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MEMBER STATES AS TRUSTEES OF THE COMMUNITY INTEREST:  
PARTICIPATING IN INTERNATIONAL AGREEMENTS  
ON BEHALF OF THE EUROPEAN COMMUNITY

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*Member States as Trustees of the Community Interest:  
Participating in International Agreements on Behalf of the European Community*

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## **Abstract**

This paper discusses the legal effects of a seemingly paradoxical situation: an international agreement falls at least in part within the exclusive competence of the Community, and yet the Member States are parties to the agreement and the Community is not. This situation, while not common, is not as unusual as we might imagine. It may occur for several reasons: it may be decided that it is in the Community interest, for political or other reasons, that the Member States rather than the Community should participate; it may be the case that only States, and not regional economic integration organisations (REIOs) such as the EC, are entitled to participate; it may be that when the agreement was originally concluded the Member States were competent - since then, however, EC exclusivity has 'supervened'. In cases such as these the European Court of Justice has taken the view that the Member States party to the agreement are acting *on behalf of the Community*, and in its interests. The legal questions explored in this paper arise out of the fact that the international agreement is not formally a 'Community agreement' within the scope of Article 300 EC and thus the matters regulated by that provision, including the binding nature of the agreement as far as the Community is concerned, and its place in the Community legal order, are not expressly resolved. Although these agreements are in some senses anomalous, and their position in the Community legal order may be ambiguous, they also illustrate the constraints under which the Member States – although fully sovereign States – may operate as a result of their Community obligations, the way in which the international identity of the Union may be represented by the Member States, and the accommodations possible between the demands of the Community legal order and the practical exigencies of international treaty-making.

## **Keywords**

European law, international agreements, international relations



## I. Introduction

This paper discusses the legal effects of a seemingly paradoxical situation: an international agreement falls at least in part within the exclusive competence of the Community, and yet the Member States are parties to the agreement and the Community is not. This situation, while not common, is not as unusual as we might imagine and it gives rise to a number of interesting legal questions. It may occur for several reasons:

- It is decided that it is in the Community interest, for political or other reasons, that the Member States rather than the Community should participate. The classic example of this is the AETR.<sup>1</sup>
- It may be the case that only States, and not regional economic integration organisations (REIOs) such as the EC, are entitled to participate in the agreement. This is the case for agreements concluded under the aegis of many UN agencies such as the ILO and the IMO.<sup>2</sup>
- It may be that when the agreement was originally concluded the Member States were competent; since then, however, EC exclusivity has ‘supervened’. A classic example would be the GATT.<sup>3</sup>

In cases such as these the Court of Justice has taken the view that the Member States party to the agreement are acting *on behalf of the Community*, and in its interests. The earliest case of this type was the AETR:

In carrying on the negotiations and concluding the agreement simultaneously in the manner decided on by the Council, the Member States acted, and continue to act, in the interest and on behalf of the Community in accordance with their obligations under article 5 of the Treaty.<sup>4</sup>

And the Regulation that gave effect to the AETR within the Community recognises this explicitly in its preamble:

Whereas, since the subject matter of the AETR Agreement falls within the scope of Regulation (EEC) No 543/69, from the date of entry into force of that Regulation the power to negotiate and conclude the Agreement has lain with the Community; whereas, however, the particular circumstances in which the AETR negotiations took place warrant, by way of exception, a procedure whereby the Member States of the Community individually deposit the instruments of ratification or accession in a concerted action but nonetheless act in the interest and on behalf of the Community;<sup>5</sup>

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<sup>1</sup> It will be recalled that in Case 22/70 *Commission v Council* (AETR) [1971] ECR 263, paras 82-90, the Court of Justice, having found that the conclusion of the AETR fell with exclusive Community competence, accepted the political judgment of the Council that it would have been disruptive of the ongoing negotiations to substitute the Community for its Member States at such a late stage.

<sup>2</sup> As far as the ILO is concerned see Opinion 2/91 (ILO Convention No.170) [1993] ECR I-1061; as far as the IMO is concerned see Case C-45/07 *Commission v Greece*, judgment 12 February 2009; both cases are discussed further below.

<sup>3</sup> In Cases 22-24/72 *International Fruit Company* [1972] ECR 1219, the Court held that although the Community was not then a formal party to the GATT, it was nevertheless bound by it as a result of the transfer by the Member State GATT parties to the Community of competence in the fields covered by the GATT. The focus of this case was on the binding nature of the GATT as far as Community secondary legislation is concerned rather than the obligations on the Member States.

<sup>4</sup> Case 22/70 *Commission v Council* (AETR) [1971] ECR 263, para 90. Article 5 is now Article 10 EC.

<sup>5</sup> Regulation (EEC) 2829/77 OJ 1977 L 334/11.

The Regulation then provides that ‘In ratifying or acceding to the AETR the Member States, having regard to the Council recommendation of 23 September 1974, shall act on behalf of the Community.’<sup>6</sup> Regulation 561/2006, which currently gives effect to the AETR within the Community, also refers to the AETR in its Preamble and to the need for the Member States to act together in the Community interest:

Since the subject matter of the AETR falls within the scope of this Regulation, the power to negotiate and conclude the Agreement lies with the Community.

If an amendment to the internal Community rules in the field in question necessitates a corresponding amendment to the AETR, Member States should act together to bring about such an amendment to the AETR as soon as possible, in accordance with the procedure laid down therein.<sup>7</sup>

In Opinion 2/91 the Court was asked to determine Community competence in relation to ILO Convention No.170, which the Community as such would not be able to conclude. Procedures had been devised by agreement between Council and Commission to accommodate the negotiation of ILO Conventions falling within Community competence. The Court said, in the context of ruling on the scope of its own jurisdiction:

In any event, although, under the ILO Constitution, the Community cannot itself conclude Convention No 170, its external competence may, if necessary, be exercised through the medium of the Member States acting jointly in the Community's interest.<sup>8</sup>

Later in the judgment the Court, having held that aspects of ILO Convention No.170 fell within exclusive Community competence and aspects within shared competence, goes on to stress the importance of the duty of cooperation in this context. This duty, based on Article 10 EC (also referred to in the *AETR* judgment) could then be regarded as the basis for the Member States’ duty to the Community in relation to the agreement.

Our third initial example is the *International Fruit Company* case. This differs from the others in that it is not a question of the Member States concluding the agreement on behalf of the EC; rather, the Court holds that since the Member States have conferred exclusive competence in the matters covered by the GATT to the Community, the Community should be held bound by the GATT, in what is termed functional succession to the Member States.

It therefore appears that, in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community.<sup>9</sup>

The Court does not say anything directly about the obligations that might flow for Member States within Community law from this development. But the implication, born out by later cases, is that compliance with the GATT by the Member States has become a matter for Community law.<sup>10</sup>

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<sup>6</sup> Ibid. Art 2(1).

<sup>7</sup> Regulation (EC) 561/2006 OJ 2006 L 102/1, Preamble paras 10 and 11; note the parallel between the latter para 11 and Article 307(2) EC.

<sup>8</sup> Opinion 2/91 [1993] ECR I-1061, para 5.

<sup>9</sup> Cases 22-24/72 *International Fruit Company* [1972] ECR 1219, para 18.

<sup>10</sup> See Cases 267-269/81 *Amministrazione delle Finanze v SPI SpA* [1983] ECR 801, para 15.



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As we have seen, the obligation on the Member States in these cases flows ultimately from Article 10 EC. In matters of exclusive competence, the Member States may act only by way of Community authorization.<sup>11</sup> In a case involving internal measures in the field of fisheries conservation (a matter of exclusive competence) the Court referred to the Member States as acting as ‘trustees of the common interest’:

As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which Article 155 [now Art 211] ... gives to the Commission.<sup>12</sup>

The Member States, acting in a field of exclusive Community competence and as trustees of the common, or Community, interest are subject to the supervision of the Commission.

The legal questions we will explore below arise out of the fact that the international agreement in the above examples is not formally a ‘Community agreement’ within the scope of Article 300 EC and thus the matters regulated by that provision, including the binding nature of the agreement as far as the Community is concerned, and its place in the Community legal order, are not expressly resolved. To what extent can the provisions of Article 300 apply by analogy? Do the three factual/legal scenarios given above lead to different answers to any of these questions? In what follows we will look at the negotiation and then conclusion of the agreement, the status of the agreement in Community law and the jurisdiction of the Court of Justice, and the Community law obligations on the Member States.

## **II. Negotiating and Concluding Agreements ‘on Behalf of’ the EC**

### *a. The Formation of a Common Negotiating Position by the Member States*

Where an agreement is to be negotiated by the Member States instead of the Community (although it falls within exclusive Community competence), the Member States are obliged to establish a joint negotiating position within the framework of the common institutions and this will be binding on them. Thus, in *AETR* the Court held:

[The Council decided that] throughout the negotiations and at the conclusion of the agreement, the States would act in common and would constantly coordinate their positions according to the usual procedure in close association with the Community institutions, the delegation of the Member State currently occupying the presidency of the Council acting as spokesman. [...]

It follows from the foregoing that the Council's proceedings dealt with a matter falling within the power of the Community, and that the Member States could not therefore act outside the framework of the common institutions.

It thus seems that in so far as they concerned the objective of the negotiations as defined by the Council, the proceedings of 20 March 1970 could not have been simply the expression or the

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<sup>11</sup> See for example Case 41-76 *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République* [1976] ECR 1921, para 32; Case 174/84 *Bulk Oil* [1986] ECR 559; Case C-70/94 *Werner* [1995] ECR I-3189; Case C-83/94 *Leifer and Others* [1995] ECR I-3231. Article 2(1) of the Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon) provides that ‘Where the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union.’

<sup>12</sup> Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, para 30.

recognition of a voluntary coordination, but were designed to lay down a course of action binding on both the institutions and the Member States, and destined ultimately to be reflected in the tenor of the Regulation.<sup>13</sup>

Thus the role of negotiator given by Article 300 to the Commission is here taken by the Member States coordinated through the Council and Presidency. In *AETR* the Commission had complained that the decision to act through the Member States in this way thereby deprived it of its role; in accepting that the Member States should negotiate and conclude the agreement on behalf of the Community the Court accepted this result. However it does refer to the need for the Council and Commission 'to reach agreement ... on the appropriate methods of cooperation with a view to ensuring most effectively the defence of the interests of the Community.'<sup>14</sup>

It may be desirable and possible for the Commission to negotiate the agreement. In the case of the ILO, a working agreement was reached and contained in a Council decision of 22 December 1986 which applies to cases where an ILO Convention covers matters within exclusive Community competence and which provides that the Council will authorize the Commission to negotiate and to speak on behalf of the Community in the Conference.<sup>15</sup> In Opinion 2/91 the Court stressed the application of the duty of cooperation in this regard:

In this case, cooperation between the Community and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States.

It is therefore for the Community institutions and the Member States to take all the measures necessary so as best to ensure such cooperation both in the procedure of submission to the competent authority and ratification of Convention No 170 and in the implementation of commitments resulting from that Convention.<sup>16</sup>

We may ask to what extent the obligation on the Member States in these cases – based as it is on exclusive Community competence – goes beyond the duty of cooperation operative in the case of mixed agreements. The quotation from Opinion 2/91 just cited implies that it is of the same nature although perhaps stronger ('cooperation ... is all the more necessary'). If the duty of cooperation in the case of mixed agreements in cases of shared competence is ultimately a best efforts obligation,<sup>17</sup> it could be argued by contrast that in the case we are considering here, where the Member States are acting on behalf of the Community, the obligation is to negotiate through a common position or not to conclude the agreement at all. It may be given expression through the adoption 'within the Council' either of a negotiating mandate for the Commission or, in cases where the Commission is not given the power to negotiate, through an agreed negotiating position such as was adopted for the *AETR*. In the case of the *AETR* although it was not adopted as a formal Decision the Court held that had the power to review the legality of the 'proceedings' of the Council, as a binding measure, under what is now Article 230 EC. Were the Member States to act not through the Council but by 'common accord', this may not be reviewable, but the exclusive nature of the Community's competence will colour the Court's characterization of the act.<sup>18</sup>

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<sup>13</sup> Case 22/70 *AETR*, n 1 above, paras 49, 52, 53.

<sup>14</sup> *Ibid.* para 87.

<sup>15</sup> See further Opinion 2/91, n 2 above, part IV.

<sup>16</sup> Opinion 2/91, n 2 above, paras 37-38.

<sup>17</sup> 'If it [the duty of cooperation] is to be kept conceptually separate from pre-emption, as a restraint on but not a denial of Member State competence, this obligation is best seen as a 'best efforts' obligation rather than requiring Member States to refrain from acting until agreement is reached.' M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M Cremona and B de Witte, *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing, 2008), 168.

<sup>18</sup> Joined cases C-181/91 and C-248/91 *European Parliament v Council and Commission* [1993] ECR I-3685, paras 12 and 14: 'acts adopted by representatives of the Member States acting, not in their capacity as

**b.      *The Decision to Authorize the Member States to Conclude the Agreement***

In fields within exclusive Community competence the Member States may act only with Community authorisation.<sup>19</sup> This implies that under Community law (not of course as a matter of international law) they should not conclude such an agreement without Community authorisation. This may be given ad hoc (as with AETR) or by way of a more general authorisation. Since the Council is the institution that concludes Community agreements the authorisation should be given by the Council, although the Commission may act in specific cases under implementing powers. Although in the *AETR* case the Court accepted an informal, though binding, decision in the Council without an explicit legal base, there is an argument for saying that the decision should be adopted on the same legal basis as would form the basis for a decision to conclude the agreement (were it to be concluded by the Community), and this might imply a role for the European Parliament, depending on the substantive legal base. This would be a way of preserving the institutional balance, although it would not necessarily mirror exactly the procedure for concluding a Community agreement.<sup>20</sup>

As we have seen, Member States may be authorized to conclude agreements on behalf of the Community where the Community itself is not entitled to become a party. Thus in 2002 the Council adopted a decision authorizing the Member States to ratify the ‘Bunkers Convention’ on civil liability for oil pollution damage. The Preamble explains the rationale clearly:

The Community ...has sole competence in relation to Articles 9 and 10 of the Bunkers Convention inasmuch as those Articles affect the rules laid down in Regulation (EC) No 44/2001. The Member States retain their competence for matters covered by that Convention which do not affect Community law. Pursuant to the Bunkers Convention, only sovereign States may be party to it; there are no plans, in the short term, to reopen negotiations for the purpose of taking into account Community competence for the matter. It is not therefore possible for the Community to sign, ratify or accede to the Bunkers Convention at present, nor is there any prospect that it will be able to do so in the near future. ... The substantive rules of the system established by the Bunkers Convention fall under the national competence of Member States and only the provisions of jurisdiction and the recognition and enforcement of the judgments are matters covered by exclusive Community competence. ... The Council should therefore authorise the Member States to sign, ratify or accede to the Bunkers Convention in the interest of the Community, under the conditions set out in this Decision.<sup>21</sup>

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members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court... [However] it is not enough that an act should be described as a “decision of the Member States” for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.’ It should be noted that in this case the Court stresses the right of the Member States to act collectively outside the Council given the shared nature of competence in the field; in *AETR* the Court held that competence being exclusive the Member States ‘could not act’ outside the common institutions: see text at n 13 above.

<sup>19</sup> See cases at n 11 above.

<sup>20</sup> For example, under Art 300(3) EC, where co-decision is required for an internal act, the European Parliament is consulted on the conclusion of an agreement.

<sup>21</sup> Council Decision (EC) 2002/762 of 19 September 2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention) OJ 2002 L 256/7, Preamble paras 3-7. Note that Denmark is not covered by the Decision, by virtue of its opt-out from Title IV EC Treaty, nor is it affected by the Community’s exclusive competence arising from Reg 44/2001.

Member States are to make a Declaration at the time of ratification or accession that as between the EU Member States, recognition and enforcement of judgments are covered by Community rules.<sup>22</sup> The Decision also requires the Member States to use their best endeavours to ensure the amendment of the Bunkers Convention to allow the Community to become a contracting party.<sup>23</sup> Similar examples have been the 2004 Council Decision authorising the Member States to ratify the 2003 Protocol to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage,<sup>24</sup> and the 2002 Council decision authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Parental Responsibility, which was concluded within the framework of the Hague Conference on Private International Law.<sup>25</sup>

The imposition of conditions on the conclusion of international agreements by Member States is not new. A relatively early example is the Regulation which sets out the conditions under which the Member States should ratify and implement the Convention on a Code of Conduct for Liner Conferences, drawn up under the auspices of the United Nations Conference on Trade and Development.<sup>26</sup>

Where authorisation is given to a Member State on an individual basis, a distinction needs to be made between those cases where the Member State acts *on behalf of* the Community and those where it acts on its own account, albeit under Community authorisation. In the first case the Member State acts in the Community interest; in the second case, the authorization is given on the ground that it is not contrary to the Community interest for the Member State to conclude the agreement. We will consider this latter case in section IV below.

Examples of the first scenario include those cases where individual Member States are authorised by Council decision, adopted under Article 111(3) EC, to conclude agreements with third countries respecting the use of the Euro. These are cases where the special relationship between one Member State and the third country concerned provides a political rationale for the procedure. Thus Italy has been authorised to conclude agreements with San Marino,<sup>27</sup> and with Vatican City;<sup>28</sup> France with

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<sup>22</sup> This Declaration, although not binding, is similar in effect to a disconnection clause; on such clauses see further M Cremona, 'Disconnection Clauses in EC Law and Practice' in C Hillion and P Koutrakos *Mixed Agreements Revisited - The EU and its Member States in the World* (Hart Publishing, forthcoming 2010).

<sup>23</sup> Council Decision (EC) 2002/762, n 21 above, Art 5.

<sup>24</sup> Council Decision (EC) 2004/246 of 2 March 2004 authorising the Member States to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, and authorising Austria and Luxembourg, in the interest of the European Community, to accede to the underlying instruments OJ 2004 L 78/22.

<sup>25</sup> Council Decision (EC) 2003/93 of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, OJ 2003 L 48/ 1; see also Council Decision (EC) 2008/431 authorising those Member States who have not already done so to ratify or accede to the Convention, OJ 2008 L 151/36. The Member States are again required to make a declaration as to the application of Community rules to the recognition and enforcement of judgment between Member States, in particular here Regulation (EC) 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children, OJ 2000 L 160/19.

<sup>26</sup> Council Regulation (EEC) 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, OJ 1979 L 121/1. This Regulation was repealed with effect from 18 October 2008 following the application of EC competition rules to maritime transport and the consequent incompatibility of shipping conferences with Community competition law: Regulation (EC) 1490/2007 of 11 December 2007, OJ 2007 L 332/1.

<sup>27</sup> Council Decision (EC) 1999/97 OJ 1999 L 30/33; Monetary Agreement between the Italian Republic, on behalf of the European Community, and the Republic of San Marino, OJ 2001 C 209/1.

<sup>28</sup> Council Decision (EC) 1999/98 OJ 1999 L 30/35; Monetary Agreement between the Italian Republic, on behalf of the European Community, and the Vatican City State and, on its behalf, the Holy See, OJ 2001 C 299/1.

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Monaco.<sup>29</sup> Portugal was authorised to continue its monetary agreement with Cape Verde,<sup>30</sup> and France its agreements with the UEMOA (Union économique et monétaire ouest-africaine), the CEMAC (Communauté économique et monétaire de l'Afrique Centrale) and the Comores.<sup>31</sup> In the case of the agreements with San Marino, Vatican and Monaco the Council Decision sets out the negotiating position of the Community and provides for its conclusion by the Member State subject to the possibility of referral to the Council. The agreements themselves are published in the Official Journal.

**c. *Are There Circumstances in Which the Member States Could Be Required to Conclude an Agreement?***

If we envisage an agreement which falls within exclusive Community competence but which the Community cannot conclude, should the Member States be under an obligation to conclude the agreement? Given the problems for the integrity of the legal order that might arise if some but not all Member States were to become parties, it could be argued that such an obligation would flow from Article 10, based on the need to represent the interests of the Community, and on the rationale for the presence of exclusivity – the need to protect the unity of the common market and the uniform application of Community law.

Mixed agreement provide an analogy here: in the case of ‘bilateral’ mixed agreements such as Association Agreements, the Community act of conclusion will wait until all Member States have ratified. Accession Treaties generally contain a specific clause obliging the new Member State to accede to certain mixed agreements; there is no such clause for agreements of the type considered here (such as some ILO Conventions) but arguably there should be.<sup>32</sup>

**d. *Can the Court Give an Opinion under Article 300(6)?***

Under Article 300(6) EC, the Council, Commission, European Parliament or a Member State may request an opinion from the Court of Justice as to the compatibility of an ‘envisaged agreement’ with the Treaty. In Opinion 2/91 the Court held that this provision could be applied to the envisaged ILO Convention although the Community itself was not to be a party. The Court held that

... the request for an opinion does not concern the Community's capacity, on the international plane, to enter into a convention drawn up under the auspices of the ILO but relates to the scope, judged solely by reference to the rules of Community law, of the competence of the Community and the Member States within the area covered by Convention No 170.<sup>33</sup>

Article 300(6) EC also provides that if the opinion as to compatibility is negative, the agreement can enter into force ‘only in accordance with Article 48 TEU’ (i.e. via Treaty amendment). The principle behind this provision will apply but it cannot have exactly the same effect: this provision has the effect of removing the Council’s power to adopt a decision concluding an incompatible agreement.<sup>34</sup> The

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<sup>29</sup> Council Decision (EC) 1999/96 OJ 1999 L 30/31; Monetary Agreement between the Government of the French Republic, on behalf of the European Community, and the Government of His Serene Highness the Prince of Monaco OJ 2002 L 142/59.

<sup>30</sup> Council Decision (EC) 98/744 OJ L 358/111.

<sup>31</sup> Council Decision (EC) 98/683 OJ L 320/58.

<sup>32</sup> In the case of ILO Convention No.170, part of which the Court held was a matter of exclusive Community competence, only a few Member States have in fact ratified it: Germany, Italy, Luxembourg, Poland and Sweden.

<sup>33</sup> Opinion 2/91, n 2 above, para 4.

<sup>34</sup> Thus the decision concluding it may be declared invalid. This would not, however, invalidate the agreement in terms of international law; see C-327/91 *France v Commission* [1994] ECR I-3641; C-13/07 *Commission v Council*, opinion of AG Kokott, para 173: ‘The annulment of a prior decision establishing the Community position would not alter the fact

Member State acts concluding an incompatible agreement (even one within exclusive Community competence) cannot be declared *invalid* by the Court of Justice. However it is certainly the case that, were the Member States to conclude such an agreement, they would be acting contrary to their Community law obligations.

### III. The Legal Status of Agreements Concluded by Member States ‘on Behalf of’ the EC

We will here discuss essentially the extent to which Article 300(7) EC might apply by analogy or extension to agreements concluded by Member States on behalf of the Community. The issues arising include whether the agreement is binding on the Community and on the Member States, who is responsible for its implementation, does the Court have jurisdiction to interpret it, and does it take precedence over secondary Community law?

#### a. *Is the Agreement Binding on the Community?*

Under Article 300(7) EC, agreements concluded by the Community are binding on the Community and its institutions (as well as the Member States). In the cases where a single Member State concludes an agreement on behalf of the Community, which would include for example the delegation to Italy of the power to conclude agreements on the use of the Euro with San Marino and Vatican City, we can take the view that the agreement will be binding on the Community (and, in these cases, on the ECB). The decision authorising Italy to conclude those agreements is in fact based on Article 111(3) EC, which provides that agreements concluded under that provision will be binding on the Community, the ECB and the Member States.

This is a rather special case, and it is only in the case of GATT and the Nomenclature Convention that the Court has explicitly declared an agreement to which only the Member States are parties to be binding on the Community.<sup>35</sup> It is possible that the same principle might be applied to other agreements but caution should be exercised: it is not merely that all Member States are party to the agreement; it must be shown that there has been a transfer of power to the Community. In *Intertanko*, for example, the Court held in connection with the MARPOL Convention:

... it does not appear that the Community has assumed, under the EC Treaty, the powers previously exercised by the Member States in the field to which Marpol 73/78 applies, nor that, consequently, its provisions have the effect of binding the Community ... In this regard, Marpol 73/78 can therefore be distinguished from GATT 1947 within the framework of which the Community progressively assumed powers previously exercised by the Member States, with the consequence that it became bound by the obligations flowing from that agreement (see to this effect, in particular, *International Fruit Company and Others*, paragraphs 10 to 18). Accordingly, this case-law relating to GATT 1947 cannot be applied to MARPOL 73/78. It is true that all the

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that Vietnam’s accession to the WTO is binding under international law on the Community and its Member States because infringements of provisions of internal law cannot in principle, according to the general rules of international law, have any bearing on the competence to conclude treaties and agreements.’

<sup>35</sup> On GATT see n 3 above; on the Nomenclature Convention, see case 38-75 *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen* [1975] ECR 1439, para 21. We may argue that Art 6(2) TEU does the same for the ECHR but as this Convention does not concern a field of exclusive Community competence, and as the Member States are not parties on behalf of the Community, the logic is a different one and it falls outside the scope of this paper.

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Member States of the Community are parties to Marpol 73/78. Nevertheless, in the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because all those States are parties to Marpol 73/78, be bound by the rules set out therein, which it has not itself approved.<sup>36</sup>

A similar conclusion was reached in a case which raised the issue of the status in Community law of the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The Court held, citing *Intertanko*, that the Community is not bound by either the Liability Convention or the Fund Convention: ‘In the first place, the Community has not acceded to those international instruments and, in the second place, it cannot be regarded as having taken the place of its Member States, if only because not all of them are parties to those conventions ...’<sup>37</sup> Although, as we have seen, the Council had expressly authorized the Member States, in the interests of the Community, to ratify or accede to the 2003 Protocol to the Fund Convention, the Court took the view that this made no difference since the Protocol did not apply to the facts at issue in the case.<sup>38</sup> The result is somewhat unsatisfactory since the Court was thereby unable to give a clear ruling on the relationship between two different liability regimes (that based on the international conventions and that based on the EC’s waste directive<sup>39</sup>) even though by its authorizing decision of 2004 the Council had indicated support for the international regime. It is not clear how the Court would have reasoned if the Protocol itself *had* been directly relevant to the case, but it seems that, in the absence of a concluding act, it is only in exceptional cases that an international agreement may bind the Community.

In the absence of such a concluding act which would render the agreement itself an integral part of Community law,<sup>40</sup> a legislative act may transform the contents of an agreement into binding Community law by incorporating the agreement itself into the legislation designed to implement its provisions. Thus, Regulation 2829/77 was titled ‘on the bringing into force’ of the AETR and provided that the AETR would apply to the relevant types of international road transport operations.<sup>41</sup> We find another example in the Regulation originally implementing of the Convention on international trade in endangered species of wild fauna and flora (CITES), which attached the Convention as an Annex and provided in Article 1:

The Convention, as set out in Annex A, shall apply throughout the Community under the conditions laid down in the following articles. The objectives and principles of the Convention shall be respected in the application of this regulation.<sup>42</sup>

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<sup>36</sup> Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-04057, paras 48-9.

<sup>37</sup> Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd.* [2008] ECR I-4501, para 85.

<sup>38</sup> *Ibid.* para 86; see n 24 above.

<sup>39</sup> Directive (EEC) 75/442/EEC of 15 July 1975 on waste OJ 1975 L 194/39. Unlike Directive (EC) 2004/35/EC on environmental liability (OJ 2004 L 143/56), Directive 75/442 makes no mention of the Liability and Fund Conventions. The Court merely finds that the Member States in enacting national liability rules may follow the scheme established by the Conventions but must at the same time ensure full compliance with Directive 75/442.

<sup>40</sup> Case 181/73 *Haegeman* [1974] ECR 449.

<sup>41</sup> See n 5 above; the same is true of the Regulation currently in force, Regulation (EC) 561/2006 of 15 March 2006 on the harmonisation of certain social legislation relating to road transport OJ 2006 L 102/1.

<sup>42</sup> Council Regulation (EEC) 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora OJ 1982 L 384/1. This Regulation has now been replaced by Council Regulation (EC) 338/97 of 9 December 1996, OJ 1997 L 61/1, which provides in Art 1, ‘This Regulation shall apply in compliance with the objectives, principles and provisions of the [CITES] Convention.’

In considering the implications of whether and how the Community may be 'bound' by an agreement to which it is not a party, and of these forms of incorporation, we need to consider two issues in particular: the first is responsibility – as a matter of Community law – for implementation of the agreement, and the second is the place of the agreement in the Community legal order and more particularly the extent to which it can take precedence over secondary Community law.

**b. *Implementing the Agreement as a Matter of Community Law***

Member States who are party to an agreement 'on behalf of' the Community or as trustees of the Community interest are under not only an international law obligation to comply with the agreement but also a Community law obligation. If the provisions of an agreement are expressly incorporated into a Community instrument then the obligation of the Member States will flow from that Community instrument, but even in the absence of such incorporation a Community law-based obligation may be derived from Article 10 EC. The Member States participate in the agreement not only as sovereign States but also as Member States of (and under the authorisation of) the Community. Here I think we can again draw an analogy with mixed agreements, where the Member States participate in their own right but also with commitments as Member States:

... in ensuring compliance with 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 ...

Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments.<sup>43</sup>

Here of course the agreement has not been 'concluded by the Community institutions', but the principle and the Community interest seem to be the same. This argument is supported by *SPI & SAMI*, where the Court held that it had jurisdiction to interpret the GATT even where the point at issue was national, not Community, law: 'in that regard it does not matter whether the national court is required to assess the validity of Community measures or the compatibility of national legislative provisions with the commitments binding the Community [i.e. GATT].'<sup>44</sup>

Thus for the Member States, as trustees of the Community interest, compliance with the agreement is a Community law obligation which may be enforceable by the Court.<sup>45</sup>

Is there a corresponding obligation on the Community, albeit not bound directly via Article 300(7)? The Member States, as parties to the agreement, may be in the uncomfortable position of being bound in international law by an agreement which they have no power to implement (since the subject matter is within exclusive Community competence). Indeed in the case of the ILO, the ILO itself, when accepting that an agreement – although it must be concluded by the EC Member States – may be negotiated by the Commission, declared that 'Member States alone can be held liable for failure to comply with those undertakings, even if the breach of the provisions of such a convention is attributable to a Community measure adopted by majority decision.'<sup>46</sup> As a matter of *Community law*, therefore, and as a corollary to the Community's exclusive competence, there must be an obligation on the institutions flowing from the duty of cooperation to ensure that the agreement is implemented. If the agreement is found to be binding on the Community institutions either directly through the GATT

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<sup>43</sup> Case C-239/03 *Commission v France (Étang de Berre)* [2004] ECR I-9325, paras 26 & 29.

<sup>44</sup> Cases 267-269/81 *Amministrazione delle Finanze v SPI SpA* [1983] ECR 801, para 15.

<sup>45</sup> As far as GATT is concerned, see case C-61/94 *Commission v Germany* [1996] ECR I-3989.

<sup>46</sup> Document, drawn up by the Governing Body of the International Labour Office on 12 February 1981, supplemented by another document dated 31 May 1989, as cited in Opinion 2/91, n 2 above, part IV.



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case law or indirectly through incorporation, this will of itself entail an obligation to implement it and to enact any necessary legislation. In fact, in *Commission v Greece*, the Court asserted the exclusive competence of the Community to take initiatives designed to ensure compliance with international rules incorporated into a Community Regulation.<sup>47</sup>

**c. The Agreement as Part of the Community Legal Order**

Community agreements are an integral part of the Community legal order.<sup>48</sup> It seems clear that agreements concluded by one Member State on behalf of the Community (such as the monetary agreements) are also ‘Community agreements’ in this sense. What of agreements concluded by all Member States in a field of exclusive Community competence? In *SPI & SAMI*, as we have seen, the Court held that it had jurisdiction to interpret the GATT.<sup>49</sup> In *Libor Cipra* the Court held, with respect to the AETR:

... in ratifying or acceding to [the AETR], the Member States acted in the interest and on behalf of the Community .... According to Article 2(2) of Regulation No 3820/85, the AETR Agreement is to apply, instead of the provisions of that regulation, to international road transport operations to and/or from non-member countries which are Contracting Parties to the agreement .... In the light of the foregoing, it must be held that the AETR Agreement forms part of Community law and that the Court has jurisdiction to interpret it.<sup>50</sup>

This phrasing is reminiscent of the Court’s statement in *Haegeman*, referring to agreements concluded by the Community. But is the position of agreements such as the AETR to be completely assimilated to Community agreements? The case law since *Haegeman* has made it clear that the binding nature of agreements concluded by the Community entails that they have primacy over acts of secondary Community law.<sup>51</sup> In a case such as the AETR, however, where the agreement becomes ‘part of Community law’ by virtue of incorporation via an act of secondary law it might be difficult to argue that its provisions have primacy over secondary law. Incorporation by these means is a different legal process from the act of conclusion which, although by way of secondary act (normally a Council decision) has a legal effect determined by Article 300(7). In the specific, and not often applied, *Nakajima* case law, the Court has been prepared to assess the legality of secondary legislation in the light of the GATT on the basis that it was both binding on the Community and expressly implemented by the relevant secondary law.<sup>52</sup>

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<sup>47</sup> Case C-45/07 *Commission v Greece*, judgment 12 February 2009; this case is discussed further below. Regulation (EC) 725/2004 of 31 March 2004 on enhancing ship and port facility security OJ 2004 L 129/6 is intended to provide a basis for the harmonised implementation and monitoring of Chapter XI-2 of the International Convention for the Safety of Life at Sea (‘the SOLAS Convention’) and the International Ship and Port Facility Security Code (‘the ISPS Code’).

<sup>48</sup> Case 181/73 *Haegeman* [1974] ECR 449.

<sup>49</sup> See n 44 above.

<sup>50</sup> Case C-439/01 *Libor Cipra and Vlastimil Kvasnicka v Bezirkshauptmannschaft Mistelbach* [2003] ECR I-00745, paras 23-4.

<sup>51</sup> Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-04057, paras 42-45; joined cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, judgment of 3 September 2008, paras 306-307.

<sup>52</sup> Case C-69/89 *Nakajima All Precision Co. Ltd v Council* [1991] ECR I-02069; in paras 30-32 the Court held, ‘the new basic regulation ... was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures ... In those circumstances, it is necessary to examine whether the Council went beyond the legal framework thus laid down ... and whether, by adopting the disputed provision, it acted in breach of Article 2(4) and (6) of the Anti-Dumping Code.’ The principle has mainly been applied in anti-dumping cases; for an example of an application of *Nakajima* outside the dumping context see case C-352/96 *Italy v Council* [1998] ECR I-6937; for an

That said, the Court in *Intertanko* seems to cast doubt on the applicability of the provisions of an international agreement as a basis for review of secondary legislation even where the purpose of that legislation (in the words of Directive 2005/35 on ship-source pollution) ‘is to incorporate international standards for ship-source pollution into Community law’. The Court held that:

Since the Community is not bound by Marpol 73/78, the mere fact that Directive 2005/35 has the objective of incorporating certain rules set out in that Convention [Marpol] into Community law is likewise not sufficient for it to be incumbent upon the Court to review the directive’s legality in the light of the Convention.<sup>53</sup>

Although both Directive 2005/35 and the Court refer to ‘incorporating’ the Marpol standards, the directive at issue here does not in fact reproduce those standards; it is designed to harmonise and ensure effective Member State implementation of the standards by establishing rules regarding infringements, penalties and enforcement. It can therefore be distinguished from the incorporation of the AETR (at issue in *Libor Cipra*<sup>54</sup>) and also the incorporation of the SOLAS Convention and the International Ship and Port Facility Security Code (ISPS Code) in Regulation 725/2004/EC, at issue in *Commission v Greece*.<sup>55</sup> Nevertheless, as an agreement to which all Member States are parties, Marpol is not without legal effect:

... the validity of Directive 2005/35 cannot be assessed in the light of Marpol 73/78, even though it binds the Member States. The latter fact is, however, liable to have consequences for the interpretation of, first, UNCLOS and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78. In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78.<sup>56</sup>

Thus it seems that, in exceptional cases where there has been a full transfer of powers to the Community in the field covered by an agreement, the Community may be bound by the agreement itself and in such cases the *Nakajima* doctrine suggests that where secondary legislation is expressly designed to give effect to the agreement, it may take priority over the secondary Community law in question. In other cases, where the effect of the agreement in Community law is dependent on its incorporation in secondary legislation, it is difficult to argue that it should prevail over that legislation. Nevertheless, where Community legislation is designed to implement an international agreement in an area of exclusive Community competence, the Court may interpret that agreement in order to give effect to the principle of consistent interpretation (that is, to avoid conflict between the agreement and Community law). And in *Libor Cipra*, the AETR was interpreted with a view to its being applied by a national court in the same way as a Community Regulation, as a result of its having been incorporated into Community law by that Regulation. The fact that there is no single rule, equivalent to Article 300(7), determining the effect of these agreements in the Community legal order means that their effect will vary according to the precise way in which the legislation incorporates them expressly, or by reference, or implements them.

(Contd.) \_\_\_\_\_

example of a refusal to apply *Nakajima* reasoning to legislation designed to implement a Dispute Settlement Body ruling, see case T-19/01 *Chiquita v Commission* [2005] ECR II-315; case C-377/02 *Van Parys* [2005] ECR I-1465.

<sup>53</sup> *Intertanko*, n 36 above, para 50.

<sup>54</sup> Above n 50.

<sup>55</sup> Case C-45/07 *Commission v Greece*, judgment 12 February 2009; Regulation (EC) 725/2004 on enhancing ship and port facility security OJ 2004 L 129/6: the Regulation explicitly requires Member States to apply the international rules, and the relevant provisions of the SOLAS Convention and the ISPS Code are annexed to the Regulation.

<sup>56</sup> *Intertanko*, n 36 above, para 52. This principle of consistent interpretation has of course also been applied to the GATT and WTO in cases where *Nakajima* does not apply: see case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para 52; case C-89/99 *Groeneveld* [2001] ECR I-5851.

**d. The Formation of Positions in Institutions Set Up by the Agreement**

Certain agreements may set up institutional structures and mechanisms for the negotiation of updated or new rules. If the Community is not a party to the underlying agreement, or a member of the relevant institutions, we need to establish the ongoing Community-based obligations on the Member States within such organs and the mechanisms whereby a common Community position may be established and defended.

The Community is not a member of the IMO, nor is it a party to the International Convention for the Safety of Life at Sea (SOLAS Convention) and the International Ship and Port Facility Security Code (ISPS Code). In *Commission v Greece*,<sup>57</sup> the Court was asked to determine whether a Member State was entitled to put forward national proposals within the IMO connected with the monitoring of compliance with the SOLAS Convention and ISPS Code, given that implementation of these international rules was governed within the Community by a Regulation.<sup>58</sup> The parties do not seem to have disputed that – given the Regulation – the measure fell within the scope of exclusive Community competence. Greece argued, however, that the *AETR* ruling, which would prevent a Member State from entering into an international agreement on the subject on its own account, did not extend to submitting a proposal in the context of its participation in the IMO. The Court disagreed, holding that Greece had initiated a procedure which could lead to the adoption by the IMO of new rules, that the adoption of such new rules would have an effect on the Regulation, and that as a consequence the Member State was in breach of its obligations under Articles 10, 71 and 80(2) EC.<sup>59</sup> Although, then, Greece was not directly entering into an obligation which would affect the Regulation, it was setting in motion a procedure that might lead to such an effect in a context where the Regulation sought to harmonise implementation of the international rules. To the argument that since the Community was not a member of the IMO the Community interest had to be defended by Member States (and that Greece was acting in this interest) the Court was clear:

The mere fact that the Community is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty. Moreover, the fact that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest.<sup>60</sup>

A non-binding arrangement agreed within the Council relating to participation in the IMO did not, in the view of the Court, envisage such unilateral action in the absence of an agreed common position and even if it had, it could not have the effect of permitting a Member State to act in contravention of the Community's exclusive powers.<sup>61</sup>

This case illustrates the importance – indeed the necessity – of forming a common position with respect to proposals of this kind. The duty of cooperation operates here on the Commission, as well as on the Member States. In the IMO case, Greece argued that the Commission was in breach of this duty, since it had not tabled the Greek proposal for discussion before the relevant Community committee prior to its submission by Greece. Whereas Advocate General Bot felt that the Commission

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<sup>57</sup> Case C-45/07 *Commission v Greece*, judgment 12 February 2009.

<sup>58</sup> Regulation (EC) 725/2004 of 31 March 2004 on enhancing ship and port facility security OJ 2004 L 129/6.

<sup>59</sup> For further discussion see M Cremona, 'Extending the reach of the AETR principle: Comment on *Commission v Greece* (C-45/07)' (2009) 34 *European Law Rev* 754.

<sup>60</sup> Case C-45/07 *Commission v Greece*, n 57 above, paras 30-31.

<sup>61</sup> Compare the role of a binding inter-institutional agreement in a case of shared competence in case C-25/94 *Commission v Council* (FAO agreement) [1996] ECR I-1469.

had done enough to ‘promote coordination at Community level’,<sup>62</sup> the Court seems to have taken the view that the Commission could have done more. However both agreed that, even if the Commission had failed in its performance of the duty of cooperation, this did not entitle the Member State to ‘unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of Community law.’<sup>63</sup>

Assuming such a common position is adopted by the Council, what is its legal status? This question is under consideration in a case involving *CITES*.<sup>64</sup> Again we have a Convention (the Convention on International Trade in Endangered Species – CITES) to which the Community is not a party, which has established a framework – the Conference of the Parties (COP) – for the amendment of Convention Annexes listing protected species. The Community has observer status in the COP and as we have already seen, the CITES Convention has been implemented in the EC by means of a Community Regulation.<sup>65</sup> The case concerns the need for a legal base for a Council decision establishing a common position for the Member States in a meeting of the COP.

For Community agreements, Article 300(2) EC establishes a procedure for establishing the Community position in a body set up by an agreement, where that body is to adopt decisions having legal effects.<sup>66</sup> In the case of CITES, as the Advocate General points out in her opinion, the Council decision does not establish a *position of the Community*, since the Community does not participate as a party in the COP. In addition it differs from a decision adopted under Article 300(2) since it is addressed to the Member States, whereas a decision adopted under Article 300(2) does not have a direct addressee but rather determines the conduct of another institution (the Commission). Nevertheless it is clear from its wording that the act is a Council measure addressed to the Member States – and not only a decision of the representatives of the Member States meeting in Council – and is thus amenable to judicial review under Article 230 EC.<sup>67</sup> It is, in the AG’s view, subject to the obligation to state reasons, and in particular its legal basis. The AG does not take a view on whether Article 300(2) should be the appropriate procedural legal basis in such cases, merely saying that both a procedural and a substantive legal basis should be referred to in the decision.

If the Court follows the AG’s view that a legal basis is required for the adoption of a decision in such a case, in some cases this will result (at least in theory) in decisions taken by qualified majority vote and a Member State may therefore be bound in Community law to adopt a position in the international institutional framework which it voted against in the Council.

#### IV. Supervening Exclusivity and Bilateral Agreements of the Member States

In this final section, we will turn to a slightly different scenario: the case where an agreement falls, at least in part, within EC exclusive competence but where, although the Member States(s) are not acting on behalf of the Community, it may be compatible with the Community interest for them to be authorized to conclude it. Where the Community becomes exclusively competent in a particular field,

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<sup>62</sup> Case C-45/07 *Commission v Greece*, n 57 above, Opinion of AG Bot, paras 41-43.

<sup>63</sup> Para 26, citing by analogy Case C-5/94 *Hedley Lomas* [1996] ECR I-2553. For a critique of this position see M Cremona n 59 above.

<sup>64</sup> Case C-370/07 *Commission v Council*, pending, opinion of AG Kokott, 23 April 2009.

<sup>65</sup> See n 42 above.

<sup>66</sup> This is the same procedure as for signing an agreement: the Council acts on a proposal from the Commission, normally by qualified majority but unanimously where the agreement covers a field for which unanimity is required for the adoption of internal rules, and for association agreements.

<sup>67</sup> C.f. the *AETR* case, n 1 above; the AG does however distinguish the decision in this case from that taken in the case of the *AETR* as regards the obligation to state reasons.

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there may be a large number of already existing Member State external bilateral agreements.<sup>68</sup> It is likely to be impractical either to require the Member States to denounce the agreements, or for the Community to negotiate new agreements with the third states concerned. The best solution may be to allow the bilateral agreements to continue while ensuring that any incompatibilities with Community law are removed.

This question is somewhat different from those considered above, since we are not here dealing with Member States concluding agreements *on behalf of* the Community – the Member State in concluding the agreement is acting under the *aegis* of the Community, since it acts under authorisation and subject to a future decision of the Community to act. The agreements nevertheless remain clearly Member State agreements, there is no basis on which it could bind the Community, and the Member State's obligations would be owed only to the other contracting party; similarly the agreement would not bind the non-participating Member States. Thus the agreements could not be classed as part of Community law or subject to the interpretative jurisdiction of the Court. However, the problems in practice are close and the solution of conditional authorization may be relevant also for other cases where the Member States are acting in the Community interest.

It seems clear that authorisation is required for any renewal or amendment of an existing bilateral agreement with a third country in a field covered by exclusive Community competence.<sup>69</sup> It is also clear that removal of any incompatibilities is required. It is not certain that authorisation is needed merely to continue in force a bilateral agreement if the bilateral agreement, apart from falling within a field of exclusive Community competence, is fully compatible with Community law. In the first of the four cases considered below, the Member States were authorised to continue in force (as well as to renew) existing trade agreements providing they did not create an obstacle to the implementation of the CCP. In the air services case, most, if not all, bilateral agreements needed amending in order to comply with the *Open Skies* judgments, and so the issue of agreements 'continuing in force' unamended did not need to be addressed. The future treatment of bilateral BITS once the Lisbon Treaty enters into force is a different matter although it can also be argued that all existing bilateral BITS are in fact incompatible with Community law and will need to be amended. The development of exclusive Community competence in aspects of civil justice has led to the establishment of a procedure whereby the Community will decide in each case whether there is an interest in concluding new bilateral agreements itself, and if not, may authorise the Member State to do so, subject to conditions.

**a. Trade Agreements after 1969**

As is well known, 'measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community'.<sup>70</sup> An example of such authorization has been the Council Decisions authorising the renewal or continuation in force of provisions governing matters covered by the common commercial policy contained in the Member States' trade and cooperation agreements with third countries.<sup>71</sup> Following the 2004 enlargement, the

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<sup>68</sup> I am not here considering inter-Member State bilateral agreements, which pose their own problems.

<sup>69</sup> Any renewal or amendment of agreements originally concluded prior to the EC Treaty's entry into force or to the Member State's accession will also prevent the application of Article 307 EC: see *Open Skies* cases, n 74 below.

<sup>70</sup> Case 41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République* [1976] ECR 1921, para 32.

<sup>71</sup> The original decision was Council Decision (EEC) 69/494 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 (EC) 2001/855 OJ 2001 L 320/13; this decision expired on 30 April 2005 and has not been renewed.

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.<sup>72</sup> 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.<sup>73</sup>

**b. Air Services Agreements**

Following the Court judgments in the *Open Skies* cases,<sup>74</sup> the Council agreed that Community agreements on air services should be negotiated with third countries which would replace bilateral Member State agreements. In addition, and pending the negotiation of the Community agreements, the Council adopted a Regulation which attempts to give effect to the duty of cooperation where Member States are under an obligation to bring existing agreements into line with Community law and which falls partly within exclusive competence.<sup>75</sup> The Preamble to the Regulation refers to the duty of cooperation and confirms that the cooperation procedure established by the Regulation is ‘without prejudice to the division of competencies between the Community and Member States’ (recital 5). The Regulation establishes that Member States may ‘enter into negotiations with a third country concerning a new air service agreement or the modification of an existing air service agreement’, subject to conditions concerning notification to the Commission and the use of agreed standard clauses. Where those standard clauses are used, ‘the Member State shall be authorised to conclude the agreement;’ in other cases authorisation will depend upon an assessment that the agreement ‘does not harm the object and purpose of the Community common transport policy’.

**c. Bilateral Agreements in the Civil Justice Field**

Another recent example of the conditional authorization of bilateral Member State agreements by way of a Regulation is found in two Regulations relating to international agreements in the fields of (i) applicable law in relation to contractual and non-contractual obligations,<sup>76</sup> and (ii) jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations.<sup>77</sup> The background here is Opinion 1/2003, in which the Court of Justice held that the

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<sup>72</sup> Com (2004) 697, 22 October 2004; this proposal has since been withdrawn.

<sup>73</sup> 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 (EC) 2001/855, n 71 above, recital 7 and Art 1.

<sup>74</sup> Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany* [2002] ECR I-09427.

<sup>75</sup> Regulation (EC) 847/2004 on the Negotiation and Implementation of Air Service Agreements between Member States and Third Countries OJ 2004 L 157/7. See Commission Communication on the consequences of the Court judgments of 5 Nov 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.

<sup>76</sup> Regulation (EC) 662/2009 of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations OJ 2009 L 200/25; the Regulation is based on Articles 61(c) and 65 EC and under Art 67(5) was adopted under co-decision.

<sup>77</sup> Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations OJ 2009 L 200/46. This regulation is

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Community possessed exclusive external competence in relation to matters affecting the Brussels I Regulation (Regulation (EC) 44/2001), that is, in relation to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. There will not always be a Community interest, despite this exclusive competence, in concluding every agreement which contains provisions on jurisdiction and/or on recognition and enforcement of judgments.<sup>78</sup> The mechanism instituted by the Regulations both establishes a procedure for determining whether there is sufficient Community interest in the conclusion of a particular agreement by the Community, and if there is not, for authorizing the Member State to conclude the agreement itself.<sup>79</sup> The two Regulations cover agreements falling wholly or partly within the scope of specific Community Regulations<sup>80</sup> and which are either bilateral or a limited type of regional agreement 'between a limited number of Member States and of third countries neighbouring Member States which is intended to address local situations and which is not open for accession to other States.'<sup>81</sup> Both the amendment of existing agreements and the negotiation of new agreements are covered.

The procedure requires initial notification to the Commission; authorization to open negotiations is on condition that:

- the EC does not already have an agreement on the same subject matter with the third country concerned, nor does it envisage opening negotiations within the next two years;
- the Member State concerned has demonstrated that it has a specific interest in concluding an agreement with the third country, related in particular to the existence of economic, geographic, cultural, historical, social or political ties between the Member State and that third country;
- the proposed agreement appears not to render Community law ineffective and not to undermine the proper functioning of the system established by that law;
- the envisaged agreement would not undermine the object and purpose of the Community's external relations policy as decided by the Community.

The Commission may propose negotiating guidelines and may request the inclusion of particular clauses. The agreement must include either a sunset clause providing for its termination in case of a future conclusion of an agreement with the third State on the same subject by the Community itself, or provision for the direct replacement of the relevant provisions of the agreement by the provisions of a subsequent Community agreement (it is thus clear that the Member State agreement does not pre-empt a later Community agreement). Standard forms of these clauses are included. The conclusion of the agreement is then subject to a separate authorisation: the Commission assesses whether the final text meets the conditions specified above. Before a decision not to authorise is taken the Commission must

(Contd.) \_\_\_\_\_

based on Articles 61(c) and 65 EC and under Art 67(2) and (5) it was adopted by the Council acting unanimously after consulting the European Parliament.

<sup>78</sup> Regulation 44/2001 is of course not the only relevant legislation adopted in the field of civil justice which might give rise to exclusive competence; see also inter alia Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, OJ 2003 L 338/1; Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1; Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6; Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

<sup>79</sup> This approach is modeled on that adopted in the case of air services agreements; see above and Conclusions of the JHA Council, 19 April 2007. The recitals to the Rome I and II Regulations also foresee such a procedure.

<sup>80</sup> Regulation 662/2009 covers agreements concerning matters falling entirely or partly within the Rome I and Rome II Regulations (n 78 above); Regulation 664/2009 covers matters falling within the scope of Regulations 2201/2003 and 4/2009, 'to the extent that those matters fall within the exclusive competence of the Community' (n 78 above).

<sup>81</sup> Regulation 662/2009, n 76 above, Art 2(1)(b).

issue a reasoned opinion which is subject to discussion with the Member State; this opinion and the final decision are notified to the Council and the European Parliament. Although the Regulations setting out the overall framework were adopted by the Council, or Council and Parliament, the individual authorisation in each case would thus be granted by the Commission. The Commission argues that this proposed procedure is better than either assuming that all agreements in these fields will be concluded by the EC, or trying to establish detailed rules for pre-authorisation for each type of agreement. It preserves flexibility while providing a framework for taking the decision in each case.

**d. BITS after the Coming into Force of the Treaty of Lisbon**

The Treaty of Lisbon will make a considerable change to the scope of the common commercial policy, while confirming its exclusive nature: for the first time, foreign direct investment will be covered by the CCP.<sup>82</sup> The precise scope of FDI in this context, and its relationship with the provisions on capital movements, as well as the wider implications of this move to exclusivity, are complex questions which we cannot explore here.<sup>83</sup> However it is likely that the Union will not seek to replace all Member State external bilateral investment treaties (BITS) with Union agreements, and that some form of authorising measure will be adopted following the models already considered here. The authorisation will need to cover any renewal or amendment of existing BITS, and will require any incompatibilities to be eliminated.<sup>84</sup> It is likely that it will also cover continuation in force of compatible BITS, whether or not this is strictly necessary – but it is certainly arguable that in fact all the existing BITS are incompatible with Community law on the basis of their provisions on equal treatment and on dispute settlement.<sup>85</sup>

## V. Conclusion

This paper has taken as its starting point the fact that there are circumstances in which the Member States alone may become, or remain, parties to international agreements falling within exclusive Community competence. This may occur because the Community is excluded from participation by the international legal framework within which the agreement is negotiated, or because it is regarded as being in the Community interest for the Member States to participate, or because exclusive competence has arisen after the conclusion of an agreement by the Member States. The paper has explored the Community law obligations that arise for the Member States in these circumstances as well as the status of such agreements within the Community legal order. In such cases the Member States are said to act on behalf of, and in the interests of, the Community, although the implications of this lie at the Community rather than the international level. The Community's exclusive competence, based on Article 10 EC, requires that the Member States act under Community authorization, that Community negotiating positions are formulated and adhered to. Duties of compliance and implementation are a matter of Community obligation as well as international law, and competence to implement the agreement will lie with the Community rather than the Member States.

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<sup>82</sup> Article 207(1) TFEU; according to Article 3(1) TFEU the Union will have exclusive competence over the common commercial policy.

<sup>83</sup> See for example J Ceysens, 'Towards a common foreign investment policy? Foreign investment in the European constitution', (2005) 32 *Legal Issues of Economic Integration* 259; M Krajewski, 'External Trade Law and the Constitutional Treaty: Towards a federal and more democratic common Commercial Policy?', (2005) 42 *Common Market Law Rev* 91.

<sup>84</sup> The requirement to eliminate incompatibilities is already present, since it does not depend on exclusivity: see cases C-205/06 *Commission v Austria* and C-249/06 *Commission v Sweden*, judgments 3 March 2009.

<sup>85</sup> Thanks to Angelos Dimopoulos for this point. See also T Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 *Common Market Law Rev* 283.



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Although there is no formal legal link between the Community and the agreement in terms of either international or Community law, there are different ways in which the agreement may become part of Community law. Where there has been a complete transfer of competence to the Community, the agreement may directly bind the Community itself, including the institutions, by analogy with Article 300(7) EC. However it is more usual for the agreement to be incorporated into Community law by way of secondary legislation, either by way of referral or by including (parts of) the agreement in the legislation itself. The Court of Justice will have jurisdiction to interpret the agreement and will apply the principle of consistent interpretation. Whether the agreement will take priority over secondary legislation – so that incompatibility may lead to the invalidity of that legislation – will depend on whether, and the mechanism whereby, the agreement becomes part of Community law, as well as the nature of the agreement itself. The cases discussed here show that the phenomenon is not all that unusual. Although these agreements are in some senses anomalous, and their position in the Community legal order may be ambiguous, they also illustrate the constraints under which the Member States – although fully sovereign States – may operate at an international level as a result of their Community obligations, the way in which the international identity of the Union may be represented by the Member States alongside the Community and the accommodations possible between the demands of the Community legal order and the practical exigencies of international treaty-making.

The paper has also touched upon a related and perhaps increasing phenomenon as Community competence expands: the authorization of Member States to continue in force existing agreements and to negotiate new agreements, with procedures put in place, including standard clauses, to ensure compatibility with Community law and to leave scope for the future development of the Community's own external policy. Here too we find that what might appear to be a clear-cut distinction between exclusive and shared competence in fact reveals a more complex interaction between Member States and the Community in their international relations.

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