Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order

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E.L. Rev. 3 *The constitutional philosophy of dual federalism is based on the idea of dual sovereignty. The federal and the state governments are regarded as co-equals, which operate independently within their respective spheres. Dual federalism rejects the idea of a hierarchical relationship between constitutional "levels". In line with that federal philosophy, the constitutional architecture of dual federalism is based on mutually exclusive powers. The idea of exclusive powers belonging to the European Community has been a judicial creation. The article revisits the*

emergence of exclusive competences in the Community legal order. Beyond the Court's "pointillist" jurisprudence, various attempts have been made to search for broader constitutional guidelines. These grander constitutional schemes and the two intellectual rationales for constitutional exclusivity that underpin them will be analysed in turn. The concluding part discusses the constitutional (pre)conditions that were originally responsible for the emergence of exclusive powers in the Community legal order.

Introduction: dual federalism and exclusive competences

The two most influential constitutional expressions of the federal principle have emerged under the names of "dual federalism" and "co-operative federalism". While the two variants of constitutional federalism are both based on the idea of *duplex regimen,* they differ in their conception of *how* the two levels of government relate to each other.

The constitutional philosophy of dual federalism is based on the idea of dual sovereignty. The federal government and the state government are regarded as co-equals. The postulated constitutional "equality" between the two levels of government rejects the idea of a hierarchical relationship between them. The federal and the state governments operate independently in their respective spheres. The dualist federal principle thus needs to devise a "method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent". [1] The only method accomplishing that constitutional aim is a division of powers into two mutually exclusive spheres, for as soon as the constitutional arrangement provides for shared competences, the question of hierarchical subordination will arise, for the possibility of conflict between the two "sovereigns" generates the need for a conflict-resolution mechanism in the form of a ***E.L. Rev. 4*** principle of supremacy. [2] Constitutionally, the relationship between the two governments thus changes from one of co-ordination to a relationship of subordination.

Exclusive competences are the hallmark of dual federalism: within their scope, only one authority exists. Exclusive powers are constitutionally guaranteed monopolies, for only one governmental level is entitled to act autonomously. Actions of other public authorities are prohibited unless authorised--a constitutional logic that inverts that of shared powers. [3] Exclusive competences are thus double-edged provisions. Their positive side entitles one authority to act, while their negative side "excludes" anybody else from acting autonomously within its scope.

The Treaty establishing the European Economic Community contained no verbal reference to the concept of exclusivity. Exclusive competences have even been considered "foreign" to the Community legal order. [4] Since the Treaty on European Union, the exclusive versus non-exclusive power dichotomy has, however, become part of the official vocabulary of the constitutional charter of the European Union. Article 5(2) EC--constitutionalising the principle of subsidiarity--indirectly acknowledges the existence of areas that "fall within its exclusive competence". The same indirect recognition can be found in Art.43(d) EU confining the mechanism of enhanced

cooperation to those policy areas that do "not concern the areas which fall within the exclusive competence of the Community".

The original idea of exclusive powers pertaining to the EC was essentially a judicial creation. [5] How has the concept of exclusive power been received in the Community legal order? The following definitions have been offered:

E.L. Rev. 5 "Exclusive competence comprises powers which have been definitely and irreversibly forfeited by the Member States by reason of their straightforward transfer to the Community." "Where the Community has exclusive competence, this means that any action by a Member States in the same field is *a priori* in conflict with the Treaty." [6]

"[T]he existence of such competence arising from a Treaty provision *excludes any competence* on the part of Member States which is concurrent with that of the Community, in the Community sphere and in the international sphere." [7]

Exclusivity is thus understood as constitutional exclusivity or "*a priori* exclusivity". [8] But what are the Community's exclusive powers? What is their raison d'être? Has the Community's sphere of exclusive powers been dynamic or stable? The present article will approach these questions in three steps. A first section will revisit the emergence of exclusive competences in the Community legal order. Analysing their "birth" conditions will help us find the constitutional reasons for their emergence. The emphasis will, thus, be on their *genesis* and not on their subsequent constitutional biographies. [9] With the Court's jurisprudence on the issue of exclusive Community power being rather "pointillist", various constitutional attempts have been made to search for broader constitutional guidelines. The grander constitutional schemes suggested in the past two decades as well as the two principal rationales for constitutional exclusivity will be reviewed in the second section of this article. The concluding section will, finally, discuss the constitutional conditions that may have been responsible for the emergence of exclusive powers in the Community legal order.

Constitutional genesis: exclusive points on a canvas of shared powers

The original Treaty of Rome did not group the Community's competences into classes of exclusive, shared or complementary competences. The Community legal order had no express competence typology. Apart from the spectrum of naturally exclusive implied organisational powers of an international organisation, [10] all Community competences ***E.L. Rev. 6*** appeared to be shared with the Member States. The emergence of constitutional exclusivity in particular policy areas dates from the 1970s. These powers were "discovered" by the European Court of Justice and have remained very "exclusive": the Court has only added a few exclusive points on the constitutional canvas of shared powers. In this section, we shall reconstruct the constitutional genesis xof three constitutional monopolies granted to the European Community. [11]

Constitutional genesis no.1: the common commercial policy

The 1957 Treaty of Rome had given the Community the central task of "establishing a common market and [of] progressively approximating the economic policies of Member States". [12] This involved "the elimination, as between Member States, of customs duties", "the establishment of a common customs tariff and of a common commercial policy towards third countries". [13] The provisions on the customs union had been placed inside the title on the free movement of goods. [14] The chapter on "commercial policy" was to be found in the title of the Treaty dealing with economic policy. [15]

Despite past heavy amendment, the textual cornerstones of the Common Commercial Policy (CCP) have proved remarkably solid. [16] According to Art.131 EC, the Member States aim, by establishing a customs union between themselves, to contribute to the harmonious development of world trade and the progressive abolition of restrictions on international trade. Article 132 commits the Member States to progressively harmonise their national systems of aid for export to third countries so as to ensure that competition ***E.L. Rev. 7** between undertakings in the Community is not distorted. The central provision of the CCP, however, is Art.133(1) EC and reads:

"The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."

Approaching the provision with a systematic and textual interpretation methodology, Art.133 EC appeared not to be destined for exclusivity. Placed in an area of the Treaty more characterised by co-ordination than by integration, [17] the CCP may well have been interpreted in tandem with the provisions on conjunctural policy and the balance of payments. Moreover, the "achievement of uniformity" was to take the form of the establishment of "uniform *principles*"--arguably leaving a degree of external commercial powers to the Member States. [18]

From a teleological perspective, on the other hand, the commercial policy of the Community had from the very beginning strong credentials for constitutional exclusivity. First, in order to benefit from the special regime for customs unions under GATT, [19] the European Community would not only be required to substantially eliminate customs duties and restrictive regulations as between its Member States. As a customs union, it also needed to ensure that "substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union." [20] (This, certainly, begged the question how much uniformity was required by the phrase "substantially the same".) Secondly, ex-Art.116 EEC appeared to be based on the idea of (partial) exclusivity when stipulating that "[f]rom the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common

market, proceed within the framework of international organisations of an economic character only by common action."

E.L. Rev. 8 From a teleological perspective, the candidature of the CCP as an a priori exclusive Community competence was, consequently, strong from the beginning. In the words of one eminent commentator at the time:

"The common commercial policy of the European Economic Community is generally regarded as a typical example of a Community policy, i.e., a policy on which jurisdiction is withdrawn from the member states and committed to the Community[.]" [21]

The European Court of Justice did indeed fashion the Common Commercial Policy as the Community's exclusive competence par excellence. The crystallisation process began in relation to the customs union with *Sociaal Fonds voor de Diamantarbeiders*. [22] There, a national charge had been levied on the import of rough diamonds coming from third countries. The Community's common customs tariff had been introduced by Regulation 950/68 and had entered into force on July 1, 1968. Could Member States maintain or introduce charges having an effect equivalent to customs duties thereafter? Having clarified that the national charge fell into the scope of the common commercial policy, the Court found that the Member States had lost all power to act:

"According to [Article 133 (1)] of the Treaty, the common commercial policy shall be based on uniform principles [.] (…) It is for the Commission or the Council to evaluate these requirements in each case both as regards the establishment of the common customs tariff and the adoption of the commercial policy. It follows therefore that *subsequent to the introduction of the common customs tariff all Member States are prohibited from introducing, on a unilateral basis, any new charges or from raising the level of those already in force.*" [23]

The judicial reasoning had still remained slightly ambivalent. The source for the prohibition of the national act could equally well have been based on the argumentative idea of constitutional or legislative exclusivity: was the exclusion of national action a direct result of Art.133 EC or a consequence of the pre-emptive effect of Regulation 950/68? The Court gradually moved to accept the former option.

The first signs of a choice in favour of a constitutionally exclusive power rationale began to take shape in the form of the "succession" doctrine established by the Court in *International Fruit.* [24] Yet, the constitutional exclusivity thesis fully emerged in Opinion ***E.L. Rev. 9*** 1/75. [25] In that advisory opinion, the European Court of Justice had been asked to clarify the scope and nature of the Community's power under Art.133 EC in the context of an OECD agreement on export credits. The Court started by confirming that a Community commercial policy envisaged internal as well as external measures. [26] While recognising that the development of a common commercial policy was a matter of a gradually evolving body of rules, the Court characterised the Community competence in Art.133 EC as an exclusive treaty-making power:

"Such a policy is conceived in that Article in the context of the operation of the common market, for the defence of the common interest of the Community, within which the particular interests of the Member States must endeavour to adapt to each other. Quite clearly, however, *this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power,* so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community. In fact any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a *strict uniformity* of credit conditions granted to undertakings in the Community, whatever their nationality. (…) To accept that the contrary were true would amount to recognizing that, *in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its tasks in the defence of the common interest.*" [27]

The harmonious operation of the institutional framework of the Community and the solidarity among its members would be called into question if the Member States retained a competence to engage autonomously in commercial activities with third countries. In the defence of the common interest, any national action adopted in the hope that a Member State's "own interests were separately satisfied in external relations" was to be prohibited. Only a "strict uniformity" in relations with third countries would eliminate the distortions of competition in the Common Market. This was heavy armour to justify the exclusion of any "concurrent" power on the part of the Member States both in the internal and the ***E.L. Rev. 10*** external sphere. [28] Opinion 1/75 had announced the arrival of constitutional exclusivity in the EU legal order: exclusivity was unconnected with the presence of Community legislation and originated in the Treaty provisions themselves. [29]

The announcement was substantiated a year later in *Donckerwolcke.* [30] Belgian merchants had imported textile products from Lebanon and Syria into France. The products had been duly put into circulation on the Belgian market and therefore appeared to enjoy all the benefits of free movement thanks to Art.23(2) EC. The French authorities had established a customs monitoring system, which included a declaration of the real source of the goods in order to detect deflections of trade within the Common Market. The national customs rules were stricter than the ones envisaged by the Community free movement certificate. Because the goods at issue did "not as yet come within the common commercial policy", [31] the legislative pre-emption rationale was inapplicable. In the absence of specific commercial policy measures for these goods, the national measures had to be assessed against the common commercial policy provisions themselves.

The *Donckerwolcke* Court painted a colourful picture claiming that "full responsibility in the matter of commercial policy was transferred to the Community by means of [Articles 133(1)]" with

the consequence that "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." [32] Member States, therefore, no longer enjoyed autonomous legislative powers as the legitimacy of all national action derived from a Community mandate. Since then, the constitutionally exclusive nature of the common commercial policy could no longer be questioned. [33] The exclusive nature of the CCP has become commonplace in European constitutionalism. [34]

Constitutional genesis no.2: the conservation of biological resources of the sea

If the first judicial dot had resulted from constitutional design, the second point of exclusivity emerged from constitutional accident. The Community's powers in relation to the conservation of biological resources of the sea would, in 1958, hardly have appeared as a candidate for constitutional exclusivity. Article 38 of the Treaty of Rome had declared the Common Market to extend to agriculture and trade in agricultural products, *including fisheries.* A Common Market organisation for fishing products emerged in 1970, together ***E.L. Rev. 11*** with a proposal for a common structural policy for this area. [35] Fisheries appeared to be "an agricultural activity just like any other". [36]

Matters began to change with the accession of Denmark, Ireland and the United Kingdom. For the three accession countries, fishing was of major importance--they had greater fish stocks and better conservation policies [37] --and to accommodate their geopolitical interests, the 1972 Act of Accession permitted much derogation from the existing Community regime. Moreover, because the Community had not yet developed a structural fishing policy, Art.102 of the Act of Accession provided:

"From the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea."

The character of Art.102 of the Act was a little odd. The article:

"confirm[ed] existing competences of the Community--a confirmation that may have been deemed necessary in view of the fact that the preceding two articles (Article 100 and Article 101) allow derogations from the most basic principle of the common fisheries policy--*i.e.,* the principle of equal access--for a period of ten years. However, Article 102 added one new element: it obliged the institutions of the Community to exercise their competences in respect of marine fisheries before a specific deadline." [38]

The Article was thus of a transitory nature. [39] Once the time-limit in Art.102 had expired, it could no longer be used as a legal basis for the Community fisheries policy. [40] Apart from the

special transitional regime, fishing conservation measures were still firmly rooted in the Common Agricultural Policy (CAP) and thus still fell within the sphere of shared powers.

Surprisingly, this changed rather dramatically. The transformation from shared to exclusive power began with *Kramer*. [41] Let us revisit the scene. Criminal prosecutions had been brought against Dutch fishermen for having violated national fishing quotas. The ***E.L. Rev. 12*** Netherlands had implemented a recommendation from the North-East Atlantic Fisheries Commission--an international body that had been set up by the North-East Atlantic Fisheries Convention--to which all the Member States, except Italy and Luxembourg, and seven non-Member countries belonged. In the course of a preliminary ruling, the national criminal court raised a number of questions relating to the division of competences in the external and the internal sphere of the Community universe.

In relation to the external sphere, the Court developed the doctrine of parallel external powers and found an implied external power of the Community to enter into the international Convention. [42] In the next step, the Court then asked "whether the Community institutions in fact assumed the functions and obligations arising from the Convention and from the decisions taken thereunder". [43] Finding that the Community had legislative power in relation to conservation measures, the Court conceded that the Community had not actually exercised them. From there, the Court reasoned as follows:

"This being so, and the Community not yet having fully exercised its functions in the matter, the answer which should be given to the questions asked is that at the time when the matters before the national courts arose, the Member States had the powers to assume commitments, within the framework of the North-East Atlantic Fisheries Convention, in respect of the conservation of the biological resources of the sea, and that consequently they had the right to ensure the application of those commitments within the area of their jurisdiction.

However, it should be stated first, that this authority which the Member States have is only of a transitional nature and secondly that the Member States concerned are now bound by Community obligations in their negotiations within the framework of the Convention and of other comparable agreements. *As to the transitional nature of the abovementioned authority, it follows from the foregoing considerations that this authority will come to an end "from the sixth year after accession at the latest', since the Council must by then have adopted, in accordance with the obligation imposed on it by Article 102 of the Act of Accession, measures for the conservation of the resources of the sea.*" [44]

The Court did not once refer to "exclusive powers"--neither in the external nor in the internal sphere. [45] The Court *did,* however, speak of the "transitional nature" of the "authority" of the Member States to engage in international agreements and that this authority will come to an end "from the sixth year after accession at the latest". However, the anticipated reason for the exclusion of the Member States was the *future* legislative ***E.L. Rev. 13*** pre-emption of the Member States

"since the Council must by then have adopted, in accordance with the obligation imposed on it by Article 102 of the Act of Accession, measures for the conservation of the resources of the sea." [46]

Moreover, the partial exercise of the Community's powers would not be sufficient. Only once the Community had "*fully* exercised its power in the matter" would the Member States disappear from the legislative scene. [47] The mere existence of the Community power was thus not sufficient to deprive the Member States of their power. [48]

But what would happen once the six years had passed *without any legislative action* ? Would the competence of the Member States automatically vanish? The Court answered this question in another judgment. The 1978 deadline had indeed elapsed and the Community legislature had been inoperative as a result of British obstinacy. The United Kingdom had vetoed all legislative measures, [49] justifying its unilateralism by invoking the Luxembourg accord, and stubbornly adopted its own preferred *national* conservation model in 1979. This proved too much for the Commission. The Community institution brought the state before the Court. [50] Pitilessly, Britain argued that:

"as long as the Council has not exercised the powers conferred upon it by Article 102 of the Act of Accession, even after the expiration of the period laid down in that article, the Member States retain residual powers and duties until the Community has fully exercised its powers." [51]

***E.L. Rev. 14** The Court was not impressed and decided to help the "deficient Community legislator". [52] It was in *Commission v United Kingdom* that the European Court formally declared the constitutional exclusivity of this policy area. The Court pointed to the expiry of the deadline and held that:

"Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of Community law." [53]

The Council's failure to exercise the legislative power could not "restore to the Member States the power and freedom to act unilaterally in this field". The transfer of powers in the area of biological resources was "total and definitive". [54] Therefore, national legislators wishing to act could only do so with a "specific authorization" issued from the Commission. In a word, the Community had from January 1, 1979 assumed "exclusive powers" on the subject of conservation measures as set out by Art.102 of the Act of Accession. [55] Since the exclusivity was independent of prior legislative action on the part of the Community, it was original and of a constitutional nature.

Constitutional genesis no.3: Opinion 1/76 and "constitutional necessity" in the external sphere

Legal orthodoxy will stop here. "The Court of Justice has recognised two exclusive powers." [56] Yet, *at least* a third point of judicially created constitutional exclusivity may still have to be added to the picture: the Opinion 1/76 doctrine.

The Opinion did not speak the language of exclusive powers. In the Opinion the doctrine of parallelism celebrated its first triumph, granting the Community a *shared* power to conclude the inland waterway agreement. [57] The Opinion's exclusive power rationale only emerged in Opinion 1/94. [58] There the Court (re)constructed the "Opinion 1/76 doctrine" as a source of exclusivity beside the ERTA doctrine. [59] Under the latter doctrine, a parallel ***E.L. Rev. 15*** external power would become exclusive to the extent that Community legislation had been *previously* adopted. In Opinion 1/94, the Court wished to extend this exclusionary effect to situations where the "external powers may be exercised, and thus become exclusive, *without any internal legislation having first been adopted*". [60] An external power could then become exclusive *on exercising* that very power through the adoption of an international agreement.

This constitutional miracle places the Opinion 1/76 doctrine somewhere between legislative and constitutional exclusivity, that is, between subsequent and original exclusivity. While acknowledging an "anticipated ERTA effect" [61] "without any internal legislation having first been adopted", the Court insisted that only the future exercise of the external power would render it exclusive. The exclusivity is not purely legislative, since the Member States are prevented from autonomous action at a time when no Community measure exists; nor is the exclusivity purely constitutional, for it is through the subsequent exercise that the competence becomes exclusive. The Court positioned Opinion 1/76 somewhere between both forms of exclusivity. [62]

The scope of this hybrid exclusivity is, however, very restricted. The Opinion 1/76 doctrine has been confined to "the situation where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules." [63] Clear constitutional preference is, therefore, given to the implementation of Community objectives through internal legislation as opposed to harmonisation by means of directly effective international agreements. The Community will only enjoy an exclusive external power, where the achievement of an internal objective was "inextricably linked" with the external sphere. [64] Exclusivity will be restricted to a "situation in which internal competence could effectively be *exercised only at the same time as external competence*". [65]

While the Court has thus considerably restricted the scope of the Opinion 1/76 doctrine, this hybrid form of exclusivity represents an anomaly in the typology and federal division of powers between the Community and the Member States. [66]

From judicial pointillism towards broader constitutional lines?

The idea of exclusive Community competences has remained very "exclusive" indeed. However, the very possibility of the Court "identifying" exclusive competences has given rise to a belief in a dynamic order of competences: "The demarcation lines of this block of exclusive powers will have to change as European integration progresses. They cannot remain frozen." [67] The judicial initiative of the ECJ spilled ***E.L. Rev. 16*** over into the political realm. There, the idea of exclusive Community competences was taken up by the European Parliament's 1984 Draft Treaty establishing the European Union. The existence of exclusive competences found, finally, official expression in the Maastricht Treaty. The introduction of the principle of subsidiarity was based on a competence typology that distinguished between exclusive and non-exclusive competences. The identification of those competences beyond subsidiarity control became, consequently, of increasing institutional and academic concern and reinvigorated the quest for the demarcation of the Community's sphere of exclusive powers.

The attempt to distil general constitutional guidelines from the judicial pointillism of the past proved a "delicate" task. [68] Furthermore, the search for broader constitutional lines was not always undertaken for the sake of constitutional clarity only. Each "order of things" will in itself, be a political manifestation. [69] This is all the more true for a federal polity's order of competences: "*Kompetenzfragen sind Machtfragen*". [70] Various suggestions as to the scope of the Community's sphere of exclusive power have been made in the last two decades. These constitutional designs as well as the underlying rationales advanced to justify the Community's claim for exclusive power will be the theme of the second section of this article.

(a) The 1984 Draft Treaty establishing the European Union

The Draft Treaty establishing the European Union (DTEU) represents the first attempt for broader constitutional lines in the quest for Europe's monopolies of power. The Draft Treaty had been adopted by the European Parliament in 1984 to replace the 1957 Treaty of Rome. It never entered into force, but remains of academic interest for it (re)introduced a number of fundamental constitutional ideas into the debate on Europe's constitutional future. [71]

The DTEU distinguished between exclusive and concurrent competences of the European Union. [72] A definition of constitutional exclusivity was given in Art.12:

"*Where this Treaty* confers exclusive competence on the Union, the institutions of the Union shall have sole power to act; national authorities may only legislate to the ***E.L. Rev. 17*** extent laid down by the law of the Union. Until the Union has legislated, national legislation shall remain in force." [73]

The Draft Treaty did not catalogue the Union's exclusive competences. The exclusive or concurrent nature of each competence was spelled out expressly in Pt IV of the Draft Treaty. Therein, the European Union was given the following exclusive competences: free movement and trade between Member States, [74] competition, [75] as well as commercial policy. [76] Interestingly, the Draft Treaty also codified an obligation to act under the Community's exclusive powers in the external sphere:

"[w]here certain external policies fall within the exclusive competence of the European Communities pursuant to the Treaties establishing them, but where that competence has not been fully exercised, a law shall lay down the procedures required for it to be fully exercised within a period which may not exceed five years." [77]

The enumeration of the exclusive competences of the European Union was exhaustive. [78] Fisheries--including the biological conservation of the sea--were, consequently, classified as a concurrent competence. [79]

(b) The Maastricht Treaty and the "1992" vision of the European Commission

In 1992, the European Commission actively promulgated its views on the scope of the Community's exclusive competences in an inter-institutional communication on the significance of the principle of subsidiarity. [80] According to this institutional actor, the exclusive powers of the Community were characterised by a functional and a material element. Functionally, exclusive competences would imply an obligation to act on the Community "because it is regarded as having sole responsibility for the performance of ***E.L. Rev. 18*** certain tasks". [81] The obligation to act would have to be clearly imposed by the Treaty itself and the Commission mentioned Arts 14 and 34 EC as illustrations. [82]

Materially, exclusive competences would imply a loss of power to act autonomously on the part of the states. However, exclusive competence for the Community "does not mean that the Member States can no longer legislate". Member States would be entitled to act where the Community "agrees" or "provides an umbrella for national action". [83] The Commission conceded "we cannot conclude that, because the Community has exclusive competence for an area defined in the Treaty" "all responsibility for the activity in question (agriculture, say) is covered by exclusive competence. The text of the Treaty cannot be interpreted so broadly as to leave common sense out of account." [84]

So what then did the Commission identify as the exclusive domains of the Community? Invoking the dynamic nature of the Community legal order, the Commission ventured to speak of a:

"genuine obligation to act leading, in the course of time and through the rulings of the Court of Justice, *to the formation of a block of exclusive powers centred around the four fundamental*

freedoms and certain common policies essential to, or a corollary of, the establishment of an internal market." [85]

The following competences were then specifically earmarked for exclusivity: the removal of barriers to the four freedoms, the common commercial policy, the "general rules on competition", the common organisation of agricultural markets, the conservation of fishery resources and the "essential elements of transport policy". [86] Having lined up a block of exclusive competences for the Community, the Commission re-emphasised the dynamic nature of the classification: "The demarcation lines of this block of exclusive powers will have to change as European integration progresses. They cannot remain frozen." [87] The Commission recognised however that the exclusive powers of the ***E.L. Rev. 19*** Community ought to be "strictly construed" "because they represent an exception to Community powers as a whole". [88]

(c) The Treaty establishing a Constitution for Europe (2004)

In response to the Laeken Declaration on the Future of the European Union, [89] the European Convention and the Member States produced a Treaty establishing a Constitution for Europe in 2004. [90] Motivated by the search for a "better division and definition of competence in the European Union", [91] the Treaty establishing a Constitution for Europe expressed the wish to deepen the transparency of Europe's public life. [92] It was hoped that the Constitutional Treaty would finally put to rest the "lasting controversies over the scope of the exclusive competences of the European Union". [93]

Let us take a closer look at the competence order proposed by the Constitutional Treaty. Article I-12 defined the concept of exclusive competence as follows:

"When the Constitution confers 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 Union acts."

This definition is, without doubt, an advance on the European Parliament's Draft Treaty on European Union. [94] Moreover, unlike the 1984 Draft Treaty, the Constitutional Treaty groups the areas of exclusive Community competence in a competence catalogue placed in the general Pt I of the Treaty. Article I-13 confines the areas of exclusive competences to the following areas:

"Areas of exclusive competence

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative ***E.L. Rev. 20*** act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope."

The enumeration is exhaustive, for Art.I-14 specifies that:

"[t]he Union shall *share* competence with the Member States *where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17*." [95]

Let us turn to the first paragraph of Art.I-13. Except for the inclusion of competition law, "[t]he four listed instances of exclusive Union competence existing *a priori* have long been recognized in the case law". [96] If codification of the Court's settled jurisprudence was the object of the constitutional exercise, then the inclusion of "the competition rules necessary for the functioning of the internal market" in Art.I-13 "is surely incorrect". [97]

Moreover, the desire for clear(er) boundaries and a stable universe of constitutional exclusivity--assuming this should have been the intention of the Constitution makers --is seriously undermined by Art.I-13(2). From a constitutional perspective, the "self entitlement clause" [98] of Art.I-13(2) is anathema to the very purpose of searching for a "better division and definition of competence in the European Union". [99] If the Constitution makers intended a dynamic growth of the Community's exclusive competences, then Art.I-13(2) will compromise the clearer *division* of competences between the European Union and the Member States. If, on the other hand, the Constitutional Treaty introduced a dual notion of "exclusive competence" for, respectively, the internal and the external sphere of Union law, then this dual notion of exclusive competence will undermine the better *definition* of Union competences.

Leaving aside the question whether Art.I-13(2) faithfully reflects the jurisprudence of the Court of Justice, [100] the "self entitlement clause" entails substantive constitutional tensions. It sadly codifies the "cubist perspectives" developed by the European Court in the external relations sphere and would allow the Union *legislator* to bar the application of the *constitutional* principle of subsidiarity in the external sphere. [101] In this respect, one could have hoped for a little more

courage on the part of the Constitution makers to embrace more closely the idea of parallelism in the constitutional regimes of the Union's internal and external spheres. [102]

*E.L. Rev. 21 *Ontology and functionality: constitutional guidelines for the discovery of exclusive competences?*

Two constitutional rationales have informed the discourse on the emergence and raison d'être of exclusive competences in the Community legal order. The first reason could be called the *ontological* rationale. The ontological rationale states that certain competences must *naturally* be exclusive Community competences:

"Belonging to the exclusive competences of the Union are those powers of which the Union is the *natural holder* taking into account the attainment of the general objectives laid down in the beginning of the Treaty and the matter-specific objectives determined in the particular Treaty chapter containing the legal basis granting that power to the Union." [103]

This argument is well known in US and German federalism. The *functional rationale* for exclusivity, on the other hand, bases the raison d'être for constitutional exclusivity on the "functional necessity" for the Community legal order. [104] Either argument presents us with constitutional guidelines for the discovery of Europe's exclusive competences.

(a) The ontological rationale and its shortcomings

The intellectual heart of the ontological rationale is that legal action at the state level is conceptually impossible. For example, the establishment of a "citizenship *of the Union*" or the regulation of "*intra-Community* trade" seem--by definition--to be naturally exclusive Community powers, while legislation on "citizenship" or "trade" may equally be possible at the national level.

The intellectual difficulty with the ontological rationale, then, lies in its susceptibility to become a tautology where the definition of the competence is conceptually connected with the authority that exercises it. Only the Community can adopt *Community* rules, but this does not, of course, imply that only the Community may enact rules within a particular policy *area.* It thus depends on how a constitution--in our case: the Community legal order--constructs its competence categories: an "intra-Community trade" competence will be exclusive, while the Community's "trade competence" may only be shared.

***E.L. Rev. 22** These shortcomings in the heuristic potential of the ontological rationale have resurfaced in relation to the classification of the Community's internal market competences. The European Parliament's 1984 Draft Treaty had opted for the exclusivity of the internal market competences. [105] The Commission's 1992 vision also classified the "removal of barriers to free movement" as an exclusive competence. [106] The 2004 Constitutional Treaty, on the other

hand, considered the internal market to fall within the Community's shared power. So, is the establishment and functioning of the internal market an exclusive or a shared competence?

Two considerations are in order. First, unlike the constitutional regime for the customs union, none of the fundamental freedoms is an absolute freedom. Member States may continue to legislate autonomously if their national actions are justified under Art.30 EC or the mandatory requirements. Moreover, the fundamental freedoms do not prevent national legislators from regulating purely internal situations. [107] The free movement provisions, thus, only limit the *exercise* of the national legislative competence: the Member States may loose their ability to impose national product requirements on imports; yet, they may legitimately exercise their competence over national goods. The free movement provisions do not eliminate national legislative competence; they only restrict some aspects of their territorial *exercise*.

Secondly, we mystify the reality of this division of material competences between the Community and the Member States in the internal market by concentrating on the Community mode of intervention. The ontological fallacy runs like this: since "the Member States simply cannot harmonise each other's laws, regulations or administrative action in fields which come within the scope of application of the Treaty" "the exercise of Community competence under [Articles 47(2) and 95] of the Treaty is exclusive in character". [108] Fortunately, the European Court of Justice has not succumbed to the ontological fallacy. While the Court in the *Tobacco Advertising* case still seemed neutral on the issue, [109] the *Biotechnology* case put the ontological fallacy in relation to Art.95 EC to rest. The Community's internal market power was treated as a normal non-exclusive competence. [110]

E.L. Rev. 23 The ontological argument must thus be taken with some salt: it does not conclusively follow that because only the Community can "*harmonise* national laws", proceed by "*common* action" or establish "*common* principles", that the underlying policy fields must by their very nature be exclusive competences of the Community. [111] Such reasoning conflates the nature of the Community's competences with the Community's particular method or the geographical scope of their *exercise*: whenever the Community interferes, its actions should--in conformity with the principle of subsidiarity--have a "*Community* dimension". To build this "Community dimension" into the definition of the competence leads to nothing but a tautology.

(b) The functional rationale and its shortcomings

In contrast to the static competence order created by the ontological rationale, the functional argument implies a dynamic understanding of the typology of Community competences: "the dynamism of the functional criterion gives rise to an evolution of the exclusive domains of the Community". [112] The classification of competences as exclusive or shared may, thus, differ over the course of development of the Community legal order. [113]

The intellectual heart of the functional rationale is that the Community will enjoy an exclusive competence wherever the exclusion of the national level is necessary "for the defence of the common interest of the Community". [114] The rationale for assuming an exclusive Community competence is, consequently, some form of legal self-defence justified by constitutional necessity. [115]

The Court employed this argument in Opinion 1/75 in relation to the Common Commercial Policy. Let us take a closer look at its justification for "strict uniformity" in relation to external trade. The argument of the Court was that any autonomous action by the Member States would "lead to disparities" that would "distort competition between undertakings of the various Member States in external markets", "distort the institutional ***E.L. Rev. 24*** framework" and call into question the "mutual trust within the Community". Conclusion: "strict uniformity". [116]

The rhetorical arsenal is heavy, but logically not conclusive. First, any degree of legislative autonomy left to the national level will in itself entail the potential for *some* disparity in the regulatory environment in the internal market and, consequently, *some* distortion of competition. Yet, the Court has not employed similar emotive language in other contexts, such as the Common Agricultural Policy (CAP) or the Community's harmonisation provisions. Secondly, how could a degree of *national* autonomy distort the institutional framework of the *Community* ? And if it were so, could this reason not again be projected to all other Community activities and not just the Common Commercial Policy? Thirdly, even accepting that these reasons are specific to the Common Commercial Policy, how can the Court *today* explain that they do not apply to all matters falling within the scope of the commercial policy provisions? Does Art.133(5) EC not guarantee a shared competence of Member States to conclude commercial agreements with third countries? In sum, the crude functional argument used by the Court in Opinion 1/75 cannot explain why the Community's competence in commercial policy should be exclusive in nature. [117]

Let us look for a more convincing specific functional rationale in the academic literature. There, the following suggestions have been made: "The fact remains, however, that at least some of the Community's objectives simply could not be satisfactorily achieved unless the Community's power to act was exclusive." [118] These would be activities that "could not be effectively carried on, if competence were shared with the Member States". [119] The decisive criterion would be the "degree of danger for the effective achievement of the Community's tasks". [120]

But what degree of danger justifies the constitutional exclusion of the Member States from a policy field? The shortcoming of the functional rationale is its indeterminate character: what amounts to "constitutional necessity" will typically be in the eye of the beholder. Some authors have insisted that national action must "*severely* prejudice later Union action". [121] Others have gone further and restricted constitutional exclusivity to those "policy fields that are non-viable without strict uniformity". [122] From ***E.L. Rev. 25*** a subsidiarity perspective, the more restrictive the functional criterion the better: only those competences of the Community should be regarded as exclusive in

which a sharing of responsibility with the Member States would endanger the very existence of the Community policy. Only "existential" threats to a Community policy should justify the total exclusion of national autonomy within a policy field.

Who determines the presence of existential threats to a Community policy? Or, more generally, who should identify and demarcate the sphere of exclusive Community powers? The decision could be left to (periodic) constitutional codification or to the European Court's dynamic interpretation. In the latter case, adherents of the dynamic view of exclusive competences readily concede the existence of a strong presumption against constitutional exclusivity: in case of doubt, the Community's competences should be shared. [123] Yet, one might wonder whether the judicial discovery of exclusive competences has not an inherently "constitutional significance" that "could be brought about only by way of Treaty amendment"? [124]

Conclusion: the flight into dual federalism in the external sphere

Beyond the naturally exclusive competences that are typically implied within the charter of an international organisation, the idea of exclusive Community powers was undecided in the 1957 Treaty of Rome. In the course of time, a number of exclusive Community competences have emerged "*sous la plume de la Cour*". [125] The judicial creation of exclusivity remained, however, rather pointillist: only a handful of exclusive points were added on to the Community canvas of shared power. The idea of exclusive Community powers has remained very exclusive indeed.

Why has the Court never used a broader brush to widen Europe's sphere of exclusive power? Was the discovery of exclusive competences perhaps "the child of a particular period in the Court's case law"? [126] And has the era of ex post judicial discovery of exclusive powers, perhaps, come to an end? In order to answer these questions in this final section, we need to again take a closer look at the constitutional period during which exclusive competences first emerged in the Community legal order.

Three factors characterised the Community's federalism in the 1970s: the first being "cultural", the second "institutional" and the third "normative" in nature. On a cultural level, the 1970s saw the Community working under the premise that "strict uniformity" was a constitutional end in itself. [127] On the institutional level, decision ***E.L. Rev. 26*** making up to the Single European Act was dominated by unanimity. The infamous Luxembourg Compromise allowed each Member State to veto Community legislation by invoking its national interest. The "deficiency of the Community legislator"--diagnosed during this time [128] --was surely a result of the decline in decisional supranationalism. The question the Court had to answer during this period then was: should states that had vetoed all Community legislation against the will of all other Member States--as the United Kingdom had done in relation to biological conservation measures--be allowed to enjoy its autonomous competence within that policy area? The "discovery" of exclusive Community competences provided a useful constitutional means to defend the common interest of the Community by foreclosing national "exit" strategies.

Could the emergence of constitutional exclusivity thus be explained as a normative reaction to the decline in decisional supranationalism? [129] While arguably providing a necessary condition, the threat posed by the Luxembourg Compromise for the functioning of the Community legal order cannot convincingly furnish a *sufficient* condition for the emergence of exclusive Community competences. The institutional reading fails to explain why exclusivity appeared in *some* policy fields, but not in others. Why did constitutional exclusivity--original as well as subsequent exclusivity [130] --emerge predominantly in the *external* and not in the internal sphere of the Community legal order?

There is no single and simple answer to this question. However, one influential factor explaining the emergence of exclusivity predominantly in the external sphere might be found in the structure of the Community's *normative* supranationalism in ***E.L. Rev. 27*** the 1970s. While the supremacy of Community law vis-à-vis unilateral national measures had been firmly established by that time, [131] the relationship between Community law and international agreements concluded by the Member States was much less settled. With the supremacy issue here still in suspense, the Court moved down the more aggressive route of constitutional exclusivity. The Court's "flight into dual federalism" blocked the Member States' "flight into international law". [132] Moreover, the demarcation of mutually exclusive spheres--in which either the Community or the Member States were "sovereign"--elegantly avoided the question of the normative hierarchy of the Community over the Member States being even posed *in the context of international relations*. Dual federalism in the external sphere suggested the idea of co-ordination and "sovereign" equality between the two levels of government.

Today, all of these three reasons for the emergence of exclusive Community power have largely disappeared. First, with the rise of co-operative federalism as the dominant constitutional philosophy, [133] the Community's constitutional culture has changed. Secondly, the need to force the Member States into common action by declaring a competence exclusive at the constitutional level is less vital with the rise of qualified majority voting. In Europe's present, the Community legislator functions sufficiently well to define and defend the Community interest. Legislative pre-emption and not constitutional pre-emption should be the order of the day. Finally, the normative ambivalence that characterised the relationship between Community law and the international legal powers of the Member States and led the Community to take refuge in the philosophy of dual federalism has also disappeared. The supremacy of Community law over international agreements concluded by the Member States has firmly been established. [134]

In conclusion, the constitutional conditions that spurred the emergence of exclusive competences within the Community legal order have today largely disappeared. Indeed, Europe's sphere of constitutional exclusivity has remained substantially the same over the past three decades. The 2004 Treaty establishing a Constitution for Europe reflected the conservative trend by, more or less adequately, codifying the European Court's jurisprudence. While the search for broader constitutional lines may nonetheless continue, Europe's future constitution-makers should bear in

mind **E.L. Rev. 28* that "[d]ual federalism died for a reason." [135] In line with this wisdom from another federal order, Europe's sphere of exclusive power should stay as it is: frozen in time.

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Footnotes

1 K.C. Wheare, *Federal Government* (Oxford University Press, 1953), p.11.

2 Misleadingly, the principle of supremacy has been defined as follows: "The principle of supremacy can be expressed, not as an absolute rule whereby Community (or federal) law trumps Member State law, but instead as a principle whereby each law is supreme within *its sphere of competence*. This more accurate characterization of supremacy renders crucial the question of defining the spheres of competence" (J.H.H. Weiler, "The Transformation of Europe" (1991) 100 *Yale Law Journal* 2403 at pp.2414-2415, fn.26, emphasis in original). There are two problems with this definition. First, it glosses over an important constitutional asymmetry: whereas state law is only "supreme" within its exclusive sphere of competence, federal law is "supreme" within its sphere of exclusive competence *as well as* within the competence sphere *shared* with the states. (This objection can only be overcome if one denies the existence of spheres of shared competence.) This brings us to the second and more serious objection. The above definition of supremacy uses the very vocabulary of dual federalism and its technique of building mutually distinct spheres of competences. However, in dual federalist systems, there is in fact no need for the supremacy principle as a conflict resolution mechanism. Since "each law" has "*its* sphere of competence", the issue of competing claims to sovereignty over a legislative issue will simply not arise. The construction of separate competence spheres under a philosophy of dual federalism serves the very purpose of avoiding the supremacy issue. The doctrine of supremacy only makes sense in a constitutional setting of co-operative federalism with overlapping spheres of competence, *cf.* R. Schütze, "Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption" (2006) 43 C.M.L. Rev. 1023.

3 There, of course, everything that is not prohibited is allowed.

4 C. Stewing, *Subsidiarität und Föderalismus in der Europäischen Union* (Heymann, 1992), p.104. While approaching the issue from a radically different perspective A.G. Toth has also argued that the distinction between exclusive and non-exclusive competences is "totally alien to, and contradicts the logic

of, the structure and the actual wording of the E[]C Treaty as well as the whole jurisprudence of the Court of Justice", A.G. Toth, "A Legal Analysis of Subsidiarity", in *Legal Issues of the Maastricht Treaty* (D. O'Keeffe and P.M. Twomey eds, Wiley Chancery Law, 1994), pp.37-48 at p.39.

5 Art.106 EC--introduced in the Community legal order by the TEU--is so far the only textually explicit exclusive competence of the EC.

6 K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (Thomson, Sweet & Maxwell, 2005), at pp.5-022 and 5-026. For a much "softer" definition of exclusivity, see: P. Koutrakos claiming that "instead of seeking to exclude Member States", the idea of exclusivity only "serves to highlight the essential role of the emerging policy for the achievement of the main objectives of the EC Treaty", P. Koutrakos, *EU International Relations Law* (Hart, 2006), p.21. This definition of exclusivity, however, separates the concept from its federal context.

7 Opinion 2/91 (Convention No.170 of the International Labour Organisation concerning safety in the use of chemicals at work) [1993] E.C.R. I-1061, at [8] (emphasis added).

8 A. Dashwood, "The Relationship Between the Member States and the European Union/European Community" (2004) 41 C.M.L. Rev. 355 at p.369.

9 For the constitutional regime subsequently developed for these "officially" exclusive competences, see: R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of the Legislative Function in the European Union* (EUI Thesis, 2005), Ch.5.

10 These "naturally" exclusive powers were automatically implied in the setting up of the EC. Among these organisation powers are: first, the power of the EC institutions to determine their internal organisation under Arts 210 and 283 EC. In *Humblet,* the ECJ, for example, referred to the "Community's exclusive power to fix the amount of those salaries" and that the three Communities "withdraw the remuneration paid to officials of the Community from the Member States' sovereignty in tax matters", Case 6/60, *Humblet v Belgian State* [1960] E.C.R. 559, at 577. However, some moderation on the exclusive nature of all internal organisational powers is in order. The European Parliament is a case in point: While its elections are governed by common principles, each Member States still retains the power to decide on the form of these elections in its territory. Also, the salaries of Members of the European Parliament still differ according to their nationality. Secondly, the Community's budgetary power belongs to its exclusive organisational powers.Certain powers of the ECJ were also, arguably, since the beginning implied exclusive powers, such as the Court's jurisdiction over Community staff cases, *cf.* Case C-288/04, *AB v Finanzamt fur den 6., 7. und 15. Bezirk* [2005] E.C.R. 7837), the "exclusive jurisdiction to declare void an act of a Community institution" Case 314/85, *Foto-Frost* [1987] E.C.R. 4199, at [17], as much as "Article 235 EC gives the Community Courts exclusive jurisdiction to hear and determine actions for reparation of damage brought under the

second paragraph of Article 288 EC against the European Community", *cf.* Case C-275/00, *European Community, represented by the Commission of the European Communities v First NV and Franex NV* [2002] E.C.R. 10943, at [43]. Article 292 EC, on the other hand, will not grant an exclusive judicial competence to the ECJ, since national courts do engage in "the interpretation or application of this Treaty". The exclusivity here relates solely to other international tribunals: Case C-459/03, *Commission v Ireland (Mox Plant),* not yet reported. See on the latter point: J. Cazala, "La contestation de la compétence exclusive de la Cour de justice des Communautés européennes" (2004) 40 R.T.D. Eur. 505.

11 In the absence of an exhaustive list of exclusive Community competences, the candidature of other competences as constitutionally exclusive powers has been put forward. First and foremost, monetary policy has been described as characterised by a "definite transfer" of powers from the national level to the Community, K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union,* cited above, at 279. In particular, according to Art.106(1) EC, the ECB shall have the "exclusive right" to authorise the issue of banknotes within the Community. A second and third candidate are said to be, respectively, the power of the Community to conclude association agreements and the "determination of European rights", *cf.* Dittert, *Die ausschlie%EFlichen Kompetenzen der Europäischen Gemeinschaft im System des EG-Vertrags* (P. Lang, 2001), pp.167-168 and pp.174-175. Finally, the control power of the Commission in state aid cases should be deemed constitutionally exclusive.

12 Art.2 EEC.

13 Art.3(a) and (b) EEC.

14 Arts 12-29 EEC.

15 Arts 110-116 EEC.

16 The only exception being ex-Art.116 EC.

17 For the distinction between the spheres of "integration" and "co-ordination", see: L.-J. Constantinesco, *Das Recht der Europäischen Gemeinschaften: Das institutionelle Recht* (Nomos, 1977), pp.246-260.

18 "What is puzzling about this wording is why one should speak of "uniformly established principles" in the context of a "common policy", considering that a common policy could by its very nature be nothing but form", U. Everling, "Legal Problems of the Common Commercial Policy in the European Economic Community" [1966-7] 4 C.M.L. Rev. 141 at p.150.For the opposite position, see: C. Calliess, who sees in the wording of Art.133 EC, particularly the reference to common principles a clear textual indication of an exclusive competence (*cf.* C. Calliess, "Der Schlüsselbegriff der "ausschlie%EFlichen Zuständigkeit' im Subsidiaritätsprinzip des Art.3 b II EGV" [1995] 6 *Europäische Zeitschrift für Wirtschaftsrecht* 693 at p.696: "*Diese Formulierung überla%EFt den Mitgliedstaaten in klarer und bestimmter Weise keinerlei Befugnisse mehr*"). The ECJ has also argued in this direction in Case 43/75, *Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] E.C.R. 455, at [28]-[29]. Here, the

Court found that the word "principle" "is specifically used in order to indicate the fundamental nature of certain provisions" and that "[i]f this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the Community and the coherence of its external relations would be indirectly affected".

19 *cf.* Art.XXIV(8)(a) GATT.

20 *ibid.* For a discussion of the point, see: J. H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill, 1969), pp.607-610.

21 U. Everling, cited above, fn.18, at p.141. Yet, the same author adds a nuance to this: "The external relations of a customs union require by their very nature collective action in cases like tariff agreements. On the other hand, this need does not go beyond a certain point. The unusual wording of [Article 133] may well have been chosen to express a limitation in this sense: the common commercial policy must in any case bring about uniform principles in the specified fields. Whether these principles are, however, to be carried into effect by truly collective proceedings or rather by the concerted action of Member States remains open and is left to the *discretion of the Council to decide from case to case*", *ibid.*, at 151, emphasis added.

22 Joined Cases 37 and 38/73, *Sociaal Fonds voor de Diamantarbeiders v NV Indiamex et Association de fait De Belder* [1973] E.C.R. 1609.

23 *ibid.,* at [15]-[18].

24 Joined Cases 21-24/72, *International Fruit Company NV v Produktschap voor Groenten en Fruit* [1972] E.C.R. 1219, at [14]-[16] and [18] (emphasis added): "The Community has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period, *by virtue of [Arts 131 and 133] of the Treaty.* By conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the general agreement. *Since the entry into force of the E[]C Treaty* and more particularly, since the setting up of the common external tariff, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the General Agreement and has been recognized by the other contracting parties. (…) *It therefore appears that, in so far as under the E[]C Treaty the Community has assumed the powers previously exercised by Member States in the area covered by the General Agreement, the provisions of that agreement have taken effect of binding the Community.*"In Joined Cases 267/81, 268/81 and 269/81, *Amministrazione delle Finanze dello Stato v Societa Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* [1983] E.C.R. 801, at [17], the ECJ clarified that following the introduction of the common customs tariff on July 1, 1968 the Community had "assumed its full powers in relation to the sphere covered by GATT".

25 Opinion 1/75 (Draft understanding on a local cost standard) [1975] E.C.R. 1355.

26 *ibid.,* at 11: "A commercial policy is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others. Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves."

27 *ibid.,* at 13 (emphasis added).

28 The principal symmetry in scope and content of the commercial policy competence in the internal and the external sphere was later expressed more clearly in Case 45/86, *Commission of the European Communities v Council of the European Communities (Generalised tariff preferences)* [1987] E.C.R. 1493.

29 For a sceptical assessment, see H.H. Maas, "The External Powers of the EEC with Regard to Commercial Policy: Comment on Opinion 1/75" (1976) 13 C.M.L. Rev. 379 at p.386.

30 Case 41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* [1976] E.C.R. 1921.

31 *ibid.,* at [6].

32 *ibid.,* at [32].

33 See, e.g. Opinion 1/78 (International Agreement on natural rubber) [1979] E.C.R. 2871.

34 The rise of partial exclusivity of the CCP and its codification through the Nice Treaty falls outside the scope of this article. For a discussion of this point, see P. Eeckhout, *External Relations of the European Union* (Oxford University Press, 2004), pp.48 *et seq.,* as well as P. Koutrakos, *EC International Relations Law* (Hart, 2006), pp.61 *et seq.*

35 The Council had adopted two Regulations. Regulation 2141/70 lay down a common structural policy and Regulation 2142/70 established the common organisation of fishing products. The former Regulation spelled out in its Art.1 that "common rules shall be laid down for fishing in maritime waters" in order "to encourage rational use of the biological resources of the sea and inland waters". In Art.5 it empowered the Council to "adopt the necessary conservation measures" if a stock of fish in the waters subject to the sovereignty or jurisdiction of a Member State is in danger of being over-fished. Following the enlargement of the Community, the provisions of the two Regulations were repeated in, respectively, Regulations 100/76 on the common organisation of the market in fishery products and Regulation 101/76 on a common structural policy for the fishing industry. Article 4 of the latter Regulation stated that in the event of a risk of over-fishing, the Council could act in accordance with the procedure of Art.37(2) EC to adopt the necessary conservation measures.

36 "*La pêche: une activité "agricole' comme les autres*", D. Yandais, "La Communauté et la Pêche" [1978] 14 C.D.E. 158 at p.165.

37 R. Churchill, "Revision of the EEC's Common Fisheries Policy--Part I" [1980] 5 E.L. Rev. 3 at p.6.

38 A. W. Koers, "The External Authority of the EEC in Regard to Marine Fisheries" (1977) 14 C.M.L. Rev. 269 at p.297.

39 It was placed in the forth part of the 1972 Act entitled "Transitory measures".

40 R. Churchill, cited above, fn.37, at p.14.

41 Joined Cases 3, 4 and 6/76, *Cornelis Kramer* [1976] E.C.R. 1279.

42 *ibid.,* at [30]. On the various theories and constitutional readings of the implied power doctrine in the external sphere, see: R. Schütze, "Parallel External Powers in the European Community: From "Cubist' Perspectives Towards "Naturalist' Constitutional Principles?" (2004) 23 Y.E.L. 225 at pp.228-240.

43 *Cornelis Kramer,* at [34].

44 *ibid,* at [39]-[41] (emphasis added).

45 As regards the division of powers between the Community and the Member States in the internal sphere, the Court employed a traditional pre-emption analysis. The Court was asked to investigate whether the national fishing quotas conflicted with the Community legislation on fishing policy. The two pieces of legislation would only conflict, according to the Court, if the national quota "jeopardized the objectives or the functioning of the system" established by the Community legislation. The Court found that there was no interference with the objectives of the common policy. The relevant Community legislation itself provided for comparable measures and even authorised the Member States to limit the catches of their fishing fleet.

46 *ibid.,* at [41].

47 See Case 61/77, *Commission v Ireland* [1978] E.C.R. 417, at [63]-[65] (emphasis added): "[S]o long as the transitional period laid down in Article 102 of the Act of Accession has not expired and the Community has not yet *fully exercised* its power in the matter, the Member States are entitled, within their own jurisdiction, to take appropriate conservation measures without prejudice, however, to the obligation to co-operate imposed upon them by the Treaty, in particular [Art.10] thereof."At the time, the case received the following commentary: "In the *Irish Fisheries* case the Court suggested that the power to establish permanent rules for fishing belongs to the Community as such and that this power is an exclusive one. Given, first, that the Court is referring here to *permanent* rules and, secondly that it tends to view the question of exclusivity in terms of measures actually adopted rather than the competence as such to adopt measures, it would seem that, in theory at least, Member States are not totally precluded from taking national measures. Clearly if any such measures conflict directly with Community fishery provisions, they will be set aside as a result of the operations of the normal rules relating to the supremacy of Community law over conflicting law." (R. Churchill, cited above, fn.35, at p.18).

48 Consider the Opinion of Advocate General Trabucchi in *Cornelis Kramer*: "[T]he mere existence of a Community legislative power in a particular field does not suffice to deprive the States of power to negotiate internationally in that field (…) there must have been an exercise of this power and to that end

Community rules have actually been applied in this field: only in this way can the international jurisdiction of the States be fully replaced by that of the Community. (…) [T]he incompatibility of a State's power in a particular field must not be determined in theory but by an actual comparison with the Community legislation" (at 1320). The Advocate General referred to the case law on the effect of Community legislation in the internal sphere and concluded that as the existence of Community competence did not automatically rule out the legislative powers of the Member States with respect to domestic legislation this must "by the same token also apply to the external powers of the states", *ibid.*

49 The almost heart-breaking story can be found in D. Yandais, "La Communauté et la Pêche", cited above, 185 at pp.241-242.

50 Case 804/79, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1981] E.C.R. 1045.

51 *ibid.,* at [14].

52 P. Pescatore, "La carence du législateur communautaire et le devoir du juge", in: *Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin-Jean Constantinesco* (G. Lüke, G. Ress, M. R. Will eds, Heymanns, 1983), pp.559-580.

53 Case 804/79, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland,* at [18].

54 *ibid.,* at [20].

55 *ibid.,* at [27].

56 K. Lenaerts and M. Desomer, "Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means" [2002] 27 E.L. Rev. 377 at p.388. In *Opinion 2/91* (Convention No.170 of the International Labour Organisation concerning safety in the use of chemicals at work) [1993] E.C.R. I-1061, the ECJ has indeed referred to only two areas of constitutional exclusivity: "The exclusive nature of the Community's competence has been recognized by the Court with respect to [Art.133] of the Treaty [references omitted] and to Article 102 of the Act of Accession [references omitted]" (*Opinion 2/91,* at [8]).

57 "The widely held view, apparently shared by the Court of Justice, that Community competence in the matter of establishing a laying-up fund was exclusive, seems puzzling to us." A. Dashwood and J. Heliskoski, "The Classic Authorities Revisited", in *The General Law of EC External Relations,* A. Dashwood and C. Hillion eds (Sweet & Maxwell, 2000), 3 at p.13.

58 For a more detailed account of the transformation of Opinion 1/76's rationale, see: R. Schütze, cited above, fn.42, at pp.250-259.

59 Opinion 1/94 (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property) [1994] E.C.R. I-5267, Commission submissions at 5318.

60 *ibid.*, at [85] (emphasis added).

61 I am grateful to A. Dashwood for this attractive phrase.

62 P. Eeckhout, consequently, refers to a separate "Opinion 1/76-type" of exclusive power (P. Eeckhout, *External Relations of the European Union* (Oxford University Press, 2004), p.91).

63 Opinion 2/92 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] E.C.R. I-1759, s.V, para.4.

64 Case 476/98, *Commission v Germany* (*Open Skies*) [2002] E.C.R. I-9855, at [87].

65 *ibid.,* at [88] (emphasis added).

66 For a critical evaluation, see: P. Eeckhout, cited above, at p.78.

67 "The principle of subsidiarity", Communication of the Commission to the Council and the European Parliament, October 27, 1992, SEC (92) 1990 final at p.8.

68 K. Lenaerts and P. van Ypersele, "Le Principe de Subsidiarité et son Contexte: Eude de l'article 3B du Traité CE" (1994) 30 *Cahier de droit européen* 3 at p.27.The most comprehensive attempt to establish constitutional guidelines for the identification of islands of exclusivity has been made by D. Dittert. In his monograph *Die ausschlie%EFlichen Kompetenzen der Europäischen Gemeinschaft im System des EG-Vertrags* (P. Lang, 2001), the author develops a hierarchical list of negative, positive and neutral guidelines for the existence of an exclusive competence.

69 M. Foucault, *The Order of Things: an Archaeology of the Human Sciences* (Vintage Books, 1994).

70 "Questions of competence are questions of (political) power." I. Pernice, "Kompetenzabgrenzung im Europäischen Verfassungsbund" (2000) 55 *Juristenzeitung* 866 at p.867.

71 For example, the principle of subsidiarity.

72 The distinction between exclusive and concurrent competence was not repeated in the European Parliament's Resolution on the Constitution of the European Union (February 10, 1994), [1994] O.J. C61/155.

73 Emphasis added. "The expression "remain in force' in Article 12 (1) can be interpreted in two ways: either (a) national competence remains intact, Member States being free to take whatever action they deem appropriate or (b) national competence remains in being although the national authorities are not free to translate it into legal acts ("standstill' clause). The Draft Treaty does not appear to choose between the two interpretations" (V. Constantinesco, "Division of Fields of Competence Between the Union and the Member States in the Draft Treaty Establishing the European Union", in *An ever closer Union, EC Commission* (R. Bieber, J-P. Jacqué, J.H.H. Weiler eds, EC Commission, 1985), pp.41-55 at p.44).

74 Art.47(1) DTEU: "The Union shall have exclusive competence to complete, safeguard and develop the free movement of persons, services, goods and capital within its territory; it shall have exclusive competence for trade between Member States."

75 Art.48 DTEU: "The Union shall have exclusive competence to complete and develop competition policy at the level of the Union[.]"

76 Art.64(2) DTEU: "In the field of commercial policy, the Union shall have exclusive competence."

77 Art.64(4) DTEU.

78 However, Art.11 DTEU entitled the European Council to bring industrial co-operation structures and certain aspects of defence policy into the "common action" sphere. Thereby the European Council could decide whether to bring it within either exclusive or concurrent Community competence.

79 Art.53 DTEU. The DTEU did not single out marine conservation measures as an exclusive sphere of Union competence. Arguably, however, the "patrimony clause", i.e. Art.7 DTEU, protected the exclusive nature of the Community power over conservation measures for biological resources of the sea.

80 "The principle of subsidiarity", Communication of the Commission to the Council and the European Parliament, October 27, 1992, SEC (92) 1990 final.

81 *ibid.*, at 5. This criterion has rightly been criticised as inconclusive. See, in particular, the analysis by D. Dittert: "*Richtigerweise kann jedoch die Ausschlie %EFlichkeit einer Befugnis nicht davon abhängig gemacht werden, da%EF die betreffende Vertragsbestimmung zum Tätigwerden verpflichtet. Ausschlie %EFliche Kompetenzen können auch dort bestehen, wo keine Handlungspflicht besteht, umgekehrt kann eine Handlungspflicht ebenso gut bei konkurrierenden Kompetenzen gegeben sein. [Verkehrspolitik!] (...) Umgekehrt können ausschlie %EFliche Kompetenzen auch dort bestehen, wo die Gemeinschaft nicht in jedem Einzelfall eine konkrete Verpflichtung zum Tätigwerden trifft*". D. Dittert, *Die ausschlie%EFlichen Kompetenzen der Europäischen Gemeinschaft im System des EG-Vertrags* (P. Lang, 2001), at p.104.

82 Communication of the Commission to the Council and the European Parliament, October 27, 1992, cited above. Art.14 EC reads: "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992". Article 34 EC states that "a common organization of agricultural markets shall be established".

83 Communication of the Commission to the Council and the European Parliament, October 27, 1992, cited above, at 6.

84 *ibid.*

85 *ibid.*, (emphasis added). The Commission admitted that "area" of exclusive power was not a fortunate expression: "The exclusiveness of powers is not determined by the matter covered (cars, capital), but by the imperatives of free movement. This is why not all the measures associated with the smooth operation of the internal market fall under exclusive Community competence" (*ibid.*, at 8-9).

86 *ibid.*, at 7.

87 *ibid.,* at 8. The Commission added EMU that would eventually turn into an exclusive Community competence.

88 *ibid.*

89 Laeken Declaration of December 15, 2001 on the Future of the EU, see: *http://europa.eu.int/constitution/futurum/documents/offtext/doc151201 en.htm*

90 Treaty establishing a Constitution for Europe, [2004] O.J. C310/1.

91 See above, fn.89.

92 Preamle of the Constitutional Treaty.

93 For this optimistic note, see M. Nettesheim, "Die Kompetenzordnung im Vertrag über eine Verfassung für Europa" (2004) 39 EuR 511 at p.531: "*Von Bedeutung ist ferner, dass der Vertrag über die Verfassung von Europa die immer wieder aufkommenden Streitigkeiten über Reichweite der ausschlie%EFlichen Kompetenzen der EU beenden wird.*"

94 See above.

95 Emphasis added. Article I-17 CT refers to the complementary competence of the Union.

96 A. Dashwood, "The Draft EU Constitution--First Impressions" [2002-3] 5 C.Y.E.L.S. 395 at p.408.

97 M. Dougan, "The Convention's Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers?" (2003) 28 E.L. Rev 763 at p.770.

98 For a critical appraisal of the "Selbstermächtigungsklausel", see M. Nettesheim, cited above, fn.93, at p.533.

99 Laeken Declaration, cited above, fn.89.

100 For an insightful criticism of that claim, see: A. Dashwood, cited above, fn.96, at pp.409-410.

101 See, R. Schütze, "Parallel External Powers in the European Community: From "Cubist' Perspectives Towards "Naturalist' Constitutional Principles?" (2004) 23 Y.E.L. 225 at pp.260-265.

102 A. Dashwood, therefore, suggested the (future) deletion of para.2 of Art.I-13(2): "In the writer's view, however, by far the best solution for paragraph (2) of [Art.I-13] would be deletion. The exclusivity to which the paragraph relates is different in its nature of the *a priori* exclusivity of paragraph (1). In the three cases of exclusive external relations competence which are referred to, the underlying logic is that of the principle of loyal cooperation. (…). The incorporation of the principle of loyal cooperation in Article I-5 (2) of the Convention text is quite sufficient to preserve the case law on the AETR principle and in Opinion 1/76 under the new dispensation of the Constitutional Treaty." (Dashwood, cited above, fn.96, at p.411).

103 K. Lenaerts and M. Desomer, "Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means", cited above, at p.388 (emphasis added). Consider also J.H.H. Weiler, who described the original understanding of the distribution of competences of the Community and the Member States through three categories: areas in which the Community had no jurisdiction, "areas of activity that are autonomous to the Community (therefore beyond the reach of the Member States' jurisdiction *as such*)", and areas in which Community and national competences overlap (J.H.H. Weiler, "The Transformation of

Europe", cited above, at p.2436, emphasis added). The reference to "areas of activity that are autonomous to the Community" is slightly misleading, as all *Community* competences are autonomous competences. The definition, however, suggests that Weiler had the ontological argument in mind when identifying the Community's exclusive powers: only those Community powers that find no expression at the national level are exclusive.

104 M. Nettesheim, "Kompetenzen", in *Europaïsches Verfassungsrecht: theoretische und dogmatische Grundzüge* (A. von Bogdandy ed., Springer, 2003), 415 at p.448: "*funktionalen Notwendigkeit*".

105 See above, fn.74.

106 This seems also to have been the position of K. Lenaerts, *Le Juge et la Constitution aux %21 Etats-unis d'Amérique et dans l'ordre juridique européen* (Bruyant, 1988), at p.503, fn.141: "*Il s'agit de "compétences' exclusives de la Communauté, puisque les Etats membres ont une obligation d'abstention totale par rapport à l'intégrité des principes vises par ces articles, sans que la Communauté ait légiféré. Les Etats membres peuvent tout au plus se prévaloir, à titre d'exception, d'une compétence résiduaire expresse limitée à des cas spécifiques* [.]". In a later publication, the same author, consequently, interprets the ECJ's *Keck* retreat through the exclusive competence lens: "*Ce faisant, la Cour a restitue aux Etats membres leur compétence résiduaire en matière de réglementation commerciales relatives aux modalités de vente que leur avait ôte la jurisprudence antérieure, estimant que l'exclusion de cette compétence des Etats membres n'était--à la réflexion--pas indispensable à la réalisation des objectives de l'article [28] du traite.*" (*Le principe de subsidiarité,* above, fn.68, at 19).

107 On the scope of the purely internal situation in the context of the free movement of persons, see: N. Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 C.M.L. Rev. 731.

108 Advocate General Fennelly in Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising)* [2000] E.C.R. I-8419, at [136], [142].

109 Case C-376/98, cited above.

110 Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] E.C.R. 7079, at [30]-[33]. See also, Case 491/01, *R. v Secretary of State for Health Ex p. British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] E.C.R. 3736, at [179]: "It is to be noted, as a preliminary, that the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition".

111 The difficulties of the ontological argument may equally well be illustrated with reference to the Community's power to conclude "association agreements". Article 310 EC states: "The Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure." Obviously, only the Community can conclude *Community* agreements but does this imply that Member States are excluded from concluding *national* association agreements?

112 V. Michel, cited below, fn.115 at p.174: "*[L]a dynamique du critère fonctionnel autorise une évolutivité des domaines de compétences exclusives*".

113 In this sense: M. Nettesheim, cited above, fn.104, at p.448.

114 Opinion 1/75 (Draft Understanding on a local cost standard) [1975] E.C.R. 1355.

115 For a slightly different position, see: V. Michel, *Recherches sur les compétences de la communauté européenne* (L'Harmattan, 2003), pp.171-172, identifying the "Community interest" as the rationale behind exclusive competences: "*Cette notion d'intérêt global constitue la raison d'être des compétences exclusives, dans la mesure ou elle révèle la volonté des auteurs du traite de confier aux seules institutions communes la responsabilité de définir, et de prendre en charge, un intérêt strictement communautaire.*"

116 See above, fn.27.

117 P. Eeckhout, *External Relations of the European Union,* cited above, at p.15. Commenting on the "defence of the common interest" argument in Opinion 1/75: "Yet it is clear that this is essentially a political argument, which may also be valid for other common policies. One may think of the common transport policy, also prescribed by the E[]C Treaty, but in this field the Court never recognized exclusive powers" (*ibid.,* at p.14).

118 G. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 *Columbia Law Review* 331 at p.358.

119 A. Dashwood, "The Relationship between the Member States and the European Union/European Community" (2004) 41 C.M.L. Rev. 355 at p.370.

120 See M. Nettesheim, cited above, fn.104, at p.447: "*Entscheidend ist vielmehr die Frage, ob sich mit der Parallelitaï von EU-Taïtigkeit und mitgliedstaatlichem Wirken so gro%EFe Gefahren für die effektive Aufgabenerledigung seitens der EU verbinden, da%EF diese Gefahrenlage durch einen vollstaïndigen Ausschlu %EF mitgliedstaatlichen Wirkens bekaïmpft werden mu%EF.*"

121 A. von Bogdandy and J. Bast, "The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform" (2002) 39 C.M.L. Rev. 227 at p.241 (emphasis added).

122 D. Dittert, *Die ausschlie%EFlichen Kompetenzen der Europaïschen Gemeinschaft im System des EGVertrags* (P. Lang, 2001), at p.122 (emphasis added): "*Hierbei handelt es zum einen um Politiken, die ohne eine vollstaïndige*

Vereinheitlichung nicht lebensfähig wären und bei denen jegliches einseitige Tätigwerden der Mitgliedstaaten deshalb kontraproduktiv wäre[.]"

123 *ibid.*, at 92.

124 Opinion 2/94 (Accession to the ECHR) [1996] E.C.R. 1759, at [35].

125 V. Michel, cited above, fn.115, at p.169.

126 P. Eeckhout, cited above, fn.62, at p.15 with reference to D. Waelbroeck, "The Emergent Doctrine of Community Pre-emption--Consent and Re-delegation", in *Courts and Free Markets: Perspectives from the United States and Europe,* Vol.II (T. Sandalow and E. Stein, eds, Oxford University Press, 1982), at pp.548-580.

127 "[T]he dominant legal and administrative culture of the EC of the "Six' was still rather centralist. France was clearly the politically dominant Member States. French views heavily influenced EC legislation and administration. French preoccupations about "uniformity' (and not only "coherence' or "consistency') of the EC's legal order were pervasive." (C-D. Ehlermann, "The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution" (2000) 37 C.M.L. Rev. 537 at p.540).

128 P. Pescatore, "La carence du législateur communautaire et le devoir du juge", in *Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin-Jean Constantinesco* (G. Lüke, G. Ress, M. R. Will eds, Heymanns, 1983), at pp.559-580.

129 In an affirmative sense, P. Koutrakos (cited above, fn.6, at p.21): "In theoretical terms, if examined against the antithesis between normative and decisional supranationalism articulated early on by Weiler, the approach adopted in Opinion 1/75 is easily explained." Well, is it? And if so, which facet of supranationalism influenced the other? Did the rise of normative supranationalism--of which the doctrine of exclusivity forms part--influence the decline in decisional supranationalism, or the other way around? J.H.H. Weiler himself seems to have changed opinion on this point over the years. Writing in 1981, he claimed that the European Court had shown political acumen in that "in evolving its doctrine of pre-emption the Court will have been cognizant of decisional difficulties in the Communities' policy- and rule-making structure. To insist on pure pre-emption and expect it to work necessitates efficient central organs; the absence of these in the Community gives one explanation to the pragmatic, less pure, approach adopted by the Court". "Looking at the relationship the other way round we have already suggested the possible negative effect to which ERTA may have contributed" (J.H.H. Weiler, "The Community System: the Dual Character of Supranationalism" [1981] 1 Y.E.L. 267 at p.295). The above passage clearly shows a preferential explanatory direction: the rise of normative supranationalism--of which ERTA forms part--contributed to the decline in decisional supranationalism, therefore, the Court showed political acumen in abandoning pure pre-emption/exclusivity in favour of a pragmatic approach. (In 1981, this negative correlation appeared indeed more visible with Case 804/79, *Commission v United Kingdom* [1981] E.C.R. 1045, not yet having

been decided). Ten years later, however, Weiler preferred a positive correlation. In his well-known "The Transformation of Europe", the eminent scholar now concluded: "Exclusivity and preemption not only constitute an additional constitutional layer on those already mentioned but also have had a profound effect on Community decision-making. *Where a field has been preempted or is exclusive and action is needed, the Member States are pushed to act jointly.*" *Cf.* J.H.H. Weiler, "The Transformation of Europe", cited above, fn.2, at p.2417 (emphasis added).

130 The European Court continues to interpret the ERTA doctrine's idea of subsequent exclusivity in terms of parallel *competences,* i.e. in constitutional terms and not in terms of the *legislative* phenomenon of pre-emption. See, e.g. *Opinion 1/94.*

131 Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125.

132 For an elaboration of this point, see R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of the Legislative Function in the European Union* (EUI Thesis, 2005).

133 *ibid.*

134 See, e.g. Case C-55/00, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* [2002] E.C.R. 413, at [33]: "when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect." Article 307 EC applies to international agreements between Member States and third countries concluded before January 1, 1958 or, for acceding states, before the date of their accession. For these agreements, the doctrine of Community supremacy is "suspended".

135 E. A. Young, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception" (2000-2001) 69 *George Washington Law Review* 139 at p.139. For an analysis of the false promises of dual federalism, see: R. Schütze, cited above, fn.132, Ch.9.

