in goods and, at most, to matters relating to such trade in goods. For those who take a middle course, it is possible to go beyond the strict framework of trade in goods, while adopting a selective approach with regard to the sectors covered, including services in particular. A third school of takes the view that Article 113 covers the Community's external economic relations in their entirety.

The majority of authors reject the minimalist argument in favour of the dynamic approach. However, there are some powerful arguments in favour for the addition of services in any form within the definitions of a common commercial policy. That would be consistent with the development of the concept of a common commercial policy at international level. Moreover, that solution would take into account the fact that, internally, every aspect of trade in services falls within the scope of the Community's competence. Accordingly, the situation is similar to that of the customs union, where the creation of the common market as regards the movement of goods called at once for a common trading arrangement vis-à-vis non-member countries.

7.2.5.2 Judgement of the Court

The Court starts by stating that the third decision on the national treatment rule concerns the conditions for the participation of foreign-controlled undertakings both in the internal economic life of the Community and of the Member States. The conditions in this co-operation satisfy the definitions of the common commercial policy, and are thus a subject of it.

So far as the participation of foreign-controlled undertakings in intra-Community trade is concerned, such trade is governed by the Community's internal market rules and not by the rules of its common commercial policy. The national treatment rule concerns not only international trade, but also internal trade. Thus, the theory that article 113 would be applicable must be rejected.

In Opinion 1/76,¹²⁹ the Court stated that the external competencies based on the Community's internal powers might be exercised, and thus become exclusive, without any internal legislation having first been adopted. However, that related to a situation where the conclusion of an international agreement was necessary in order to achieve Treaty objectives, which cannot be attained by the adoption of autonomous rules.¹³⁰ It is doubtless that such is not the case here, as this international agreement cannot be considered as “necessary”.

The principles set out in Opinion 1/76 are not applicable here, therefore the Court necessarily had to determine whether the matters covered by the Third Decision were already the subject of internal legislation.

Such internal legislation would have to contain provisions on the treatment to be accorded to foreign-controlled undertakings, or empowering

¹²⁹ Opinion 1/76, (Re the Draft agreement for the laying up Fund for Inland Waterway vessels).

¹³⁰ Opinion 1/94 on the WTO agreement, at para 85.

the institutions to negotiate with non-member countries, or effecting complete harmonisation of the rules governing the right affected. It follows from the case law of the Court that in those circumstances the Community enjoys exclusive competence to enter into international obligations.¹³¹

Although, in certain fields of activity to which the Third Decision relates, the Community has adopted measures capable of serving as a basis for an exclusive external competence, those measures do not cover all the activities to which the decision relates. From this follows that the Community is competent to participate in the Third Decision, but that its competence does not cover all the matters to which that decision relates. Therefore, the international action is to be shared with the Member States.

7.2.6 Opinion 2/94¹³²

The European Convention on Human Rights (the ECHR) was drafted in 1950 by most of the non-communistic countries in Europe. A number of supplements have been added through out the years. After the changes in Eastern Europe, some of the former socialist States joined the convention.

A request for an opinion was put to the Court concerning the accession by the Community to the ECHR. The Opinion concerned two questions, whether the Community was competent to enter the convention and whether the convention could be compatible with the EC-treaty.

The Court first announced that it did not enjoy the competence to give its opinion on the question whether the accession of the Community would be compatible with the provisions in the Treaty.

The Court referred to the principle of the attribution of powers, set out in article 3b of the EC Treaty (now Article 5 EC), which states that the Community can only act within the limits of the powers that have been conferred upon it in the Treaty. In the Treaty there are not any express provisions giving the Community the authority to enact rules on human rights issues or any provisions giving it the right to act internationally within this field. In accordance with the principle of attribution of powers, it could not be possible to engage the Community in an international convention for which its objectives are not designed. It should be born in mind that specific attribution is necessary both for international action and for internal action.¹³³

By stating that there are no internal rules that could give the Community external competence, the Court refers implicitly to the ERTA-principle. First, the Court admitted that there are no express external provisions, before examining and coming to the conclusion that there are no internal provisions either, that could have been read in conjunction with article 210 (now article 281 EC), and thus could create an external competence.

After having examined the lack of powers, the Court made reference to article 235 of the EC Treaty (now Article 308 EC), to analyse if that article

¹³¹ See, in particular, Opinion 2/91 and Opinion 1/94

¹³² Opinion 2/94 on the Community's accession to the European Convention on Human Rights, 28 March 1996, ECR 1759.

¹³³ Supra

could serve as a legal basis for accession of the Community. That article, which can be seen as a sort of “way out” for the Community when no Treaty provisions are applicable, has the purpose to serve as a part of the institutional system of conferred powers. However, that article cannot, the Court states, serve to give the Community new spheres in which it can act, when it does not have the competencies to do so. Having established this, the Court estimated that the Community could not enter the convention without going beyond article 235 of the EC Treaty (now Article 308 EC).

7.2.7 The Status of the European Convention on Human Rights in Community law

The importance of human rights has repeatedly been emphasised by different Member States and institutions of the Community. To be lawful, a Community act must respect human rights. In accordance with opinion 2/94,¹³⁴ the Community is not a member of the convention, however all the Member States of the Community are.

An important case as to the status of the convention in Community law is case 11/70, where the Court held that the respect of human rights “forms an integral part of the general principles of law protected by the Court of justice. The sources of those rights derives from the constitutional traditions of the Member States and the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.”¹³⁵

The Court does not deny that the importance of human rights within the Community, however, an accession to the ECHR would signify a substantial change for the institutions of the Community. In particular since, by signing the convention, the Community would accept and subordinate itself under a new international institutional system.

In the preamble of the Single European Act of 1986, respect for fundamental rights are expressly referred to.

Moreover, the Treaty on the European Union seems to repeat the important principles set out in the above mentioned cases. Article F (now article 6) states that:

- “1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.”

¹³⁴ Opinion 2/94 on the Community’s accession to the European Convention on Human Rights.

¹³⁵ Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel

Thus, there is no doubt that the ECHR enjoys a status in the Community, although not having the Community as a member.

8 The development of mixed agreements

8.1 General definitions

The development of mixed agreements can be seen as a consequence of the uncertain status of the Community.¹³⁶ The Community has got the authority to act internationally, albeit within certain limits and respecting that the Member States are still sovereign states with much of their international competencies kept, thus, agreements of a “mixed” nature occur on a regular basis.

No matter how they arise, there is a need for Member States and the Community to co-operate. The competencies are shared, or “mixed”, and that is why the agreement resulting from such competencies is called a “mixed agreement”, namely because it is *both* the Member State *and* the Community that participates in negotiations and adopting the agreement.

There has been such a constant use of this phenomenon, that the mixed agreements constitute an established part of Community law.¹³⁷

The mixed agreement presents a theoretical complex legal arrangement and the concept has been a subject for many theoretical discussions. Whether the problems they present are merely of a theoretical character or a practical is disputed.¹³⁸ Nevertheless, they form a regular and important part of the Community’s external relations and even though presenting theoretical difficulties, the carrying out of them has been rather successful and uncomplicated.

8.2 How mixed agreements arise

Mixed agreements can occur in a number of different situations. International agreements often regulate many topics, some of which the Member States might have competence, and some areas where the Community enjoy competence. There might also arise agreements in matters where the Community and the Member States share competence, as for example matters where the competence of the Community is not exclusive.

The Community might enjoy an exclusive competence on the matter covered by the agreement, but the organisation creating that agreement demands that every organisation that is a member of the convention must have an active participation of its member states. That is not the same arrangement as a mixed agreement, but more to be considered as an exercising of the Community’s competence through the Member States.

¹³⁶ Rosas, Allan “Mixed Union, Mixed Agreements”,

¹³⁷ Macleod, etc. p. 144.

¹³⁸ See Rosas, Allan “Mixed Union- Mixed agreements” etc.

Generally, all Member States participate when there is an agreement covering a topic where competence is shared. However, nothing prevents only some of the Member States from participating when an agreement only relates to issues concerning one or more Member States.¹³⁹

8.3 Mixed procedure and the duty of co-operation

The Court has recognised what is called a "mixed procedure", when competencies are shared. The Member States could negotiate and conclude the part of the agreement that covers objectives where they enjoy competence, and likewise, the Community's institutions could negotiate and conclude part of the agreement falling within their competence. However, it is of great importance that the Community and the Member States represent a unity in their international relations. This is necessary partly for the international recognition of the Community, partly as a consequence of article 5 of the EC Treaty (now article 10), which sets out a demand of loyalty from the Member States towards the Community as one of the fundamental principles in Community law. That is why the Court has emphasised the importance of a common action when entering into international commitments.¹⁴⁰ The demand for close co-operation applies when negotiating, concluding and implementing mixed agreements.¹⁴¹

The duty of representing a unity and to co-operate has become one of the fundamental principles in the external relations of the Community and this requirement cannot be excessively stressed

8.4 Opinion 1/78 on the Rubber laying-up fund¹⁴²

8.4.1 Background

In accordance with negotiations within the framework of a UN organisation, an agreement on prices of natural rubber (the aim being to keep prices of natural rubber on a reasonable level by creating a "rubber stock"), was to be adopted.¹⁴³

A request for an opinion was made to the Court. The opinion concerned two main issues, whether or not the agreement was compatible with Community law, and if the first were to be replied affirmatively, whether the

¹³⁹ Opinion 1/76, on the Inland Waterway vessels was an international agreement that only concerned six of the Member States.

¹⁴⁰ See below, Opinion 1/78.

¹⁴¹ Macleod, etc. s. 147.

¹⁴² Opinion 1/78 on the International Agreement on Natural Rubber, 4 October 1979. ECR 2871.

¹⁴³ The agreement on natural rubber, subject of negotiations in the United Nations Conference on Trade and Development (UNCTAD).

Community would have an exclusive competence to conclude the agreement.

With this case, the Court emphasised for the first time, in the context of mixed agreements, the importance and duty of co-operation between the institutions of the Community and the Member States. It is this duty of co-operation and the question of exclusive or shared competence that is of a specific interest for this essay.

Whether or not the Community enjoyed the competence to conclude the agreement was never questioned, since the agreement was covered by the common commercial policy set out in article 113 of the EC Treaty (now, after amendment, Article 133 EC) where the Community enjoys an express external competence, that is also exclusive.

The Commission claimed that the topic of the agreement was, in all senses, covered by the common commercial policy and, as a consequence of that, the Community should have the exclusive competence to negotiate and conclude the agreement.

The Council, on the other hand, considered that, since the subject of the agreement would partly fall outside the definitions of a common commercial policy, the agreement should be negotiated and concluded by both the Community and the Member States.

An arrangement had already been made beforehand if questions on the competencies would arise. According to that arrangement, 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 co-ordination of the actions of each.¹⁴⁴

8.4.2 Opinion of the Court

The Court confirmed the Commissions statement, that the installation of a natural rubber stock as such, was covered by the definitions of the common commercial policy. However, when the question was brought before the Court, negotiations on the agreement were yet not brought to an end. It had not been decided if it was the Member States or the Community that would be responsible for the financial burden.

The financing of this project was, the Court stated, an essential feature of the scheme for regulating the market. Having not yet decided whether it was the Member States or the Community that should be responsible for the financing, the Court could not decide whether the Community enjoyed an exclusive competence or not.¹⁴⁵

If the Member States were to be responsible for financing the project, there could not be an exclusion of them either from negotiations, or from conclusion of the agreement. Thus the financing of the stock would decide whether it would be a matter exclusively for the Community, or a mixed agreement. Since that question was yet not answered, the Member States could not be excluded from negotiations.

¹⁴⁴ Opinion 1/78 on the International Agreement on Natural Rubber. Para 34

¹⁴⁵ *Supra*

Thus, despite the fact that an agreement falls within the scope of article 113 of the EC Treaty (now, after amendment, Article 133EC), an article that expressly recognises the exclusive competence of the Community, that does not in itself exclude the possibility of a shared competence. This might be so, even if the subject matter falls completely within the definitions of that article.

8.5 The duty of co-operation as a fundamental principle in Community law: later Case-law

Most agreements entered by the Community on the international level, concern subjects where the Community and the Member States share competence. When there are shared competencies between the Community and the Member States, no matter how those shared competencies arise, there is a strong demand for a well working co-operation, and a unit representation in the relations with third countries and international organisations.

The Court has repeatedly recalled the important principle of co-operation and a requirement of a unit representation in the international representation of the Community.¹⁴⁶ The Community institutions and the Member States must take all necessary steps to ensure the best possible co-operation in that regard.¹⁴⁷

This co-operation might cause difficulties, as to the time of implementing an international agreement. In practice, the Community concludes a mixed agreement only after all the Member States have ratified it. Member States might be slow in the process ratification and as a consequence thereof, it may take years before the agreement enters into force, causing not only problems for the Community but also for the third parties.¹⁴⁸

8.5.1 The FAO fisheries agreement¹⁴⁹

8.5.1.1 Background

In case 25/94, the Court had to consider whether it was the Community or the Member States that were to vote in the United Nations Food and Agriculture Organisation (here after called the Organisation, FAO). The FAO had approved the Community as a member, alongside its Member States.

¹⁴⁶ Opinion 1/78, paragraphs 34 to 36, Opinion 2/91, paragraph 36, and Opinion 1/94, paragraph 108.

¹⁴⁷ Case 25/94, *Commission of the European Communities v Council of the European Union*, para 46, below. See also Opinion 2/91, 19 March 1993, paragraph 38, above.

¹⁴⁸ An illustrating example being the agreement on customs union and co-operation with San Marino, taking more than five years from the first ratification until the last, see further: Allan Rosas, "Mixed Union, Mixed Agreements",

¹⁴⁹ Case 25/94, *Commission of the European Communities v Council of the European Union*, 19 March 1996.

As an agreement concerning measures in fishing was to be adopted, the question arose who was competent to vote, the Member States individually or the Community in the place of the Member States.

The General Rules of the FAO contained a system of alternative exercise between the Member Organisation and its own Member States, giving both the right to act within areas that belonged to them, and in case of a shared competence, the process to adopt a measure in unity.

For the purpose of achieving a well working co-operation, the Community and the Member States set out an arrangement, stating that in the case of mixed competencies the aim was to achieve a common position by consensus. In areas for which the Community had exclusive competence, the Community voted. Likewise, the Member States were to vote in areas where they were found to enjoy an exclusive competence.

Instead of taking into consideration the character of the agreement, the COREPER decided, in accordance with the above-mentioned arrangement that the Member States should vote. The Commission contested this on the ground that the Community enjoys an exclusive competence in all matters concerning fisheries, particularly on agreements aimed at protecting fishing grounds and conserving the biological resources of the sea. This agreement related to measures in fishing, and therefore, the Commission stated, the Community could not be excluded from the adoption of the agreement.

The Commission proposed to the Council that the shared-competence formula should be used for the adoption of the agreement. It nonetheless proposed a vote by the Community, since the thrust of the agreement fell within the area of conservation and management of fishery resources, for which the Community had competence.¹⁵⁰

8.5.1.2 Judgement of the Court

The Court made reference to the Kramer case,¹⁵¹ confirming that the Community enjoys the internal competence to take any measure for the conservation of the biological resources of the sea, and that it has the authority to act internationally to achieve that objective.¹⁵²

The Court emphasised the importance of a close co-operation. Since the subject matter of the agreement fell partly within the competence of the Community and partly within that of its Member States, it was essential to ensure a close co-operation between the Member States and the Community. This demand of co-operation applies both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.

8.5.2 Opinion 2/2000¹⁵³

In this recent case, the Court once more brought up the importance of a close co-operation between the Member States and the Community in the

¹⁵⁰ Case 25/94, Commission of the European Communities v Council of the European Union, Para 9.

¹⁵¹ Joined Cases 3-4,6/76, Kramer and Others, see chapter 7.2.1. above.

¹⁵² Case 25/94, Commission of the European Communities v Council of the European Union, para 41-42.

¹⁵³ Opinion 2/2000, 6 december 2001.

event of mixed competencies. The Court recalled that the fact that mixed competencies might lead to difficulties cannot in itself serve as a basis for recognising an exclusive competence for the Community.

A request for an opinion was made due to an adoption of a protocol within the framework of the international convention on biological diversity (hereinafter “the Convention”). The Convention was signed by both the Community and the Member States in 1992 within the framework of the United Nations conference on Environment and Development, “the Earth Summit”. The adoption of the Convention was made on the basis of article 175 EC (Earlier, article 130 s of the EC Treaty).

Like in the United Nations Food and Agriculture Organisation,¹⁵⁴ the convention set out provisions concerning how competencies were to be exercised between Member States and the Community.

Within the framework of the organisation, an adoption was to be made of a protocol on bio-safety (the Protocol), specifically focusing on transboundary movement of any living organism.

8.5.2.1 Background

8.5.2.1.1 The Commission

The Commission considered that article 133 EC (former article 113 of the EC Treaty) would constitute an appropriate legal basis on which adoption of the agreement should be made. The Community enjoys an exclusive external competence on matters covering the common commercial policy, and, by admitting a conclusion on that basis, difficulties connected with the exercise of mixed competencies could be avoided.

If the Court should not accept such a solution, the Commission suggested, as an alternative, that the legal basis should be article 133, read in conjunction with article 174 EC (former article 130r of the EC Treaty). The Commission requested the Court for an opinion on two questions:

- (1) Do Articles 133 and 174(4), in conjunction with the relevant provisions of Article 300 of the EC Treaty, constitute the appropriate legal basis for the act concluding the protocol, on behalf of the European Community?
- (2) If the reply to the first question is in the affirmative, are the powers that the Member States retain in matters of environmental protection - and which might justify their participation in the protocol - residual powers in relation to the preponderant competence held by the Community to enter into international commitments regarding the matters dealt with by the Protocol?

The Commission considered that even though the Protocol contains provisions, which are covered by the environmental policy, it essentially falls within the definitions of the common commercial policy. Since the Court repeatedly has given the common commercial policy a broad interpretation,¹⁵⁵ it is reasonable to consider that a protocol, although having objectives with no primarily commercial aims, does not in itself exclude the Community to act on an exclusive basis under article 133 of the Treaty.

¹⁵⁴ See case 25/94, *Commission of the European Communities v Council of the European Union*, chapter 8.5.1, above.

¹⁵⁵ Opinion 1/78 on the International Agreement on Natural

If the Court considers that an adoption of the protocol is impossible only under article 133, the Commission considers that in so far as the protocol concerns environmental protection, the Community's competence is preponderant in relation to the powers of the Member States. Thus, the Community alone should conclude those parts of the protocol under article 174 EC.

The Commission further on bases its argument on article 6 EC, which states that environmental protection requirements must be integrated into the definitions and implementations of the policies, and activities referred to in article 3 EC. There has been a consistent practice on integrating non-commercial concerns into the Community's economic and commercial policy. The Commission recalls that non-commercial considerations have been recognised and integrated in the WTO, on which the Court has recognised the Community's exclusive competence under article 133 EC (former article 113 of the EC Treaty).¹⁵⁶

The Court has in earlier cases held that article 133 EC has been an appropriate legal basis for adoption of agreements relating to international trade in goods, that is, irrespective of the correct legal basis for that adoption giving effects to such commitments. For example, internal measures adopted after international commitments entered into under article 113 of the EC Treaty (now, after amendment, article 133 EC) concerning agriculture are based on article 43 of the EC Treaty (now after amendment article 37 EC).¹⁵⁷

In conclusion, the Commission requests the Court to give affirmative answers to both questions asked by it.

8.5.2.1.2 The Member States and the Council

Several Member States¹⁵⁸ and the Council participated with written observations. Since the observations from the Council and Member States were rather of the same content, they will be explained together.

The Member States and the Council consider that the principal objective of the protocol is of an environmental character and not commercial, which excludes the possibility for using article 133 EC as a legal basis. The French government recalls that recourse to article 133 EC should only be made if the agreement relates inseparably to environmental objectives and promotion of international trade, which is not the case here.

The Member States and the Council points out that when deciding the legal basis for adoption of an international instrument, consideration should be taken to objective factors such as the aim and content of the measure. The fact that an environmental agreement possesses certain commercial elements does not in itself transform that agreement into a commercial one.

The Italian government recalls the principles set out in the Vienna Convention of 1969 on the Law of Treaties. If applying that convention, the protocol is to be considered as an environmental protocol, and shall thus be

¹⁵⁶ Opinion 1/94 on the WTO agreement.

¹⁵⁷ *Supra*, paragraph 29

¹⁵⁸ More precisely, the Danish, Greek, Italian, United Kingdom, Spanish, French and Austrian governments submitted their opinions.

adopted on articles referring to environmental provisions. As the Greek government points out, the agreement would have been adopted within the framework of the WTO and not within this convention, were its aim commercial. The Austrian government considers that the Commission's reference to the GATT agreement is irrelevant. The GATT agreement is clearly a trade agreement and the environmental provisions set out under that agreement are only derogating provisions.

The Member States and the Council recognises that the Court has given the term common commercial policy a rather wide field of application in its case law. However, that has been done when agreements have concerned issues intended to promote or facilitate trade and does not justify adoption of international agreements, whose objectives are environmental, just because they affect trade.

The Member States and the council reject the idea that the Community's competence within the field of environment is of a preponderant character. Such a statement would undermine the well-established practice of mixed competencies, which is of a great importance when exercising the division of powers between the Community and the Member States. The United Kingdom government points out that, according to the principles set out in the ERTA judgement "in foro interno, in foro externo"¹⁵⁹ it is impossible to establish preponderant, let alone exclusive, Community competence to conclude the Protocol.

Moreover, the Member States and the Council emphasises that difficulties in adopting a measure cannot in itself create an exclusive competence for the Community. That is not only an incorrect way of applying Community law, but would also, as a consequence, cause exclusive Community competence for all actions based on Treaty provisions.

Both articles 174 and 175 EC concern action by the Community relating to the environment. However, unlike the Commission, most Member States and the Council consider that the protocol should be adopted on article 175 EC alone. Article 174 only establishes the objectives and principles of the Community's environmental policy, but does not create any competence of its own. Further on, the competencies are shared, and thus the protocol will constitute a mixed agreement.

8.5.2.1.3 The Parliament

The Parliament makes reference to the Vienna Convention, article 31. When deciding the legal basis for the protocol, consideration shall be taken to the convention under which the protocol is adopted. That convention was adopted under article 175, which is an incitement that the protocol also should be adopted under that provision.

The Parliament recalls the case law of the Court, and that the scope of the common commercial policy is restricted by "the overall scheme of the Treaty, and in particular by the existence of more specific provisions governing the Community's powers in other areas".¹⁶⁰ It is apparent that the protocol relates specifically to environmental protection and not

¹⁵⁹ Case 22/70, Commission v Council (ERTA), 22 October 1971, ECR 263.

¹⁶⁰ Opinion 1/94 on the WTO agreement 15 November, para 42

international trade. Thus adopting the measure on article 175 does not deprive article 133 from its substance.

Like the Member States, the Parliament emphasises that although difficulties can arise relating to the division of competence, that cannot have any influence on the choice of legal basis.

However, as a difference from the Member States, the parliament states that in so far as the Protocol's effects on international trade go beyond the scope of Article 175(1) EC, it would be appropriate to add a reference to Article 133 EC.

8.5.2.2 The judgement

The Court starts its judgement by emphasising that when an agreement falls partly within the competence of the Member States and of the Community, it is of great importance that the co-operation between the Community and its Member States is working well.

It is settled case law that the choice of legal basis for adopting a measure does not follow from its author's conviction alone. On the contrary, such choice must be based on objective factors such as the aim and the content of the measure.¹⁶¹ If a measure should contain a twofold purpose, and if one of them is identifiable as the main or predominant one, the measure must be founded on a single legal basis, namely that required by the main purpose. On the other hand, if the purposes in the agreement are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases.

The basic principles on interpreting an international agreement are set up in the Vienna Convention on the law of treaties. Article 31 states that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The Convention behind the Protocol was concluded on the basis of article 175 EC, as an instrument falling within the field of environmental protection. The convention is a result of the United Nations conference on environment and development (UNCED) and its objectives are "the conservation of biological diversity." Article 1 of the protocol refers to the Rio declaration on environment and development, and that it pursues an environmental objective, mentioning the precautionary principle, which is a fundamental principle of environmental protection, referred to in article 174 (2) EC.

The conclusion must be, regard being had to the aim, context and content of the protocol that its main purpose or component is the protection of biological diversity.

The Court does not deny that the common commercial policy has been given a broad interpretation. However, it is clear from the context, aim and content that the protocol is intended essentially to improve bio-safety and not to promote, facilitate or govern trade.

¹⁶¹ Opinion 2/2000, 6 december 2001. Paragraph 22

The Court recalls that difficulties associated with the implementation of mixed agreements cannot be accepted as relevant when selecting the legal basis for a Community measure.¹⁶²

Moreover, article 174 EC defines the objectives to be pursued in the context of environmental policy, while article 175 EC constitutes the legal basis on which Community measures are adopted, and thus constitutes the proper legal basis on which adoption of the protocol should be taken. Harmonisation is achieved at Community level on environmental policy, however since that only covers a small part of the field covered by the protocol, the competence should be shared between the Member States and the Community.¹⁶³

8.6 Consequences of mixed competencies

The most striking consequence of mixed competencies is, as the Court emphasised in the foregoing cases, the absolute demand to represent a unity towards the contracting parties.

8.6.1 Case 316/91 Parliament v Council¹⁶⁴

The European Parliament brought an action for the annulment of a regulation made within the framework of development finance co-operation under the Fourth ACP-EEC Lomé Convention. This convention was concluded by the Community and its Member States of the one part and the ACP States of the other part. By the agreement, the Member States established a seventh European Development Fund (1990, hereinafter the "EDF").

Before considering the question of annulment, the Court had to examine two questions. Who had entered into a commitment vis-à-vis the ACP States? Was it for the Community or its Member States to perform the commitment entered into?

The answer to the first question would depend not only on the convention, but also on how the powers are distributed between the Community and its Member States in the relevant field. The answer to the second question was depending on how those powers were distributed.

As to the distribution of powers between the Community and its Member States in the field of development aid, which this convention concerned, the Court stated that the Community's competence in that field is not exclusive.¹⁶⁵ The consequence of this is that the Member States are entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community. The support for this conclusion can be found in article 130x of the EC Treaty (now Article 180 EC), which expressly demands the Community and its

¹⁶² Opinion 2/ 2000 para 41.

¹⁶³ All in accordance with the principles set out in the ERTA case: Case 22/70, Commission v Council (ERTA) chapter 7.1.

¹⁶⁴ Case 316/91, European Parliament v Council of the European Union, 2 March 1994, ECR I-653.

¹⁶⁵ *Supra*, para 26.

Member States to co-ordinate their policies, consult each other and to undertake joint action within the area of development aid.

Both the Community and the Member States concluded the disputed convention with the ACP States. Thus they are both jointly liable for the fulfilment of every obligation arising from the commitments belonging to the convention.

Since the competence is shared, the Member States are entitled to exercise their competence in the field. From this, the Court states, it follows that the answer on the second question should be that competence to implement the financial assistance (as was disputed here) is shared between the Community and its Member States.

8.7 Should mixed agreements be avoided?

Although frequently used, the number of judgements from the Court reveals that there are still unsolved problems as to the practice of the mixed agreements. Mixed agreements are inevitable in certain areas. Nevertheless, when found to exist, in comparison with areas where the Community enjoys an exclusive competence, it is not rare that the process of adopting measures works slowly. For a more efficient working, it might be desirable that the Community would adopt international agreements without the participation of the Member States.

Mixed agreements could be seen as a consequence of the legal status of the Community. According to the principle of attribution of powers, the Community only has those powers that have been conferred on it. The Community can not act on a sole basis where it does not enjoy an exclusive competence, but must, as long as the Member States remain sovereign states, co-operate with those Member States. It is a fact that the Community is not a super state. As long as the Community remains an international organisation and the Member States remain sovereign states, there will not be an acceptance for the Community to act alone where it does not enjoy the competence, not from the Member States or from third parties contracting with the Community.

Most international agreements adopted today cover a wide range of topics, and although the competence of the Community is large, it is almost impossible that the entire agreement will fall within the scope of the Community's exclusive competence.

If mixed agreements could be avoided, that would have to be through co-operation with the Member States, ceding their competencies. Seeing that Member States have often been unwilling to do so, it might be unreasonable, if not impossible, to avoid mixed agreements as such. Although theoretically possible¹⁶⁶ it might be practically difficult, seeing the struggle of power between Member States and the Community frequently present in practice.

¹⁶⁶ An interesting discussion in the essay by Allan Rosas, "Mixed Union, Mixed Agreements",

9 Going from exclusive to shared competence, how the theory of implied powers has changed

To understand the development of the theory of implied powers, a careful examination of the Court's case law has been made in the previous chapters. However, as those chapters cover many cases and even more explanations on subjects which might be of secondary importance, a brief summary is suitable before further examining the subject.

9.1 The theory of implied powers

The most remarkable issue about the development of the implied powers is the development of the consequences, i.e. the conditions under which they result in an exclusive competence or not. This will be examined in the chapter below.

It might be inappropriate to say that the implied powers in themselves have developed, however this chapter will show how this theory has been modified.

9.1.1 The ERTA case¹⁶⁷

This was the first judgement where the Court recognised the implied external competencies of the Community. The Court used an interpretation focusing on the aim behind the Treaty rather than a literal approach of the provisions. The conclusion was that the Community did enjoy an external competence, based on a conjunct reading of article 210 of the EC Treaty (now Article 281 EC), providing that "The Community shall have a legal personality", and the general provisions set out in the Treaty, chapter one. Thus, wherever the Community, according to Treaty provisions, enjoys the authority to regulate certain issues on the internal level, it also enjoys an external competence to do so.

Moreover, the Court did not only limit this right to the express Treaty provisions, but the whole scheme of the Treaty could underlie and result in an external competence of the Community. Thus measures adopted by the Community within the treaty's internal sphere can serve as a basis for the Community's authority to enter into international commitments.

¹⁶⁷ Case 22/70, Commission v Council (ERTA).

9.1.2 The Kramer Case ¹⁶⁸

Even though the importance of this case lays in the changes it made to the exclusive implied powers, it warrants a mention in this chapter, since it was the first time that the Court used the theory of implied powers, after having introduced them in the ERTA case.

There were no express Treaty provisions authorising the Community to act. Nevertheless, the Community could, on the basis of the implied powers, find a legal ground on which it could act internationally. By doing so, the Court affirmed that the theory of the implied powers was now a principle of Community law.

9.1.3 Opinion 1/76 ¹⁶⁹

The importance of this case is that the Court affirms that external implied powers do not only arise where there has been an internal adoption of provisions. External competencies can arise even where the corresponding internal competence had not yet been used. Thus the Community can act internationally, albeit not having adopted internal measures yet. This could lead to an exclusive action from the Community each time that the international action is necessary for achieving the objectives set out in the Treaty.

This is even more the case when, as it was here, the regulation could not be made without the participation of a third country.

9.2 Development of the implied powers, from exclusive to shared

9.2.1 The ERTA case ¹⁷⁰

In the famous ERTA case, where the Court for the first time explained the "new" competencies of the Community, those competencies were exclusive in a quite broad aspect. By drawing the conclusion that article 210 of the EC Treaty should be read in conjunction with the objectives set out in part one of the Treaty (of which transport is one) the Court judged that the Community had the competence to act internationally.

However, the Court took a quite radical standpoint when it stated that the Community, by acting upon its competencies, would receive an exclusive competence, depriving the Member States from their powers to act. Thus each time that the Community "with a view to implementing a common policy" would adopt provisions, the Member States would no longer have the right to undertake any obligations, which could affect those rules.

¹⁶⁸ Joined Cases 3, 4 & 6/76, Kramer, 14 July 1976, ECR. 1279

¹⁶⁹ Opinion 1/76, (Re the Draft agreement for the laying up Fund for Inland Waterway vessels), 26 April 1977, ECR 741.

¹⁷⁰ Case 22/70, Commission v Council (ERTA), 31 March 1971, ECR 263.

9.2.2 The Kramer Case ¹⁷¹

Being the first case after which the Court had stated the important theory of implied powers, this case immediately changed some of the consequences from the ERTA-case.

The Court confirms the theories of the implied powers, but continues by stating that as long as the Community has not yet entered into international agreement that it is competent to enter, the Member states are free to engage themselves in international relations. The only condition is that those engagements are compatible with Community law.

Although that power is only of a transitional character, it was somewhat recognised that the Member States still remained competent. When and if the Community would carry out actions, the Member States had an obligation to use all measures to ensure the participation of the Community in agreements that would affect the Community action.

9.2.3 Opinion 1/78 ¹⁷²

The international agreement concerned the installation of a “rubber stock”, something that was undoubtedly within the definitions of a common commercial policy, set out in article 113 of the EC Treaty (now, after amendment, article 133 EC). International commitments entered within the common commercial policy fall within the exclusive competence of the Community.

Nevertheless, the Court stated that since the financing question was not solved and was of such importance, the agreement should be negotiated, and concluded on a shared basis. Thus, it seems like even within areas where the Community expressly enjoys an exclusive competence, those provisions in themselves are still not enough to, under all circumstances, give it that exclusive competence. This might be so, even if the subject matter of the agreement falls completely within the definitions of that article.

9.2.4 Opinion 2/91 ¹⁷³

The opinion was made owing to question on competencies for the Community to participate in the international labour organisation. In accordance with the ERTA-principle, the Court considered that the Community enjoyed competence since the social provisions constitute one of the internal objectives of the Community. ¹⁷⁴

When examining the possibilities for that competence to be exclusive, however, the Community stated the important principle that regard must be had to the ways in which the Community legislates issues on the subject in the internal sphere.

¹⁷¹ Joined Cases 3, 4 & 6/76, Kramer, 14 July 1976, ECR. 1279

¹⁷² Opinion 1/78 on the International Agreement on Natural Rubber, 4 October 1979. ECR 2871.

¹⁷³ Opinion 2/91, on the Convention No 170 of the international Labour Organisation, 19 March 1993, ECR I-1061

¹⁷⁴ Set out in case 22/70, Commission v Council (ERTA), 31 March 1971, ECR 263

Since the Community consistently has regulated social provisions with minimum measures, leaving the choice to the Member States to decide the appropriate level on provisions, an exclusive external competence was excluded. When adopting measures on the internal level in a way that can be considered as not exclusive, an external exclusive competence is as such impossible.

From this, the conclusion can be drawn that the Community will have to share their external competencies with its Member States in a number of areas, since minimum measures are of regular use within many fields.

9.2.5 Opinion 1/94 ¹⁷⁵

This opinion concerned provisions introducing the right of establishment and on freedom to provide services in accordance with the WTO agreement and is another case that has decreased the area of the Community's exclusive external competence.

Instead of accepting the idea proposed by the Commission, that the Community should act alone in order to establish the Community as a credible actor in international law, the Court emphasised that problems arising as a consequence of a non-uniform representation of the Community and its Member States internationally, can never serve as an argument to recognise the exclusive competence of the Community.¹⁷⁶

The Court then stated that even though the Community enjoys an exclusive competence within certain fields, such is not the case when an international action is not "necessary for the attainment of some internal Community objective".¹⁷⁷ Although provisions concerning the right of establishment as such find specific internal market objectives, this agreement included the establishment of nationals from non-member states. Therefore, there could not be an exclusive competence of the Community.

This opinion has modified opinion 1/76 in the following way: first, it is to determine whether there is an internal provision on which the Community may act. Secondly, to see whether the external action in question could contribute to achieve the objective set out in the internal provisions. If that is the case, there can be an implied power for the Community to act, and such action can become exclusive.

9.2.6 Opinion 2/92 ¹⁷⁸

This opinion made it clear that external competence can only be exclusive when the participation of a third State in a particular situation is necessary to enable the Community to fulfil its objectives. The importance of this opinion is not that it developed the consequences of the implied powers, but that it confirms the statements set out in opinion 1/76 and opinion 1/94.

¹⁷⁵ Opinion 1/94, on the WTO agreement, 14 November 1994, ECR I-5267.

¹⁷⁶ *Supra*.

¹⁷⁷ See also Opinion 1/76 (Re the Draft agreement for the laying up Fund for Inland Waterway vessels) 26 April 1977, ECR 741.

¹⁷⁸ Opinion 2/92, (Re OECD national Treatment Instrument), 19 March 1993, ECR I-521

9.2.7 Opinion 2/94¹⁷⁹

This opinion concerned the possibilities for the Community to sign of the European Convention on Human Rights (ECHR). Although not being of a great importance when reviewing the theory of implied powers and mixed competencies, the Court nevertheless repeated the principles set out in opinion 1/76.¹⁸⁰ It did so by stating that the external competencies of the Community were not exclusive when and if the international action was not “necessary for the attainment of internal Community objectives”.

¹⁷⁹ Opinion 2/94 on the Community’s accession to the European Convention on Human Rights, 28 March 1996, ECR 1759.

¹⁸⁰ Opinion 1/76, (Re the Draft agreement for the laying up Fund for Inland Waterway vessels).

10 Exclusive competence - does it still exist?

The case law of the Court has developed and modified the external competencies of the Community. Mixed competencies, resulting in mixed agreements, are today more of a rule than an exception. In the ERTA case, the Court stated that when the Community was found to enjoy an external competence, that competence was exclusive.¹⁸¹ By later case law, that statement has been modified. The question still remain, does the rule set out in the ERTA case apply under any conditions today? This chapter will not only line up examples of areas in which the Community still enjoys an exclusive competence, but also the consequences thereof.

In Opinion 2/91 the Court stated the following principle: "The exclusive or non-exclusive nature of the Community's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transnational basis."¹⁸² The importance was not only what the Treaty provisions state, but also how the Community uses those competencies to regulate the internal market.

What are the consequences of this and other statements made by the Court? Are there any rules to decide when the competence is exclusive for the Community?

Briefly, the exclusive competence of the Community can be summarised in four groups: Where Treaty provisions confer an exclusive competence, where measures have been adopted from Community institutions, where exclusivity can flow from an internal provision and where exclusivity results as a pure necessity.

10.1 Treaty provisions conferring an exclusive external competence

Certain Treaty articles conferring competence to the Community expressly state that the competence should be exclusive. In the EC Treaty, the express external provisions are of an exclusive character. Those provisions are the common commercial policy, fisheries and the articles on competition.

10.1.1 The Common Commercial Policy

The provisions for the common commercial policy are set out in article 113 the EC Treaty, (now, after amendment, article 133 EC). The Court

¹⁸¹ Case 22/70 Commission v Council (ERTA)

¹⁸² Opinion 2/91 on the Convention No 170 of the international Labour Organisation. Para. 9.

stated in the Opinion 1/75 that the policy envisaged in that article was created for the operation of the Common Market and the defence of the common interests of the Community.¹⁸³ This conception behind the article made it impossible, according to the Court, for the Member States to act within the same sphere internationally. Moreover, the Court stated that: “The provisions of articles 113 (now, after amendment, Article 133 EC) and 114, concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible.”¹⁸⁴

However, in Opinion 1/78,¹⁸⁵ the Court did, although the agreement was covered by the common commercial policy, state that a participation of the Member States was not excluded. It should also be born in mind that many international acts cover wide areas. Thus, there could be question of shared competencies on agreements that mainly are covered by the common commercial policy, simply because they also contain certain provisions which can not be considered to be covered by the Community’s exclusive competence.

10.1.2 Fisheries

The Court has drawn the same conclusion concerning fisheries as they did concerning the common commercial policy. This was made in the case *Commission v UK*.¹⁸⁶ The Treaty gives the Community the competence to establish an agricultural policy. The internal legislation has been completely adopted, i.e. the legislation concerning fisheries has become a topic in which the Community provisions exclusively rule. It could hence be emphasised that the Community enjoys an exclusive competence on the internal level on this subject.

The Community enjoys an exclusive external competence as to measures relating to the conservation of the resources of the sea. This theory is being recalled in Case 25/94, where the Court states that: “It is settled law that ... the Community has authority to enter into international commitments for the conservation of the resources of the sea” and “the Community stated that it had exclusive competence in all matters concerning fisheries which are aimed at protecting fishing grounds and conserving the biological resources of the sea”.¹⁸⁷

10.1.3 Competition

Regarding competition, the Community’s competence is probably exclusive.¹⁸⁸ This is the case, at least as regards matters falling within

¹⁸³ Opinion 1/75, 11 November 1975, ECR 1355

¹⁸⁴ *Supra*

¹⁸⁵ Opinion 1/78, on the International Agreement on Natural Rubber. 4 October 1979, ECR 2871

¹⁸⁶ Case 804/79, *Commission v UK*.

¹⁸⁷ Case 25/94, *Commission v Council*.

¹⁸⁸ Macleod, etc. p. 57.

articles 85 to 90 EC (now articles 81-86 EC) relating to the exclusive regulatory powers of the Community in these matters.

10.2 Measures adopted by the Community institutions

The ERTA principle, conferring to the Community an exclusive external competence in a very broad sense, has been discussed, and later modified by case law.¹⁸⁹ The idea behind the principle was that the Community law would be seriously threatened if the Member States could enter into international agreements and thus undermine the rules by the Community.

The idea behind the principle, that when and where the Community enjoys competence, that competence is exclusive, can be seen as another expression for the supremacy of Community law.¹⁹⁰ Thus wherever internal Community law exists, Member States will be affected by that legislation even in their ability to enter international agreements. As has already been emphasised, that idea is no longer convincing. Nevertheless, to some extent, measures adopted by Community institutions can result in exclusivity of the Community.

If the Community, internally, completely has regulated an objective, so that there is no possibility for the Member States to take legislative action, the Community also has an exclusive external competence. This is how the fisheries have become an exclusive competence for the Community. An external action from the Member States would, if realised, clearly be contrary to article 5 of the EC treaty (now article 10 EC), which demands a loyalty from the Member States.

According to the Opinion 2/91 the Community might enjoy an exclusive competence even where legislative measures are not being exhaustive.¹⁹¹ This is so if Community legislation is covering the topic to a large extent, when the view is to achieve a larger degree of harmonisation.¹⁹² This principle is however to be read with precaution, since even if internal measures have been adopted, that does not exclude the possibility for the Member States to act as long as it is not contrary to Community law.

10.3 Exclusivity from an internal express provision

Many measures adopted by the Community (such as within the area of financial services) also confer the Community to enter international agreements.¹⁹³ In Opinion 1/94, the Court stated that "Whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals non-member countries or expressly conferred on

¹⁸⁹ See chapters above.

¹⁹⁰ See: Macleod, etc. p. 58.

¹⁹¹ Opinion 2/91, on the Convention No 170 of the international Labour Organisation.

¹⁹² Supra, at para. 25.

¹⁹³ Macleod, etc. p. 60.

its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts”.¹⁹⁴ This statement clearly recognises the theory that an internal Treaty provision can which confers competence on the Community can result in an exclusive external competence.

10.4 Exclusivity as a consequence of necessity

Even where internal legislation measures have yet not been adopted, there are still circumstances under which the Community can enjoy an exclusive competence. This consequence can be drawn from the Opinion 1/76.¹⁹⁵ The Rhine and Mosel waterway- agreement could not have been possible to achieve without a third country’s (Switzerland’s) participation. Therefore, it was a necessity for an international agreement to be concluded. The Community seems to enjoy an exclusive competence to enter international agreements in situations where the objectives of the Treaty cannot be achieved by internal measures because a non-member State also has to be bound by the measures envisaged. If the only possible manner for the Community to act is by adopting an international measure, then the Community enjoys an exclusive competence to do so.

10.5 Consequences of an exclusive competence

The main consequence for the Member States when the Community enjoys an exclusive external competence is that they are forbidden to act, internally or externally in the areas covered by the exclusivity, in a way that it would undermine the action taken by the Community. In theory, the powers of the Member States have been transferred completely to the Community, and thus the States do lose some of their supremacy to the Community. An action from the Member States in areas where the Community enjoys exclusive external competence, would clearly be an action contrary to article 5 of the EC Treaty (now, article 10 EC), which demands loyalty from the Member States.

¹⁹⁴ Opinion 1/94, on the WTO agreement, para. 95.

¹⁹⁵ Opinion 1/76, (Re the Draft agreement for the laying up Fund for Inland Waterway vessels).

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