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Hans van Houtte

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International Law And Community Treaty-Making Power

*Hans van Houtte**

The European Community, in addition to its power within the Community, may negotiate and conclude agreements with states and other international organizations. In his article, Mr. van Houtte examines the Community's utilization of its treaty-making powers under community law as well as under international law. He concludes that the Community will attain full international status when it utilizes its treaty-making power completely and assumes full and exclusive responsibility for it.

INTRODUCTION

Since its creation, the European Community, comprised of the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community or Euratom (EAEC), not only has organized the internal common market, but also has become the center of an international treaty network. Agreements covering a variety of subject matters have linked the Community with a multitude of countries and international organizations. The Community has concluded conventions both with Member States and with third countries to establish diplomatic relations and to obtain privileges and immunities for its institutions and agents.¹ It has en-

* Professor of International Law, Catholic University of Leuven (Belgium); Concannon Professor of International Law 1981-82, University of Notre Dame; Dr. Jur., Lic. European Law; LL.M., Harvard University; Diploma, Hague Academy of International Law.

¹ For a discussion of the relations between the Community and international organizations, see COMMISSION OF THE EUROPEAN COMMUNITIES, *THE EUROPEAN COMMUNITY, INTERNATIONAL ORGANIZATIONS AND MULTILATERAL AGREEMENTS* (1977). With respect to the relations between the Community and Member States, see W. GANSCHOF VAN DER MEERSCH, *DROIT DES COMMUNAUTÉS EUROPÉENNES* (1969). For a discussion of the Community's relations with third countries, e.g., the agreement on the recognition of a CEE laissez-passer by Switzerland (Dec. 5, 1975), see 6 *RECUEIL DES ACCORDS CONCLUS PAR LES COMMUNAUTÉS EUROPÉENNES* 301.

tered into bilateral trade agreements with approximately thirty European, American, African and Asian countries, covering a broad range of subject matters, including tariffs and tariff preferences, commodity trade, commercial cooperation, export restrictions, free trade and custom unions.² Furthermore, roughly fifteen association agreements have created still more extensive and stable links between the Community and third countries. Most of these agreements associate individual countries with the Community. The Lomé Convention, however, associates sixty-one African, Caribbean and Pacific developing countries (the so-called "ACP" states) with the Community.³ In addition to providing for commercial, industrial, agricultural, financial and technical cooperation, this Convention protects the export earnings and the mineral production of the ACP states. Moreover, the Community signed a number of multilateral treaties that emanated from international conferences in which it participated. It thus became a party to several commodity agreements⁴ and GATT agreements.⁵ Community agreements are not, however, restricted to commercial matters; the Community is also a party to conventions on the peaceful use of nuclear energy,⁶ on fishing rights and agricultural matters,⁷ on environmental

² See C. FLAESCH-MOUGIN, *LES ACCORDS EXTERNES DE LA CEE* 24-33, 196-215 (1979).

³ Second ACP-EEC Convention, signed at Lomé, Oct. 31, 1979, 23 O.J. EUR. COMM. (No. L 347) 2 (1980). Lomé II replaced both the Yaoundé and Lomé I association agreements. See Simmonds, *The Second Lomé Convention: The Innovative Features*, 17 COMM. MKT. L. REV. 415 (1980). The Lomé II Convention was signed by fifty-eight countries. Since the signing of the Lomé II Convention, Saint Vincent, Vanuata and Zimbabwe have adhered to it.

⁴ See, e.g., the agreements on cocoa, 24 O.J. EUR. COMM. (No. L 313) 3 (1981) (International Cocoa Agreement of 1980); the agreements on coffee, 19 O.J. EUR. COMM. (No. L 309) 30 (1976) (International Coffee Agreement), 22 O.J. EUR. COMM. (No. L 248) 10 (1979) (Council Decision of Sept. 25, 1979 on the notification of the Community's intention to continue to participate in the International Coffee Agreement); the agreements on natural rubber, 23 O.J. EUR. COMM. (No. L 213) (1980) (International Natural Rubber Agreement of 1979), 23 O.J. EUR. COMM. (No. L 259) 30 (1980) (Council Decision of Sept. 23, 1980 on the application of the International Natural Rubber Agreement); the agreement on olive oil, 22 O.J. EUR. COMM. (No. L 327) 2 (1979) (International Olive Oil Agreement of 1979); the agreements on textiles, 17 O.J. EUR. COMM. (No. L 118) 1 (1974) (Council Decision of March 21, 1974 concluding the Arrangement regarding International Trade in Textiles), 20 O.J. EUR. COMM. (No. L 348) 59 (1977) (Council Decision of Dec. 20, 1977 concerning the Protocol extending the Arrangement regarding international trade in textiles); the agreement on tin, 22 O.J. EUR. COMM. (No. L 10) 11 (1979) (Council Decision of Dec. 18, 1978 concluding the Fifth International Tin Agreement); and the agreements on wheat, 22 O.J. EUR. COMM. (No. L 152) 7 (1979) (Council Decision of June 12, 1979 concerning the International Wheat Agreement of 1971), 24 O.J. EUR. COMM. (No. L 155) 1 (1981) (Council Decision of May 12, 1980 on the Protocols extending the International Wheat Agreement of 1971).

⁵ After the Tokyo Round, the Community signed twelve GATT agreements. See 21 O.J. EUR. COMM. (No. L 71) 1 (1980) (Council Decision of Dec. 10, 1979 concluding the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations).

⁶ See, e.g., the agreement for cooperation on the peaceful uses of nuclear energy concluded with Brazil, 12 J.O. COMM. EUR. (No. L 79) 7 (1969).

pollution,⁸ and on nuclear and health research.⁹

The Community's treaty-making powers often have been analyzed from within the Community. Community agreements are regarded as a logical complement of the Community's internal activities, as a consecration of the Community's international status and as a necessary instrument for a common foreign policy. The precise allocation of treaty-making power between the Community and the Member States has been much discussed. Also the subject of discussion has been the allocation of treaty-making power within the Community itself as between the Commission, which has to negotiate an agreement, and the Council of Ministers, which has to conclude it. These constitutional deliberations continue.¹⁰

The Community's treaty-making power, however, should also be examined under international law. Indeed, at first glance, the allocation of treaty-making power by Community law does not affect states and international organizations not subject to Community law that negotiate or conclude an agreement with the Community. For them, international law, not Community law, should determine whether the Community can validly conclude such agreement. Yet, as will be

⁷ See, e.g., the agreements on fisheries with Canada, Norway and Sweden, 23 O.J. EUR. COMM. (No. L 226) 2, 48, 52 (1980); with the United States, 20 O.J. EUR. COMM. (No. L 141) 2 (1977); and the North East Atlantic Fisheries Convention, 24 O.J. EUR. COMM. (No. L 227) 22 (1981).

⁸ See, e.g., the Barcelona Mediterranean pollution agreement, 20 O.J. EUR. COMM. (No. L 240) 3 (1977); the convention for the protection of the Rhine against chemical pollution, 20 O.J. EUR. COMM. (No. L 240) 76 (1977); the agreements on a concerted action project in the field of physico-chemical behavior of atmospheric pollutants, 23 O.J. EUR. COMM. (No. L 39) 19 (1980); the agreement in the field of organic micro-pollutants in water, 23 O.J. EUR. COMM. (No. L 39) 25 (1980); the Convention on long range transboundary air pollution, 24 O.J. EUR. COMM. (No. L 171) 13 (1981); and the Protocol concerning cooperation in combating pollution of the Mediterranean Sea by oil and other harmful substances in case of emergency, 24 O.J. EUR. COMM. (No. L 162) 6 (1981).

⁹ For the nuclear research agreements concluded with the International Atomic Energy Agency, see Dausen, *Die Beteiligung der Europäischen Gemeinschaften an multilateralen Völkerrechtsübereinkommen*, 14 *EUROPARECHT* 138, 139 (1979). The Community has also entered into agreements for cooperation in the field of thermo-nuclear fusion and plasma physics with Spain, 23 O.J. EUR. COMM. (No. L 190) 24 (1980); Sweden, 19 O.J. EUR. COMM. (No. L 162) 28 (1976); and Switzerland, 21 O.J. EUR. COMM. (No. L 242) 2 (1978).

¹⁰ See, e.g., C. FLAESCH-MOUGIN, *supra* note 2, at 41-53 for a discussion of the legal, political and economic motivation for Community agreements. See also C. HELD, *LES ACCORDS INTERNATIONAUX CONCLUS PAR LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE* (1977); H. KRÜCK, *VÖLKERRECHTLICHE VERTRÄGE IM RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN* (1977); and Simmonds, *The Evolution of the External Relation Law of the European Economic Community*, 28 *INT'L COMP. L.Q.* 644-68 (1979) for a legal analysis of Community agreements. For a broader discussion of the Community's treaty-making power, see Wellenstein, *Twenty-five Years of European Community External Relations*, 16 *COMM. MKT. L. REV.* 407 (1979).

demonstrated in Part I,¹¹ international law leaves it to the Community to define the scope of its treaty-making power. Therefore, Community rules on treaty-making powers are also relevant to its negotiation partners.¹² These partners, however, are not strictly bound by the Community rules since international law takes a lenient attitude towards agreements *ultra vires*, i.e., concluded by the Community without treaty-making power.¹³ Part II¹⁴ describes how the Community in fact allows Member States, whenever necessary, to become parties to agreements which are within the Community's treaty-making powers. Member States thus may join the Community as parties to "mixed agreements"¹⁵ or they can even act as a party instead of the Community.¹⁶ From Parts I and II it will become clear that treaty responsibility is not related to treaty-making power.

I. INTERNATIONAL LAW AND COMMUNITY TREATY-MAKING POWER

Each specific legal system determines which subjects can validly act within that system. Consequently, international law—and not community law—determines whether the Community's agreements are valid under international law. States have been the traditional actors in the international system. Now, however, it has become generally accepted that international organizations also are subjects of international law and can conclude agreements. Since such agreements are rather recent phenomena, they were not a well-developed aspect of international law until the mid-seventies. During that period the International Law Commission started to draft a convention on treaties concluded between states and international organizations or between international organizations.¹⁷ The Community's agreements shall be tested hereafter under the clauses of the draft convention, which apply the rules of international law to an organization's treaty-making power.

¹¹ See notes 17-74 and accompanying text *infra*.

¹² See notes 18-60 and accompanying text *infra*.

¹³ See notes 61-74 and accompanying text *infra*.

¹⁴ See notes 75-103 and accompanying text *infra*.

¹⁵ See notes 75-92 and accompanying text *infra*.

¹⁶ See notes 92-103 and accompanying text *infra*.

¹⁷ *Question of Treaties concluded between States or International Organizations or between two or more International Organizations*, [1979] 1 Y.B. INT'L L. COMM'N 137 [hereinafter cited as ILC draft]. Prior to this draft convention, agreements by international organizations had been examined by a number of authors. See, e.g., Reuter, *Le Droit des Traités et les Accords Internationaux conclus par les Organisations Internationales*, 1 MISCELLANEA W.J. GANSHOF VAN DER MEERSCH 195 (1972); AGREEMENTS OF INTERNATIONAL ORGANIZATIONS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (K. Zemanek ed. 1971).

A. *Scope of the Community's Treaty-Making Power*

Whereas states enjoy full treaty-making power,¹⁸ international organizations only have the treaty-making power necessary to realize their specific tasks.¹⁹ Each organization's treaty-making power is thus determined by the scope of the organization itself. As set out in the ILC draft, "The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization."²⁰ Consequently, international law leaves it to the Community to determine its own treaty-making power. Article 2 of the ILC draft then defines "the relevant rules of an organization" that determine its treaty-making power, as "the constituent instruments, relevant decisions and resolutions and established practice of the organization."²¹ Hence, the Community's treaty-making powers are determined by the Community Charters, *i.e.*, the Treaty of Paris for the ECSC and the two Treaties of Rome for the EEC and Euratom,²² along with the rules and practice of its Commission and Council of Ministers, as well as by the decisions of its Court of Justice.

The Community's jurisdiction to enter into international agreements is primarily based on its Charters. The ECSC and Euratom treaties grant those organizations overall power to conclude any agreement necessary to fulfill their tasks.²³ The EEC Treaty, on the other hand, grants the EEC treaty-making power only in the following areas: com-

¹⁸ United Nations Conference on the Law of Treaties, at art. 6, U.N. Doc.A/CONF. 39/11 (1969) (Vienna Convention).

¹⁹ The International Court of Justice has confirmed the functional rights and duties of international organizations. As early as 1949, the Court had recognized that "[w]hereas a State possesses the totality of international rights and duties, recognized by international law, the rights and duties of an . . . [o]rganization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174, 180. Although the Court of Justice formulated the principle with regard to the United Nations, it may be extended to all international organizations.

²⁰ ILC Draft, *supra* note 17, at art. 6.

²¹ ILC Draft, *supra* note 17, at art. 2.

²² Treaty Instituting the European Coal and Steel Community (ECSC), Apr. 18, 1951, 261 U.N.T.S. 140 (*entered in force* July 23, 1952) [hereinafter cited as ECSC Treaty]; Treaty Establishing the European Economic Community (EEC), Mar. 25, 1957, 298 U.N.T.S. 11 (*entered in force* Jan. 1, 1958) [hereinafter cited as EEC Treaty]; Treaty Establishing the European Atomic Energy Community (Euratom), Mar. 25, 1957, 298 U.N.T.S. 169 (*entered in force* Jan. 1, 1958) [hereinafter cited as Euratom Treaty].

²³ For the European Coal and Steel Community, for example, see ECSC Treaty, *supra* note 22, at arts. 6, 93-94; Hallier, *Die Vertragsschlussbefugnis der Europäischen Gemeinschaft für Kohle und Stahl*, 17 ZEITSCHR. AUSL. ÖFF. RECHT UND VÖLKERRECHT 428, 442-43 (1956); G. LÖRCHER, DER ABSCHLUSS VÖLKERRECHTLICHER VERTRÄGE NACH DEM RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN 71 (1965); H. REICHARDT, AUSWÄRTIGE BEZIEHUNGEN DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL ZU DRIITSTAATEN UND INTERNATIO-

mercial and customs agreements,²⁴ agreements for cooperation with other international organizations,²⁵ and association agreements.²⁶ Article 7(2) of the Protocol on Privileges and Immunities grants the Community the power to conclude agreements concerning travel documents issued by the Community.²⁷

Initially, the EEC was deemed to have only the treaty-making powers the EEC Treaty expressly granted.²⁸ In practice, however, the EEC did not limit itself to a strict reading of the EEC Treaty and concluded all agreements which came within its normal attribution.

The Community has interpreted Article 210 of the EEC Treaty as not only granting it an international legal personality, but also enabling it to conclude diplomatic agreements.²⁹ Additionally, the Community broadened the scope of Article 113, giving the EEC treaty-making power necessary to conduct a common commercial policy. Article 113,³⁰ which particularly referred to agreements on tariff and trade, on uniformity in measures of liberalization, on export policy and on countervailing measures, has also been invoked to regulate the market and prices of certain commodities through commodity agreements, to secure import of certain goods, and to restrict the import of others by agreement.³¹ Moreover, although Article 113 initially was not con-

NALE ORGANIZATIONEN (1961). For Euratom, see Euratom Treaty, *supra* note 22, at arts. 2(h), 10, 29, 73, 199-201, 206.

²⁴ EEC Treaty, *supra* note 22, at art. 113.

²⁵ *Id.* at arts. 229-31.

²⁶ *Id.* at art. 238.

²⁷ Protocol on the Privileges and Immunities of the European Economic Community, Apr. 17, 1957, 298 U.N.T.S. 140.

²⁸ See, e.g., C. FLAESCH-MOUGIN, *supra* note 2 at 129-30; Pescatore, *Les Relations Extérieures des Communautés Européennes*, [1961] ACADEMIE DE DROIT INTERNATIONAL-RECUEIL DES COURS I (vol. II).

²⁹ W. GANSHOF VAN DER MEERSCH, *supra* note 1 at 344, 347; H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 210.06 (1976).

³⁰ EEC Treaty, *supra* note 22, at art. 113.

³¹ See, e.g., the agreement guaranteeing Indian sugar exports, 18 O.J. EUR. COMM. (No. L 190) 36 (1975); the agreements to restrict the importation of textiles with Argentina, 22 O.J. EUR. COMM. (No. L 298) 2 (1979); with Bangladesh, 22 O.J. EUR. COMM. (No. L 298) 39 (1979); with Brazil, 23 O.J. EUR. COMM. (No. L 70) 2 (1980); with Columbia, 24 O.J. EUR. COMM. (No. L 273) 2 (1981); with Egypt, 24 O.J. EUR. COMM. (No. L 273) 40 (1981); with Guatemala, 22 O.J. EUR. COMM. (No. L 350) 2 (1979); with Haiti, 23 O.J. EUR. COMM. (No. L 70) 68 (1980); with Hong Kong, 23 O.J. EUR. COMM. (No. L 95) 2 (1980); with Hungary, 24 O.J. EUR. COMM. (No. L 332) 40 (1981); with India, 24 O.J. EUR. COMM. (No. L 273) 77 (1981); with Indonesia, 22 O.J. EUR. COMM. (No. L 350) 28 (1979); with Korea, 22 O.J. EUR. COMM. (No. L 298) 68 (1979); with Macao, 22 O.J. EUR. COMM. (No. L 298) 107 (1979); with Malaysia, 24 O.J. EUR. COMM. (No. L 332) 2 (1981); with Pakistan, 22 O.J. EUR. COMM. (No. L 298) 144 (1979); with Peru, 22 O.J. EUR. COMM. (No. L 350) 60 (1979); with the Philippines, 23 O.J. EUR. COMM. (No. L 371) 2 (1980); with Romania, 24 O.J. EUR. COMM. (No. L 273) 116 (1981); with Singapore, 22 O.J. EUR. COMM. (No. L 350) 100 (1979); with Sri Lanka, 22 O.J. EUR. COMM. (No. L 298) 185 (1979); with Thailand, 22

ceived to cover agreements on subject matters where no harmonization between the Community and third countries was envisaged, such as antitrust, Article 113 agreements nevertheless include antitrust provisions.³² While Article 113 originally was thought to cover mere trade, it now also covers technical and commercial cooperation and even food relief.³³ According to the letter of the treaty, Article 113 agreements differ considerably from Article 238 association agreements. First, while the former are restricted to trade, the latter cover a broader range of subjects, including, for example, technical cooperation.³⁴ Second, the Council needs unanimity to conclude association agreements,³⁵ whereas a qualified majority is sufficient for Article 113 agreements.³⁶ Nevertheless, these differences have disappeared in practice.

At present, the distinction between an association agreement and an Article 113 agreement on the basis of their subject matter has become extremely vague. Association agreements mainly focus on trade issues while Article 113 agreements are no longer limited to trade matters.³⁷ Moreover, the Commission and the Council proceed upon the same principles to negotiate and conclude agreements without distinguishing as to whether the agreement is based on Article 113 or Article 238.³⁸ The Community's choice between association and Article 113

O.J. EUR. COMM. (No. L 298) 224 (1979); with Uruguay, 23 O.J. EUR. COMM. (No. L 70) 39 (1980); with Yugoslavia 24 O.J. EUR. COMM. (No. L 273) 162 (1981).

³² Compare H. KRÜCK, *supra* note 10, at 49, and Pescatore, *supra* note 15, at 85 with the agreements with Austria, 15 J.O. COMM. EUR. (No. L 300) 2 (1972) (art. 23); with Finland, 16 O.J. EUR. COMM. (No. L 334) 13 (1973) (Information concerning the date of entry into force of the Agreement with Finland); with Israel, 18 O.J. EUR. COMM. (No. L 136) 3 (1975) (art. 13), 18 O.J. EUR. COMM. (No. L 165) 1 (1975) (Regulation No. 1625/75 of the Council of June 26, 1975 on the safeguard measures in the Agreement with Israel); with Norway, 16 O.J. EUR. COMM. (No. L 171) 2 (1973) (art. 23); with Portugal, 15 J.O. COMM. EUR. (No. L 301) 165 (1972) (art. 26); with Spain, 13 J.O. COMM. EUR. (No. L 182) 2 (1970) (art. 9); with Sweden, 15 J.O. COMM. EUR. (No. L 300) 97 (1972) (art. 23); and the agreements with Switzerland, 15 J.O. COMM. EUR. (No. L 300) 189 (1972) (art. 23).

³³ Compare Bleckmann, *Der gemischte Vertrag im Europarecht*, 11 EUROPARECHT 301 (1976) with the agreements with Argentina, 14 J.O. COMM. EUR. (No. L 249) 19 (1971); with Brazil, 17 O.J. EUR. COMM. (No. L 102) 24 (1974); with China, 21 O.J. EUR. COMM. (No. L 123) 2 (1978), 21 O.J. EUR. COMM. (No. L 143) 28 (1978) (Information concerning the entry into force of the Trade Agreement with China); and with Mexico, 18 O.J. EUR. COMM. (No. L 247) 11 (1975), 18 O.J. EUR. COMM. (No. L 262) 35 (1975) (Entry into force of the Agreement with Mexico). See also the agreement with the United Nations Relief and Work Agency (UNRWA) for Palestine Refugees, 19 O.J. EUR. COMM. (No. L 203) 44 (1976), 19 O.J. EUR. COMM. (No. L 249) 14 (1976) (Information concerning the signing of the Convention with the UNRWA).

³⁴ EEC Treaty *supra* note 22, at arts. 113, 238.

³⁵ *Id.*

³⁶ *Id.* at art. 113.

³⁷ C. FLAESCH-MOUGIN, *supra* note 2, at 104-14.

³⁸ *Id.* at 54, 65-69, 74-82, 103-22.

agreements instead has a political importance: where an Article 238 association is politically less opportune, as was, for example, the case with Franco's Spain, with Israel, Egypt or Lebanon, the Community only concluded Article 113 trade agreements.³⁹

The Court of Justice, which generally takes an expansive view of Community treaty-making powers in order to avoid its "surrender of the independence of action in its external relations,"⁴⁰ specifically supported a broad interpretation of Article 113. In its Opinion, 1/75 on the OECD Local Cost Understanding,⁴¹ the Court had to consider whether export credits were included in the commercial policy, notwithstanding Article 113's silence on the matter. The Court provided a broad interpretation of the concept of "commercial policy." It stated that these terms could not be construed more narrowly when they concern the Community's commercial policy than when they concern a state's policy. Therefore commercial policy included both export policy and credits.⁴² In its Opinion 1/78 on the International Agreement on Natural Rubber,⁴³ the Court indicated that Article 113 could cover any agreement that fundamentally aims at a change in the terms of international trade (such as the rubber agreement), even when individual clauses of a subsidiary or an ancillary nature do not enter within the scope of Article 113.⁴⁴

The Community already has implied treaty-making powers with respect to matters for which the EEC Treaty did not grant express treaty-making powers, because it considers implied external powers as the necessary complement to the effective use of express internal powers. The Community thus has deemed that Articles 43, 75, and 84, which require the regulation of agriculture and transportation within the Common Market, provided, for example, sufficient authority for a fisheries agreement with the United States,⁴⁵ for treaties on European

³⁹ *Id.* at 123-28.

⁴⁰ Opinion 1/76 given pursuant to Article 228(1) of the EEC Treaty, [1977] E. Comm. Ct. J. Rep. 741, 758, [1977] 2 Comm. Mkt. L.R. 279, 298 (Draft Agreement establishing a European laying-up fund for inland waterway vessels).

⁴¹ Opinion 1/75 given pursuant to Article 228 of the EEC Treaty, [1975] E. Comm. Ct. J. Rep. 1355, [1976] 1 Comm. Mkt. L.R. 85.

⁴² *Id.* at 1362, [1976] 1 Comm. Mkt. L.R. at 91. See Kapteyn, *The Common Commercial Policy of the European Economic Community*, 11 TEX. INT'L L.J. 485 (1976); Maas, *The External Powers of the EEC with regard to Commercial Policy*, [1976] COMM. MKT. L. REV. 379.

⁴³ Opinion 1/78 given pursuant to the Second Subparagraph of Article 228(1) of the EEC Treaty, [1979] E. Comm. Ct. J. Rep. 2871, [1979] 3 Comm. Mkt. L.R. 639.

⁴⁴ *Id.* at 2912, [1979] 3 Comm. Mkt. L.R. at 676.

⁴⁵ Agreement with the United States, 20 O.J. EUR. COMM. (No. L 141) 2 (1977). See also Raux, *Les Accords Externes de la CEE*, 14 REV. TRIM. DROIT EUROPÉEN 431, 462 (1978).

road transportation,⁴⁶ and for multilateral maritime liner Codes.⁴⁷ Furthermore, it could find implied treaty-making powers in other treaty articles as well.⁴⁸

The Court of Justice has repeatedly confirmed the principle that the Community's internal regulating powers can be projected into implied treaty-making powers. Its epoch-making ERTA decision of March 31, 1971⁴⁹ concerned the conclusion of the European Road Transport Agreement (ERTA) which the Member States were negotiating with other European states.⁵⁰ During the course of these negotiations, the Community decided to regulate internally road transportation. As the Community gave concrete shape to the common transport policy, it also claimed treaty-making power in this field; the Community, and not the Member States, should henceforth negotiate the ERTA agreements.⁵¹ The Court confirmed this view: each time the Community adopts common rules to implement a policy envisaged by the EEC Treaty, "the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system."⁵² In other words, as soon as the Community has regulated for the Common Market a matter provided for by the treaty, it also has pre-empted the treaty-making power in that field. "The system of internal Community measures may not therefore be separated from that of external relations."⁵³

The ERTA principle has been restated and in some aspects devel-

⁴⁶ See note 53 *infra*; Raux & Flaesch-Mougin, *Les Accords Externes de la CEE*, 11 REV. TRIM. DROIT EUROPÉEN 227, 238 (1975).

⁴⁷ Carriage of goods by the sea, 16 O.J. EUR. COMM. (No. L 91) 2 (1973); Proposal concerning a Convention on a conduct for liner conferences, 21 O.J. EUR. COMM. (No. C 35) 3 (1978). See also Daus, *supra* note 9, at 168. The Member States, and not the Community, finally entered into this agreement. See note 96 *infra*.

⁴⁸ See H. KRÜCK, *supra* note 10, at 71-92.

⁴⁹ *Commission of the European Communities v. Council of the European Communities*, [1971] E. Comm. Ct. J. Rep. 263, [1971] Comm. Mkt. L.R. 335.

⁵⁰ The European agreement concerning European Road Transport (ERTA) was signed on Jan. 19, 1962 in Geneva. The agreement has not entered into force due to an insufficient number of ratifications.

⁵¹ [1971] E. Comm. Ct. J. Rep. at 269-71 (submissions and arguments of the parties).

⁵² *Id.* at 274, [1971] Comm. Mkt. L.R. at 355.

⁵³ *Id.* at 264, [1971] Comm. Mkt. L.R. at 335. See generally Collinson, *The Foreign Relations Powers of the European Communities: A Comment on Commission v. Council*, 23 STAN. L. REV. 956 (1971); Kovar, *L'affaire de L'A.E.T.R. devant la Cour de Justice des Communautés Européennes et la compétence Internationale de la CEE*, 17 ANN. FR. DROIT INT'L L. 386 (1971). It is uncertain whether the ERTA case implies that not only Community decisions, but also directives or even informal declarations suffice to actualize the Community's pre-emption in the domestic and consequently in the external field. See Daus, *supra* note 9, at 146.

oped and refined by later decisions.⁵⁴ In Opinion 1/76,⁵⁵ for example, the Court of Justice confirmed the ERTA principle: "Authority to enter into international commitments may not only arise from an express attribution by the treaty, but equally may flow from its provisions."⁵⁶ This case concerned an agreement on transport on inland waterways, a matter the Community had not yet regulated within the Common Market. The Court stated that the Community's treaty-making power covered not only matters already regulated within the Common Market, but also matters within its virtual capacity to regulate, but not yet covered by internal measures.⁵⁷ The ERTA rule, as refined by Opinion 1/76, thus has enlarged the scope of the Community's treaty-making powers so much, that it now equals the scope of the Common Market itself. At present, however, the Community seldom makes use of these large treaty-making powers because it fears opposition from the Member States to such extensive Community powers, since the expansion of these Community powers reduces the individual Member States' international capacity. The Community, therefore, prefers as much as possible to base its treaty-making powers upon the specific provisions of Articles 113 and 238.

Recently, the Community has looked for a subsidiary source of treaty-making power when Articles 113 and 238 do not provide a sufficient basis. According to Article 235, on the proposal of the Commission, a unanimous Council can grant itself the power to act whenever necessary to achieve an objective of the Community, even though not provided for by the EEC Treaty.⁵⁸ Commission and Council already have used Article 235 to enlarge their treaty-making powers beyond what they considered to be the original scope of the EEC Treaty.⁵⁹ In

⁵⁴ *Officer of Justice v. Kramer*, [1976] E. Comm. Ct. J. Rep. 1297, [1976] 2 Comm. Mkt. L.R. 440 (joint cases 3/76, 4/76 and 6/76); Opinion 1/75, note 41 *supra*; Opinion 1/76, note 40 *supra*. With respect to Opinion 1/76, see Groux, *Le Parallélisme des Compétences Internes et Externes de la Communautés Européennes*, [1978] CAHIERS DE DROIT EUROPÉEN 3 and Philip, *A propos de l'avis 1/76 de la Cour de Justice des Communautés Européennes*, 21 REV. MARCHÉ COMMUN. 55 (1978).

⁵⁵ Opinion 1/76, [1977] E. Comm. Ct. J. Rep. 741, [1977] 2 Comm. Mkt. L.R. 279.

⁵⁶ *Id.* at 755, [1977] 2 Comm. Mkt. L.R. at 295.

⁵⁷ *Id.*

⁵⁸ EEC Treaty, *supra* note 22, at art. 235.

⁵⁹ See, e.g., the commercial cooperation agreement with Canada, 19 O.J. EUR. COMM. (No. L 260) 23 (1976); with India, 20 O.J. EUR. COMM. (No. L 328) 5 (1981); with the United Nations Relief and Works Agency for Palestine Refugees (UNRWA), 23 O.J. EUR. COMM. (No. L 108) 56 (1980); and the cooperation agreement with Indonesia, Malaysia, the Philippines, Singapore and Thailand, 23 O.J. EUR. COMM. (No. L 144) 2 (1980). For criticism of the use of Article 235, see O. JACOT-GUILLARMOD, *DROIT COMMUNAUTAIRE ET DROIT INTERNATIONAL PUBLIC* 32 (1979). The Rhine pollution agreements, 20 O.J. EUR. COMM. (No. L 240) 76, 87 (1977), were based solely on Article 235. See O. JACOT-GUILLARMOD, *supra* at 77, for criticism of this approach.

addition, the Community has recently implied additional treaty-making authority by looking to the purpose of the EEC Treaty. The Community thus has based its treaty-making power solely upon the treaty itself,⁶⁰ even while expanding its authority beyond the literal wording.

B. *Treaties Concluded by the Community*

The Community not only exercises its expressly granted treaty-making powers but it also assumes powers beyond the original concepts of the treaties. Therefore to protect themselves, states and international organizations negotiating agreements with the Commission, can request that the latter ask the Court of Justice to confirm the Community's treaty-making power for the agreement involved.⁶¹ As stated above,⁶² each international organization determines its own treaty-making power. Within the Community, the Court of Justice has the last word in the interpretation of the Charter, and consequently, on the extent of the Community's treaty-making powers based upon the Charter. Therefore, a Court of Justice decision on the Community's treaty-making powers binds the Community as well as third parties.

There is, however, always a risk that the Community negotiated and concluded an agreement without the necessary powers, *i.e.*, *ultra vires*.⁶³ Initially, Community agreements found to be *ultra vires* were denied any binding force. Such a strict *ultra vires* rule, however, became highly impractical for third parties after the theory of implied or deduced powers blurred the limits of the Community's treaty-making powers. Consequently, the *ultra vires* rule has been softened.⁶⁴

⁶⁰ See, e.g., the agreements with Austria, 18 O.J. EUR. COMM. (No. L 188) 2 (1975) and with the Bank for International Settlement, 21 O.J. EUR. COMM. (No. L 316) 22 (1978). See generally Raux, *supra* note 45, at 666. For political reasons, no association-agreement could be concluded with Yugoslavia. Hence, the agreement is based upon the treaty in general. This agreement, signed on April 2, 1980, is not yet published.

⁶¹ Opinion 1/75 was requested to avoid challenges to the treaty-making powers "for all interested parties, including third countries." Opinion of the Court Given Pursuant to Article 228 of the EEC Treaty of 11 November 1975, [1975] E. Comm. Ct. J. Rep. 1355, 1361, [1976] 1 Comm. Mkt. L.R. 85, 90. Cf. note 42 *supra*.

⁶² See notes 18-60 and accompanying text *supra*.

⁶³ For example, since the Community has no power to conclude agreements which further aims beyond its scope, it has no power to exchange tariff reductions for the right to establish in a third country, as that power still belongs to the competence of the Member States. Bleckmann, *Die Kompetenz der Europäischen Gemeinschaft zum Abschluss völkerrechtlicher Verträge*, 12 EUROPARECHT 109, 112 (1977).

⁶⁴ See Bothe, *Die Stellung der Europäischen Gemeinschaften im Völkerrecht*, [1977] ZAÖRV 122, 136-37; Geiger, *Aussenbeziehungen der Europäischen Gemeinschaft und auswärtige Gewalt der Mitgliedstaaten*, [1977] ZAÖRV 640, 650; KRÜCK *supra* note 10, at 147; Meessen, *Das Abkommen von Lomé als gemischter Vertrag*, 15 EUROPARECHT 36, 37 (1980).

The Community cannot just reject any agreement which is *ultra vires*. Indeed, as the International Law Commission put it, the Community "may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules regarding competence to conclude treaties as invalidating its consent unless that violation was manifest."⁶⁵ The *ultra vires* rule manifests itself and only operates when the lack of treaty-making power "is or ought to be within the cognizance of any contracting state or any other contracting organization."⁶⁶ Therefore, the parties entering into an agreement with the Community have a duty to exercise reasonable diligence to determine, when in doubt, whether the agreement falls within the scope of the Community's treaty-making powers. They cannot avoid the nullity of an agreement when they reasonably should have known that the Community lacked the power to conclude it.⁶⁷ Euratom, for example, is confined to the non-military use of nuclear energy. Thus, an agreement on military use of nuclear power is manifestly *ultra vires*—as any third party should know—and not binding on the Community. When, on the other hand, the Community's lack of treaty-making power is not manifest, the *ultra vires* rules may not be invoked and the Community remains bound.

Other than agreements *ultra vires*, the Community is bound by the treaty obligations it accepts.⁶⁸ It cannot refuse to perform when contrary Community rules are introduced after it has made a commitment.⁶⁹ Since the Community would have concluded the agreement in its own standing, it is internationally responsible for its non-performance.⁷⁰ The Community can request from the Member States the support necessary to comply with its treaty obligations. It can even hold Member States that do not cooperate responsible under Community law.⁷¹

Moreover, Member States may be held individually responsible by

⁶⁵ Report of the International Law Commission on the work of its thirty-first session, 34 U.N. GAOR, Supp. (No. 10) 418-19, U.N. Doc. A/34/10 (1979), reprinted in [1979] 2 Y.B. INT'L L. COMM'N 152, U.N. Doc. A/CN.4/SER.A/1979/Add.1(Part 2) [hereinafter cited as Report of the International Law Commission].

⁶⁶ *Id.* at 419, 2 Y.B. INT'L L. COMM'N at 152.

⁶⁷ *Id.* at 420-21, 2 Y.B. INT'L L. COMM'N at 152-53.

⁶⁸ See, e.g., Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty, (Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials Facilities and Transports), [1978] E. Comm. Ct. J. Rep. 2151, 2178-79, [1979] 1 Comm. Mkt. L.R. 131, 158-59. Articles 101 and 184 imply that the EAEC assumes its obligations itself.

⁶⁹ See Report of the International Law Commission, note 65 *supra*.

⁷⁰ See Bleckmann, *supra* note 33 at 302.

⁷¹ EEC Treaty, note 22 *supra*. Article 169 reads:

the Community's treaty-partner for violations of treaty obligations undertaken by the Community. The collectivity of Member States can be held responsible on a subsidiary basis, *i.e.*, as members of an international organization which fails to honor its responsibility.⁷² Furthermore, in the ILC draft, Article 36 was introduced which declared that Member States:

shall observe the obligations . . . which arise for them from the provisions of a treaty, to which the organization is a party if . . . the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the states' members of the organization are bound by the treaties concluded by it⁷³

This draft article was vehemently criticized by the Soviet participant because it would not express a general principle of international law. Nevertheless, it is specifically significant for the Community.⁷⁴ Furthermore, since Article 228 of the EEC treaty binds Member States to validly concluded Community agreements, it could be argued that under the draft article, the Member States can be held internationally responsible for Community treaty violations.

II. MEMBER STATES AND COMMUNITY TREATY-MAKING POWER

A. Mixed Agreements

Any or all of the Member States may sign third party agreements jointly with the Community.⁷⁵ The existence of such mixed agreements

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Id. See also Bleckmann, *supra* note 33, at 311; O. JACOT-GUILLARMOD, *supra* note 59, at 87.

⁷² C. HELD, *supra* note 10, at 201.

⁷³ Report of the International Law Commission, note 65 *supra*. Article 36 provides:

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States' members of the organization are bound by the treaties concluded by it; or

(b) the States and organization participating in the negotiation of the treaty as well as the States' members of the organization acknowledged that the application of the treaty necessarily entails such effects.

Id.

⁷⁴ See 1 Y.B. INT'L L. COMM'N (session 1525 ¶¶ 21-32); Report of the International Law Commission on the work of its thirtieth session, 33 U.N. GAOR, Supp. (No. 10) 337-41, U.N. Doc. A/33/10 (1978), reprinted in 2 Y.B. INT'L L. COMM'N 134-35, U.N. Doc. A/CN.4/SER.A/1978/Add.1(Part 2).

⁷⁵ See Bleckmann, *supra* note 33, at 301-02; Dupuy, *La technique de l'accord mixte utilisée par les Communautés européennes*, [1973] ANNUAIRE INSTITUT DROIT INTERNATIONAL 259-63.

partly can be explained by legal considerations. Indeed, when certain subject matters of an agreement pertain to the Community's jurisdiction and others to the Member States' jurisdiction, the agreement has to be concluded by the Community, as well as by the Member States individually.⁷⁶ The Community participates, for example, along with the Member States in the United Nations Conference on the Law of the Sea, because the conservation and utilization of marine life resources and the exploitation of sea-bed resources are matters that fall within the scope of the Community's powers.⁷⁷ The Community, however, tries to avoid mixed agreements as much as possible because they undermine its status as an independent treaty party. The Court of Justice has minimized the legal need for mixed agreements. In its Opinion 1/76,⁷⁸ concerning a draft Rhine River navigational agreement between the Community, six of the nine Member States, and Switzerland, the Court limited the extent to which Member States can get involved in a mixed agreement. The Court of Justice held that participation by Member States was only legitimate for the purpose of removing legal obstacles flowing from previous conventions binding Member States: "The participation of these states in the agreement must be considered as being solely for this purpose and not as necessary for the attainment of other features of the system." Except for this special undertaking "the legal effects of the agreement with regard to Member States result . . . from the conclusion of the latter by the Community."⁷⁹ In its Opinion 1/78,⁸⁰ the Court of Justice further reduced the need for mixed agreements by stating that the Community has exclusive treaty-making power once the agreement is within the scope of the Community, even though some subsidiary and ancillary clauses are outside that scope.⁸¹

Some agreements are of mixed character for political reasons. On the one hand, Community participation in international conferences

⁷⁶ *E.g.*, the Court of Justice stated that the International Agreement on Natural Rubber, which entered within the scope of Community powers, should be a mixed agreement if the Member States had to subscribe to the financing of the rubber-stock. Opinion of the Court given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty, [1979] E. Comm. Ct. J. Rep. 2871, 2918, [1979] 3 Comm. Mkt. L.R. 639, 681 (International Agreement on Natural Rubber).

⁷⁷ BUHL, *The European Communities and the Law of the Sea*, [1981] OCEAN DEVELOPMENT AND INTERNATIONAL LAW.

⁷⁸ Opinion given pursuant to Article 228(1) of the EEC Treaty, [1977] E. Comm. Ct. J. Rep. 741, [1977] 2 Comm. Mkt. L.R. 279 (Draft Agreement establishing a European laying-up fund for inland waterway vessels).

⁷⁹ *Id.*, [1977] 2 Comm. Mkt. L.R. 279.

⁸⁰ [1979] E. Comm. Ct. J. Rep. 2871, [1979] 3 Comm. Mkt. L.R. 639.

⁸¹ Steenberg, *The Common Commercial Policy*, 17 COMM. MKT. L. REV. 229, 231-32 (1980).

confirms its international status. Consequently, the Community often insists on joining the Member States in conferences in which the subject is within the Community's, as well as the Member States' jurisdiction. It then signs agreements jointly with the Member States although the Member States' signatures alone would suffice.⁸² The Community, for example, signed the Helsinki Act jointly with the Member States. Because the Helsinki Act is not legally binding, the significance of the Community's signature was merely political.⁸³ On the other hand, Member States, demonstrating excessive nationalism, sometimes insist on the joint signing of an agreement that is exclusively within the Community scope. Although their treaty-making power is legally transferred to the Community, occasionally the Community may accede to such Member States' claims and tolerate the mixed character of the agreement for reasons of political expediency.⁸⁴ Finally, third parties that do not recognize the Community's signature, or that insist on a joint commitment of Community and Member States can obtain the Member States' signatures under agreements concluded by the Community.⁸⁵

Particular problems may arise as to the responsibility of the Community and/or Member States for violations of mixed agreements. Mixed agreements do not entail joint responsibility of Community and Member States as is sometimes mistakenly believed. The Court of Justice made it clear that the joint signing of an agreement leaves untouched the respective responsibilities of the Member States and the Community.⁸⁶ It ruled that through their own ratification Member States merely assume the obligations authorized as within their individual treaty-making power. For matters within Community jurisdiction, however, the agreement solely enters into force by virtue of the Com-

⁸² Dausès, *supra* note 9, at 148.

⁸³ The Act's nonbinding character may explain why it was never published in the Official Journal. On the binding force of the Helsinki Act, see Kiss & Dominick, *The International Legal Significance of the Human Rights Provision of the Helsinki Final Act*, 13 VAND. J. TRANSNAT'L L. 293, 296-303 (1980).

⁸⁴ For example, the Member States requested that they conclude the Agreements on Technical Barriers and on Trade in Civil Aircraft (Tokyo-Round), although such matters fall entirely within the Community treaty-making power. Cf. Written Question No. 1698/79 by Mrs. Walz to the Commission of the European Communities, 23 O.J. EUR. COMM. (No. C 137) 36 (1980); 23 O.J. EUR. COMM. (No. C 105) 31 (1980).

⁸⁵ Dausès, *supra* note 9, at 164.

⁸⁶ Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty, (Draft Convention of the International Atomic Agency on the Physical Protection of Nuclear Materials Facilities and Transports), [1978] E. Comm. Ct. J. Rep. 2151, 2180-81, [1979] 1 Comm. Mkt. L.R. 131, 160; Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities*, 16 COMM. MKT. L. REV. 615, 634 (1979).

munity's signature and binds Member States on the basis of Community law and not on the basis of their own signature on the agreement.⁸⁷ The Community and Member States never have "concurrent" or "parallel" powers.⁸⁸ The Community's obligations and responsibilities have to be separated from those of the Member States. The mixed agreement can stipulate which obligations are undertaken by the Community and which by the Member States. The Community, however, avoids clear partition-formulas, which forfeit future expansion of its treaty-making powers. Such a partition clause, therefore, remains too vague to be helpful.⁸⁹ At any rate, regardless of a partition clause, the Community's and Member States' obligations have to be allocated according to the division of treaty-making powers between them. The fact that the Community is vested with large powers "is a domestic question in which third parties have no need to intervene."⁹⁰ Third parties that recognize the Community as treaty partner have to accept the distribution of treaty-making power, and consequently of eventual treaty liability, between the Community and the Member States. They cannot hold the Community responsible for treaty obligations that lie beyond its treaty-making power and are assumed by the Member States.⁹¹

B. Agreements Concluded Exclusively By Member States

Some agreements, concluded by Member States before or after the creation of the Common Market, cover matters over which the Community afterwards may claim treaty-making powers. In making such a claim the Community asserts that it stepped into the Member States' shoes and, as the Court of Justice declared, that "it replaced the Member States in commitments arising from the Convention . . . and is

⁸⁷ Opinion given pursuant to Article 228(1) of the EEC Treaty, [1977] E. Comm. Ct. J. Rep. 741, 756, [1977] 2 Comm. Mkt. L.R. 279, 296-97 (Re the Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels). See also Pescatore, note 86 *supra*.

⁸⁸ According to Pescatore, "there is no place in the system for the construction of 'concurrent' or 'parallel' powers. In other words, whenever and so far as the matter belongs to the Community's sphere, jurisdiction over it is exclusive of any concurrent power of Member States." Pescatore, *supra* note 86, at 624.

⁸⁹ See, e.g., Dausen, *supra* note 9, at 150-52; Buhl, *supra* note 77, at § 25 (EEC proposal for an Article 300 in the UN Conference on the Law of the Sea).

⁹⁰ [1978] E. Comm. Ct. J. Rep. 215, [1979] 1 Comm. Mkt. L.R. 131.

⁹¹ Bleckmann, *supra* note 33, at 311. Bleckmann suggests that in mixed agreements the Community could be responsible for obligations *ultra vires* on condition that all Member States signed the agreement and thus freed the Community from the limits they put on its treaty-making power in the EEC Treaty. However as Meessen, *supra* note 64, at 36, points out, such exemption may not be implied but requires the procedure provided for by Article 236 of the EEC Treaty. See C. HELD, *supra* note 10, at 205.

bound by the said commitment.”⁹² It is the Community’s position that the transfer of powers from Member States to the Community entails a succession of certain treaty rights and obligations in relation to third states.⁹³ Such succession of treaty obligations appears to conform with international law.⁹⁴ But when third states oppose the succession proclaimed by the Community, international law is unclear as to whether, and to what extent, the parties (*i.e.*, Member States) remain responsible.

Agreements concluded by Member States on matters over which the Community afterwards claims treaty-making powers may have to be prolonged or renewed. The Community in such instances sometimes just asserts its treaty-making power by authorizing the member states to prolong or renew the agreement.⁹⁵ Occasionally, for example, the Community is turned down as a treaty partner by parties who do not recognize its treaty-making power or simply prefer Member States as treaty partners. In such cases, the Community may order the Member States to conclude the agreement on its behalf.⁹⁶

In its ERTA decision,⁹⁷ the Court of Justice recognized that the Community may delegate some treaty-making power to Member States whenever necessary. In that case, negotiations had been started and carried out to a considerable extent by the Member States when the Community claimed the power to conclude the agreement. The Court confirmed that the treaty-making powers indeed were vested in the Community, but it did not wish to jeopardize the outcome of the nego-

⁹² *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen* (preliminary ruling requested by the Tariefcommissie) (*Customs Agent of the Dutch Railways v. Inspector of Customs and Excise*), [1975] E. Comm. Ct. J. Rep. 1439, [1976] 1 Comm. Mkt. L.R. 167.

Just as, in the case of commitments arising from GATT, the Community has replaced the Member States in commitments arising from the Convention of 15 December 1950 on Nomenclature for the Classification of Goods in Customs Tariffs and from the Convention of the same date establishing a Customs Cooperation Council, and is bound by the said commitments.

Id. at 1450, [1976] 1 Comm. Mkt. L.R. at 178. *See also*, with regard to GATT, *International Fruit Company NV, Kooy Rotterdam NV, Velleman en Tas NV and Jan Van den Brink's Im-en Exporthandel NV v. Produktschap voor Groenten en Fruit* (reference for a preliminary ruling by the College van Beroep voor het Bedrijfsleven), [1972] E. Comm. Ct. J. Rep. 1219, [1975] 2 Comm. Mkt. L.R. 1.

⁹³ O. JACOT-GUILLARMOD, *supra* note 59, at 121-35; Pescatore, *supra* note 86, at 638.

⁹⁴ *See* A.D. McNAIR, *THE LAW OF TREATIES* 629-33 (1961), for an analogy with member states of the German Empire retaining international personality.

⁹⁵ *See, e.g.*, Council Decision of Nov. 11, 1980, 23 O.J. EUR. COMM. (No. L 307) 27 (1980) (authorizing prolongation or tacit renewal of certain Trade Agreements concluded between the Member States and third countries).

⁹⁶ Dausès, *supra* note 9, at 168.

⁹⁷ [1971] E. Comm. Ct. J. Rep. 263, [1971] Comm. Mkt. L.R. 335.

tiations. Therefore, rather than require third countries to accept the transfer of powers from Member States to the Community, the Court decided that the Member States had to continue the negotiations and conclude the agreement on behalf of the Community and in accordance with its policy.⁹⁸

Member States undoubtedly may continue to conclude agreements in areas in which the Community does not claim treaty-making power. For example, they continue to conclude bilateral economic cooperation agreements with third countries.⁹⁹ Even in these areas, however, the Member States have to be loyal to the policy of European integration that they have underwritten. Their treaties may be neither incompatible with their Community obligations nor detrimental to the Community's future negotiating positions.¹⁰⁰ Although the Community does not claim the power to conclude these treaties, it may exercise a "treaty suggesting power." It requires the Member States, for example, to consult the Community before concluding cooperation agreements.¹⁰¹ The Member States, and not the Community, are parties to these agreements and remain responsible for them. Even when Member States conclude agreements on behalf or under orders of the Community, they cannot pretend that they lacked the necessary treaty-making powers. Indeed, under international law, states are presumed to have the full capacity to conclude such agreements.¹⁰² The Community can be bound by provisions of an agreement concluded by Member States alone, only on the condition that such is the parties' intention and that the Community expressly accepts these obligations.¹⁰³

⁹⁸ *Id.* at 281-82, [1971] Comm. Mkt. L.R. at 361-62.

⁹⁹ It remains unclear to what extent cooperation agreements may be concluded by Member States and by the Community. See O. JACOT-GUILLARMOD, *supra* note 59, at 165-71; Pescatore, *supra* note 86, at 628.

¹⁰⁰ EEC Treaty, *supra* note 22, at art. 5. Cf. Court of Justice Opinion 1/76, [1977] E. Comm. Ct. J. Rep. 741, [1977] 2 Comm. Mkt. L.R. 279.

¹⁰¹ See, e.g., Council Decision of July 22, 1974, 17 O.J. EUR. COMM. (No. L 208) 23 (1974) (establishing a consultation procedure for cooperation agreements between Member States and third countries). See also the Proposal for a Council Decision setting up an information and consultation procedure for relation and agreements with third countries in the field of transport by rail, road and inland waterway, 23 O.J. EUR. COMM. (No. C 350) 69 (1980).

¹⁰² See note 18 *supra*.

¹⁰³ Article 35 of the International Law Commission draft states that:

1. [Subject to Article 36,] an obligation for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

CONCLUSION

International law recognizes the Community's treaty-making powers, as defined by Community law. For the Community, these powers, which are extensive, confirm the Community's international status. A cleavage, however, exists between the theoretical treaty-making power and the actual treaty conclusion. Although the Community often is a party to international agreements, it does not make all possible use of its treaty-making powers. Indeed, it sometimes allows Member States to conclude agreements which in fact enter within the Community's jurisdiction. The Community will better realize its international status when it fully utilizes its treaty-making powers.

Undoubtedly, treaty-making powers and treaty conclusions confirm the Community's international status. Yet, another and probably even more essential confirmation of this status is the international responsibility for the concluded agreements. The Community's and Member States' responsibility for Community agreements has yet to be extensively discussed. Generally, however, the Community is not exclusively responsible since the Member States also bear some parallel or subsidiary responsibility. The Community will obtain the full international status it is entitled to, when it not only utilizes its treaty-making power completely, but also assumes full and exclusive responsibility for that power.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

Report of the International Law Commission, *supra* note 65, at 395, 2 Y.B. INT'L L. COMM'N at 144.