

EUI WORKING PAPERS

LAW No. 2006/22



External Relations of the EU and the Member States:
Competence, Mixed Agreements,
International Responsibility, and
Effects of International Law

MARISE CREMONA



EUROPEAN UNIVERSITY INSTITUTE

Department of Law

**EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW**

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ISSN 1725-6739

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50016 San Domenico di Fiesole (FI)
Italy

<http://www.iue.it/>
<http://cadmus.iue.it/dspace/index.jsp>

ABSTRACT

The following Report will be presented to the 22nd FIDE Congress to be held in Limassol, Cyprus, 1-4 November 2006. It has been prepared in response to a questionnaire devised by the General Rapporteur, Professor Piet Eeckhout, which is reproduced as an Annex. It seeks to do two things: first, to respond to the questions and issues raised by the General Rapporteur, and second to comment on some issues and recent developments which are particularly relevant to the relationship between the European Union and its Member States in the external relations field. These include the obligation on Member States when exercising their own external competence to comply with their Community law obligations, including procedural obligations; issues relating to choice of legal base for external action, and in particular the impact of the pillar structure when characterising EU external action; international responsibility under mixed agreements; and the relationship between international law and EU law.

KEYWORDS

Legal Issues

competences
dispute resolution
European law
fundamental/human rights
GATT
international agreements
judicial review
non-contractual liability

External Relations

CFSP/ESDP
international relations
security/external

Disciplinary Background of Paper

law

CONTENTS

Chapter 1 - Competence

- 1. Exclusivity*
- 2. Compliance*
- 3. Legal base and inter-pillar issues*

Chapter 2 – Mixed agreements and international responsibility

- 1. Internal constitutional aspects of mixed agreements*
- 2. International responsibility*
 - a. Where there is a Declaration of competence*
 - b. Where there is no Declaration of competence*

Chapter 3 – Legal effects of international law

- 1. Community agreements*
 - a. Judicial review*
 - b. Creation of individual rights*
- 2. The UN Treaty and Human Rights: the example of sanctions*

**External Relations of the EU and the Member States:
Competence, Mixed Agreements, International Responsibility, and
Effects of International Law**

Report for FIDE 2006

by the Community Rapporteur

Marise Cremona

The following Report has been prepared in response to a questionnaire devised by the General Rapporteur, Professor Piet Eeckhout, which is reproduced as an Annex. It will be presented to the 22nd FIDE Congress to be held in Limassol, Cyprus, 1-4 November 2006.

The report which follows does not attempt to summarise the current state of EU or EC external relations law, an impossible task in a report of this nature. Rather it seeks to do two things: first, to respond to the questions and issues raised by the General Rapporteur (see the Annex) which provide a structure for the report, and second to comment on some issues and recent developments which seem to this rapporteur to be particularly relevant to the relationship between the European Union and its Member States in the external relations field.¹ As will be seen, the two aims overlap to a considerable degree.

¹ Thanks are due to a number of people with whom the author had very useful conversations on these topics, including Ricardo Gosalbo Bono, Frank Hoffmeister, Ricardo Passos, Alan Dashwood, Christophe Hillion, Bruno de Witte and others; needless to say the opinions expressed here are my own.

Chapter 1 - Competence

1. Exclusivity

It is striking but not surprising that the conditions under which exclusive Community competence to enter into external agreements arises are still the subject of both academic discussion, institutional debate and new case law. In *Opinion 1/2003*² the Court of Justice was able to elucidate its 2002 judgements in the *Open Skies* cases,³ in particular as to the conditions under which exclusive competence arises, and demonstrates the detailed analysis of a prospective agreement that will often be necessary before such a question can be answered. The Opinion offers us a comment on *Open Skies*, and a(nother) reformulation of the *AETR* test which shows that it is still very much the basis of the Court's reasoning in this area. It deals with a relatively new area of Community competence (judicial cooperation in civil matters) about which there are differing views among the Member States on the scope and nature of Community external competence.⁴ It is not appropriate here to give a detailed analysis of every aspect of *Opinion 1/03*; instead a number of points may be made.

First, it is worth noting the Court's affirmation that the implied external competence of the Community may be either exclusive or shared. In spite of *Opinion 2/91*,⁵ some earlier case law, by eliding the issues of the existence of competence and its exclusivity, had cast doubt on the possibility of implied shared competence.⁶ In *Opinion 1/03* such doubts are laid to rest, the Court clearly stating that implied competence may be either exclusive or shared.⁷ The point is significant when one considers the extent to which

² *Opinion 1/03* of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2006] ECR 0000. The Opinion was requested by the Council, which observed however that it was not seeking to argue either for or against exclusive competence but was seeking a clarification of the division of competence between the Community and Member States in the field of judicial cooperation in civil matters, an issue which arises in practice and on which the Member States are divided.

³ Case C-466/98 *Commission v UK* [2002] ECR I-9427; Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797; Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

⁴ *Opinion 1/03*, para 28.

⁵ *Opinion 2/91* of 19 March 1993 on Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work.

⁶ For example, *Opinion 1/94* and also the *Open Skies* cases themselves. In Case C-467/98 *Commission v Denmark*, for example, the Court said, in the context of a discussion of possible exclusive competence, "It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence." (at para 81).

⁷ *Opinion 1/03*, paras 114-115. The existence of implied competence in this case was not disputed, although the relevant Treaty provision from which it was implied (Art 65 EC) requires action to be taken "insofar as necessary for the proper functioning of the internal market"; the Court bases itself on the fact that internal legislation had been adopted in the field (notably Regulation 44/2001). The question of whether that legislation might be affected within the meaning of *AETR* (and thus give rise

the growing Community *acquis* in the field of Justice and Home Affairs provides the basis for Community external competence.⁸

Second, the Court was clearly of the view (rightly so) that *Opinion 1/76* could not apply in this case; in fact in no case since *Opinion 1/76* itself has this ground of exclusivity based on necessity been applied in practice. The test was formulated at a time when the Court of Justice was still developing its ideas of implied external competence (in particular the relationship between the existence and the exclusivity of competence), and has been subject to convincing academic criticism.⁹ *Opinion 1/76* would be better regarded as an example of the existence of competence even in the absence of prior internal legislation;¹⁰ it is not demonstrably necessary for the Union legal order that such competence should be exclusive *per se*; the other conditions of exclusivity (in particular the *AETR* test) are sufficient.¹¹ However although the Court does not in *Opinion 1/03* discuss the application of *Opinion 1/76* it clearly confirms its continued theoretical existence as a separate basis for exclusive competence and in its formulation of the test potentially widens the grounds for exclusivity, by omitting the idea of an “inextricable link” between external and internal action, the need to act simultaneously at both levels.¹²

Third, the Court’s formulation of the *AETR* test is striking in its emphasis on the unity of the common market, the uniform and consistent application and the effectiveness of

to exclusive competence) does not depend on the wording of its legal base but rather on its actual content: see *Opinion 1/03*, paras 131 and 134.

⁸ For example, the United Nations Convention against Transnational Organized Crime (Palermo Convention) was signed by the Community as well as its Member States; Council Decision 2004/579/EC on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime OJ 2004 L 261/69. On matters within Title VI TEU (police and judicial cooperation in criminal matters) the Council adopted a Joint Position to facilitate coordination and adoption of common negotiating positions by the Member States, and to ensure compatibility of the Convention with existing Union initiatives: Joint Position 1999/235/JHA on the proposed United Nations convention against organised crime OJ 1999 L 87/1.

⁹ A. Dashwood and J. Heliskoski, “The Classic Authorities Revisited” in A. Dashwood and C. Hillion, *The General Law of EC External Relations*, 13-14.

¹⁰ P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (Oxford), 68.

¹¹ As Heliskoski points out, “the rationale for exclusivity [in *Opinion 1/76*] is the same as that in the *AETR* judgement, only the common rules would have been introduced by international agreement and not by an autonomous legislative act of the Community.” J. Heliskoski, *Mixed Agreements*, p.44.

¹² “As regards exclusive competence, the Court has held that the situation envisaged in *Opinion 1/76* is that in which internal competence may be effectively exercised only at the same time as external competence (see *Opinion 1/76*, paragraphs 4 and 7, and *Opinion 1/94*, paragraph 85), the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (see, in particular, *Commission v Denmark*, paragraph 57).” *Opinion 1/2003*, para 115; this formulation essentially repeats the formulation offered by the Council (see para 37) but omits the reference to the “inextricable link” found in *Opinion 1/94* para 86 and also cited by the Council. On the inextricable link and the need to act externally and internally at the same time, see *Opinion 1/94*, paras 86 and 89; A. Dashwood, “The Relationship between the Member States and the European Union/European Community” (2004) 41 *Common Market Law Rev.* 355 at 372.

Community law and the proper functioning of the system.¹³ It is the purpose of exclusive competence that is emphasised rather than the need to fall within one of several specific situations that have been found in the past to give rise to exclusive competence, situations which are now referred to as “only examples”.¹⁴ Such an approach might be expected to be more flexible; however, when the Court turns to the proposed Convention itself in order to apply these tests, it subjects its provisions to a very detailed analysis, concluding that indeed exclusive competence is justified on the ground that the uniform and consistent application of Community rules, in particular the complex regime established by Regulation 44/2001, would be affected by the proposed new Lugano Convention.

Fourth, the Court’s attitude to so-called “disconnection clauses” should be mentioned. Such clauses are designed to protect the autonomy of the Community legal order, by providing that as between EU Member State parties to an international agreement, the relevant provisions of Community law shall apply.¹⁵ They are facilitative of mixed agreements in areas of law which may have an impact on the Community legal order and have been used extensively in multilateral conventions such as those adopted within the framework of the Council of Europe. As the Court rightly points out, these clauses are intended to ensure compliance, to avoid conflict between systems and to make it clear that the joint participation of the Community and its Member States will not alter the scope of Community law in relations between the Member States themselves, thus ensuring the primacy of Community law. They indicate to other Contracting Parties that the agreement is one in which there is a Community competence and Community rules to apply, but do not give any indication of the scope or nature of Community (or Member State) competence. However the Court goes further and adds a warning: disconnection clauses, it says, such as that in Article 54B of the Lugano Convention¹⁶ which was to serve as a model for the proposed new clause, not only do not guarantee that Community rules are not affected but “on the contrary may provide an indication that those rules are affected”.¹⁷ This is of course the language of *AETR*; if Member States feel that by including a disconnection clause they are signalling that this is an area of possible exclusive competence (because Community rules are likely to be affected) the clause is much less likely to be acceptable, and a useful way of managing agreements of genuinely shared competence will be lost.

Fifth, this case provides the first example of exclusive Community competence in a field subject to the “opt-out” of a Member States, in this case Denmark. Denmark does not participate in Title IV of the EC Treaty which contains Articles 61(c) and 67 EC on

¹³ See *Opinion 1/03* at paras 122, 128, 131. See especially, “The purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law and the proper functioning of the systems established by its rules” (para 131).

¹⁴ See *Opinion 1/03* at para 121.

¹⁵ For example, under Art. 38 (2) of the European Convention on certain international aspects of bankruptcy 1990, “In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply rules arising from this Convention, except in so far as there is no Community rule governing the particular subject concerned.”

¹⁶ Art 54B(1) provides that “This Convention shall not prejudice the application by the Member States of the European Communities of the [Brussels Convention]...”.

¹⁷ *Opinion 1/03*, para 130.

which the competence of the Community to conclude the proposed Lugano Convention is founded. It is not bound by Regulation 44/2001 and so has concluded a separate agreement with the Community which extends the provisions of that Regulation to Denmark.¹⁸ As it would not be bound to Lugano II by virtue of Community participation, Denmark will participate in Lugano II in its own right. In spite of the Court's comments about the unity and coherence of the Community legal order, therefore, the potential for breaching that unity is already present. The Community has exclusive competence, but Denmark is able to conclude the Convention on its own account. What would be the legal position if Denmark were to fail to conclude Lugano II, or were to negotiate an agreement on its own account with another third country in the field covered by the Convention? Presumably Article 10 EC imposes an obligation on Denmark not to disrupt the development of the Community legal order even in fields in which it does not participate.¹⁹

Opinion I/03 provides a rich opportunity for reflection on the nature and scope of non-*a priori* exclusive competence, of which only an indication has been given here. It is evidence that the *AETR* approach is still very much the basis and starting point of the Court's reasoning on exclusivity in relation to implied powers, and it offers a bold assertion of exclusivity in an area relatively new to Community competence. Coming after a number of more restrictive judgements, that is of significance in itself. However it is important to say that the field covered by the Opinion is a very specific one, and one in which the Community legal regime is extensive. The field covered by the Convention was one which would directly impact on the behaviour of courts in third countries; it was not therefore a case where the Community could have taken "concerted action" via autonomous legislation.²⁰ It should not be regarded as opening the door to a new wider reading of the scope of exclusivity, but rather as a signal that the approach to be adopted should focus on the overall nature and effect of an agreement on the Community legal order. It confirms the impression of *Open Skies* that such an enquiry will require a "comprehensive and detailed analysis" of a prospective agreement and of Community law.²¹

Even well established fields of exclusive Community competence can give rise to new problems. The accession of ten new Member States in 2004 has provided an occasion to review the consequences of the *a priori* exclusivity of the common commercial policy (CCP) for both existing and new Member States. As is well known, "measures of commercial policy of a national character are only permissible after the end of the

¹⁸ Council Decision 2005/790/EC on the signing on behalf of the Community of the Agreement between the EC and Denmark on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ 2005 L 299/61.

¹⁹ C.f. Art 23(1) TEU. Article 5 of the Agreement with Denmark (see note 16) attempts to deal with the second issue by providing *inter alia* that Denmark will abstain from concluding such an agreement "unless it is done in agreement with the Community and satisfactory arrangements have been made with regard to the relationship between this Agreement and the international agreement in question". It also provides that Denmark will "abstain from any actions that would jeopardise the objectives of a Community position within its sphere of competence," an obligation that would apply to Danish participation in Lugano II. These obligations flow from the EC-Denmark agreement, however, not directly from Community law.

²⁰ *Opinion I/03*, para 123.

²¹ *Opinion I/03*, para 133.

transitional period by virtue of specific authorization by the Community”.²² An example of such authorization has been the Council Decisions authorising the renewal or continuation in force of provisions governing matters covered by the CCP contained in the Member States’ trade and cooperation agreements with third countries.²³ Following the 2004 enlargement, the Commission submitted a proposal to extend the then current authorization to certain agreements of the new Member States; however the scrutiny of existing agreements of the new Member States prompted re-consideration of all existing Member State agreements and no agreement was reached before expiry of the authorization Decision itself.²⁴ At present, therefore, authorization has lapsed; the rights of third States are protected by Article 307 EC, where agreements were concluded before the entry into force of the EC Treaty, or before accession of the relevant Member State; however in case of conflict the Member States are under an obligation to re-negotiate or denounce the agreements.²⁵

2. Compliance

Where Community competence is exclusive, “Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules.”²⁶ Compliance – in the sense of the need to avoid contradiction – should not arise where competence is exclusive. Where Member States retain competence, or where that competence is shared with the Community, however, the need to comply with Community law imposes a significant constraint upon Member States. The overall basis for this obligation is of course Article 10 EC, together with the duty of cooperation, a principle developed in the context of mixed agreements and which derives from the requirement of unity in the international representation of the Community.²⁷ The principle of cooperation can now be seen as a constitutional principle within EC external relations law.²⁸ It is not of course limited to the Member States and also applies

²² Case 41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République* [1976] ECR 1921, para 32.

²³ Council Decision 69/494/EEC on the progressive standardisation of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements, OJ 1969 L326/39. The most recent decision is Council Decision 2001/855/EC authorising the automatic renewal or continuation in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and trade agreements concluded between Member States and third countries OJ 2001 L 320/13. This decision expired on 30 April 2005 and has not been renewed.

²⁴ Com (2004) 697, 22 October 2004; this proposal has since been withdrawn.

²⁵ Case C-170/98 *Commission v Belgium* [1999] ECR I-5493; Case C-84/98 *Commission v Portugal* [2000] ECR I-5215; Case C-62/98 *Commission v Portugal* [2000] ECR I-5171. See also Council Decision 2001/855/EC, note 23, recital 7 and Art 1.

²⁶ C-467/98 *Commission v Denmark* [2002] ECR I-9519, para 82.

²⁷ *Opinion 2/91 (re ILO Convention No.170)* [1993] ECR I-1061, at paras 36-38; *Opinion 1/94 (re WTO Agreements)* [1994] ECR I-5267 at para 108. In Case C-25/94 *Commission v Council* (FAO Fishery agreement) [1996] ECR I-1469, the Court held that the arrangement between the Council and the Commission for the management of decision-making under a mixed agreement was a fulfilment of the duty of cooperation between the Community and its Member States: paras 48-49.

²⁸ Koutrakos, “The Elusive Quest for Uniformity in EC External Relations” (2001) Vol.4 *Yearbook of European Law* 243 at p.258.

to inter-institutional cooperation²⁹ and even to cooperation between national courts and the Court of Justice.³⁰ Here we will focus on the position of the Member States, for whom compliance includes both substantive and procedural dimensions.

Substantive compliance: it is non-controversial that when exercising their own competence, Member States are required to comply with their Community law obligations, arising out of the EC Treaty itself, secondary legislation, and from Community and mixed agreements. Member State action at different levels may be affected. So, for example, the *Open Skies* cases illustrate that although the Open Skies agreements were held to fall largely outside exclusive Community competence, the Member States' own treaty-making powers in the field are constrained by the need to comply with (*inter alia*) the EC Treaty rules on the right of establishment.³¹ In practical terms, this aspect of the rulings was influential in deciding the course of Community and Member State policy as regards future air transport negotiations.³² International tax treaties provide another example of the significance of the requirement of compliance with Community law, in an area of Member State competence.³³ In addition to treaty-making powers, substantive compliance impacts upon Member States' autonomous action, both internationally³⁴ and internally.³⁵

Procedural compliance: Three recent cases illustrate that Article 10 EC imposes procedural constraints on Member States. In the first pair of cases, Germany and

²⁹ See for example Case C-65/93 *European Parliament v Council* [1995] ECR I-643, at para 23. In Case C-317/04 *European Parliament v Council* (pending) the Parliament has argued that the Council is in breach of this duty by concluding an international agreement after the Parliament had requested an Opinion from the Court of Justice under Art 300(6) EC but before the Court had delivered its Opinion; AG Leger has dismissed the argument on the ground that the Art 300(6) procedure is not designed to protect institutional prerogatives; it may be argued however that a dispute about legal base is not merely a question of institutional prerogative but also impacts directly on competence, which may be directly relevant to a third country: on this, see further below. The issue of the duty of cooperation in this case was in reality centred on the Parliament's delay in giving its opinion under Art 300(3) to enable it to wait for the Court's Opinion, and the Council's decision to conclude the agreement without waiting for the Parliament's opinion given its view of the urgency of the situation.

³⁰ Joined Cases C-300/98 *Parfums Christian Dior SA v Tuk Consultancy BV* and C-392/98 *Assco Gerüste GmbH, Rob van Dijk v Wilhelm Layher GmbH & Co. KG, Layher BV* [2000] ECR I-11307, at paras 36-38.

³¹ C-467/98 *Commission v Denmark* [2002] ECR I-9519, paras 122-139.

³² It is noteworthy that despite the limited nature of Community exclusive competence in the field of air transport, following the *Open Skies* cases the Council decided to grant the Commission a mandate to negotiate with third countries, reflecting the difficulty for Member States of ensuring compliance with Art 52 EC in individual negotiations. Commission Communication on the consequences of the Court judgements of 5 November 2002 for European air transport policy COM(2002)649; Commission Communication on relations between the Community and third countries in the field of air transport COM(2003)94; Regulation 847/2004/EC on the Negotiation and Implementation of Air Service Agreements between Member States and Third Countries OJ 2004 L 157/7.

³³ For example, Case C-307/97 *Saint-Gobain v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161; Case C-55/00 *Gottardo v INPS* [2002] ECR I-413.

³⁴ Case C-146/89 *Commission v UK* [1991] ECR I-03533, in which it was held that by altering the baseline from which the territorial sea is measured the UK (although acting in conformity with international law) was in breach of its obligations under EC fisheries legislation.

³⁵ Case C-239/03 *Commission v France (Étang de Berre)* [2004] ECR I-09325, in which it was held that by failing to comply with a mixed agreement, France was in breach of its Community law obligations: see further below, chapter 2.

Luxembourg were found to be in breach of their obligations under Article 10 EC by concluding bilateral agreements with third countries on the transport of goods and passengers by inland waterway.³⁶ The agreements were concluded after a decision by the Council to authorise the Commission to negotiate a multilateral agreement with a number of third countries. In neither case did the Court accept the Commission's argument that Community competence in the field was exclusive, based on *AETR*; existing Community legislation was concerned only with market access for Community carriers and thus would not be "affected" by such a bilateral agreement. However, the Court held that the Member States were in breach of Article 10 EC ("that duty of genuine cooperation"³⁷) by continuing bilateral negotiations after the mandate had been agreed in the Council without cooperating with or consulting the Commission.³⁸ The adoption of the mandate is the start of a "concerted Community action" which imposes obligations of cooperation on the Member States; this obligation may not extend to a duty of complete abstention, but does require close cooperation and consultation with the Commission in order to avoid undermining the Community's multilateral negotiation, as well to ensure consistency between the positions adopted.³⁹ Although therefore there is explicitly stated to be no exclusive Community competence, the Member States were in fact constrained in their freedom to conclude bilateral agreements in the field. Note however that the obligation arose out of the decision of the Council to open Community negotiations; and that the breach of Article 10 EC lay not so much in continuing bilateral negotiations as in the absence of consultation and coordination with the Community institutions (especially the Commission).

The *Sellafield* case⁴⁰ (which is pending at the time of writing) provides a further example of the implications of Article 10 EC as a constraint on the exercise by Member States of their external powers, in this case the ability to engage in dispute settlement procedures under a Convention to which they are party. The Commission argues that Ireland is in breach of its obligations under Articles 10 and 292 EC in submitting a dispute with the United Kingdom under the Law of the Sea Convention (UNCLOS) to dispute settlement procedures established under that Convention. The case will be discussed further below; here we just note the view of AG Poiares Maduro that Ireland was in breach of its obligations under Article 10 EC, independently of Article 292, by failing in its duty of cooperation. This breach was based, not on the initiation of dispute settlement proceedings *per se*⁴¹ but on the failure to inform and consult with the Community institutions before initiating the UNCLOS procedure. Poiares Maduro argued that such consultation could have clarified the Community law dimension of the dispute, and could also have raised the possibility of using Community law remedies in relation to the alleged violation of the Convention (infringement proceedings against

³⁶ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-04805; Case C-433/03 *Commission v Germany* [2005] ECR I-0000, judgment 14 July 2005.

³⁷ C-266/03 *Commission v Luxembourg* [2005] ECR I-04805, para 58.

³⁸ Advocate General Tizzano (in Case C-433/03, at paras 75-78) discusses the possibility of the adoption of the negotiating mandate by the Council having a suspensory effect, in the sense of itself forming the basis for an exclusive Community competence, and concludes that this would be disproportionate.

³⁹ C-266/03 *Commission v Luxembourg* [2005] ECR I-04805, paras 57-62.

⁴⁰ Case C-459/03 *Commission v Ireland*, pending; opinion of AG Poiares Maduro 18 January 2006.

⁴¹ On this point, AG Poiares Maduro took the view that Art 292 operates as a *lex specialis* in relation to the general principle established in Art 10, and that therefore Art 10 was unnecessary as an additional ground of complaint (para 54-55).

the UK⁴²). A recent example of successful prior consultation in the case of an international dispute between two Member States is provided by the Belgium/Netherlands “Iron Rhine Arbitration”.⁴³ Here, the Commission was consulted and accepted the Member States’ view that there were no substantive issues of Community law likely to be affected by the arbitration.⁴⁴ As in the earlier cases, the infringement in the *Sellafield* case (in the view of the Advocate General) lay in the failure to consult in advance of taking action. This must therefore be regarded as an important requirement placed on Member States where there is a possibility that their actions in the external sphere might impact on the Community legal order or even on Community policy-making.⁴⁵

3. Legal base and inter-pillar issues

From the point of view of the Community institutions, the question of characterisation of an international agreement and the legal base for its conclusion could be said to be of greater importance than the issue of exclusivity. Of course, the existence of an appropriate legal base is a necessary basis for the existence of competence, and so is the more fundamental question.⁴⁶ In addition, the choice of legal base is relevant in determining procedures to be followed (for example, the role of the European Parliament). As such it has internal constitutional/institutional implications as well as impacting on the scope of Community competence and its nature (exclusive or shared). The trade/environment interface has given rise to several legal base disputes, at an internal level as well as in external relations.⁴⁷ In the case of the Rotterdam Convention on international trade in hazardous chemicals, the Commission and Council differed over the appropriate legal base for conclusion of the Convention, the Commission proposing Article 133 and the Council instead adopting the concluding Decision on the basis of Article 175(1) EC.⁴⁸ Although the disagreement impacted on competence

⁴² On the possibility of infringement proceedings against a Member State for failure to comply with a mixed agreement, see below Chapter 2.1.

⁴³ The dispute on the Iron Rhine railway line was submitted to an arbitral tribunal under the PCA in 2003 and the award was handed down in May 2005 (available on <http://www.pca-cpa.org/ENGLISH/RPC/#Belgium/Netherlands>).

⁴⁴ See Award of the Arbitral Tribunal (note 41) at paras 13-15. In their letter to the Commission the Member States undertook to comply with Art 292 EC should a question of Community law arise in the course of proceedings.

⁴⁵ c.f. the obligation on the Member States to inform and consult each other within the Council in the field of the Common Foreign and Security Policy, found in Art 16 TEU.

⁴⁶ “The choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the Protocol to a Treaty provision which empowers it to approve such a measure. To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed.” *Opinion 2/2000 (re Cartagena Protocol)* [2001] ECR I-9713, para 5.

⁴⁷ See for example Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR 2867; Case C-187/93 *Parliament v Council* [1994] ECR I-2857; C-62/88 *Greece v. Council (Chernobyl)* [1990] ECR 1527; *Opinion 2/2000 (re Cartagena Protocol)* [2001] ECR I-9713 ; Case C-281/01 *Commission v Council (Energy Star Agreement)* [2002] ECR I-12049.

⁴⁸ Case C-94/03 *Commission v Council*, [2006] ECR I-0000, 10 January 2006.

questions,⁴⁹ the Court, having decided that this was case of genuinely dual legal base and therefore that the Decision should have been based on both Articles 133 and 175(1),⁵⁰ discussed the implications of its finding purely in terms of procedure. Its conclusion was that there was no procedural incompatibility between the legal bases, the voting procedure in the Council being the same under both provisions, and the Parliament's prerogatives safeguarded by the use of Article 175(2). However although the Advocate General had taken the view that (for these reasons) the defect was purely formal and should not therefore necessitate annulment,⁵¹ the Court annulled the Decision. The legal effects of such an annulment are in this case minimised: the Convention had been implemented by a Regulation, which was also annulled, in a separate case, for the same reasons.⁵² However the legal effects of that Regulation were preserved under Article 231 EC, and so the Community's implementation of the Convention is not put into question. It is noticeable, however, that the Court does not regard the issue of legal base as a purely internal affair. On the contrary, it confirms the importance of the correct legal base as a signal to other Contracting Parties of the extent of Community competence and the division of competence between the Community and the Member States, which, it says, is also relevant to the implementation of the agreement at Community level.⁵³ This might seem a somewhat surprising statement: in earlier cases the Court has taken a clear view that the distribution of competence between the Community and Member States is an internal question.⁵⁴ In Chapter 2 we will explore further both the internal and the international dimensions to the question of responsibility for the implementation of mixed agreements. There is a danger, if decisions as to legal base are seen as a signal to third countries, that the issue of choice

⁴⁹ The Commission proposal for the conclusion of the Convention was based solely on Articles 133 and 300 EC and stated that "the Community is competent in respect of all matters governed by the Convention." Com (2001)802 final, Art 2(2); the Council altered the legal base and included a declaration of competence relating to environmental objectives: Council Decision 2003/106/EC concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade OJ 2003 L 63/27. The Convention was concluded as a mixed agreement with most but not all Member States also parties.

⁵⁰ I will not here go into the reasoning on which the Court based this conclusion; I will say only that we now have three cases deciding respectively that an environmental legal base was appropriate (*Opinion 2/2000*), that the CCP base was appropriate (Case C-281/01 *Commission v Council (Energy Star Agreement)*) and that a dual legal base should have been used (Case C-94/03 *Commission v Council*); it does not however seem any easier to predict the outcome of a future case on the same issue.

⁵¹ Case C-94/03 *Commission v Council*, [2006] ECR I-0000, Opinion of Advocate General Kokott, 26 May 2005, paras 49-57. The Advocate General in fact took the view that the single legal base chosen by the Council was correct.

⁵² Case C-178/03 *Commission v European Parliament and Council*, [2006] ECR I-0000, 10 January 2006. On the question of potential international responsibility of the Community following the annulment of the concluding Decision, see note 145.

⁵³ Case C-94/03 *Commission v Council*, para 55.

⁵⁴ See for example *Opinion 2/2000 (re Cartagena Protocol)* [2001] ECR I-9713 at para 17 in which the Court held that the precise delimitation of powers under an agreement (once it was clear that this was a matter of shared competence) was not a question that required the preliminary Opinion procedure of Art 300(6) EC as it does not affect the issue of Community competence to conclude the agreement: "That procedure is not intended to solve difficulties associated with implementation of an envisaged agreement which falls within shared Community and Member State competence." See also *Ruling 1/78* [1978] ECR 2151, para 35 in which the delimitation of competence was said to be "a domestic question".

of legal base will become even more politicised than it is already, making it more difficult to base that choice purely on “objective factors which are amenable to judicial review”.⁵⁵ The reference to implementation of the agreement is understandable in the instant case, as the Court was on the same day and on the same grounds giving judgement on the legal base of the implementing Regulation. However it is by no means always the case that the legal base for the conclusion of an agreement will signal the appropriate legal base for its implementation.⁵⁶

The relation between legal bases for internal and external action was also at issue in another pending case which raises important issues relating to the characterisation of international agreements, as well as the inter-relationship between the pillars. In the Passenger Name Records (PNR) cases, the European Parliament is challenging the conclusion by the Council of an agreement with the United States on the processing and transfer of PNR data, and a Decision adopted by the Commission finding that the US Bureau of Customs and Border Protection provides an adequate level of protection of PNR data under the Data Protection Directive (Directive 95/46/EC).⁵⁷ Of the number of grounds of review raised by the Parliament we will here focus on the issue of legal base. The PNR agreement was concluded on the basis of Article 95 EC which was also the legal base of the internal measure, the Data Protection Directive. AG Leger argued, however, that it did not necessarily follow that the appropriate legal base for action internally is appropriate for external action.⁵⁸ This is no doubt true, but let us unpack the question a little. It may be that there is an express legal base in the Treaty for external action; notwithstanding the existence of “internal” legal bases such as Articles 43, 175 or 95 EC for example, where an agreement has a direct impact on trade in goods the appropriate legal base will be Article 133.⁵⁹ In cases of implied competence, on the other hand, an “internal” legal base will inevitably be used; the question is then whether the agreement serves to further the objectives of the EC Treaty as expressed in that internal legal base, the existence of prior internal legislation being relevant (under the *AETR* test) to the question of exclusivity.⁶⁰ In fact, the discussion in AG Leger’s Opinion centres around this point: can it be said that the PNR Agreement serves to fulfil the objectives of Article 95? The Council put forward internal market arguments for the conclusion of the agreement, based on distortions of competition and problems with the single airline market as a result of US policy in the absence of an agreement. The Advocate General took the view that even if these arguments were to be accepted, the internal market objective could only be regarded as incidental; the major objectives of the agreement, set out in its Preamble, are two-fold: the prevention of terrorism and organised crime, and the protection of fundamental rights, especially privacy. The agreement itself does not appear to have an internal market objective and a legal base

⁵⁵ Case C-94/03 *Commission v Council*, para 34.

⁵⁶ See for example, *Opinion 1/94* at para 29; Case C-268/94 *Portugal v Council* [1996] ECR I-6177, at paras 47 and 67.

⁵⁷ Case C-317/04 *European Parliament v Council*; C-318/04 *European Parliament v Commission*, Opinion of AG Leger, 22 Nov. 2005.

⁵⁸ Case C-317/04 *European Parliament v Council*, Opinion of AG Leger, 22 Nov. 2005, para 154.

⁵⁹ See Case C-281/01 *Commission v Council (Energy Star)* [2002] ECR I-12049, at para 46.

⁶⁰ Secondary legislation may also itself provide a basis for an international agreement; see for example, Art 24(3) of Directive 2000/12/EC (Consolidated Banking Directive) OJ 2000 L 126/1. In such cases there must be a link between the objectives of the agreement and the objectives of the legal base for the internal legislative act.

should reflect the objectives of the agreement rather than those of the Community institutions in concluding that agreement (as evidenced for example in the concluding Decision). However it is arguable that in determining legal base it is appropriate to look not only at the objectives of an agreement but also at its effects; if its *effects* will contribute to achieving the Treaty objective set out in a particular legal base (such as the proper functioning of the internal market in Article 95 EC) then arguably this should be sufficient.

The PNR case also raises a more fundamental issue: that of inter-pillar demarcation of legal base. Although not strictly necessary to the case itself, the Advocate General does touch on an alternative legal base for the agreement (Article 95 EC being in his view inadequate), mentioning the possibility of the third pillar and perhaps also the second.⁶¹ As he says, the Court of First Instance (CFI) has pointed out that the fight against terrorism is not an objective of the EC Treaty but rather of the TEU.⁶² To what extent is it possible to use Community powers (including external competence) to achieve objectives that are specific to the CFSP or to police and judicial cooperation in criminal matters (PJC) under the third pillar? Where there is a clear Community competence, such as trade policy, or development cooperation policy, there is no reason why that competence cannot be used in ways which support broader TEU (including second or third pillar) objectives. The CFI took the view, however, (in my view correctly) that to seek to use the EC's "flexibility clause" under Article 308 EC for purely Union (TEU) objectives would be to undermine the "constitutional architecture of the pillars" and the "integrated but separate" Union and Community legal orders. Just as the powers of the Union under the TEU should not be used in such a way as to "affect" the *acquis communautaire* (Article 47 TEU), to accept the use of Article 308 alone to achieve any TEU objective would be inconsistent with the specific powers and instruments under the CFSP and PJC provisions of the TEU.⁶³

In the case of economic sanctions, on the other hand, there is an explicit *passerelle* written into Articles 301 and 60 EC, referring to a Joint Action or Common Position adopted under the TEU. In *Yusuf* and *Kadi*, this was held to "import" TEU objectives into the Community legal order in this specific field⁶⁴ and thus to justify the extension of sanctions instruments to individuals by using Article 308, not alone but alongside Articles 301 and 60 EC, a conclusion that has attracted criticism as well as praise.⁶⁵ The link between CFSP objectives as expressed in a common position, Articles 301 and 60 EC, and Article 308 EC does indeed appear somewhat tenuous, and even more tenuous

⁶¹ Case C-317/04 *European Parliament v Council*, Opinion of AG Leger, 22 Nov. 2005, paras 157-162.

⁶² Case T-306/01 *Yusuf and Al Barakaat International Foundation*, at paras 152-154 and 167; Case T-315/01 *Kadi v Council and Commission*, at para 131, judgments 21 September 2005.

⁶³ The Constitutional Treaty would clarify this point by providing that action taken under the (former) first pillar should not "affect the application of the procedures and extent of the powers of the institutions" in the field of the CFSP: Article III-308 CT.

⁶⁴ Case T-306/01 *Yusuf and Al Barakaat International Foundation*, at para 160-161.

⁶⁵ For a critical approach see for example A.Garde, casenote to cases T-306/01 and T-315/01, (2006) *Cambridge Law Journal*; a more positive view is taken by Tomuschat, who calls this aspect of the judgements "an intelligent answer" and "entirely persuasive", comment in (2006) 43 *Common Market Law Rev* 537, at 540.

is the link to the operation of the common market that Article 308 in theory requires.⁶⁶ Nevertheless the alternative, the use of the TEU as a sole legal basis for sanctions against individuals, leads to the denial of any rights of judicial review at Community or Union level.⁶⁷ More broadly we can identify a tension between (on the one hand) the creation of a European Union which is “founded on the European Communities,” which is intended to operate under a single institutional framework and to “assert its identity on the international scene” through consistent external action, and (on the other hand) a system of very different institutional bases for action and legal instruments (CFSP, PJC, EC Treaty). Increasingly the relationship between these legal bases and legal instruments, and the proper use of one rather than another, will come to the fore. The position is made more difficult by the absence of the Court of Justice’s jurisdiction under the CFSP and its restrictive scope under the PJC; however there are signs that a creative use will be made of its powers under Article 47 TEU.⁶⁸

Two further pending cases illustrate the difficult questions as to choice of legal base between the pillars that can and will arise. In particular both cases illustrate the difficult relationship, legally speaking, between security and development. Both policy areas have a somewhat open-ended nature and it is easy to see that policies or activities might well be found to have both a security and a development dimension. As we have seen there is no problem with the Community using its development policy powers to assist in achieving the Union’s Security Strategy.⁶⁹ However in a case brought by the European Parliament against the Commission in relation to the Philippines border mission, the Parliament argues that the Regulation which provides the financial basis for the mission⁷⁰ has an essentially development objective and should not be used for action which is designed to assist in combating terrorism rather than development.⁷¹ In a second case, the Commission has challenged the Council’s use of a CFSP measure to give financial assistance to ECOWAS in the field of Small Arms and Light Weapons (SALW).⁷² The control of SALW has been the subject of action both within the CFSP⁷³ and the Community’s development policy.⁷⁴ In an “EU Strategy to combat illicit

⁶⁶ This requirement is sometimes hard to identify; see for example the use of Article 308 as the only legal basis for the adoption of Regulation 976/99/EC on the implementation of Community operations which within the framework of Community cooperation policy contribute to the general objective of developing and consolidating democracy and the rule of law and respect for human rights and fundamental freedoms in third countries OJ 1999 L 120/1.

⁶⁷ See for example T-338/02 *Segi v Council*, Order 7 June 2004; the Order is being appealed: C-354/04 P and C-355/04 P. The Constitutional Treaty would both provide a single legal base for restrictive measures against States, individuals and groups and provide for judicial review of such measures: Articles III-322 and 376 CT.

⁶⁸ For example Case C-176/03 *Commission v Council*, 13 September 2005.

⁶⁹ The European Security Strategy “A Secure Europe in a Better World”, adopted by the European Council in December 2003.

⁷⁰ Regulation 443/92/EEC on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America, OJ 1992 L52/1.

⁷¹ Case C-403/05 *European Parliament v Commission*, pending.

⁷² Decision 2004/833/CFSP OJ 2004 L 359/65; Case C-91/05 *Commission v Council*, pending.

⁷³ Council Joint Action 2002/589/CFSP on SALW, OJ 2002 L 191/1; see also Council Common Position 2005/304/CFSP on conflict prevention, management and resolution in Africa, OJ 2005 L 97/57, Art 7.

⁷⁴ Support for SALW projects in a number of ACP States under the EDF. See also Cotonou Convention Art 11(3).

accumulation and trafficking of SALW and their ammunition” adopted in December 2005 the European Council links SALW to both the European Security Strategy and to development policy, highlighting the need for a comprehensive response and referring to the possibility of inserting clauses on SALW in future EC agreements, but without any concrete statement as to how to achieve coordination between the pillars. The Commission, which has included conflict prevention and support for the ECOWAS moratorium on SALW in its Regional Indicative Programme for West Africa (ECOWAS and WAEMU), argues that the Council’s action infringes Article 47 TEU as it affects Community powers in the field of development aid. The Council sees the decision as an implementation (one among several) of its 2002 Joint Action on SALW. Clearly the Council is concerned that the Commission will use the potential breadth of development policy to ring-fence (via Article 47 TEU) an increasingly large slice of security policy; the Commission is concerned that the Council will increasingly encroach on development policy objectives by claiming a security dimension. There seems no doubt that the EC could choose to act under Community powers in this area.⁷⁵ In such a case, which is one of non-preemptive development cooperation, the Member States may choose to act themselves either unilaterally or collectively;⁷⁶ does Article 47 TEU prevent them from choosing to act through a CFSP instrument? However necessary it may be, Article 47 EC potentially creates an obstacle for developing fully integrated policies across the Union, and the Constitutional Treaty would not remove the obstacle. On the contrary, since the equivalent to Article 47 TEU (Article 308 CT) looks in both directions, protecting not only the *acquis communautaire* but also the CFSP chapter from encroachment. Given the potential breadth of CFSP activity the precise relationship between the CFSP chapter and the other chapters of Title V of the Constitutional Treaty will need clarification.

A further context in which Article 47 TEU can cause difficulty, which might be termed “inter-pillar mixity”, arises where it is agreed that a particular international agreement covers both CFSP and EC fields of activity. Agreements covering more than one pillar are legally possible,⁷⁷ but the relationship between the different elements may be problematic. For example, an agreement may cover trade, economic cooperation and development, but also contain clauses on weapons of mass destruction or cooperation in relation to anti-terrorism.⁷⁸ The autonomy of the Community pillar, protected by Article 47 TEU, may be threatened if explicit links are made between compliance with such clauses and trade or financial cooperation measures, so that a determination by the

⁷⁵ See for example Regulations 1724/2001/EC and 1725/2001/EC on action against anti-personnel landmines, OJ 2001 L 234/1 and 6.

⁷⁶ Case C-316/91 *European Parliament v Council* [1994] ECR I-0625. In the case of SALW the Member States have indeed taken individual action: see Fourth Annual Report on the implementation of the EU Joint Action on SALW, OJ 2005 C 109/1.

⁷⁷ For example, see the agreement between the EU, the EC and Switzerland on the Schengen acquis, signed on behalf of the EC by Council Decision 2004/860/EC OJ 2004 L 370/78, and on behalf of the EU by Council Decision 2004/849/EC [sic] OJ 2004 L 368/26.

⁷⁸ The EU’s Strategy on WMD adopted by the European Council in December 2003 refers to the need to use “political and economic levers (including trade and development policies)” in pursuit of its policies (para 29) as well as “Mainstreaming non-proliferation policies into the EU’s wider relations with third countries, ... *inter alia* by introducing the non-proliferation clause in agreements with third countries.” (para 30, B.2). Such an agreement could be based on Art 24 TEU as well as on the appropriate EC Treaty legal base.

Council in relation to non-proliferation might trigger action under the trade provisions of the agreement. As we know, in the case of economic sanctions, such a bridge is explicitly built into the EC Treaty but even in this case a separate EC Treaty-based legal act is required. Article 47 TEU precludes action which might “affect” the Community *acquis*; it is not clear whether such an effect takes place where relations with a third country in a field covered by the *acquis* are determined as a result of a Council act in the CFSP field. In all probability Article 47 would require that the link should not be made automatic or explicit; but such a result is hardly conducive to transparency. Issues relating to implementation and enforcement of such inter-pillar mixed agreements also need to be worked out. The duty of cooperation is a useful starting point, and it can be argued that this duty applies across the pillars as it does in relation to shared competence.⁷⁹ However this cooperation must take place in the context of the need to safeguard the autonomy of the Community legal order and the different institutional balance in the different pillars. Putting this simply: how is it possible, in a case of inter-pillar mixity, to ensure that the Commission takes its proper lead in implementing those parts of the agreement that fall within Community competence, and that the Council takes the lead on CFSP and PJC matters, while still maintaining effective coordination of policy and a coherent presentation of the “EU position”⁸⁰ to its contracting partners?

To conclude this chapter: although exclusive competence is still an issue which gives rise to uncertainty and debate, and the *AETR* principle is having the effect of creating new Community competences as the EC *acquis* grows, especially in areas of Justice and Home Affairs, it is at least as important to examine the constraints on Member States in the exercise of their own competence, whether or not shared with the Community. These constraints operate at the substantive and procedural levels and derive ultimately from the loyalty principle in Article 10 EC and the duty of cooperation. From the point of view of the Community institutions the most important issues of competence relate to questions of characterisation of agreements and legal base, especially the demarcation of competence across the pillars and issues arising from the relatively new phenomenon of inter-pillar mixity. A number of questions relating to the interpretation of Article 47 TEU in cases of inter-pillar competence have yet to be resolved.

Chapter 2 – Mixed agreements and international responsibility

1. Internal constitutional aspects of mixed agreements

In this section we will consider some aspects of the Member States’ responsibility *in Community Law* for the performance of Community agreements (including mixed agreements). Our starting point must be the *Community law obligation* to perform the

⁷⁹ C. Hillion, *The evolving system of European Union external relations as evidenced in the EU Partnerships with Russia and Ukraine*, thesis, University of Leiden 2005.

⁸⁰ The term EU may be used in different ways: to refer to the second and third pillar powers only, or as a reference to the EU as the over-arching entity bringing together all three pillars. Ambiguity between these meanings of the term also risks ambiguity as to the allocation of competence between EC and EU.

agreement derived from Art 300(7) and Art 10 EC, which is separable from their obligations (in international law) as parties to mixed agreements.

“In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the Agreement. That is why the provisions of such an agreement, as the Court has already stated in its judgment of 30 April 1974 in case 181/73 *Haegeman* [1974] ECR 449, form an integral part of the Community legal system.”⁸¹

Whether the Community or the Member State actually implements the agreement will depend on “the state of Community law for the time being in the areas affected by the provisions of the agreement.”⁸² This depends on the internal division of competence, and does not necessarily depend on who concludes the agreement or on the legal base used.⁸³ Thus, the Commission has a role in ensuring compliance with Community agreements, as a Community obligation. In *Commission v Germany*,⁸⁴ for example, the Commission brought an infringement action against Germany under Article 226 [ex 169] EC, on the grounds of a German failure to comply with the International Dairy Arrangement concluded by the Community in 1980 under GATT (Tokyo Round). Germany argued that a disputed interpretation of IDA obligations had been referred to the “113 Committee” and that the Commission should have waited for its view. The Court disagreed, holding that the role of the Committee is purely advisory, and should not hinder the Commission’s duty to enforce Community law under what is now Article 211 EC; responsibility for ensuring the uniform interpretation of Community agreements lies with the Court of Justice and is not a matter for political consensus.⁸⁵ In this decision the Court lays the foundation for its future positions as regards both the enforcement and the interpretation of agreements. Both these cases involved agreements which were not mixed; how do these principles apply in the case of mixed agreements?

“... mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence.”⁸⁶

This implies that a Member State has a Community law obligation (not just an international law obligation) to implement a mixed agreement insofar as its provisions are “within the scope of Community competence”.⁸⁷ What does this mean? It is unclear

⁸¹ Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641, at para 13.

⁸² Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641, at para 12.

⁸³ Case C-268/94 *Portugal v Council*, para 47.

⁸⁴ Case C-61/94 *Commission v Germany* [1996] ECR I-3989.

⁸⁵ “The initiation of proceedings before the Court by the Commission cannot therefore depend on the outcome of consultations within the Article 113 Committee; a fortiori, it cannot hinge on whether a consensus between the Member States has first been found to exist within the Committee with regard to the interpretation of the Community’s commitments under an international agreement.” (Case C-61/94 *Commission v Germany* [1996] ECR I-3989 at para 15)

⁸⁶ Case C-239/03 *Commission v France (Étang de Berre)* at para 25.

⁸⁷ In Case 12/86 *Demirel*, for example, the Court held that the provisions of the Association Agreement with Turkey on free movement of persons fell within Community competence (para 9), and also,

in part because when the Community concludes a mixed agreement it is not always clear to what extent it is operating under Community competence and engaging Community responsibility.⁸⁸ In the case of an agreement which is mixed because it contains provisions which are *outside* Community competence (and possibly others which are outside Member State competence), then it is comparatively clear, at least as far as internal Community law is concerned. However, if the agreement is one of concurrent competence, where the whole or part of the agreement falls within shared competence, it is not always clear to what extent the Community has exercised its competence in concluding the agreement. Some authors hold that the Community is only engaged to the extent of its exclusive competence, everything else is reserved to the Member States.⁸⁹ The Court of Justice has been more nuanced, making a link between the “scope of Community competence” and the “scope of Community law” and introducing the concept of a Community interest in the performance of mixed agreements.

In *Commission v Ireland (Berne Convention)*, Ireland was charged with breach of its obligations under the EEA for not acceding to the Berne Convention; it argued that IPR are a matter of Member State competence within this mixed agreement. The Court held that for a Member State to be in breach of a Community law obligation it must be shown that this provision of the agreement comes within the scope of Community law:

“In the present case, there can be no doubt that the provisions of the Berne Convention cover an area which comes in large measure within the scope of Community competence. ... The Berne Convention thus creates rights and obligations in areas covered by Community law. That being so there is a Community interest in ensuring that all Contracting Parties to the EEA Agreement adhere to that Convention.”⁹⁰

In this case the reference to the Community interest is linked to the fact that Community legislation overlaps with the Berne Convention (i.e. that part of the mixed agreement concerning which compliance was at issue). However in *Commission v France (Étang de Berre)*, the ECJ held that a Member State could be in breach of its Community law obligations by failing to implement a mixed agreement, even though the alleged breach concerned an aspect of the agreement which was not covered by Community legislation; it was enough that the *field in general* was “covered in large measure” by Community legislation and in such cases “there is a Community interest in compliance by both the Community and its Member States with the commitments

citing *Kupferberg*, that “in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the Agreement” (para 11).

⁸⁸ See further the discussion in section 2 of this Chapter.

⁸⁹ For example, J. Heliskoski, *Mixed Agreements*, pp. 46-47. “...the justification for the participation of the Member States is to be found precisely in the circumstance that the Community has not decided – and upon the conclusion of a given agreement does not decide – *actually to exercise* its non-exclusive competence, which makes it possible for the Member States to act under their own powers. But this must however mean that the Community’s participation is legally only relevant insofar as the Community’s exclusive competence is concerned; the rest of the commitments are assumed by the Member States in their individual capacity.” (emphasis in the original)

⁹⁰ Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943, at paras 16 & 19.

entered into.”⁹¹ Rosas notes that in these cases the Court, by asking whether the field is “covered in large measure” by Community rules, appears to be favouring the approach to competence and exclusivity developed in *Opinion 2/91* rather than its *AETR* approach.⁹² AG Poiares Maduro in the *Sellafield* case⁹³ also makes the link with competence, arguing that the Court is here holding that the Community did actually exercise a non-exclusive competence over the whole agreement when it was concluded, even though there was no existing Community legislation covering parts of it. However, the question of compliance and responsibility once an agreement has been concluded is rather different from the issue of competence to conclude the agreement, and the Court clearly sees a Community interest in holding the Member States to account under Community law for the whole of a mixed agreement, at least where it is a matter of shared competence. Once the agreement has been concluded, it has become a part of Community law and the Community interest is relevant to its enforcement as well as its interpretation.⁹⁴ It is significant that the Court’s reasoning is ultimately based on the Community interest and the scope of Community law, rather than on competence. As Dashwood has said, the limits of Community powers are not the same as the limits of the scope of application of the Treaty, the objectives of the Treaty being attained through action not only of the Community itself but also by the Member States.⁹⁵ The approach might be different in the case of a provision of a mixed agreement which is clearly outside Community competence, for example within the CFSP; even here it could be argued that there is a Community interest in securing performance of the whole agreement, and therefore a Community obligation on Member States not flowing from the agreement itself but rather from Art 10 EC.⁹⁶

The conclusion by the Member States of a mixed agreement also has an effect on their relations *inter se*. In fields covered by Community law, relations between the Member States are regulated by Community law, not international law.⁹⁷ Article 292 EC is an example of that general principle,⁹⁸ expressing “the duty of loyalty to the judicial

⁹¹ Case C-239/03 *Commission v France (Étang de Berre)* at paras 29-30.

⁹² Rosas, “International Dispute Settlement: EU Practices and Procedures” (2003)46 *German Yearbook of International Law* 284.

⁹³ Case C-459/03 *Commission v Ireland*, pending; opinion of AG Poiares Maduro 18 January 2006, para 33.

⁹⁴ On interpretation of mixed agreements see Case C-53/96 *Hermes International v. FHT Marketing* [1998] ECR I-3603; Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v Tuk Consultancy* [2000] ECR I-11307; Case C-89/99 *Schieving-Nijstad v Groeneveld* [2001] ECR I-5851.

⁹⁵ Dashwood, “The Limits of European Community Powers” (1996) 21 *European Law Rev.* 113.

⁹⁶ There would also be an obligation on the Member States under Art 11(2) TEU, but this would not be enforceable directly by the Court of Justice. Gosalbo Bono has suggested that the Court might link its review powers under Art 10 EC to the requirement of consistency in Article 3 TEU which refers to the Union’s external activities as a whole: R. Gosalbo Bono, “Some Reflections on the CFSP Legal Order” (2006) 43 *Common Market Law Rev.* 337 at 366.

⁹⁷ See for example, Case 10/61 *Commission v Italy*, holding that the EC Treaty has replaced the GATT as far as inter-Community trade is concerned; see also case 235/87 *Matteucci* [1988] ECR 5589, at para 19 in which it was held that Art 5 EEC (now Art 10 EC) imposes an obligation on Member States to facilitate the application of a principle of Community law which is liable to be impeded by the operation of a prior agreement between the Member States, even where that agreement “falls outside the field of application of the Treaty”.

⁹⁸ Under Art 292 EC “Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.”

system created by the Community Treaties.”⁹⁹ But what is the scope of the Court’s jurisdictional monopoly in the context of disputes between Member States arising out of a mixed agreement? It is clear that in a multilateral agreement of this kind, the Member States have a responsibility in international law *inter se*,¹⁰⁰ the question is to what extent Community law constrains them in the enforcement of those obligations and the key lies in the need to preserve the autonomy of the Community legal order.¹⁰¹

The *Sellafield* case in which the Commission brought an infringement action against Ireland alleging breach of Articles 10 and 292 EC illustrates the problem.¹⁰² The issue is whether this inter-Member State dispute concerned “the interpretation or application of this Treaty” (Article 292 EC). The Advocate General expresses this as a question of whether the matters brought before the Arbitral Tribunal by Ireland, at least in part, “fall within the scope of Community law.”¹⁰³ Ireland argued that in concluding UNCLOS, the Community only exercised its exclusive competence (e.g. in matters of fisheries conservation); other areas of the agreement falling within shared competence (including its environmental dimension¹⁰⁴) were concluded by the Member States. AG Poiares Maduro disagrees with this limited view of Community participation in the agreement, pointing out that the Council Decision concluding the agreement was based *inter alia* on Art 130s EC (environment policy). Drawing an analogy from the *Etang de Berre* case considered above, he finds that in concluding UNCLOS, the EC exercised not only its exclusive but also its non-exclusive competence, including in environmental fields, and that therefore these aspects are within the scope of Community law and so subject to the ECJ’s exclusive jurisdiction.¹⁰⁵ The difficulty with this analysis is that apart from the legal base of the Council Decision concluding the agreement (which is, admittedly, important) there is no real evidence for this conclusion. It is arguable that the Declaration made by the EC under Annex IX of UNCLOS points the other way: Churchill and Scott bring out very clearly the ambiguity of the Declaration in this respect.¹⁰⁶ More importantly, the question itself is

⁹⁹ Case C-459/03 *Commission v Ireland*, pending; opinion of AG Poiares Maduro 18 January 2006, para 10.

¹⁰⁰ Rosas, “Mixed Union – Mixed Agreements” in Koskeniemi (ed.) *International Law Aspects of the European Union* (Martinus Nijhoff 1998), at p.142.

¹⁰¹ C-459/03 *Commission v Ireland*, opinion of AG Poiares Maduro, para 10.

¹⁰² See further discussion above in Chapter 1.2.

¹⁰³ C-459/03 *Commission v Ireland*, opinion of AG Poiares Maduro, para 2. The Advocate General takes the view that there is no threshold to the jurisdictional monopoly established by Article 292 EC: it is sufficient if part of the dispute falls within the scope of the Court’s jurisdiction.

¹⁰⁴ It was argued by Ireland that the environmental provisions of UNCLOS, being based on minimum standards, are not such as to affect Community rules within the meaning of *AETR*; c.f. *Opinion 1/92* [1993] ECR I-1061.

¹⁰⁵ C-459/03 *Commission v Ireland*, opinion of AG Poiares Maduro, para 33. It was also argued by Commission and accepted by AG Maduro that Ireland was in breach of Art 292 by citing a number of Directives before the UNCLOS Tribunal and thereby requesting or requiring that Tribunal to rule on the interpretation of Community law: Opinion of AG Maduro, paras 44-51.

¹⁰⁶ R. Churchill and J.Scott, “The Mox Plant Litigation: The First Half-Life” (2004)53 ICLQ 643 at pp 664-666; as they point out, “it would be possible to make a credible argument to the effect that concurrent competences have not been ‘transferred’ to the EC. Such an argument would be credible but by no means water-tight. ... The Declaration is genuinely ambiguous.” Tomuschat on the other hand assumes that the Declaration is clear; see Tomuschat, “The International Responsibility of the European Union” in Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer 2002) at p.185.

not the right one. The issue here is not to what extent the EC exercised its non-exclusive competence in concluding UNCLOS; given that there is agreement as to the existence of shared competence in the environmental field this is essentially a factual question and should not bear on the issue of protection of the autonomy of the Community legal order. As AG Maduro says, there is a great deal of Community law in the environmental field covered by UNCLOS, and the real issue is rather that a dispute under the agreement gave rise to issues within the scope of Community law. This would be so even if the Irish view were correct and in fact the Community had *not* concluded the environmental aspects of the agreement – there would still be a threat to the Community legal order if such issues were to be submitted to non-Community dispute settlement. It is the existence of this body of law which calls into play Article 292 EC (which refers, it will be recalled, to “the interpretation or application of this Treaty”) rather than the question of either exercise of Community competence or responsibility for implementation. In fact, it is well established that the Member States’ loyalty obligation under Article 10 EC applies also when they are exercising their own competence, and even to fields of activity that are outside Community competence altogether. Article 292 creates an obligation which is essentially internal to the Community legal order; it does not tell us anything about international responsibility (this will be discussed below in Chapter 2.2).

2. *International responsibility*

We can now turn to the question of international responsibility: put simply, who is responsible to third countries for the performance of a mixed agreement? More generally, questions arise as to the extent to which Member States might be liable for (implementing) the acts of a Community institution, and on the other hand the extent to which the Community might be held responsible for default by a Member State: the *Bosphorus* case¹⁰⁷ is an example of the former, the *EC-Asbestos* case¹⁰⁸ an example of the latter. Of course these issues arise both inside and outside the context of mixed agreements, but here we will focus specifically on mixed agreements.

Although the Court of Justice has said that in the case of a mixed agreement the division of competence between Member States and the Community is an internal question,¹⁰⁹ it does affect third countries and therefore has an external dimension. However, the approach to the internal and external dimensions of the question should, it is submitted here, be different. As we have seen, when considering the Member States’ *Community law* (internal) obligations under a mixed agreement, the essential issue is

¹⁰⁷ ECtHR Grand Chamber Judgment, 30.6.2005, in *"Bosphorus Airways" v. Ireland*, application no. 45036/98; this case concerned a challenge under the European Convention to action taken by Ireland in giving effect to a Community Regulation.

¹⁰⁸ *EC-Asbestos*, WT/DS135/AB/R, 12 March 2001; Canada brought WTO dispute settlement proceedings against the EC in relation to French legislation. In *EC and certain Member States – Large Civil Aircraft*, the USA has brought WTO dispute settlement proceedings against the EC together with Germany, France, the UK and Spain; the case concerns allegedly illegal subsidies granted by Member States to Airbus; the presence of the Member States in the dispute may be explained by the different roles of Community and Member States in the field of State aid; the case is still pending.

¹⁰⁹ See note 54 and cases there cited.

not the exercise of competence, but rather the scope of Community law and the preservation of the autonomy of the Community legal order. In contrast, in the external context, where responsibility towards third States is concerned, the allocation of competence is our starting point; hence the importance of Declarations of competence, discussed below. As we shall see, this does not necessarily exclude, however, the liability of the Community for default by a Member State in relation to the mixed agreement as a whole.

a. Where there is a Declaration of competence

Multilateral agreements that make provision for participation by regional economic integration organisations (REIOs) such as the EC alongside its Member States will often provide for a Declaration of competence by the REIO, specifying which areas of the agreement fall within the competence of the REIO and which within that of its Member States. The Court of Justice has explained their purpose clearly:

“Admittedly it goes without saying that the extent of the respective powers of the Community and the Member States with regard to the matters governed by the Protocol determines the extent of their respective responsibilities in relation to performance of the obligations under the Protocol. Article 34(2) and (3) of the Convention takes account of that very consideration, in particular by requesting regional economic integration organisations which are party to the Convention or to any of its protocols to declare the extent of their competence in their instruments of approval and to inform the depositary of any relevant modification in the extent of that competence.”¹¹⁰

Thus, Declarations are intended to indicate to third countries the distribution of competence; in reality their helpfulness varies from case to case. In some cases they do little more than list relevant Community legislation, leaving the other Contracting Parties to draw their own conclusions as to the competence implications.¹¹¹ In other cases they are more indicative of competence; so for example the Declaration made by the EC under UNCLOS Annex IX mentions the existence of exclusive and shared competence and outlines the scope of exclusive competence; it does not however specify the implications of shared competence by making clear the extent to which the Community was actually exercising its shared competence in concluding the Convention. As we have seen, this became an issue in the *Sellafeld* case. Annex IX foresees this problem, in providing that if a third State asks for information as to responsibility as between the EC and its Member States, and does not get an answer, or receives a contradictory answer, both the EC and its Member States will be jointly and severally liable. As Heliskoski points out, this provides a procedural solution to the tension between third States’ demand for certainty as to responsibility and the Community’s concern for autonomy and the dynamism of Community competence.¹¹² The Declaration of competence in relation to the Palermo Convention, in contrast, not only outlines Community competence in areas relevant to the Convention but makes

¹¹⁰ *Opinion 2/2000 (Cartagena Protocol)* [2001] ECR I-09713, para 16.

¹¹¹ See for example the UNESCO Convention on Cultural Diversity, COM(2005)678 final.

¹¹² J. Heliskoski, *Mixed Agreements*, p.161-166. It is normal practice for the Community Declaration to point out that the “scope and the exercise of Community competence are, by their nature, subject to continuous development”.

express reference to relevant Articles of the Convention itself, indicating by which Articles it considers itself bound.¹¹³

In the absence of a specific Declaration, other indications of competence may be found. Bilateral mixed agreements often have a clause defining the term “Contracting Parties” in such a way as to make it clear that competence is shared but without specifying the delimitation.¹¹⁴ The legal base of the concluding Decision may also be an indication although it has been argued above that caution is needed in reading too much into the choice of legal base.¹¹⁵

b. Where there is no Declaration of competence

Where there is no declaration on the division of competence in a mixed agreement, the authorities differ as to whether international responsibility should be apportioned between the Community and its Member States according to their respective competences, or whether the Community and Member States could be regarded as jointly and severally responsible in international law for the whole agreement. The difficulty with the former approach lies in determining, with respect to those parts of the agreement that are within shared competence, to what extent the agreement can be said to have been concluded by the Community. As the *Sellafield* case illustrates, this is by no means straightforward even where there *is* a declaration of competence and in its absence there is a risk of uncertainty for third countries. On the other hand, as Heliskoski points out, the principle of joint and several liability undermines the very idea of a division of competence and the rationale behind the use of the mixed agreement.¹¹⁶ Nevertheless, support for this approach can be found in the case law of the Court of Justice; in the *EDF* case the Court said:

“The [Lomé] Convention was concluded, according to its preamble and Article 1, by the Community and its Member States of the one part and the ACP States of the other part. It established an essentially bilateral ACP-EEC cooperation. In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.”¹¹⁷

¹¹³ Council Decision 2004/579/EC on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime OJ 2004 L 261/69 at p.115.

¹¹⁴ For example see the EEA Agreement Art 2(c): “the term ‘Contracting Parties’ means, concerning the Community and the EC Member States, the Community and the EC Member States, or the Community, or the EC Member States. The meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of this Agreement and from the respective competences of the Community and the EC Member States as they follow from the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.” For an example of the legal significance that may be attached to such a definition, see text at note 117.

¹¹⁵ See the discussion of Case C-94/03 *Commission v Council*, at note 48, and of C-459/03 *Commission v Ireland*, at note 93.

¹¹⁶ Heliskoski, *Mixed Agreements*, pp.141-153. See also Advocate General Mischo in Case C-13/00 *Commission v Ireland*, at para 30.

¹¹⁷ Case C-316/91 *European Parliament v Council* (EDF) [1994] ECR I-0625, para 29. We should note that this case concerned development cooperation which is a case of concurrent or parallel competence – that is, it was the case that either the EC or the Member States could have implemented the commitments. This will not always be the case for mixed agreements.

Rosas argues that the Community could be held responsible for the whole of a mixed agreement where there is concurrent competence, especially where Community competence has not been expressly excluded. For example, in relation to the WTO, Rosas has said “The EC is probably internationally responsible for the implementation of not only the GATT but the entire GATS and TRIPS as well, in view of the fact that no declaration on the division of competence between the EC and its Member States has been given.”¹¹⁸ Taking a similar approach, Advocate General Tesouro in the *Hermes* case, while accepting that “on the Community side” a mixed agreement such as the WTO/TRIPS requires a separation of competences,¹¹⁹ argues that this division is a purely internal matter:

“This is how matters stand on the Community side but it must not be forgotten that both the Community and the Member States signed all the WTO agreements and are therefore contracting parties vis-à-vis contracting non-member States. And while it is true that the approval of those agreements on behalf of the Community is restricted to ‘matters within its competence’, it is also true that the Final Act and the WTO Agreement contain no provisions on competence and the Community and its Member States are cited as original members of equal standing. In these circumstances, it should be recognised that the Member States and the Community constitute, vis-à-vis contracting non-member States, a single contracting party or at least contracting parties bearing equal responsibility in the event of failure to implement the agreement. This clearly means that, in that event, the division of competence is a purely internal matter.”¹²⁰

In practice within the WTO, TRIPS cases may be brought against either the EC alone or against the EC and individual Member States;¹²¹ and the EC has tended to assume lead responsibility for all WTO disputes, consulting Member States through the Article 133 Committee. The Commission likes to see the EC as the first port of call, in order to minimize the risk that a Member State and a third state might enter into bilateral negotiations or even proceedings which might have the effect of deciding issues

¹¹⁸ Rosas, “The European Union and International Dispute Settlement” in Boisson de Chazournes, Romano and Mackenzie (eds.) *International Organisations and International Dispute Settlement: Trends and Prospects* (2002) at p.57. As well as citing AG Tesouro in *Hermes* (see below), Rosas also cites the Court of Justice in Case 12/86 *Demirel*, at para 11, where the Court applies the *Kupferberg* reasoning to a mixed agreement: “in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the Agreement.” See also Tomuschat, “The International Responsibility of the European Union” in Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer 2002) at p.185.

¹¹⁹ Case C-53/96 *Hermes International v. FHT Marketing* [1998] ECR I-3603, Opinion of AG Tesouro at para 13: “the expression ‘joint competence’ must, in my view, mean that Member States and Community have the last word in their respective areas of competence, at least in cases where the required cooperation does not produce agreement.”

¹²⁰ Case C-53/96 *Hermes International v. FHT Marketing* [1998] ECR I-3603, Opinion of AG Tesouro at para 14.

¹²¹ For an example of the former, see *EC – Trademarks and Geographical Indications* brought by the USA (WT/DS174) and Australia (WT/DS290) in respect of Regulation 2081/92/EC; for an example of the latter, see *EC – Enforcement of IPR for Motion Pictures and Television Programmes* (WT/DS124) and *Greece – Enforcement of IPR for Motion Pictures and Television Programmes* (WT/DS125), both brought by the USA in respect of the same alleged infringement of TRIPS by Greece.

relating to the interpretation of the agreement and to the scope of EC competence. This practice in relation to dispute settlement contrasts somewhat with the approach to WTO negotiations where, although the Commission may act as spokesperson for “the Community and the Member States”, Member State play an important role in the formulation of negotiating positions. The duty of cooperation is important in this context and should lead to coordinated action by the Community and Member States.¹²²

International law practitioners and courts are also debating the questions that arise concerning the international responsibility of international organisations, and in particular the attribution of acts to international organisations and/or their members. In 2002 the International Law Commission appointed Giorgio Gaja as Special Rapporteur on the Responsibility of International Organisations, as well as a Working Group on the topic. Since then, four reports of the Special Rapporteur have been published and a number of draft articles adopted by the ILC Drafting Committee, covering *inter alia* attribution of conduct to an international organisation and breach of international obligations.¹²³ This work is obviously of importance to the Community and mechanisms have been established to ensure that responses to the Working Group’s work are coordinated between the Member States and the Commission.¹²⁴ Although this chapter has focused on international agreements, it should be remembered that issues of international responsibility for wrongful acts under international law have a broader application; as far as the European Union is concerned, as it extends its activities into the military and peacekeeping fields, these questions are likely to assume particular importance and the difficulties caused by its uncertain legal status need resolution.¹²⁵ The European Community, as Kuijper and Paasivirta point out, raises particular questions of both apportionment and attribution and the role played by the “rules of the organisation”. There is an understandable desire that attribution and apportionment in the context of international responsibility should reflect delimitation of competence at the Community level.

To conclude this Chapter: in the negotiation and conclusion of international agreements, and in managing their implementation,¹²⁶ the division of competence between the Community and its Member States is clearly critical and forms the basis for an ultimate division of responsibility. Some of the issues arising have been discussed in Chapter 1. Turning to the issue of responsibility for fulfilment of the obligations under a mixed agreement, the position is inherently complex, as it inevitably reflects the interests of the Community legal order, of the Member States and of third parties. When considering Member State responsibility as a matter of internal Community law, the emphasis is on the needs of the Community legal order and the Community interest. Thus in all areas which fall within the scope of Community law (not necessarily co-

¹²² *Opinion 1/94* at paras 108-109, *Opinion 2/2000* at paras 16-18.

¹²³ The reports and draft articles are available on http://untreaty.un.org/ilc/guide/9_11.htm

¹²⁴ Kuijper and Paasivirta, “Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations” (2004) *International Organizations Law Review* 1, 111.

¹²⁵ The general legal problems that arise in this context are not so different from those arising in the case of UN missions: Kuijper and Paasivirta, *supra* note 123, at p.113.

¹²⁶ There has not been space here to discuss implementation issues; see for example Case C-25/94 *Commission v Council* [1996] ECR I-1469.

equivalent to the exercise of Community competence in concluding the agreement), Member States bear a Community law obligation. This Community law obligation includes the duty of loyalty to the Community judicial process as expressed in Article 292 EC. However, in considering international responsibility towards third States for compliance with a mixed agreement, the interests of third States in legal certainty and the balance between Community and Member State competence need to be considered. An *ex ante* Declaration of competence will indicate where that balance lies and may provide a degree of legal certainty, although practice has shown that such Declarations do not answer all questions. There is some judicial support for an approach based on joint and several liability in cases where there is no *ex ante* Declaration, or where it is inconclusive. There is no doubt, however, that such an approach would tend to blur the distinction between Member State and Community participation in the agreement, a distinction whose importance is reflected in the very need for a mixed agreement – the reluctance of the Member States to accept sole Community participation in cases of concurrent competence. Heliskoski has argued that the potentially conflicting interests (of Community, Member States and third parties) can be reconciled through procedural mechanisms which ensure that the allocation of responsibility is carried out by the Community and Member States, not *ex ante* but as individual cases arise.¹²⁷ Joint and several liability would then operate as a default position to protect third parties in case of disagreement, rather than an *a priori* principle.¹²⁸ The principle underpinning such procedural mechanisms is the duty of cooperation, which provides the foundation for managing shared competence within mixed agreements.¹²⁹ In conclusion we should remember that “in practice, a claim for international responsibility against the Community has never failed for the reason that it has been brought against a “wrong party” in the context of mixed agreements.”¹³⁰

Chapter 3 – Legal effects of international law

The relationship between international law and Community/Union law is of increasing relevance and importance for a number of reasons: in part it is a sign of the maturity of the Community legal order that in its early days needed to emphasise its distinction

¹²⁷ Heliskoski, *Mixed Agreements*, pp.244-248.

¹²⁸ Article 19(2) of the mixed agreement between the EC and Member States and the USA on satellite navigation (Galileo) provides a precedent for such an approach: “If it is unclear whether an obligation under this agreement is within the competence of either the European Community or its Member States, at the request of the United States the European Community and its Member States shall provide the necessary information. Failure to provide this information with all due expediency or the provision of contradictory information shall result in joint and several liability.” Proposal for a Decision of the Council and Representatives of the Member States on the signature and provisional application of the agreement, SEC/2004/0640 final. See also Kuijper and Paasivirta, *supra* note 123, at 120, mentioning other examples, including the Energy Charter Treaty.

¹²⁹ In Case C-25/94 *Commission v Council* [1996] ECR I-1469, the Court referred to the arrangement between the Council and the Commission for the management of decision-making under a mixed agreement as a fulfilment of the duty of cooperation between the Community and its Member States: paras 48-49.

¹³⁰ Kuijper and Paasivirta, *supra* note 123, at 123.

from “traditional” international law;¹³¹ it is also partly the result of the extension of Union activity into the fields of security and defence, and the growing importance of individual and human rights within international law. As the ICJ itself has said:

“International organisations are subjects of international law and as such are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”¹³²

However these current developments are not simply a question of international organisations as themselves subjects of international law. Increasingly we see that the system of multilevel governance (whether in matters of trade, environmental protection or anti-terrorism) is not limited to the Community and national levels but also includes the international level, by which is meant not only that different jurisdictions are dealing with the same problems, but further that those jurisdictions are becoming increasingly integrated.¹³³ It is not surprising that we are seeing an increasing number of cross-jurisdictional cases, such as *Sellafield*, *Bosphorus*, *Yusuf* and *Kadi*, not to mention the cases involving the enforcement of WTO norms within the EC legal order, and that the Court of Justice has to deal more often with international law issues.

How then does the Community legal order perceive international law? It has been called “a supplementary constitutional law for the EU.”¹³⁴ The Court of Justice has stated that the Community “must respect international law in the exercise of its powers,”¹³⁵ and in the *Racke* case¹³⁶ it went further, holding that it had jurisdiction under Article 234 EC to review the legality of a Community act on grounds of breach of a rule of international law; the rules of customary international law were held to be not only binding on the institutions but part of the Community legal order. Likewise, in *Opel Austria*, the CFI applied the international law principles of good faith and legitimate expectations as expressed in Article 18 of the Vienna Convention on the Law of Treaties concerning the obligation to refrain from acts which would defeat the object and purpose of a treaty before its entry into force.¹³⁷ The Court of Justice will

¹³¹ Timmermans, “The EU and Public International Law” (1999)4 *European Foreign Affairs Rev.* 181.

¹³² *Advisory Opinion of 20 Dec 1980 on the question concerning the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, (1980)ICJ Reports 73; cited by Tomuschat, “The International Responsibility of the European Union” in Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer 2002) 177 at 179.

¹³³ Bethlehem, “International Law, European Community Law, National Law: Three Systems in Search of a Framework” in Koskeniemi (ed.) *International Law Aspects of the European Union* (Martinus Nijhoff 1998).

¹³⁴ Krajewski, “Foreign Policy and the European Constitution” (2004) 23 *Yearbook of European Law* 435 at 436.

¹³⁵ Case C-286/90 *Poulsen* [1992] ECR I-6048.

¹³⁶ Case C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz* at paras 45-46: “the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country. It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.” (paras 45-46)

¹³⁷ Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39.

regularly refer to decisions of other international courts and tribunals including the European Court of Human Rights,¹³⁸ the ICJ,¹³⁹ the EFTA Court¹⁴⁰ and the WTO Appellate Body.¹⁴¹

In what follows we will consider the impact within the Community legal order of different sources of international law, starting with international agreements concluded by the Community, and then going on to look at UN law and human rights law in the specific context of sanctions legislation.

1. Community agreements

a. Judicial review

Basing itself on Art 300(7) EC, the Court of Justice is clear that international agreements concluded by the Community are not only an integral part of the Community legal order (*Haegeman*¹⁴²), they also take precedence in the hierarchy of norms over acts of the Community legislature:

Article 300(7) EC provides that ‘agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States’. In accordance with the Court’s case-law, those agreements prevail over provisions of secondary Community legislation (Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52, and Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33).¹⁴³

As a preliminary point we should recall that the Court has not interpreted Article 300(7) EC to mean that Community agreements take precedence over *primary* Community law. In case C-122/95 *Germany v Council* for example, the Court was prepared to accept an argument that certain aspects of the Framework Agreement on Bananas were contrary to the fundamental Community law principle of non-discrimination.¹⁴⁴ Although this

¹³⁸ For example Case C-249/95 *Grant v South-West Trains* [1998] ECR I-621 at para 34.

¹³⁹ For example Case C-162/96 *Racke* [1998] ECR I-3655, at para 50, T-306/01 *Yusuf and Al Barakaat International Foundation*, judgement of 21 September 2005, at paras 233-4.

¹⁴⁰ For example Case C-192/01 *Commission v Denmark* [2003] ECR I-9693, at para 31.

¹⁴¹ For example Case C-245/02 *Anheuser-Busch v Budjovický Budvar, národní podnik* [2004] ECR I-10989 at para 49.

¹⁴² Case 181/73 *Haegeman* [1974] ECR 449.

¹⁴³ Case C-344/04 *R v Department of Transport ex parte IATA*, judgement of 10 January 2006, at para 35. In case C-61/94 *Commission v Germany* at para 52, cited by the Court in the passage quoted, the Court had said: “Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.”

¹⁴⁴ C-122/95 *Germany v Council* [1998] ECR 973. See Lenaerts and De Smijter, “The European Union as an Actor under International Law” (1999-2000) 19 *Yearbook of European Law* 95 at 102. Note that the principle of non-discrimination referred to applies to discrimination between Community nationals only: on this point see further Cremona, “Neutrality or Discrimination? The WTO, the EU and External Trade” in de Búrca and Scott (eds.) *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001).

raises some important questions, in what follows we will focus on the issue of the compatibility of Community agreements with secondary Community law.¹⁴⁵

Returning to secondary legislation, AG Jacobs has argued for a general principle of judicial review:

“it might be thought that it is in any event desirable as a matter of policy for the Court to be able to review the legality of Community legislation in the light of treaties binding the Community. There is no other court which is in a position to review Community legislation; thus if this Court is denied competence, Member States may be subject to conflicting obligations with no means of resolving them.”¹⁴⁶

International Fruit Company spelled out two conditions for such a review: the binding nature of the provision of international law, and that the provision is capable of conferring individual rights.¹⁴⁷ Both these conditions were held in case C-280/93 *Germany v Council* to apply even in direct actions for annulment of a Community act brought by a Member State. Since *International Fruit Company* itself the first condition (that the provision be binding) has rarely been an issue.¹⁴⁸ As far as agreements are concerned the Community is bound as a signatory in respect of the whole agreement, even where competence is shared and the agreement is mixed.¹⁴⁹ It is on that basis that AG Tesauro made the comments relating to the WTO agreements in the *Hermes* case cited above. In the context we are considering here (judicial review of acts of secondary legislation) it is unlikely that the provision of the agreement in question would fall outside the scope of Community law (and within Member State competence) since the Community has legislated in the field.

¹⁴⁵ Were the Court to annul the Decision concluding the agreement on such grounds, its status within the Community legal order is somewhat doubtful: Lenaerts and De Smijter (*supra* note 136 at 103) suggest that it would cease to have effect within the Community legal order; however as far as international responsibility is concerned, the Community would remain liable to its contracting parties unless it could be claimed that the conditions set out in Article 46(1) of the Vienna Convention on the Law of Treaties apply: “Although the contested Council Decision must therefore be declared void, that does not change the legal situation under international law, according to which the Community, by adopting a convention which has meanwhile entered into force, remains bound by it. That follows from the principles of the general law of treaties, as they are laid down, for example, in Article 46 of the Vienna Convention on the Law of Treaties of 23 May 1969 and Article 14 of the Vienna Convention of 21 March 1986 governing the treaty-making powers of international organizations. The agreement of the Community was indeed given contrary to its internal procedural law on authority to conclude treaties, but that infringement was not apparent to the other contracting parties. Consequently, the Community cannot rely on that irregularity as regards those other contracting parties.” AG Lenz in Case 165/87 *Commission v Council* [1988] ECR 5545 at para 35; in the event the Court of Justice in this case did not declare the concluding Decision void.

¹⁴⁶ C-377/98 *Netherlands v EP & Council* (biotechnology directive), Opinion of AG Jacobs, para 147.

¹⁴⁷ Cases 22-24/72 *International Fruit Company* [1972] ECR 1219, paras 7-8.

¹⁴⁸ It was an issue at the time of the *International Fruit Company* decision in relation to the GATT, as the Community at that time was not a party, the Court having therefore first to hold that it was nevertheless bound by the provisions of the GATT. As the Court said in Case C-377/98, at para 52, “as a rule, the lawfulness of a Community instrument does not depend on its conformity with an international agreement to which the Community is not a party.” Since then the binding nature of an international law provision has been discussed in relation to customary international law (*Racke*) and the United Nations Charter (*Yusuf*): see further discussion in chapter 3.2.

¹⁴⁹ Case 12/86 *Demirel* [1987] ECR 3719, at para 7.

The case law of the Court in which it has held consistently that the WTO does not fulfil the second of these conditions is very familiar; we consider the WTO further below in the context of the protection of individual rights. More recently (and outside the WTO context), the ECJ has broken down the second limb of the *International Fruit Company* test into its two constituent parts and applied these,¹⁵⁰ but without making any reference to individual rights, or even denying their relevance. For example, in the *IATA* case:

“Articles 19, 22 and 29 of the Montreal Convention are among the rules in the light of which the Court reviews the legality of acts of the Community institutions since, first, neither the nature nor the broad logic of the Convention precludes this and, second, those three articles appear, as regards their content, to be unconditional and sufficiently precise.”¹⁵¹

There is no mention here of the creation of individual rights, although the two tests mentioned in the passage quoted are the conditions for direct effect set out in *Kupferberg* and *Demirel*. The point is made even more clearly in *Netherlands v European Parliament and Council*, with the Court separating the issues of direct effect and judicial review. The Court here distinguishes the Convention on Biological Diversity (CBD) from the WTO agreements on the ground of its “nature and structure”:

“... the CBD ... unlike the WTO agreement, is not strictly based on reciprocal and mutually advantageous arrangements (see *Portugal v Council*, cited above, paragraphs 42 to 46). ... Even if, as the Council maintains, the CBD contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement (Case C-162/96 *Racke* [1998] ECR I-3655, paragraphs 45, 47 and 51).¹⁵²

The contrast with the reasoning in case C-280/93 *Germany v Council* is noticeable, consolidating the separation between the concept of the “nature and structure” of an agreement as a criteria for judicial review and the protection of individual rights. The reliance on *Racke* is also significant, suggesting that the Court wishes to emphasise the binding nature of international law in relation to the acts of the institutions.¹⁵³ There is also an interesting reference to the need for the Community to avoid placing obligations on its Member States that would be contrary to their international law obligations: the Court was prepared to consider the compatibility of the contested Directive with the TRIPS, on the ground that the real issue was not whether Community legislation complied with the agreement, but rather whether the Directive required the Member

¹⁵⁰ We refer here to the conditions for direct effect set out in the *Kupferberg* and *Demirel* case law: (i) the nature and structure of the agreement, and (ii) the unconditional and precise character of the specific provision.

¹⁵¹ Case C-344/04 *R v Department of Transport ex parte IATA*, judgement of 10 January 2006, para 39.

¹⁵² C-377/98 *Netherlands v EP & Council* (biotechnology directive) paras 53-54.

¹⁵³ AG Jacobs in *Racke* had some doubts about the applicability of rules of customary international law to the case on the basis of the tests laid down in *International Fruit Company*; however the Court held that the applicant was relying on the Cooperation Agreement which did satisfy those tests; the direct effect of the rules of customary international law were therefore not in issue.

States to breach *their* international law obligations.¹⁵⁴ The willingness of the Court of Justice to accept judicial review of secondary legislation on the basis of the nature and structure of the agreement in almost all cases except the WTO is striking and welcome; it is to be hoped that the trend away from regarding direct effect as a condition of judicial review in direct actions continues.

b. Creation of individual rights

The nature and structure of the agreement is of course also a part of the test when deciding whether a Community agreement is capable of creating individual rights enforceable before the courts (domestic and European). Here too we find a clear divergence between the WTO case law and that dealing with most other agreements.

In the case of Association Agreements and the Partnership and Cooperation Agreements the Court has recently continued in its attitude of relative openness to direct effect. In its interpretation of the “Europe” Association Agreements (EAs) the Court has clearly been influenced by their nature and structure as agreements designed to further closer integration with the Community and its legal order. In a number of cases, provisions of the EAs, particularly those dealing with establishment, have been found to create directly effective rights.¹⁵⁵ In *Panayotova*¹⁵⁶ Advocate General Poiares Maduro, referring to the importance of context, objectives and purpose in the interpretation of agreements (Article 31 of the Vienna Convention on the Law of Treaties) points to the “political re-orientation” of the EAs towards the accession of the associate States and the effect that should have on their interpretation, arguing that it is this context which explains the approach to interpretation adopted by the Court.¹⁵⁷ Certainly the Court has not only been prepared to grant direct effect to provisions of these agreements, it has also noticeably interpreted their provisions in line with existing case law on the EC Treaty.¹⁵⁸ The principle of effective judicial protection has also been extended to cover individuals exercising rights granted under the Europe Agreements, as a general principle which stems from the constitutional traditions common to the Member States and which is found in the European Convention on Human Rights,¹⁵⁹ and on the basis that the EA has become an integral part of the Community legal order within which such general principles apply.¹⁶⁰ Given the

¹⁵⁴ C-377/98 *Netherlands v EP & Council* (biotechnology directive) para 55. An analogy can be drawn with Art 307 EC, although of course this applies only to pre-accession agreements.

¹⁵⁵ See for example C-257/99 *Barkoci and Malik* [2001] ECR I-6557; C-63/99 *Gloszczuk* [2001] ECR I-6369; C-235/99 *Kondova* [2001] ECR I-6427; C-268/99 *Jany and Others* [2001] ECR I-8615; C-162/00 *Pokrzepowicz-Meyer* [2002] ECR I-1049; C-438/00 *Kolpak* [2003] ECR I-4135.

¹⁵⁶ Case C-327/02 *Panayotova* [2004] ECR I-11055.

¹⁵⁷ Case C-327/02 *Panayotova* [2004] ECR I-11055, Opinion of AG Maduro, paras 24-26.

¹⁵⁸ In particular the case law on non-discrimination: see C-438/00 *Kolpak* [2003] ECR I-4135, in which the Court interpreted the prohibition of discrimination in matters of employment in the EC-Slovakia EA in line with Case C-415/93 *Bosman* [1995] ECR I-4921; and C-162/00 *Pokrzepowicz-Meyer* [2002] ECR I-1049, in which the Court applied its EC Treaty case law (Case C-272/92 *Spotti* [1993] ECR I-5185) on non-discrimination in relation to foreign language assistants.

¹⁵⁹ Case C-327/02 *Panayotova* [2004] ECR I-11055, at para 27.

¹⁶⁰ Case C-23-25/04 *Sfakianakis*, judgement of 9 February 2006, para 28. Agreements become an integral part of the Community legal order on being concluded by an act of a Community institution (Case 181/73 *Haegeman* [1974] ECR 449) so this reasoning should not be specific to the EAs.

references in the judgements on the EAs to their accession context, it is interesting to see similar reasoning being applied to the Partnership and Cooperation Agreement with Russia, which has no accession dimension and which is certainly more limited in its scope and ambition than the EAs. In *Simutenkov* the Court not only held the non-discrimination obligation as regards working conditions for legally resident Russian nationals within the Community to be directly effective, it then went on to apply its rulings in *Bosman* (under the EC Treaty) and *Kolpak* (under the EC-Slovakia EA).¹⁶¹ The Court rightly mentions that other cooperation agreements have been found to be capable of direct effect; although the objectives of the EC-Russia PCA are different from the EA at issue in *Kolpak* (and certainly different from the EC Treaty), it appears to argue that the approach to non-discrimination taken in *Bosman* and *Kolpak* “follows from the ordinary sense of the words” and can therefore be applied, in the absence of any contrary indication, to the PCA. This interpretation, however, includes the ruling that the principle of non-discrimination applies not only to the State but to rules laid down by sports federations. The Court is thus prepared to extend a form of horizontal direct effect to the provisions of the EAs and PCA.

One further comment might be made about this case law. Of course, the Court’s interpretations and findings of direct effect apply only within the Community legal order, and do not bind the other Contracting Party,¹⁶² but these cases demonstrate that the Community legal order has “fuzzy edges,” with the extension of Community-type freedoms and non-discrimination rights to non-EC nationals. Is it really, in these circumstances, so irrelevant that the other Contracting Party does not accept direct effect?¹⁶³

The Court of Justice and the CFI have recently confirmed their restrictive approach to individual rights under the WTO agreements.¹⁶⁴ Most recently the issue has been raised in the context of rulings of the WTO’s Dispute Settlement Body (DSB). The Community’s capacity to conclude international agreements “necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.”¹⁶⁵ As far as the WTO is concerned, the result is ambiguous: on the one hand, the Court of Justice has stressed the importance of the DSU as a mechanism for enforcing WTO obligations and the early reluctance of the Community to involve itself with international dispute settlement¹⁶⁶ seems to have disappeared. On the other hand, the CFI has refused to give effect to an Appellate Body ruling when relied on by an individual in order to determine the existence of an unlawful act in an action for damages against the Community

¹⁶¹ Case C-265/03 *Simutenkov*, judgement of 12 April 2005; see above note 158.

¹⁶² C-321/97 *Andersson* [1999] ECR I-3551.

¹⁶³ Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641.

¹⁶⁴ Case C-377/02 *Van Parys*, judgment of 1 March 2005; Case T-69/00 *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) v Council and Commission*, judgment of 14 December 2005; note that the case is being appealed to the Court of Justice: C-120/06P. See also Case T-383/00 *Beamglow*, judgement of 14 December 2005.

¹⁶⁵ *Opinion 1/91* [1991] ECR I-6102.

¹⁶⁶ Rosas, “The European Union and International Dispute Settlement” in Boisson de Chazournes, Romano and Mackenzie (eds.) *International Organisations and International Dispute Settlement: Trends and Prospects* (2002, pp.51-52).

institutions.¹⁶⁷ Applying the standard tests for the liability of the Community institutions in damages, the CFI in this recent case examined whether there had been an unlawful act in the sense of a sufficiently serious breach of a rule of law intended to confer rights on individuals. It then refused to find that a failure on the part of the Community institutions to implement a DSB ruling constituted an “unlawful act”. Rather than basing itself on a possible argument that the rule of law in question (the provisions of the GATT, GATS and the DSB decision) was not intended to confer rights on individuals the CFI draws a striking conclusion from the Court of Justice’s case law on the WTO: although the principle of *pacta sunt servanda* is “a fundamental principle of all legal orders and particularly of the international legal order” it cannot be relied upon in this case “since, in accordance with settled case-law, the WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions.”¹⁶⁸ The CFI goes into some detail as to whether or not one of the exceptions to this principle might apply, but decides that they do not; the reasons given by the Court of Justice for refusing to use WTO rules as a basis for judicial review are not altered by the adoption of the DSB decision. In spite of the DSB decision finding an infringement, then, the CFI concludes that “the defendant institutions’ conduct cannot be regarded as unlawful”.¹⁶⁹

Although the attitude of the Community Courts towards the WTO has attracted a great deal of comment, this case at least needs to be seen in the broader context of actions for non-contractual liability in the light of international obligations, where we see a similarly restrictive approach. In *Dorsch Consult* for example, the CFI held that there was no causal link between the Community sanctions Regulation and the damage caused, on the grounds that the damage could not be attributed to the Community which was simply implementing its obligations under a Security Council Resolution.¹⁷⁰ In another recent case the CFI took the view that an alleged breach of the Ankara Association Agreement with Turkey cannot provide the basis of an action in damages on the ground that it does not meet the tests for direct effect as laid down in *Demirel*: “having regard to its nature and scheme, the Ankara Agreement is not included, in principle, in the norms in whose light the Court of First Instance reviews the lawfulness of the acts of the Community institutions.”¹⁷¹ As in *Fiamm*, therefore, the CFI is applying a restrictive approach to unlawfulness in the context of a damages action. This contrasts with the more open attitude evidenced in some of the judicial review cases

¹⁶⁷ Case T-69/00 *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) v Council and Commission*, judgment of 14 December 2005.

¹⁶⁸ Case T-69/00 *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) v Council and Commission*, at paras 109-110.

¹⁶⁹ Case T-69/00 *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) v Council and Commission*, at para 148. See also Case C-377/02 *Van Parys*, judgment of 1 March 2005. The CFI goes on to consider whether there might be liability for a lawful act, finding that although there was damage and a causal link between that damage and the act of the institutions, the damage suffered did not satisfy the tests of being unusual and special in nature.

¹⁷⁰ Case T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission* [1998] ECR I-667, at para 74. See further Chapter 3.2.

¹⁷¹ Case T-367/03 *Yedaş Tarım ve Otomotiv Sanayi ve Ticaret AŞ*, judgement of 30 March 2006, at para 41. As regard another aspect of the damages claim, the CFI rejects Community liability on the ground that the applicant itself attributed the act to a Member State (para 50).

discussed above such as *IATA* and *Netherlands v European Parliament and Council*. It also contrasts with the approach to the enforceability of individual rights at national level found in judgements such as *Panayotova* and *Simutenkov*.

2. The UN Treaty and Human Rights: the example of sanctions

Sanctions cases provide a real testing ground for the rules governing the relationship between international law and Union/Community law: they rely for their effectiveness on a close interaction between international law (especially UN Security Council Resolutions), Union/Community law and national law; in addition they raise important questions of fundamental human rights as protected at the international, Community and national levels. Bethlehem has rightly argued that from the point of view of effective implementation of sanctions, functional cooperation between these different systems is more important than their precise hierarchical relationship;¹⁷² however that relationship has proved to be important when it is a matter of accountability and human rights protection. In *Dorsch Consult* the CFI held that the damage caused by a trade embargo could not be attributed to the Community: the Community in adopting its Regulation was merely enabling the Member States to fulfil their obligations under the UNSCR in an area of exclusive Community competence.¹⁷³ Following a similar logic in the context of judicial review, the CFI in *Yusuf* and *Kadi* held that the absence of any discretion on the part of the Member States and Community in implementing the UNSCR in question means that any challenge to the legality of the Community act amounted to an indirect challenge to the underlying UNSCR, and that such a challenge would be contrary to the binding nature of such international law obligations, especially to Article 103 of the UN Charter: “the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law.”¹⁷⁴

In *Yusuf* and *Kadi* the CFI goes further than in *Dorsch Consult* in formulating the exact way in which the Community is bound to implement a UN Security Council Resolution. It puts forward an interesting argument to the effect that the Community itself is bound; not only does it have the power to carry out certain of the Member States’ obligations, and (under Article 307 EC) the obligation not to obstruct the Member States in the performance of their prior treaty obligations towards third countries.¹⁷⁵ The CFI argues that not as a matter of international law (as it is not a member of the United Nations), but *in terms of Community law itself*, the Community “must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its

¹⁷² Bethlehem, “International Law, European Community Law, National Law: Three Systems in Search of a Framework” in Koskenniemi (ed.) *International Law Aspects of the European Union* (1998), 169 at 194.

¹⁷³ Case T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission* [1998] ECR I-667.

¹⁷⁴ Case T-306/01 *Yusuf and Al Barakaat International Foundation*, judgment 21 September 2005, at para 276.

¹⁷⁵ Thus, Article 307 EC was held in Case C-124/95 *Centro-Com* [1997] ECR I-81 to justify national measures otherwise contrary to Community law if such measures are necessary to enable a Member State to fulfil its obligations under the UN Charter.

Member States”.¹⁷⁶ By analogy with the arguments used in relation to the binding nature of the GATT in *International Fruit Company*, the EC Treaty is evidence of a willingness that the Community should be so bound, and insofar as the Member States have transferred powers to the Community those powers must be used in conformity with those obligations. There is no space here to detail every step in the Court’s reasoning, but its conclusion is important: that the Community is bound by the UN Charter (and therefore by UNSCR) *as a matter of Community law*. If this is the case, however, the basis on which the Court declined judicial review is undermined; if UN obligations take effect within the Community legal order as a matter of Community constitutional law, then there is no reason why an act of the institutions giving effect to such an obligation should not be judged in the light of other constitutional principles of the Community legal order, including of course the protection of fundamental human rights. There would then need to be a discussion as to the relative force of these different principles within the Community’s constitution but there is no justification for denying review altogether.¹⁷⁷ Indeed, the Court of Justice engaged in just such a review in the *Bosphorus* case, in which it not only interpreted a sanctions Regulation taking into account the text and aims of the UNSCR which it implemented, but also then went on to consider a claim that the Regulation should be declared invalid on grounds of proportionality and breaches of human rights.¹⁷⁸

Although the Court of Justice in the *Bosphorus* case declared the Regulation to be in conformity with Community law, Ireland was held to account before the European Court of Human Rights in respect of its implementation of the Regulation.¹⁷⁹ The approach of the European Court of Human Rights to the issue of attribution, responsibility and review is an interesting contrast to that of the CFI. In *Yusuf* the CFI argued that because the institutions had no autonomous discretion, to review the Community Regulation would be tantamount to reviewing the UNSCR: “the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions.”¹⁸⁰ The European Court of Human Rights on the other hand is clear that even where the Member States are implementing their (international and Community law) obligations without discretion they are responsible for compliance with the ECHR; there is no absolution of responsibility from ECHR obligations whenever a Contracting

¹⁷⁶ Case T-306/01 *Yusuf*, at para 243.

¹⁷⁷ The CFI ultimately engaged in a limited review of the legality of the Community act in the light of *jus cogens*, but that aspect of the judgement will not be discussed further here. For a further critique see Eeckhout, “Does Europe’s Constitution Stop at the Water’s Edge? Law and Policy in the EU’s External Relations” *Fifth Walter Van Gerven Lecture*, Leiden, 2005.

¹⁷⁸ Case C-84/95 *Bosphorus* [1996] ECR I-3953. The Court decided that “as compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question ... cannot be regarded as inappropriate or disproportionate” (para 26).

¹⁷⁹ “*Bosphorus Airways*” v. *Ireland*, application no. 45036/98, European Court of Human Rights Grand Chamber Judgment, 30 June 2005.

¹⁸⁰ Case T-306/01 *Yusuf*, para 266. As Tomuschat points out, the CFI does not really deal with the implications of the absence of judicial review at the level of the UN; he however welcomes the CFI’s acceptance of the primacy of the UN system: Tomuschat, comment on cases T-306/01 and T-315/01, (2006) 43 *Common Market Law Rev.* 537 at 543-4.

Party is implementing EC law. The absence of discretion did not prevent the act being attributed to Ireland, nor did it absolve it from its Convention obligations. The Court's assessment of Ireland's compliance then rests on its doctrine of "equivalence" whereby "State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."¹⁸¹

These cases raise again the issue of international responsibility, in particular the question of "piercing the organisational veil", the extent to which Members of an organisation may be held liable for acts attributed to that organisation.¹⁸² In cases where the Member States have no discretion in implementing decisions adopted by international organisations it could be argued that the Member State is effectively acting as agent of the organisation and thus the organisation and not the Member State should be liable.¹⁸³ On this view, the *Bosphorus* case should be seen in the light of the fact that the EC is not a party to the Convention and thus action against the Community as such is not possible. However, to regard Member States as somehow acting as agents for the EC even in matters of exclusive competence does not really reflect the complexity of the Community legal order, or the way in which international, Community and domestic law interacts in such cases. If we are to reflect the functional distribution of powers between these different legal orders, it should not be possible for either a State or an international organisation to deny responsibility, no matter the binding nature of the obligation it was implementing; and if the originator organisation's rules leave no room for discretion on the part of the implementing authority, then in addition it should be possible to hold that organisation indirectly responsible. Whichever approach is adopted, questions will remain within each legal system as to the norms against which the legality of institutional or State acts may be measured, and the hierarchy of norms within that system, and it is on those issues that the *Yusuf* and *Bosphorus* cases offer differing perspectives. Finally, we should remember that where sanctions or other restrictive measures are adopted in relation to individuals not on the basis of the EC Treaty, but under CFSP powers only, there is at present no possibility for judicial review before the Court of Justice.¹⁸⁴ In such cases, the role of national courts and the European Court of Human Rights is critical.

To conclude this chapter: as an international organisation the EC is a subject of and therefore subject to international law. As a matter of its own legal order, the Court of Justice has said that the Community is bound by the general rules of customary international law and in the view of the CFI the Community is also bound, as a matter

¹⁸¹ *"Bosphorus Airways" v. Ireland*, para 155. For a comment, see Douglas-Scott, (2006) 43 *Common Market Law Rev.* 243.

¹⁸² Kuijper and Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations" (2004) *International Organizations Law Review* 1, 111.

¹⁸³ For a fuller discussion, see Kuijper and Paasivirta, *supra* note 180, at 126-128.

¹⁸⁴ For example, an individual visa ban; this gap would be filled under the Constitutional Treaty: see note 57.

of its own constitutional system, by the UN Charter. However judicial review of sanctions measures by affected individuals has proved difficult to achieve. International agreements entered into by the Community are binding on the Community institutions and will take precedence over secondary legislation, although the conditions under which individuals may rely on such agreements to challenge the legality of such legislation either directly or as part of an action for damages may be restrictive, depending on the view taken by the Community Courts as to the nature and structure of the specific agreement. Application of Community agreements at national level is marked by a willingness of the Court of Justice to accept their potential for the creation of individual rights and, taking into account the different objectives and context of the agreements, the interpretation of those rights in the light of its case law on the EC Treaty. Although therefore the position of international law within the Community legal order might appear to be clear, a number of uncertainties remain concerning the hierarchy of norms as between international law and primary or fundamental principles of Community law (including the protection of human rights), and the conditions under which Community acts may be declared unlawful as a result of a breach of international law, including treaty obligations. There is no doubt that we will continue to see these issues emerge regularly in litigation before the Community Courts.

Marise Cremona
European University Institute
15 May 2006

ANNEX

FIDE 2006

External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law

Questionnaire

Introduction

The questions below relate to current developments in EU external relations law, in a number of different areas. They touch upon issues which are of importance, not only for the EU as such, but also for the Member States. They are grouped under three chapters, (1) competence, (2) mixed agreements and international responsibility, and (3) effects of international law. These are not watertight compartments. The division in chapters will serve to organise the discussion, but there are clearly overlapping questions and issues. Strict classification is therefore inappropriate.

Most of the questions concern the effects of certain EC/EU law developments on Member States or in national law. Many of the questions inquire into national problems, official positions, or critiques. It is vital that rapporteurs approach national administrations and officials with a view to collecting relevant information. Rapporteurs may nevertheless be faced with difficulties in identifying national problems and positions. Rapporteurs are strongly encouraged also (1) to present their own views, and those in national scholarship, on the legal developments identified in the questionnaire and (2) to report on other issues, not referred to in the questionnaire, which they consider relevant. The questions are only a proxy for the production of reports which enable us to put together an overall picture of the state of EU external relations law, as it affects the Member States and national law.

The Community rapporteur is equally invited not to regard the questions as sacrosanct. The general rapporteur very much welcomes queries and input from the various rapporteurs (contact details at the bottom of this document). It is hoped that, through feedback, the questionnaire may become something of a living instrument.

Chapter 1 - Competence

1. Under the *AETR* doctrine the European Community has exclusive competence to enter into an international agreement where the agreement affects EC rules. As EC legislation expands in an ever increasing number of areas, many of which are (relatively) new (e.g. immigration, asylum, conflict-of-laws, anti-discrimination law), which are the practical examples of the *AETR*-effect? In which cases has EC participation in a negotiation, resulting from the *AETR* rule, been discussed? Is there a national or European mechanism for checking *AETR*-effects, when Member States enter into a new

negotiation, or when an agreement is amended or renegotiated? Which political, legal, and practical problems were raised?

2. Thinking outside the box: Is not the *AETR*-principle too strong in some cases, in the sense of requiring EC participation in an international negotiation and in the conclusion of an agreement whenever some EC-law provisions are affected? Could EC interests be protected through mechanisms other than full participation? Are there any examples of this?

3. Are there any examples of EC exclusive competence being exercised on the basis of the concept of “necessity” as developed by the Court of Justice in Opinion 1/76, Opinion 1/94 and the Air Transport Cases?

4. What has been the practice over the last ten years in WTO negotiations on services (GATS)? Have the Member States been involved in an individual capacity? Have any of them produced their own proposals or submissions? Have any of them claimed an independent role? Has the practice been affected by the entry into force of the Treaty of Nice (new Article 133 EC)? Has it been affected by the Treaty establishing a Constitution for Europe? Same questions for WTO negotiations on intellectual property (TRIPs).

5. What views are there on external EC competence in the field of human rights? To what extent is Opinion 2/94 still relevant, in light of the subsequent Treaty amendments? What positions are there in Member States on accession to the European Convention on Human Rights? How does the non-ratification of the Constitution for Europe affect those positions?

6. Concerning mixed agreements in general, especially those with an institutional dimension: Are there any examples of specific competence problems, in terms of new negotiations, or of participation in the work of the institutions/organisation as set up by the mixed agreement? What mechanisms exist to give effect to the duty of cooperation between the EC and the Member States?

7. Concerning the Third-Pillar agreements (Article 24 TEU) with the United States on extradition and mutual legal assistance (OJ xxx): What is the current status of ratification in the Member States? What national procedures are being followed? Are there any official statements on the nature of those procedures and of the agreements themselves? Are the agreements considered to be EU agreements or Member State agreements?

8. Concerning the bridge between the Common Foreign and Security Policy and the EC Treaty in Articles 301 and 60 EC: What views and positions are there on what the Court of First Instance decided in *Yusuf and Kádi*? Are there any concerns about the extension of EC competence to sanctions against individuals? Is it appropriate for Article 308 EC to be used for the pursuit of CFSP objectives?

Chapter 2 – Mixed agreements and international responsibility

9. The *Mox Plant* case is an example of two Member States engaging in international litigation under a mixed agreement (in casu the Convention on the Law of the Sea). Are there any other such cases, which have either materialised in actual litigation or where litigation was contemplated? If so, please provide details about any official national or EC positions; about whether the EC was notified; about any official discussions which took place; about any relevant outcomes of the litigation.

10. In the context of litigation under mixed agreements, what views are there on the scope and meaning of Article 292 EC, the Treaty provision which establishes the exclusive jurisdiction of the Court of Justice?

11. Are there any cases of Member States having engaged in international litigation against a non-Member State under a mixed agreement? If so, was the EC notified? Were there any official discussions? Idem regarding litigation by the EC under a mixed agreement. Were any of the Member States involved in an individual capacity?

12. Within the WTO: Which cases have been brought against Member States (including cases which did not (yet) go beyond the level of consultation)? What was the EC's reaction? What was the reaction of the Member State(s) concerned?

13. How do Member States react to the *Bosphorus* judgment of the European Court of Human Rights? How do they react to the fact that the Court may hold them responsible for violations of the Convention resulting from EC acts?

14. The International Law Commission is studying issues of international responsibility of international organizations, including questions of responsibility in the case of EC mixed agreements. What are the national and EC positions? Are they coordinated?

Chapter 3 – Legal effects of international law

15. Is there national case-law on mixed agreements which did not result in a reference to the Court of Justice? Is there national case-law on GATS or on TRIPs? Is there national case-law on pure EC agreements which did not result in a reference to the Court of Justice? If yes, please give a short summary.

16. Are there currently enforcement actions by the Commission against Member States (Article 226 EC) for failure to comply with international agreements binding on the EC?

17. Is there national case-law on the domestic legal effect of WTO law in areas which are within national competence (see *Christian Dior*)? What views are there on the Court's jurisdiction to deal with questions of interpretation of WTO law (*Hermès*, *Christian Dior*, *Schieving-Nijstad*)? What views are there on the impossibility for Member States to rely on WTO law in an action for annulment (*Portugal v Council*)?

What views are there on the recent case-law concerning the effect of WTO law (*Van Parys, Chiquita, xxx*)?

18. What views are there on the recent case-law by the Court of Justice on the direct effect of association and cooperation agreements (e.g. *Simutenkov, Panayotova, Deutscher Handballbund, Kondova*)? Have these cases given rise to any specific issues or problems at national or Community level?

19. In *Yusuf* and *Kádi* the Court of First Instance declined to review an EC Regulation based on a UN Security Council Resolution, because of the binding nature of UN law. Is there national case-law on the domestic legal effect of Security Council Resolutions? What views are there on these judgments?

20. What are considered to be the legal effects of the extradition and mutual legal assistance agreements with the US? Are the Member States (re)negotiating bilateral agreements? How do such negotiations or agreements relate to the EU-US agreements?

Professor Piet Eeckhout
Director, Centre of European Law
King's College London