

*EC Law and International Agreements of the Member States—An Ambivalent Relationship?**

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I. INTRODUCTION: THE EUROPEAN AND THE INTERNATIONAL LEGAL ORDER

THE EUROPEAN COMMUNITY (EC) was established in 1957 on the basis of an international treaty. The Treaty of Rome formed part of international law, though the Court of Justice was soon eager to emphasise that the ‘Community constitutes a *new legal order* of international law’,¹ and that:

*By contrast with ordinary international treaties, the E ... C Treaty has created its own legal system which, on the entry into force, became an integral part of the legal systems of the Member States and which their Courts are bound to apply.*²

The Community legal order had been declared autonomous in order to establish the supremacy of Community law over national law. But *how* autonomous was the ‘new legal order’ vis-à-vis the old legal order of international law?

The potential for ambivalence between the European Community and the international legal order was inherent, for the borderline between Community law and international law was ‘not so certain or distinct’.³ To resolve this ‘somewhat uneasy’ relationship, EC law ‘first had to establish

* In honour of P Pescatore.

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¹ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, 12 (emphasis added).

² Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585, 593 (emphasis added).

³ Pescatore, P ‘International Law and Community Law—A Comparative Analysis’ (1970) 7 *CML Rev* 167.

and define its own position *vis-à-vis* international law'.⁴ The relationship between Community law and international law had remained a 'neglected problem' during the foundational period of the Community legal order. Writing in 1976, one commentator optimistically exclaimed:

For more than a decade, the relationship between Community law and national law has been the object of careful and enlightening studies. Since the main issues, such as the problems of direct applicability and of priority of Community Law, are about to be settled, the attention of European lawyers is by now shifting to the analysis of the relationship between Community law and public international law (henceforth: international law) which had been neglected so far.⁵

The attention did not shift. However, what was the problem? The 'complex and ambiguous'⁶ relationship with the international legal order in the early days of the Community was particularly troubled with regard to the international powers of the Member States.⁷ What was the relationship between the international treaties concluded by Member States and Community law? The *internal* division of competences between the Community and the Member States did not correspond to the international law perspective that accords *external* sovereignty to the Member States.⁸ The continued existence of the states' treaty-making powers raised complex questions about the normative relationship between the Community legal order and the international legal order:

If Community law were merely regional international law, the question of status and effect of international law within the Community legal order would have to be answered by international rules on the conflict of treaties and by principles governing the internal law of international organisations.⁹

⁴ Timmermans, C 'The EU and Public International Law' (1999) 4 *European Foreign Affairs Review* 181.

⁵ Meessen, KM 'The Application of Rules of Public International Law within Community Law' (1976) 13 *CML Rev* 485.

⁶ Puissechet, J-P 'La Place du Droit international dans la Jurisprudence de la Cour de Justice des Communautés Européennes' in *Scritti in onore di Giuseppe Federico Mancini* (Milan, Giuffrè, 1998) 779, 780.

⁷ The other dimensions of this ambivalent relationship, such as the international capacity and responsibility of the EC, will not be discussed in this article. For a discussion of these issues for international organisations see generally Klabbers, J *An Introduction to International Institutional Law* (Cambridge, CUP, 2002) chs 3 and 14.

⁸ Krück, H 'Die auswärtige Gewalt der Mitgliedstaaten und die auswärtigen Befugnisse der Europäischen Gemeinschaften als Problem des Souveränitätsverständnisses' in Bleckmann, A and Ress, G (eds) *Souveränitätsverständnis in den Europäischen Gemeinschaften* (Baden-Baden, Nomos, 1980) 155, 163. The inverse problem can be found in many a federal state, where the external sovereignty of the federation has been interpreted to give it wider powers than in the domestic sphere. For a discussion of this 'foreign affairs exceptionalism' in the context of the United States see Levitan, DM 'The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory' (1946) 55 *Yale Law Journal* 467.

⁹ Peters, A 'The Position of International Law within the European Community Legal Order' (1997) 40 *German Yearbook of International Law* 9, 11. For the view that considers Community law as part of traditional international law see Wyatt, D 'New Legal Order, or Old?' (1982) 7 *EL Rev* 147, arguing that the Community legal order is 'quite explicable in terms of traditional international legal theory and practice' (*ibid*, 148).

From the perspective of traditional international law, subsequent agreements of the Member States would be subject to the ordinary international law method for 'successive treaties relating to the same subject-matter' as set out in Article 30 of the Vienna Convention on the Law of Treaties.¹⁰ From the outset, it seemed unlikely that this rule was to apply fully within the European legal order. However, in order to protect the integrity of the latter, a simple modification of the international legal principles would not be sufficient. While the supremacy of the Community legal order vis-à-vis the national legal orders could still be explained from *within* an international law paradigm,¹¹ the international treaty law framework could not justify the supremacy of Community law over subsequent international treaties of the Member States. A 'new paradigm' was needed to explain and legitimise the supremacy of Community law over all forms of international law *within the Community legal order*. The EC—born with the genetic code of international law—needed to distinguish itself *from* international law in the same way as '[c]hildren too, in order to grow independent and adult, must occasionally dissociate themselves from their parents and mark their independence'.¹²

This article will investigate how the Community legal order has matured in its originally ambivalent relationship with the international treaty-making powers of the Member States. Has this *second* 'infant disease' been cured?¹³ Will EC law tolerate international agreements concluded by its Member States? To what extent, if any, does the European Community depart from the international law of treaties? What are the constitutional principles that govern the exercise of the Member States' international treaty-making powers?

The article is divided into two parts. The first part discusses the international commitments that the Member States 'brought into' the Community. Here, the normative relationship between EC law and the international treaties of the Member States was relatively straightforward. While the *lex posterior* principle would apply for inter se agreements, the Community legal order expressly acknowledged the international law principle of *res*

¹⁰ Art 5 of the Vienna Convention on the Law of Treaties (1969) clarified that the Convention would also apply to 'Treaties constituting international organisations and treaties adopted within an international organisation'. The provision states: '[t]he present Convention applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation'. For a fuller discussion of Art 30 of the Vienna Convention, see sects II and III below.

¹¹ Kelsen, H *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, Mohr, 1920).

¹² Timmermans, C, above n 4, 183.

¹³ The first infant disease being the question of direct effect of Community law in the national legal orders: see Pescatore, P 'The Doctrine of 'Direct Effect': an Infant Disease of Community Law' (1983) 8 *EL Rev* 155.

inter alios acta in Article 307 EC. Normative ambivalences only occurred in relation to the question whether the Community would consider *itself* bound by certain international agreements of its Member States under the doctrine of Community succession.

The second part analyses agreements concluded by the Member States after 1958 (or their accession).¹⁴ Early on, there arose the problem whether the Member States could informally amend the EC Treaty. Even more problematically, what were the constitutional mechanisms in the Community legal order to 'integrate' international agreements concluded by the Member States with third states? No constitutional equivalent to Article 307 existed. Would these agreements—once they were found to conflict with Community legislation—be provisionally 'supreme' over EC law, or would the Community legal order extend its supremacy beyond unilateral national measures to include international agreements? The external relations federalism of the Community legal order raised many interesting questions, some of which will be addressed in the following sections.

II. INTERNATIONAL AGREEMENTS OF THE MEMBER STATES PRIOR TO THE EC TREATY

When the EC came into existence in 1958, it had not been born into a normative vacuum. The six Member States of the Community were extensively linked with each other and with third states in a complex network of bilateral and multilateral treaties. In what ways would the emergence of the European Community affect this set of connections? The 'supremacy' of the *lex posterior* was a firmly established principle of international treaty law.¹⁵ International agreements between the Member States (*inter se* agreements) would thus be overridden to the extent that they would conflict with the EC Treaty. However, the Member States' previous contractual relations with third countries could not—at least not under 'ordinary' international law—simply be ignored or even overruled. Protecting the

¹⁴ The article will not specifically deal with the Social Policy Agreement or the Schengen Convention. For an analysis of the ambivalent relationships between EC law and the former see Curtin, D 'The Constitutional Structure of the Union: a Europe of Bits and Pieces' (1993) 30 *EL Rev* 17, 52–60. The Schengen Convention and its connections with the Community legal order are discussed in O'Keefe, D 'The Schengen Convention: A Suitable Model for European Integration?' (1991) 11 *Yearbook of European Law* 183.

¹⁵ The principle has been codified in Art 30(3) of the Vienna Convention on the Law of Treaties (1969): '[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'.

interests of third parties, international law accepts the idea of the relative validity of treaty obligations: a subsequent treaty that conflicts with an earlier one cannot legally affect the rights of a state that is party only to the earlier treaty.¹⁶

The EC Treaty expressly dealt with the rights of third states in Article 307 EC:

1. The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.
2. To the extent that such agreements are not compatible with this Treaty, the Member States or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude ...

The EC Treaty thus confirmed the 'ordinary' international law principle of *res inter alios acta* for prior contractual engagements of its Member States with third countries. Why was this still significant? The acknowledgment would, as we shall see below, recognise the continued normative force of Member States' prior international treaty obligations *in the Community legal order*. The Community legal order would 'suspend' the supremacy of its own law—even its primary law—to allow for the implementation of these international agreements. However, would there be teleological or temporal limits to that suspended supremacy? What efforts would Member States have to go to in order to fulfil their obligations under the EC Treaty? Would the Community sometimes consider itself bound by certain international agreements concluded prior to its coming into existence?

A. The 'Suspended Supremacy' of EC Law—Article 307 EC

Article 307 EC codified the 'precedence' of prior international obligations of the Member States over conflicting Community law.¹⁷ In the event of a

¹⁶ See also the discussion on the Vienna Convention in sect III below.

¹⁷ Lenaerts, K and van Nuffel, P *Constitutional Law of the European Union* (London, Sweet & Maxwell, 2003) 751. The concept of 'precedence' is perhaps not the best concept to capture the relationship, for international agreements of the Member States do not form part of the Community legal order.

conflict between the two, Community law could be disapplied *within the national legal orders*. Would this constitutional solution apply to *all* prior international treaties concluded by the Member States or was there a category of agreements beyond the generic solution suggested by Article 307 EC? The Court has answered this question: Article 307 EC ‘is of general scope and applies to any international agreement, irrespective of subject-matter’.¹⁸ There would be no ‘teleological reduction’ of Article 307 EC.

However, there were two limitations imposed by Article 307 EC on the Member States—one substantive and one procedural. Substantively Article 307 EC would only allow Member States to implement their *obligations* towards *third states*.¹⁹ Member States could not rely on Article 307 EC to enforce their rights against third states, nor could they rely on the provision to enforce their obligations against other Member States. This has been a constitutional commonplace ever since the beginning of the Community legal order:

[T]he terms ‘rights and obligations’ in [Article 307] refer, as regards the ‘rights’, to the rights of third countries and, as regards the ‘obligations’, to the obligations of Member States and that, by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty, a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligation ... In fact, in matters governed by the E ... C Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT.²⁰

While prior *inter se* agreements would be overridden by the EC Treaty, the suspension of the supremacy principle was considered a necessary constitutional reflex to allow for the satisfaction of prior international obligations with third states: Article 307 EC ‘would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community *not to impede the performance of the obligations of Member States which stem*

¹⁸ Case C-466/98, *Commission v United Kingdom* [2002] ECR I-9427 para 23.

¹⁹ What happens when a former ‘third’ state becomes a Member of the Community? This situation is illustrated in Case C-3/91, *Exportur SA v LOR SA and Confiserie du Tech SA* [1992] ECR I-5529, where the ECJ had to deal with a bilateral convention between France and Spain. The Court emphasised, as a preliminary point, that the accession of Spain to the EC had changed its perspective: ‘it should be observed that the national court rightly considered that the provisions of a convention concluded after 1 January 1958 by a Member State with another State could not, *from the accession of the latter State to the Community*, apply in the relations between those States if they were found to be contrary to the rules of the Treaty. It is therefore necessary to determine whether the provisions of the Franco-Spanish Convention are compatible with the rules of the Treaty on the free movement of goods’: *ibid*, para 8 (emphasis added). The bilateral convention had become an *inter se* agreement and was, consequently, fully assimilated to the regime applicable to national unilateral measures: *ibid*, para 39.

²⁰ Case 10/61, *Commission v Italy* [1962] ECR 1, 10–11.

from a prior agreement'.²¹ Such a severe incursion into the integrity of the Community legal order had to be interpreted restrictively: 'when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure'.²²

Procedurally, the states would be under a Community duty to 'take all appropriate steps' to eliminate all normative incompatibilities. Could this procedural obligation solidify into an obligation of result? Was there, in other words, a temporal deadline that Member States could not miss? Was Article 307(2) stronger than a 'best effort' obligation?²³ The closest the European Court has come to requiring a solid result is *Commission v Portugal*.²⁴ Here, Portugal had claimed that Article 307(2) would 'not impose the obligation to achieve a specific result, in the sense of requiring them, regardless of the legal consequences and political price, to eliminate the incompatibility'.²⁵ The constitutional duty to denounce an agreement should arise only 'exceptionally and in extreme situations', 'since denunciation is a measure which in principle gives rise to international liability'.²⁶

The Court disagreed. No restrictive interpretation of the procedural duty imposed by Article 307(2) EC was in order, since 'the balance between the foreign-policy interests of a Member State and the Community interest is already incorporated in [Article 307] of the Treaty'.²⁷ True, the Member States had a choice as to which steps to take, but they were 'nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty'. When 'a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded'.²⁸

²¹ Case 812/79, *Attorney General v Juan C. Burgoa* [1980] ECR 2787, para 9 (emphasis added). This was confirmed in Case C-158/91, *Criminal Proceedings against Jean-Claude Levy* [1993] ECR I-4287, para 22 (emphasis added): '[i]n view of the foregoing considerations, the answer to the question submitted for a preliminary ruling must be that the national court is under an obligation to ensure [that the relevant Community legislation] ... is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the E...C Treaty.'

²² Case C-324/93, *The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd* [1995] ECR I-563, para 32.

²³ Cremona, M 'Defending the Community Interest: the Duties of Cooperation and Compliance', Paper delivered to the EUI Workshop 'EU Foreign Relations Law: Constitutional Fundamentals', Florence, 11 Nov 2006.

²⁴ Case C-84/98, *Commission v Portugal* [2000] ECR I-5215.

²⁵ *Ibid*, para 30 (emphasis added).

²⁶ *Ibid*, para 33.

²⁷ *Ibid*, para 59.

²⁸ *Ibid*, para 58. For an elaborate discussion of the question of when denunciation may be necessary see: Koutrakos, P *EV International Relations Law* (Oxford, Hart, 2006) 313-16.

This ‘Community-friendly construction of Article 307’ thus gave some teeth to the procedural obligation in Article 307(2) EC.²⁹

Will the problem of prior international obligations then not naturally fade away in due course? With the temporal frame clearly set to agreements before 1 January 1958,³⁰ the ‘biological’ solution for old international agreements has encountered one major challenge: successive European enlargements. Each accession of new Member States gives Article 307 EC a new lease of life.

B. International ‘Debts’: The Theory and Practice of Community Succession

In international law, the Community will only be bound by treaties to which it is a party. And yet, may the Community sometimes *consider itself* bound by the ‘international debts’ of its Member States? In *Burgoa*, the Court rejected Article 307 EC as the direct source for a Community obligation: the provision ‘is directed *only* to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question’.³¹ Indeed, the wording of Article 307 EC did not—unlike Article 106 Euratom³²—envisage the future assumption of international obligations originating from the previous agreements of its Member States.³³ The self-binding of the EC would have to find a different rationale and would have to be a constitutional choice taken by the European judiciary.

²⁹ Klabbers, J ‘Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States’ (2001) 26 *EL Rev* 187, 197.

³⁰ For the question when an amendment transforms an ‘old’ into a ‘new’ agreement see: Case C-476/98, *Commission v Germany (Open Skies)* [2002] ECR I-9855, para 64, where the Court ruled that an amendment that ‘entails new and significant international commitments’ will turn a prior into a subsequent agreement.

³¹ Case 812/79, *Attorney General v Juan C Burgoa* [1980] ECR 2787, para 9 (emphasis added).

³² Art 106 Euratom reads: ‘Member States which, before the entry into force of this Treaty, have concluded agreements with third States providing for cooperation in the field of nuclear energy shall be required to undertake jointly with the Commission the necessary negotiations with these third States in order to ensure that the rights and obligations arising out of such agreements shall as far as possible be assumed by the Community. Any new agreement ensuing from such negotiations shall require the consent of the Member State or States signatory to the agreements referred to above and the approval of the Council, which shall act by a qualified majority.’

³³ Meessen thus concluded: ‘[t]he provision that treaty commitments of the Member States *vis-à-vis* third states ‘shall not be affected’ excluded any attempt on the part of the Community to have the rules of state succession concerning unions of states applied to its own formation. The non-application of these rules must be regarded as operating in two directions: the treaty commitments of the Member States are neither cancelled nor are they automatically transferred to the Community’: see Meessen, KM, above n 5, 489.

When, where and why should the Community legally consider itself bound? Would the 'transfer of powers' from the Member States to the Community trigger 'a substitution or succession in the meaning of international law'? Was it true that 'by taking over, by virtue of the Treaties, certain competences and certain powers previously exercised by the Member States, the Community equally had to assume the international obligations that controlled the exercise of these competences and powers'?³⁴

Two academic doctrines emerged during the 1970s to explain the self-binding of the Community legal order. The first doctrine, known as the 'mortgage theory', is based on the idea of *nemo dat quod non habet*. The pre-existing international obligations of the Member States would pre-structure the Community legal order: '[a]s no-one can transfer more powers than he has, the Member States were not competent to transfer any powers conflicting with these treaties to the Communities when they were established'; therefore 'the Community is bound by these conventions from the binding force they already had on the Member States before the Community's establishment'.³⁵ The mortgage theory is informed by the idea that previous obligations can pierce the corporate veil of an international organisation.³⁶ Because it ignored the autonomy of the Community legal order, the theory has been severely criticised.³⁷

The second doctrine borrows from the idea of 'state succession'. Since the Community is not a 'State', the concept had to be applied analogously. The doctrine of *Community* succession would stem from the 'emergence of a succession effect recognized in international law, except that we are dealing with a succession that is neither territorial nor general, but a succession

³⁴ Pescatore, P *L'ordre juridique des Communautés Européennes* (Liège, Presse universitaire de Liège, 1975) 147–8: 'un effet de substitution ou de succession au sens du droit international : en assumant, en vertu des traités, certaines compétences et certains pouvoirs précédemment exercés par les Etats membres, la Communauté a dû reprendre, également, les obligations internationales qui réglaient l'exercice de ces compétences et pouvoir' (translation by the author).

³⁵ Schermers, HG 'The European Communities Bound by Fundamental Rights' (1990) 27 *CML Rev* 249, 251.

³⁶ Hilf, M 'Europäische Union und Europäische Menschenrechtskonvention' in Beyerlin, U (ed) *Recht zwischen Umbruch und Bewahrung* (Berlin, Springer, 1995) 1193, 1197: '[e]igentlich sollte die materielle Bindung aller Organe der EU bzw. der drei Gemeinschaften an die EMRK unbestritten sein: Der Gedanke der Rechtsnachfolge drängt die Annahme förmlich auf, daß die Mitgliedstaaten Hoheitsgewalt nur unter gleichzeitiger Weitergabe der an diese geknüpften Rechtsbindungen übertragen konnten'.

³⁷ Uerpman-Witzack, R 'The Constitutional Role of Multilateral Treaty Systems' in von Bogdandy, A and Bast, J (eds) *Principles of European Constitutional Law* (Oxford, Hart, 2006) 145, 168: '[i]t is difficult to explain this in legal theory. First of all, the idea referred to contradicts the general view that the EC exercises original jurisdiction and not a bundle of Member State jurisdictions'. C Tomuschat even claims that the 'mortgage theory' is rejected by the majority of Community commentators considering 'that the establishment of the Community had led to the emergence of a new governmental power centre which could not be conceptualised as being made up of fragments or splinters of national sovereign authority': Tomuschat, C 'Case Note on *Yusuf and Kadi*' (2006) 43 *CML Rev* 537, 543.

of a functional and limited kind'.³⁸ Community succession would not be based on a transfer of territory, but on a transfer of functions.³⁹ Where the Member States had transferred their powers to the Community, the Community would automatically assume their international obligations. Being thus materially bound, the question of formal accession became secondary.⁴⁰

The following sub-sections investigate the Community's normative relationship to the three major international 'satellites' to the Community legal order: the General Agreement on Tariffs and Trade (GATT), the European Convention on Human Rights (ECHR) and the United Nations (UN). Community succession was first accepted in relation to GATT (1947) and had not—until recently—been extended to ECHR or UN legal obligations.

1. *The General Agreement on Tariffs and Trade (1947)—A 'Settled' Relationship*

Famously, the European Court accepted a Community succession in relation to the General Agreement on Tariffs and Trade (1947). Formally, the Community was not a party to GATT. However, all its Member States were. Could Member States or even private parties rely on the 'supremacy' of their prior GATT obligations before national courts? In *International Fruit*,⁴¹ Dutch traders had challenged the legality of various protective Community measures restricting the importation of apples from third countries as contrary to Article XI of GATT. Having been concluded before the establishment of the Community legal order, the question as

³⁸ Pescatore, P 'La Cour de Justice des Communautés Européennes et la Convention Européenne des Droits de l'Homme' in Matscher, F and Petzold, H (eds) *Protecting Human Rights: The European Dimension* (Cologne, Heymann, 1988) 441, 450: 'une manifestation de l'effet de succession reconnue en droit international, sauf que nous avons affaire ici à une succession ni territoriale, ni générale, mais à une succession fonctionnelle et limitée' (translation by the author).

³⁹ On the application of the idea of 'succession' see Petersmann, EU 'Artikel 234 EEC' in von der Groeben, H, von Boeckh, H and Thiesing, J (eds) *Kommentar zum EWG-Vertrag* (Baden-Baden, Nomos, 1974) 736, 745–6 (rn 8): '[i]n Übereinstimmung mit dem Rechtsgutachten des IGH betr. 'Reparations for Injuries Suffered in the Services of the U.N.' (ICJ Rep.1949, S.174 ff.) kann die (analoge) Anwendbarkeit allgemeinen Völkerrechts auf eine mit eigener Völkerrechtspersönlichkeit ausgestattete Internationale Organisation wie die EWG (vgl. Art.210 EWGV) nur funktionell vom Gründungsvertrag der Organisation sowie von den Erfordernissen der völkerrechtlichen Grundsätze des Vertrauensschutzes und der Rechtssicherheit her ermittelt werden ... [Es] liegt eine analoge Anwendung der erwähnten Staatensukzessionsregeln dahingehend nahe, da gemeinschaftsrechtlich bewirkte Kompetenzverschiebungen innerhalb präföderaler Wirtschaftsgemeinschaften ähnlich wie bundesstaatliche Zuständigkeitsverschiebungen vom internationalen Vertragspartner hinzunehmen sind und den völkerrechtlichen Erfüllungsanspruch des internationalen Vertragspartners ändern können'.

⁴⁰ In the succinct words of Pescatore, '[o]n n'adhère pas à ce qui est déjà en vigueur' : Pescatore, P, above n 38, 441.

⁴¹ Joined Cases 21 to 24/72, *International Fruit Company NV v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

to the application of Article 307 EC arose. The ambivalent relationship between GATT and the Community legal order was extensively discussed by Advocate General Mayras:

The question is governed by the first paragraph of [Article 307] of the Treaty of Rome ... And it is on the basis of this provision that the plaintiff firms in the main action have sought to justify the allegation that the Commission regulations are invalid ... The above provision has remained inapplicable with regard to GATT, for not only have the Community and the States not considered the agreement as being incompatible with the Treaty of Rome—in which case it would have been necessary to take the steps provided for by the second paragraph of [Article 307], but, on the contrary, the Community has considered itself bound by the General Agreement.

First, a certain number of provisions of the Treaty of Rome and more especially secondary Community legislation are exactly in keeping with the provisions of GATT and, although it is true that express references to multilateral agreements in the Treaty are rare, references by implication and more especially provisions taken from them are not lacking—see for example Articles 18 [repealed⁴²], 29 [now Article 27 EC], 110 [now Article 131 EC] and 111 [repealed⁴³] of the Treaty. In the same way, the Community authorities, which are mindful of the compatibility of their action with the rules of GATT in regard to third countries, frequently base their decisions directly on the provisions of the General Agreement ...

⁴² Art 18 EEC read: '[t]he Member States declare their readiness to contribute to the development of international trade and the lowering of barriers to trade by entering into agreements designed, on a basis of reciprocity and mutual advantage, to reduce customs duties below the general level of which they could avail themselves as a result of the establishment of a customs union between them'.

⁴³ Art 111 EEC read: '[t]he following provisions shall, without prejudice to Articles 115 and 116, apply during the transitional period: (1) Member States shall coordinate their trade relations with third countries so as to bring about, by the end of the transitional period, the conditions needed for implementing a common policy in the field of external trade. The Commission shall submit to the Council proposals regarding the procedure for common action to be followed during the transitional period and regarding the achievement of uniformity in their commercial policies. (2) The Commission shall submit to the Council recommendations for tariff negotiations with third countries in respect of the common customs tariff. The Council shall authorise the Commission to open such negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. (3) In exercising the powers conferred upon it by this Article, the Council shall act unanimously during the first two stages and by a qualified majority thereafter. (4) Member States shall, in consultation with the Commission, take all necessary measures, particularly those designed to bring about an adjustment of tariff agreements in force with third countries, in order that the entry into force of the common customs tariff shall not be delayed. (5) Member States shall aim at securing as high a level of uniformity as possible between themselves as regards their liberalisation lists in relation to third countries or groups of third countries. To this end, the Commission shall make all appropriate recommendations to Member States. If Member States abolish or reduce quantitative restrictions in relation to third countries, they shall inform the Commission beforehand and shall accord the same treatment to other Member States.'

However, it so happens that the rights which Member States are recognised to possess and the obligations assumed by them in the context of GATT are essentially, at least since the end of the transitional period, dependent on Community powers, whether it is a question of the Common Customs Tariff or decisions directed at regulating trade with third States in the sectors subject to a common market organisation. *The Community is therefore, in reality, bound by the provisions of the General Agreement although it is not a contracting party in a formal sense of the expression ...* [T]he argument which the plaintiff companies advance on the basis of the first paragraph of [Article 307] is not relevant; it can be of no relevance in solving the question of validity put to you.⁴⁴

The Court followed suit. While not endorsing the ‘teleological reduction’ of the scope of Article 307 EC, it nonetheless minimised the importance of the Article 307 route.⁴⁵ Claiming that the incompatibility of a Community measure with a provision of international law can only affect the validity of the former where the Community is bound by the latter,⁴⁶ the Court moved to the famous passage that would create the doctrine of Community succession:

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 [Articles 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 recognised 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 the effect of binding the Community.*⁴⁷

⁴⁴ *International Fruit*, above n 41, 1236–7 (emphasis added).

⁴⁵ *Ibid*, paras 10–13. The Court’s choice was wise, for the Art 307 EC route might have been more dangerous. This is well illustrated by the decision of the German Federal Finance Court of 9 Jan 1996, discussed by Reich, N ‘Judge-made *‘Europe à la carte’*: Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation’ (1996) 7 *European Journal of International Law* 103, 111, where the Federal Court insisted on the ‘supremacy’ of the German international law obligations under GATT. Art 307 EC would entitle Germany to set aside Community law that was incompatible with the international agreement.

⁴⁶ *International Fruit*, above n 41, para 7.

⁴⁷ *Ibid*, paras 14–16 and 18 (emphasis added). In Joined Cases 267, 268 and 269/81, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* [1983] ECR 801, para 17, the ECJ clarified that following the introduction of the common customs tariff on 1 July 1968 the Community had ‘assumed its full powers in relation to the sphere covered by GATT’.

Early on, the decision was thus taken to confirm:

[T]hat the Community *as such* is committed not only to the rules of international agreements concluded by the Community itself, but also to rules of international law which were binding on all Member States when the E ... C Treaty entered into force, *viz.*, to the extent to which the national powers in the matter of the application of the latter rules have been actually transferred to the Community and this transfer has been recognised by third countries.⁴⁸

Functional succession was viewed as emanating from the exclusive nature of the Community's powers under the Common Commercial Policy (CCP).⁴⁹

This ingenious solution would cut the Gordian knot of the ambivalent relationship between GATT, the Community legal order and the Member States: the Community—itself materially bound by the international agreement—could henceforth *centrally* determine the extent to which GATT obligations affected EC law. Today, the Community is formally bound by the GATT as a member of the World Trade Organisation (WTO). The succession doctrine has, therefore, been laid to rest with regard to this multi-lateral agreement.

2. *The European Convention on Human Rights (1950)—A Relationship to be Settled?*

When the EC Treaty entered into force on 1 January 1958, five of its Member States were parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. Ever since France joined the Convention system in 1974, all EC Member States have also been members of the European Convention legal order. How would the European Court of Justice define the relationship between the Community legal order and the European Convention system?⁵⁰ Would the Community allow its Member States to invoke Article

⁴⁸ Kapteyn, PJG 'The Domestic Law Effect of Rules of International Law within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules' (1974) 8 *International Lawyer* 74 (emphasis added). For a critical evaluation of the succession theory in the context of GATT see Uerpmann-Witzack, R, above n 37, 166: '[t]he EC was actually integrated into GATT 1947 as a Member State under international law. However, consent to this existed amongst all of the participants. Consequently the position of the EC within GATT 1947 could be explained by the concept of implied accession'.

⁴⁹ The Court of Justice had not yet 'officially' declared the CCP to be an exclusive competence of the Community. However, the doctrine of succession was a precursor to that development: see Schütze, R 'Dual Federalism Constitutionalised: the Emergence of Exclusive Competences in the EC Legal Order' (2007) 32 *EL Rev* 3, 6–10.

⁵⁰ This article will not deal with the systemically opposite question of how the *European Convention system* has defined its relationship to the Community legal order. Suffice it to make three brief points: first, the obligations under the European Convention have been held to be of an 'integral' kind, for '[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over

307 EC to justify violations of EC law in order to fulfil their obligations under the ECHR? Or would the Court consider the Community materially bound *via* the ‘mortgage theory’ or the ‘succession theory’?

The status of the Convention in the Community legal order evolved in tandem with the Community’s relationship to fundamental rights in general. This development began as a constitutional reaction against national judiciaries applying *national* constitutional human rights ‘for fear that might prejudice the supremacy of Community law’.⁵¹ In order to substantiate the rule of law within the Community legal order, the European Court began to interpret its jurisdiction to include ‘fundamental human rights [as] enshrined in the general principles of Community law’.⁵² Yet, the Court left no doubt that “[t]he protection of such rights, *whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community*”.⁵³ Constitutional inspiration was not constitutional translation: there was no human rights ‘mortgage’ inherited from the Member States.

Having identified the constitutional traditions of its Member States as an inspiration for Community human rights, the European Court soon discovered another source: the ECHR. In *Nold*, the Court expanded the ‘inspiration theory’ by pointing out that ‘international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, *can supply guidelines which should be followed within the framework of Community law*’.⁵⁴ Subsequent case law would even grant the Convention ‘a special place as a source for the Court’s catalogue of fundamental rights’.⁵⁵

and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement”: *Ireland v United Kingdom* Series A No 25 (1978) 1 EHRR 90, para 239. Inter se modifications among the parties of the Convention will, consequently, conflict with its purpose. Secondly, the Convention legal order has not considered the Community materially bound by the ECHR, but has allowed an indirect review of Community acts *via* its Member States. Thirdly, the European Court of Human Rights has developed a similar stance to the Community legal order as the German Constitutional Court had *vis-à-vis* the Community legal order in *Solange I*. These principles have recently been summarised in App No 45036/98 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim İrketi v Ireland*, (2006) 42 EHRR 1.

⁵¹ Jacobs, FG ‘European Community Law and the European Convention on Human Rights’ in Curtin, D and Heukels, T (eds) *Institutional Dynamics of European Integration*, Vol. II (Dordrecht, Martinus Nijhoff, 1994) 561.

⁵² Case 29/69, *Erich Stauder v City of Ulm* [1969] ECR 419, para 7.

⁵³ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1979] ECR 1125 para 4 (emphasis added).

⁵⁴ Case 4/73, *Nold, Kohlen und Baustoffgroßhandlung v Commission* [1973] ECR 491, para 13 (emphasis added).

⁵⁵ Lawson, R ‘Confusion and Conflict? Diverging Interpretations of the European Conventions on Human Rights in Strasbourg and Luxembourg’ in Lawson, R and de Blois, M (eds) *The Dynamics of the Protection of Human Rights in Europe*, Vol. III (Dordrecht, Martinus Nijhoff, 1994) 219, 223.

However, implicitly rejecting the 'succession theory',⁵⁶ the ECJ did not consider itself bound by the interpretation given to the Convention by the European Court of Human Rights. This solution would protect the autonomy of the Community legal order vis-à-vis the European Convention system. It would allow the Community to protect human rights 'within the framework of the structure and objectives of the Community'. The interpretative freedom created the possibility of a distinct *Community* standard of human rights and, concomitantly, entailed the danger of diverging interpretations of the European Convention in Strasbourg and Luxembourg.⁵⁷

Did the Treaty on European Union change this *indirect* normative relationship between the two legal orders? Article 6(2) EU expressly obliges the Union to respect fundamental rights 'as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Did this provision incorporate the ECHR in the Community legal order? Some have argued that '[t]he ECHR is now *formally* integrated into EC law'.⁵⁸ More moderate voices have limited the binding effect to its material *de facto* dimension.⁵⁹ However, what is the constitutional rationale behind these statements? Could it really be argued that Article 6(2) TEU incorporated the ECHR by express reference? The extension of the *Fediol* doctrine—developed in the *Community* legal order for *Community* agreements—seems hardly convincing.⁶⁰ In the absence of a stronger reason, the better view is that Article 6(2) EU has not changed the constitutional status quo.⁶¹ The Community is still *not* formally or materially bound by the European Convention on Human Rights.

⁵⁶ An early commentator—seeing in the last sentence of *Nold* a direct reference to the ECHR that had just been ratified by France—thus argued: '[t]he Court could have followed the precedent of the *Third International Fruit Case* in which it decided that the E ... C was bound by the GATT. It should then have held that the Communities were bound by the European Convention on Human Rights now that all its Member States were parties to it': Schermers, HG 'Community Law and International Law' (1975) 12 *CML Rev* 77, 83. The Court confirmed its position against succession in Case 36/75, *Rutili v Ministre de l'Intérieur* [1975] ECR 1219.

⁵⁷ See in particular: Joined Cases 46/87 and 227/88, *Hoechst AG v Commission* [1989] ECR 2859. For an excellent analysis see: Lawson, R, above n 55, esp. 234–50.

⁵⁸ Krogsgaard, LB 'Fundamental Rights in the European Community after Maastricht' (1993) 19 *LIEI* 99, 108 (emphasis added).

⁵⁹ Jacobs, FG, above n 51, 563: '[a]s a result of the development of the case-law, now confirmed by the Single European Act and the Treaty on European Union, the Community can be said to be subject *in effect* to, if not bound formally by, the European Convention on Human rights'. In a similar vein M Hilf, above n 36, 1207, argued that: '[f]ür das künftige Verhältnis der EU zur EMRK ist davon auszugehen, daß mit [Artikel 6(2) EUV] die materielle Bindung jeglicher im Rahmen der EU ausgeübten Hoheitsgewalt an die EMRK sichergestellt sein dürfte.'

⁶⁰ *Contra*, Uerpmann-Witzack, R, above n 37, 172–4.

⁶¹ Neuwahl, NA 'The Treaty on European Union: A Step Forward in the Protection of Human Rights?' in Neuwahl, NA and Rosas, A (eds) *The European Union and Human Rights* (Dordrecht, Martinus Nijhoff, 1995) 1, 14. This position has been confirmed by the ECJ in Case C-112/00, *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR

The relationship between the Community legal order and the European Convention system has, thus, to some extent remained ambivalent.⁶² Any divergence from the ECHR standard could potentially give rise to a defence under Article 307 EC.⁶³ However, the Member States do not employ this option: the provision has not been pleaded as a constitutional shield to implementing a higher Convention standard against the supremacy of Community law. Furthermore, the Court of Justice has not applied the ‘mortgage theory’ or the ‘succession theory’ to the ECHR—and for good reasons. Acceptance of the former would have severely compromised the autonomy of the Community legal order vis-à-vis both national and international human rights standards. Acceptance of the latter would have implied that the Community had ‘replaced’ the Member States through an exclusive transfer of power with regard to human rights policy. This result would contradict the constitutional message of Opinion 2/94, according to which the Community has not even—unlike its Member States—the competence to accede to the ECHR.⁶⁴

3. *The United Nations Charter (1945)—An Unsettled Relationship?*

The European Community is not a member of the United Nations.⁶⁵ All Member States of the European Community are, however, members of the United Nations. According to Article 48(2) of the UN Charter, decisions of the Security Council ‘shall be carried out by the Members of the United Nations directly and through action in the appropriate international agencies of which they are members’.⁶⁶

I-5659, paras 71–72 (emphasis added): ‘[a]ccording to settled case-law, fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect ... *The principles established by that case-law were reaffirmed* in the preamble to the Single European Act and subsequently in [Article 6(2)] of the Treaty on European Union’.

⁶² Even an (eventually) legally binding EU Charter of Fundamental Rights will entertain an ‘ambivalent’ relationship with the ECHR: see Polakiewicz, J ‘The Relationship between the European Convention on Human Rights and the EU Charter of Fundamental Rights’ in Kronenberger, V (ed) *The European Union and the International Legal Order* (The Hague, TMC Asser, 2001) 69.

⁶³ Mendelson, MH ‘The European Court of Justice and Human Rights’ (1981) 1 *Yearbook of European Law* 125, 160.

⁶⁴ Opinion 2/94, (*ECHR Accession*) [1996] ECR 1759.

⁶⁵ According to Art 4 UN Charter, only states can become full members. Before formal amendment of the UN Charter, the Community must ‘settle for a more modest participation in the work of the world organisation’: Brückner, P ‘The European Community and the United Nations’ (1990) 1 *EJIL* 174, 176.

⁶⁶ Art 48(2) UN Charter.

The fulfilment of United Nations obligations is mandatory: Article 103 of the UN Charter specifies that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

What is the legal relationship between the United Nations and the Community legal order? Sandwiched between the United Nations and the national legal orders, how does the Community layer affect or transform the obligations under the United Nations Charter? Have the Community Courts considered United Nations law binding on the Community, even if 'the singular and independent nature of the Community legal order, which has been made clear from the beginning by the case law of the Court of Justice, points in the opposite direction'?⁶⁷

The competence overlap between the United Nations and the Community legal order has principally materialised in the form of economic sanctions adopted by the United Nations Security Council. Here, the normative positioning of the European judiciary began with *Bosphorus*.⁶⁸ The decision—consolidated in subsequent jurisprudence—established the Community's traditional approach towards the UN legal order. Security Council Resolutions were not formally part of the Community legal order. Nor did the Community consider itself materially bound by the United Nations Charter. It viewed the international norms as special guidelines in an approach that paralleled the Community legal order's relationship to the European Convention on Human Rights.⁶⁹

The traditional relationship between the two autonomous legal orders has recently been 'un-settled' by the Court of First Instance (CFI) in *Yusuf*.⁷⁰ The case was brought by alleged Taliban terrorists whose assets had been frozen. The contested Community regulations—as well as the CFSP common position—had reproduced the relevant UN Security Council Resolutions.⁷¹

⁶⁷ Puissochet, JP 'The Court of Justice and International Action by the European Community: The Example of the Embargo against the Former Yugoslavia' (1996–7) 20 *Fordham International Law Journal* 1557, 1568.

⁶⁸ Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953.

⁶⁹ For a more elaborate discussion of the Community's traditional approach towards UN Security Council Resolutions see: Koutrakos, P *Trade, Foreign Policy and Defence in EU Constitutional Law: the Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments* (Oxford, Hart, 2001) 58–91 as well as Schütze, R 'On Middle Ground: The European Community and Public International Law', *EUI Working Paper 2007/13*, 16–19.

⁷⁰ Case T-306/01, *Abmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, [2005] ECR II-3533.

⁷¹ In particular: UN Security Council Resolution 1390/2002, laying down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities.

The Community measures had been based on Articles 301, 60 and 308 EC.⁷² The applicants had challenged the legality of these measures, *inter alia*, on the grounds that their fundamental *Community* rights had been violated. The Community institutions, having intervened in the proceedings, argued that ‘the Charter of the United Nations prevail[s] over every other obligation of international, Community or domestic law’ to the effect that Community human rights standards should be inoperative.⁷³

How did the CFI re-position the Community legal order vis-à-vis the United Nations? While admitting that under public international law the EC was not formally bound by UN law, the Court still found that ‘the Community *must be considered to be bound* by the obligations under the Charter of the United Nations in the same way as its Member States, *by virtue of the Treaty establishing it*’.⁷⁴ How did the Court come to this novel interpretation? The Court repeated that all the Member States of the Community were bound under Chapter VII of the Charter and, referring to Articles 297 and 307 EC, it considered that the Community ‘must, therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect’.⁷⁵ The Court’s reasoning ran as follows:

By concluding a treaty between them [the Member States] could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under that Charter. On the contrary, their desire to fulfil their obligations under that Charter follows from the very provisions of the Treaty establishing the European Economic Community and is made clear in particular by [Article 297] and the first paragraph of [Article 307] ...

By conferring those powers on the Community, the Member States demonstrated their will to bind it by the obligations entered into by them under the Charter of the United Nations. Since the entry into force of the Treaty establishing the European ... Community, 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 performance of their obligations under the Charter of the United Nations ...

⁷² Common Position 2002/402/CFSP led to the adoption of Council Regulation (EC) 881/2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation 467/2001, OJ 2002 L 139/9. Art 2 of the Regulation reads: ‘[a]ll funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.’

⁷³ *Yusuf*, above n 70, para 227.

⁷⁴ *Ibid*, para 243 (emphasis added).

⁷⁵ *Ibid*, para 239.

*It therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community[.]*⁷⁶

This is, if confirmed by the European Court of Justice, a radical change in the relationship between the United Nations and the Community legal order. The Court imposed a *positive* obligation on the Community legislator to implement UN Security Council Resolutions by invoking the functional succession doctrine. The doctrine, established in *International Fruit* for GATT had long been thought dead. *Yusuf* revives and extends it 'by analogy' to the United Nations Charter. This extension is highly debatable.⁷⁷ While it is true that all the Member States of the European Community are also Members of the United Nations, the Community has not replaced the Member States in foreign affairs by assuming an exclusive competence within this area.

The references to Articles 297 and 307 EC are spurious.⁷⁸ The former provision is addressed to the Member States—not the Community,⁷⁹ while

⁷⁶ *Ibid*, paras 245–253 (references omitted). Significantly, the Court did not refer to the exclusive nature of the Community competence to adopt economic sanctions (under Art 133 EC).

⁷⁷ Analysing the European Court's relationship to GATT in *International Fruit* before the CFI had decided *Yusuf*, Eeckhout, P *External Relations of the European Union* (Oxford, OUP, 2004) 438 claimed that '[m]uch of that reasoning can be transposed to the relationship between the UN Charter and the EC, in so far as Security Council resolutions are concerned'. Therefore, 'the Court might well, if the question were ever to come before it, be inclined to recognise the binding character of UN Charter and of Security Council resolutions, and find support for such recognition in its own case law'. However, there are heavy arguments against such a position: first, as Eeckhout himself admits, the Community has not replaced the Member States in the UN or in the Security Council. Secondly, the idea that the Member States 'could not transfer to the Community more powers than they possessed' (*nemo dat quod non habet*) has been rejected by the majority of Community commentators, considering 'that the establishment of the Community had led to the emergence of a new governmental power centre which could not be conceptualised as being made up of fragments or splinters of national sovereign authority': Tomuschat, C 'Case Note on Yusuf and Kadi' (2006) 43 *CML Rev* 537, 543.

⁷⁸ 'Un tel effet contraignant ne peut pas non plus être formellement déduit des stipulations du traité CE (notamment ses [Articles 10, 297 ou 307]). La singularité et l'autonomie de l'ordre juridique communautaire, soulignées, dès l'origine, par la jurisprudence de la Cour, plaideraient même plutôt en sens contraire': Puissochet, JP 'La Place du Droit international dans la Jurisprudence de la Cour de Justice des Communautés Européennes' in *Scritti in onore di Giuseppe Federico Mancini* (Milan, Giuffrè, 1998) 779, 790. For the opposite view see: Tomuschat, C (above n 77, 542) arguing that in relation to Arts 307 and 297 'the exposition of the Court does not show any weakness'. Tomuschat suggests a teleological reduction of the scope of Art 307 EC: '[o]bviously, the membership status within the United Nations does not belong to the category of elements which adversely affect the desirable Community harmony and which, therefore, should be eliminated (Article 307(2))'. The author justifies this result by reference to his belief that 'the United Nations constitutes the overarching structure of a world order system of governance in which the Community forms a regional sub-system, hierarchically inferior to the fundamental principles and rules enshrined in the Charter': *ibid*, 541–2.

⁷⁹ Art 297 EC allows a Member State, inter alia, 'to carry out obligations it has accepted for the purpose of maintaining peace and international security' and, therefore, represents a specification of Art 307 EC: '[w]hereas [Article 307] of the Treaty of Rome regulates the

the latter allows Member States *temporarily* to suspend the supremacy of Community law to fulfil their prior international legal obligations. In fact, even an analogous application of Article 307 EC could hardly explain why the annulment of a *Community* measure would prevent the *Member States* from fulfilling their obligations under the UN Charter.⁸⁰ The traditional constitutional rationale behind Article 307 EC has always been to permit Member States to satisfy their international commitments *against* Community law. The ‘internationalist’ reading suggested by the CFI would seem to force Member States into fulfilment of their international obligations *qua* *Community law*.

Having thus discussed the last aspect of the still ambivalent relationship between EC law and the international agreements of the Member States before 1958, let us now proceed to the second aspect of this article.

III. INTERNATIONAL AGREEMENTS OF THE MEMBER STATES AFTER THE CREATION OF THE EC

The EC Treaty did not eliminate the treaty-making powers of the Member States under international law. The Member States continued to be entitled to conclude international agreements within the material scope of the Community legal order. The doctrinal complexities in the normative relationship between EC law and the remaining treaty-making powers of the Member States were marked. What status would the Community legal order accord to subsequent inter se agreements between the Member States? Could the Member States modify or even amend Community law by informal agreement? How would the Community deal with Member State agreements with third states? Would these agreements be provisionally ‘supreme’

solution of possible conflicts between two legal orders, [Article 297] confers in a special situation, wide derogative powers to the Member States concerned which can affect all Treaty provisions within the limits set by [Article 298] ... Under the strict terms of [Article 297] Member States therefore were empowered to adopt measures in order to implement Security Council resolutions as on economic sanctions against, for example, Southern Rhodesia. Measures were taken by Member States in this regard which were designated by the Council and Commission as legal. The derogation clause of [Article 297] of the Treaty of Rome itself provides, however, for consultation among all Member States ... When these discussions occur they may lead to the adoption of a Community act’: Bohr, S ‘Sanctions by the United Nations Security Council and the European Community’ (1993) 4 *EJIL* 256, 265–6.

⁸⁰ ‘But if the Court were to strike down those regulations, why would that impede the performance by the Member States of their UN obligations? Those obligations would remain intact, and surely every Member State could itself decide to take the action (freezing of assets) which is required by the relevant resolutions ... Surely there might be some Member States where it would be possible to have review of the domestic measures on human-rights grounds in domestic constitutional law. But that cannot be of concern to the CFI’: Eeckhout, P ‘Does Europe’s Constitution Stop at the Water’s Edge?: Law and Policy in the EU’s External Relations’, *Fifth Walter van Gerven Lecture*, 22.

over conflicting Community legislation *à la* Article 307 EC? Or would the Community legal order extend its claim to supremacy beyond unilateral national measures of the Member States?

Before tackling these constitutional questions for the Community legal order, let us take a step back and revisit the normative solutions offered by 'ordinary' international law. According to Article 5 of the Vienna Convention on the Law of Treaties (VC), the Convention applies to constitutional treaties of international organisations and 'treaties adopted within an international organisation' 'without prejudice to any relevant rules of the organisation'. Article 30 VC deals with the application of successive treaties on the same subject matter. The provision distinguishes between subsequent treaties *erga omnes* and subsequent treaties that were not concluded by all the parties of an earlier treaty. In the first scenario, the *lex posterior* principle applies: 'the former treaty applies only to the extent that its provisions are compatible with those of the later treaty'.⁸¹ In the second scenario, Article 30(4) VC distinguishes between state parties to both treaties—to which the *lex posterior* rule is extended—and 'third states', ie parties to only one of the treaties, to which the *pacta tertiis* principle applies. The *pacta tertiis* or *res inter alios acta* principle is not a conflict rule. On the contrary, it confirms the relative validity of each contractual norm and thereby ushers in the 'normative relativism' of the international law of treaties.

The Vienna Convention distinguished between amendments (changes by all parties) and modifications (changes by some parties) of multilateral treaties. Articles 39–40 VC leave the parties free to determine the parameters of treaty amendment. The 'general rule of treaty amendment' views the consent of all the parties as a sufficient condition for amendment 'because unanimous agreement of the contracting States cannot be restricted by external constraints of a procedural or a substantive nature'.⁸² By contrast, Article 41 VC limits the contractual freedom of the parties to modify multilateral treaties *inter se*.⁸³ The provision states:

Agreements to modify multilateral Treaties between certain of the Parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) the possibility of such a modification is provided for by the treaty; or

⁸¹ Art 30(3) VC.

⁸² De Witte, B 'Rules of Change in International Law: How Special is the European Community?' (1994) 25 *Netherlands Yearbook of International Law* 299, 303. For a more cautious tone see: Schermers, HG and Blokker, N *International Institutional Law* (Dordrecht, Martinus Nijhoff, 2003) 734: '[m]any authors take the view that the members may overrule an amendment clause by unanimous decision. It does however seem doubtful whether the general law of treaties always prevails over express constitutional provisions.'

⁸³ Karl, W 'Treaties, Conflicts between' in Bernhardt, R (ed) *Encyclopedia of Public International Law* (Amsterdam, North-Holland, 1995) 935, 939.

- (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
- 2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

The Vienna Convention thus declares illegal those *inter se* modifications that expressly or impliedly affect rights of third states or conflict with the object and purpose of the multilateral treaty as a whole. The exception to the contractual freedom of states is typically explained by reference to the distinction between ‘bilateral’/‘reciprocal’ and ‘multilateral’/‘integral’ obligations.⁸⁴ Only a change of the former will constitute a true *inter se* modification by some of the parties.

With this normative baggage from the international legal order in mind, let us now turn to the constitutional questions for the European Community raised above. Would the Community legal order follow the traditional canons of international treaty law? In 1968, this still seemed an acceptable view:

The undisputed special characteristics of the EC Treaties would not permit, also in the light of the practice so far formed, to speak of a ‘break’ with the traditional technique of multilateral treaties.⁸⁵

Alternatively, would the Community legal order claim its autonomy here too? Would it impose the supremacy of Community law over the international treaties concluded by its Member States after they entered the Community legal system? The following two sub-sections will address these issues by looking at *inter se* agreements (A) and Member States’ agreements with third states (B) concluded after the emergence of the European Community.

A. Agreements between Member States of the Community

Whereas *inter se* agreements concluded prior to the coming into force of the Treaty had posed virtually no normative problems,⁸⁶ the normative

⁸⁴ The distinction is nowhere codified in the Vienna Convention, on the Law of Treaties, but is said to underlie a number of its provisions. The distinction has also entered the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (see Pauwelyn, *J Conflict of Norms in Public International Law* (Cambridge, CUP, 2003) 55).

⁸⁵ Fois, *P Gli Accordi Degli Stati Membri Delle Comunità Europee* (Milan, Giuffrè, 1968) 168 (translation by the author): ‘[I]e indubbe particolarità dei Trattati non autorizzano infatti, alla luce anche della prassi finora formatasi, a parlare di “rottura” “avec la technique traditionnelle du traité multilatéral”’ (quoting Cartou, *L Le Marché commun et le droit public* (Paris, Sirey, 1959) 8).

⁸⁶ They would remain effective to the extent that they were compatible with EC law—the solution suggested by Art 30 VC. See sect II A above.

ambivalence between Community law and *subsequent* international agreements of the Member States was diagnosed early on:

In the first place, it is necessary to define the relationship between these [subsequent *inter-se*] agreements with the Community Treaties. In fact, regulations or decisions adopted by the Council, by means of the fact that they implement the Treaty, will always remain subordinate to the Treaties that form their base and justification. An international agreement, on the other hand, even if styled as an implementing measure, is concluded by the same parties as the Treaties. Could one, therefore, not consider such an agreement as equivalent to the Community Treaties? These so-called 'complementary' or 'executive' agreements could, in this way, become the instrument of a 'cold revision', that is, a revision outside the formal amendment procedure set out in the Treaty. This process is, thus, not without danger to the Communities.⁸⁷

Apart from Article 293 EC—asking the Member States to engage in the negotiation of inter se conventions in certain areas—and the specific permission for the two regional economic unions in Article 306 EC,⁸⁸ there was no express provision for inter se cooperation. Did this mean that the states' ability to engage in international cooperation inter se was generally allowed, or had the Treaty exhaustively enumerated the subject matters for such cooperation in Article 293 EC? What was the nature of these inter se agreements—were they Community law or international law? If the latter, would they follow the 'ordinary' international law route, that is, allowing inter se modifications, except for those matters that interfered with the rights of *other* Member States or with an 'integral norm' of EC law? And, most importantly, could inter se agreements amend or modify EC law?⁸⁹

In answering these questions, we shall distinguish between two classes of inter se agreements: agreements between *all* Member States (*erga omnes*) and agreements between some Member States. The distinction corresponds to the dichotomy between amendment and modification in the international law of treaties. Analytically, the problems posed in either category were different: agreements *erga omnes* posed the danger of the Member States abandoning the supranational Community channels in favour of the international law route. This raised the spectre of 'cold revisions'. By contrast, the second category of agreements seemed less dangerous. The constitutional regime governing inter se agreements of some Member States will be discussed after we have investigated the constitutional principles

⁸⁷ Pescatore, *P L'ordre juridique des Communautés Européennes* (Liège, Presse universitaire de Liège, 1975) 143–4 (translation by the author).

⁸⁸ Art 306 reads: 'The provisions of this Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty.'

⁸⁹ In an affirmative sense see van Panhuys, JHF 'Conflicts between the Law of the European Communities and Other Rules of International Law' (1965–6) 3 *CML Rev* 420, 440.

applicable to inter se agreements between all Member States, including Community Conventions.

1. *Inter se Agreements between All Member States—A Flight into International Law?*

Within the category of inter se agreements *erga omnes*, 'decisions of the representatives of the Governments of the Member States meeting in the Council' represent the most common and controversial category. The unwieldy name is a misnomer: they are not unilateral acts, as the concept of 'decision' would indicate, but executive international agreements of the Member States.⁹⁰ These 'decisions *sui generis*' had become an established constitutional practice by the early 1970s. Despite their popularity, the constitutional nature of these 'decisions' remained obscure. Some commentators thought of them as a special form of Community law.⁹¹ Others viewed them as a form of ordinary international law.⁹² A third position sat on the fence and declared the international agreements to be legal hybrids between the two.⁹³ This ambivalence mystified their status and relationship to the Community legal order: were these decisions *sui generis* 'almost omnipotent',⁹⁴ or, 'by their very nature', subordinate to

⁹⁰ Pescatore, P, above n 87, 140: '[i]l s'agit, somme toute, d'accords internationaux "en forme simplifiée", conclus dans le cadre offert par le Conseil des Communautés.' A (slightly) different characterisation is given by Ipsen, HP *Europäisches Gemeinschaftsrecht* (Tübingen, Mohr, 1972), 468, considering these decisions as unilateral acts of an international organ set up by the collectivity of the Member States: '[i]nsgesamt handelt es sich um Beschlüsse eines vertraglich nicht instituierten Kollegialorgans, dessen Mitglieder mit dem kollegialen Rat der Gemeinschaften identisch sind. Deshalb ist weniger seine Erscheinung als Institution, als vielmehr seine Funktion der Beschlussfassung von rechtlicher Bedeutung'.

⁹¹ In favour of a classification as Community law: Hartley, TC *The Foundations of European Community Law* (Oxford, Clarendon, 1988) 92: '[i]n addition to the constitutive Treaties, there are certain other international agreements between the Member States. Where these deal with matters within the scope of the Community and were drawn up within the Community context, they may be regarded as part of Community law'. See also Wuermeling, J *Kooperatives Gemeinschaftsrecht* (Kehl, Engel, 1988) 199.

⁹² In favour of the international law status: Constantinesco, L-J *Das Recht der Europäischen Gemeinschaften* (Baden-Baden, Nomos, 1977) 543: '[d]ie Rechtsangleichung durch völkerrechtliche Abkommen ist ein klassisches Instrument ... Die Abkommen sind Ausdruck einer rein intergouvernementalen Prozedur, auch wenn sie der EWG dienen'. The ECJ now sides with this position: see Joined Cases C-181 and 248/91, *Parliament v Council (Emergency Aid)*[1993] ECR I-3685.

⁹³ Limpens-Meinertzshagen, A 'La Coordination ou l'Unification du Droit par voie de Convention entre les Etats Membres' in de Ripaincel-Landy, D, et al. (eds) *Les instruments du rapprochement des législations dans la communauté économique européenne* (Brussels, Université Libre de Bruxelles, 1976) 153, 158: '[l]a convention CEE se situe à mi-chemin entre la convention internationale classique et le droit communautaire stricto sensu'.

⁹⁴ The position was taken by Wagner, H *Grundbegriffe des Beschlussrechts der Europäischen Gemeinschaften* (Cologne, Heymann, 1965) 242: '[d]er "uneigentliche Ratsbeschluss" ist nahezu omnipotent. Er unterliegt keinen Bindungen des Gemeinschaftsrechts'. See also Deliege-Sequaris, M 'Révision des Traités Européens En Dehors des Procédures Prévus' (1980) 16 *Cahiers de Droit Européen* 538.

EC law?⁹⁵ The legality of decisions *sui generis* had traditionally been justified by reference to their falling *outside* the scope of the treaty.⁹⁶ Where the EC Treaty had given no competence to the Community to pursue its objectives, the Member States were entitled to use their international treaty-making powers to 'complement' Community law.⁹⁷ The recourse to inter se agreements would elegantly overcome the constitutional limitations flowing from the enumeration principle on which the Community legal order was based.

However, what about inter se agreements that fell *within* the competence of the Community? Could the cooperating Member States freely choose between the Community channels and the international channels? In *ERTA*,⁹⁸ the Member States—unhappy with the Commission's proposed solutions for a negotiating mandate—had simply adopted 'proceedings' in order to coordinate their position for the negotiation and conclusion of an international agreement. The Member States had settled on a negotiating position that would try to extend the internal Community system to relations with third states, except 'certain derogations from that system which would have to be accepted by the Community'.⁹⁹ The Member States had invited the Commission to make the necessary proposals for amending the internal Community legislation. The Commission disliked the proceedings and went to Court.

The European Court acknowledged that the legal effect of the 'proceedings' would differ 'according to whether they are regarded as constituting

⁹⁵ This view was expressed by Hartley, T, above n 91, 94–5 (emphasis added) in the context of Community Conventions: '[i]f a convention is adopted after the Treaty, it could be argued that the convention impliedly amends the Treaty and should therefore prevail. This, however, fails to take account of the fact that both Treaty and convention are part of the Community legal system and in that system the constitutive Treaties are by their very nature of superior status: they *create* the legal system of which the conventions are a part. Moreover, the Treaties contain provisions laying down specific procedures for their amendment ... [T]here can be little doubt that the existence of these procedures creates a presumption: if the Member States adopt subsequent agreements without going through the procedures, they may be presumed, *in the absence of an express provision to the contrary*, not to have intended to amend the constitutive Treaties ... If the subsidiary convention does not override the Treaties, it cannot affect the legislative powers conferred by them; consequently, acts adopted under those powers also cannot be affected. It follows from this that, *in the absence of an express provision in the convention*, the Community act will prevail.' (However, did this mean that an inter se agreement could make provision that it wished to prevail over the EC Treaty or secondary Community law?)

⁹⁶ Ibsen, HP, above n 90, 469 and 471.

⁹⁷ The 'decisions of the Member States meeting in the Council' were therefore classified as 'complementary law' by P Pescatore, for '*il s'agit d'actes à caractère diplomatique (ou international), complémentaires à la fois des traités eux-mêmes et du système d'actes institutionnels que ceux-ci ont mis en place*': Pescatore, P 'Remarques sur la Nature Juridique des "Décisions des Représentants des Etats Membres Réunis au sein du Conseil"' (1966) 14 *Sociaal-economische Wetgeving (SEW)* 579, 579.

⁹⁸ Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263.

⁹⁹ *Ibid.*, para 46.

the exercise of powers conferred on the Community, or as acknowledging the coordination by the Member States of the exercise of powers which remained vested in them'.¹⁰⁰ So were these proceedings an act of the Council? In Byzantine circular reasoning, the Court simply evaded the question of authorship and equated the 'Council' with the 'Member States acting within the Council'.¹⁰¹

This would have an important consequence. The Member States, wishing to act in their international capacities, had not played by the procedural rules set out in the EC Treaty. Thus, once the Court decided that the proceedings were to be attributed to the Council, the derogation from the envisaged 'legislative procedure' could become easy prey for judicial scorn. The right to propose and negotiate—these essential institutional roles of the Commission—would then have been violated. Although it was for the Council to 'decide in each case whether it is expedient to enter into an agreement with third countries, it does not enjoy a discretion to decide whether to proceed through inter-governmental or Community channels'.¹⁰² (What the Court meant to say was that the *Member States* could not freely choose whether to pursue a given project through international or Community channels.)

Hidden behind the famous 'ERTA doctrine',¹⁰³ thus lay another important constitutional message: the EC Treaty could constitutionally 'pre-empt' international cooperation between *all* Member States within its scope. Did this imply that wherever the Member States wished to act *erga omnes* within the scope of the Treaty, they were forced onto the Community track,

¹⁰⁰ *Ibid.*, para 4.

¹⁰¹ *ERTA*, above n 98, showed that the concept of 'Community legislation' had not yet been clearly defined. For a fuller discussion of the Court's Byzantine reasoning as regards the Community authorship of the 'proceedings' see Schütze, R 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 *Yearbook of European Law* 91, 101–3.

¹⁰² *ERTA*, above n 98, para 70. Let us pause for a second here. Can the Council—a Community institution—act through inter-governmental channels and would this act still be part of the Community legal order?

¹⁰³ The Court structured *ERTA* into three parts. The *ERTA* doctrine has traditionally been identified with the first part of the judgment (*ibid.*, paras 6–32) dealing with the scope and nature of the Community's implied external powers: cf Schütze, R 'Parallel External Powers in the European Community: From "Cubist" Perspectives Towards "Naturalist" Constitutional Principles?' (2004) 23 *Yearbook of European Law* 225. The second part of the ruling (paras 33–67) dealt with the legal nature of the proceedings (cf Schütze, R, above n 101), while the third part (paras 68–96) concerned the horizontal division of powers between the 'Council' and the Commission. In this third part, paras 70–77 could be seen indirectly to support the thesis of the constitutional exclusivity of the Community channels for *erga omnes* cooperation, whereas paras 81–84 appear informed by a legislative pre-emption rationale. According to the latter view, the Member States would be prevented to undertake, acting individually or even collectively, obligations with third countries which affect existing Community legislation.

because for this special form of cooperation the Community channels were 'exclusive'?¹⁰⁴

The thesis of the 'exclusivity' of the Community channels for inter se cooperation involving *all* Member States within the scope of the Treaty was indeed accepted for the Community's amendment procedure. Article 48 TEU (previously Article 236 EEC) constitutes the Community's amendment clause. In addition to requiring common accord and ratification by all Member States in accordance with their respective constitutional requirements, the clause also imposes a variety of procedural limits.¹⁰⁵ 'This may seem strange', as, '[g]enerally speaking, the reason for the special clause is the contracting parties' willingness to relax the general rule in order to facilitate adaptation of the treaty to changing circumstances'. The amendment clause of the Community legal order seemed to 'serve the wholly different purpose of protecting the treaty regime against its own creators, by putting obstacles in the way of over-hasty revision plans by the contracting parties'.¹⁰⁶

Would the Member States, therefore, still be able to rely on their general international treaty-making powers to amend the EC Treaty outside the Community channels of Article 48 TEU? Positive judicial responses were

¹⁰⁴ The constitutional solution proposed in *ERTA* was soon translated into the language of exclusive competences: '[d]ie Frage lautet: ist es rechtlich zulässig, nicht im EWG-Vertrag vorgesehene Übereinkommen unter den Regierungen der Mitgliedstaaten auszubandeln und abzuschließen, wenn die Organe der Gemeinschaft eine Befugnis zur Rechtsetzung nach dem EWG-Vertrag besitzen, insbesondere nach Artikel 100 oder 235? Meine These ist: sobald hinsichtlich einer bestimmten Frage die Merkmale einer im EWG-Vertrag enthaltenen Ermächtigung der Organe der Gemeinschaft zur Rechtsetzung vorliegen, fehlt den Regierungen der Mitgliedstaaten die Befugnis, die betreffende Frage im Wege der völkerrechtlichen Vereinbarung untereinander zu regeln. Die Organe der Gemeinschaft besitzen von da an die ausschließliche Zuständigkeit, über den fraglichen Gegenstand zu legiferieren. Es besteht daher keine Wahl zwischen dem gemeinschaftlichen und dem zwischenstaatlichen Verfahren, und zwar auch nicht so lange, als die Organe von der Rechtsetzungsbefugnis noch nicht Gebrauch gemacht haben': Schwartz, IE 'EG-Rechtsetzungsbefugnisse, insbesondere nach Artikel 235—ausschließlich oder konkurrierend?' (1976) 11 *Europarecht (Sonderheft)* 27, 28 (emphasis added).

¹⁰⁵ Art 48 TEU reads: '[t]he government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements'.

¹⁰⁶ De Witte, B, above n 82, 307 and 309. However, the author ultimately attributes a facilitating function to these procedural conditions (*ibid*, 313): '[y]et, what is facilitated is not the adoption of the amendments itself (the 'common accord' of all States is required as well as ratification by them all), but only the initiative for an amendment: the Council of the European Communities can decide to convene a revision conference'.

not unknown in the first decade of the European project.¹⁰⁷ However, the Court rejected this option. In *Defrenne*,¹⁰⁸ the Member States had tried to modify the temporal application of the EC Treaty and the Court was unimpressed: ‘apart from the specific provisions, *the Treaty can only be modified by means of the amendment procedure carried out in accordance with [Article 48 TEU]*’.¹⁰⁹ With regard to the *form* of amendment, the Member States were no longer ‘*Herren der Verträge*’. Within the Community legal order, ‘[t]he amendment of the European Treaties is not, therefore, within the ‘*domaine réservé*’ of the States’.¹¹⁰ Whereas informal amendments of the Community legal order may be legal *in international law*, they would be illegal in Community law—a ‘dualist’ solution that would safeguard the autonomy and integrity of the Community legal order.

Can this finding be extended to all forms of inter se cooperation *erga omnes* that fall within the material scope of the EC legal order? A judicial cloud for the theory of the exclusivity of the Community channels emerged in *Parliament v Council (Emergency Aid)*.¹¹¹ An annulment action was brought by the Parliament against a decision taken ‘at a working lunch attended by the Ministers and by a Member of the Commission’ to provide ad hoc aid to Bangladesh.¹¹² The ‘decision’ had been taken without parliamentary involvement and—just as the Commission had done in *ERTA*—the European Parliament claimed that its institutional prerogatives as set out in Article 272 EC had been violated.

The subject matter of emergency aid fell within the scope of the Treaty: Article 177 EC provided a complementary competence for development cooperation. The Council argued that ‘the jurisdiction of the Community to grant humanitarian aid is not exclusive, the Member States remaining

¹⁰⁷ These resulted from the constitutional practice under the ECSC Treaty. The ECSC Treaty had been amended twice during the transitional period (although this was prohibited) under the Treaty. These amendments were nonetheless regarded as legal, and the Council, the ECSC High Authority and the European Parliament accepted them, ‘allowing the conclusion to be drawn that the Community itself agreed to set aside the provisions prohibiting amendment of its constitution’: Schermers, HG and Blokker, N *International Institutional Law* (Dordrecht, Martinus Nijhoff, 2003) 736. See also Carstens, K ‘Die kleine Revision des Vertrages über die Europäische Gemeinschaft für Kohle und Stahl’ (1961) 21 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1.

¹⁰⁸ Case 43/75, *Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

¹⁰⁹ *Ibid.*, para 58 (emphasis added).

¹¹⁰ De Witte, B, above n 82, 315–6. On the possible substantive limits to the competence of the Member States with regard to Treaty amendment see also the author’s excellent discussion at *ibid.*, 318–22 and Everling, U ‘Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?’ in Bernhardt, R (ed), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte* (Berlin, Springer, 1993) 173.

¹¹¹ Joined Cases C-181 and 248/91, *Parliament v Council (Emergency Aid)* [1993] ECR I-3685.

¹¹² *Ibid.*, Opinion of AG Jacobs, para 2.

free to act, collectively or individually, alongside the Community'. The non-exclusive nature of the competence had been acknowledged by the Parliament; yet, it insisted that "when the Member States wish to give aid within the framework of the Community, *they can act only through the Council and only in accordance with the Community budget procedure*".¹¹³

This time, the Court sided with the Council. Recalling that 'acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review', the Court simply found that 'the Community does not have exclusive competence in the field of humanitarian aid, and that consequently the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it'.¹¹⁴

This answer is, with due respect, not logically conclusive: the non-exclusive nature of the Community competence does not constitutionally imply that the Member States must be entitled to exercise their competence through an inter se agreement *erga omnes* outside the Community channels. The prohibition of this mode of cooperation—and this is an important point—will not turn a shared or complementary competence into an exclusive Community competence. A constitutional limitation simply precludes the Member States from *exercising* one aspect of their *shared* competence. The Court may wish to reconsider its choice in the future and outlaw the 'chameleonic' behaviour of Member States.¹¹⁵ The exclusivity of the Community channels, triggering the involvement of the Community institutions, would indeed seem justified for this form of inter se cooperation: where all Member States get involved, the matter will doubtlessly have a 'Community' dimension and therefore should bring the European Commission and/or the European Parliament onto the scene. For matters falling within the scope of the Treaty, the Community's

¹¹³ *Ibid*, para 15 (emphasis added).

¹¹⁴ *Parliament v Council (Emergency Aid)*, above n 111, paras 12, 16.

¹¹⁵ A beautiful image by de Witte, B: '[t]he EU Member States cannot *freely* decide to switch from the "European law track" to the parallel "international law track" ... If EU states were freely allowed to 'switch to the international law track' jointly, this would constitute a constant threat to the integrity of the EU legal order ... The careful institutional balance established by the EC and EU Treaties, and the categorical distinction between international law and European law made by the ECJ, would then become very fragile. Thus, the question arises as to whether such "chameleonic" behaviour is compatible with the obligations of the Member States under EU law': de Witte, B 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in de Witte, B, Hanf, D and Vos, E (eds) *The Many Faces of Differentiation on EU Law* (Antwerp, Intersentia, 2001) 231, 232–3.

general legislative power under Article 308 EC could then be used to channel all inter se cooperation *erga omnes* into Community waters.¹¹⁶

2. *Excursus: The Ambivalent Nature of ‘Community Conventions’ Under Article 293 EC*

In Article 293 EC, the EC Treaty contained a provision that expressly encouraged Member States to engage in future inter se cooperation within the scope of the Treaty. Legend has it that the Article was inserted two weeks before the conclusion of the 1957 Rome Treaty. The agreements envisaged under Article 293 EC came to be known as ‘Community Conventions’, because the EC legal order envisaged them and only Member States could become contracting parties. Article 293 EC provides as follows:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

- the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals,
- the abolition of double taxation within the Community,
- the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

The ambivalent character of inter se cooperation as a ‘grey area between Community law and international law’ also coloured Member State cooperation under Article 293 EC.¹¹⁷ From the very beginning, these conventions appeared to be ‘foreign bodies within the general system of Community

¹¹⁶ The relationship between inter se cooperation *erga omnes* and Art 308 EC had already been addressed in *ERTA*, above n 98, where the Court simply held that “[a]lthough [Article 308] empowers the Council to take any “appropriate measures” equally within the sphere of external relations, it does not create an obligation, but confers on the Council an option, failure to exercise which cannot affect the validity of proceedings”: *ibid* para 95. Arguably, this passage did already betray a judicial preference against the thesis of the exclusivity of the Community channels for inter se agreements *erga omnes*. For a recent discussion of the scope of Art 308 EC and its position in the Community legal order see Schütze, R ‘Organised Change towards an “ever closer Union”’ (2003) 22 *Yearbook of European Law* 79.

¹¹⁷ Wuermeling, J *Kooperatives Gemeinschaftsrecht* (Kehl, Engel, 1988) 267.

Law sources'.¹¹⁸ Pescatore's theoretical presentiment was to be borne out by constitutional practice. Of the few Community Conventions that were signed or ratified by the Member States,¹¹⁹ the most important one has, undoubtedly, been the Brussels Convention.¹²⁰ This Convention provided the prism and battleground on which most of the theoretical debates on the nature of Community Conventions were fought.

Were these Community Conventions considered part of Community law or part of international law? Academic voices in favour of the first view have characterised Community Conventions as 'new primary Community law',¹²¹ (secondary) 'Community law',¹²² or 'second generation of Community law'.¹²³ Behind this classification stands the idea that by concluding a convention under Article 293 EC, the Member States would exercise a *Community* competence as trustees of the Community interest.¹²⁴ This conception implies an 'open concept' of Community law.¹²⁵ This view has been rightly attacked: a 'Convention between Member States cannot be classified a Community measure: that category coincides with the catalogue of acts adopted by the Community institutions.'¹²⁶ Regardless of

¹¹⁸ Pescatore, P 'International Law and Community Law—A Comparative Analysis' (1970) 7 *CML Rev* 167, 180.

¹¹⁹ Eg Convention on Mutual Recognition of Companies and Bodies Corporate of 29 Feb 1968 [1969] Bull Supp 2/7; Convention on the Law applicable to contractual Obligations (80/934/EEC), OJ 1980 L 266/1; Convention on Insolvency Proceedings (CONVINSOL/X1); Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ 1990 L 225/10.

¹²⁰ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), OJ 1998 C 27/1.

¹²¹ Schlosser, P 'Neues Primärrecht der EG' (1975) 28 *Neue Juristische Wochenschrift* 2132, 2133 refers to the Brussels Convention as an extension of primary Community law.

¹²² Hartley, TC, above n 91, 93–4: 'Conventions under [Article 293] form part of the Community legal system' and as such form 'part of Community law.' In this sense see also Wuermeling, J, above n 117, 92: '[d]ie Gemeinschaftskonventionen sind Gemeinschaftsrecht'.

¹²³ Rasmussen, H 'A New Generation of Community Law? Reflections on the Handling by the Court of Justice of the Protocol of 1971 relating to the Interpretation of the Brussels Convention on Jurisdiction and Enforcement of Judgments' (1978) 15 *CML Rev* 249.

¹²⁴ Wuermeling views Art 293 EC as a *Community* competence to be exercised by the collectivity of Member States: '[d]ie Mitgliedstaaten handeln im Falle des Art. [293] E...GV also ausschließlich kraft gemeinschaftlicher Kompetenz und Zuständigkeitsverteilung, nicht in Ausübung verbliebener völkerrechtlich-nationaler Außenkompetenz ... Damit übernimmt die Gesamtheit der Mitgliedstaaten organschaftliche Funktionen innerhalb der Gemeinschaft, ohne selbst Organ zu sein. Vereinbarungen, die in diesem Zusammenhang geschlossen werden, stellen ein Integrationsinstrument des EWGV neben anderen dar': Wuermeling, J, above n 117, 68.

¹²⁵ *Ibid*, 90–2: '[d]eshalb sollte sich eine Charakterisierung des Gemeinschaftsrechts allein an der Gemeinschaftsbezogenheit eines Rechtsaktes orientieren'. For an analysis of the complex principles underpinning the idea of Community authorship see Schütze, R, above n 101, esp. 98–106.

¹²⁶ Capotorti, F 'The Task of the Court of Justice and the System of the Brussels Convention' in Court of Justice of the European Communities (ed) *Civil Jurisdiction and Judgments in Europe* (London, Butterworths, 1992) 13, 15.

the question of whether the catalogue of legal instruments enumerated in Article 249 EC is exhaustive, the source of Community Conventions is not Article 293 EC, but the pre-existing treaty-making powers of the Member States.¹²⁷

Which of the two opposing views did the European Court adopt? The Court was given a chance to clarify the nature of the Brussels Convention after it had been given jurisdiction to interpret it via an additional Protocol.¹²⁸ In *Duijnstee*,¹²⁹ referring to the aims of the Convention as defined in its Preamble, the Court acknowledged the supremacy of the Convention over conflicting national law:

Both of the provisions on jurisdiction and those on the recognition and enforcement of judgments are therefore aimed at strengthening the legal protection of persons established in the Community. The principle of legal certainty in the Community legal order and the aims pursued by the Convention in accordance with [Article 293] of the Treaty, on which it is based, require that the equality and uniformity of rights and obligations arising from the Convention for the Contracting States and the persons concerned must be ensured, regardless of the rules laid down in that regard in the laws of those States. *It must be concluded that the Convention, which seeks to determine the jurisdiction of the courts of the Contracting States in civil matters, must override national provisions which are incompatible with it.*¹³⁰

Basing its decision on the need to ensure legal certainty and uniformity, the Court thus centralised the answer to two fundamental questions that are normally the exclusive prerogative of national legal orders: the questions of the supremacy and direct effect of international treaties. Granting the Brussels Convention both attributes distanced it from 'ordinary' international law. The emergence of an 'autonomous' interpretation of the Convention had already started the partial 'supranationalisation' of the

¹²⁷ Schwartz, IE 'Übereinkommen zwischen den EG-Staaten: Völkerrecht oder Gemeinschaftsrecht?' in Kroneck, FJ and Oppermann, T (eds) *Im Dienste Deutschlands und des Rechtes* (Baden-Baden, Nomos, 1981) 551, 606: 'Rechtsquelle der Übereinkommen und Protokolle ist nicht die Gemeinschaft, sondern die Gesamtheit der Mitgliedstaaten. Sie haben ihren rechtlichen Ursprung in einem multilateralen Vertrag zwischen Staaten, nicht im einseitigen Rechtssetzungsakt eines Organs der Gemeinschaft. Die Übereinkommen und Protokolle stammen von einer anderen Rechtsetzungsgewalt als die Verordnungen und Richtlinien der Gemeinschaft. Grund für die Geltung von Übereinkommen und Protokollen zwischen den Mitgliedstaaten ist nicht wie bei Verordnungen und Richtlinien ein Befehl des EWG-Vertrages, sondern der Abschluß eines Vertrages zwischen Staaten ... Die Übereinkommen und Protokolle sind nicht vom EWG-Vertrag abgeleitetes Organrecht, sondern autonomes Vertragsrecht'.

¹²⁸ Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 Sept 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

¹²⁹ Case 288/82, *Ferdinand MJJ Duijnstee v Lodewijk Goderbauer* [1983] ECR 3663.

¹³⁰ *Ibid.*, paras 12–14 (emphasis added). The Court had already dealt with the issue of supremacy in Case 25/79, *Sanicentral GmbH v Rene Collin* [1979] ECR 3423.

Convention.¹³¹ Through that judicial process the Convention was gradually 'allied to the Community order'.¹³²

Did this 'supranationalisation' of the Brussels Convention turn it into Community law? The answer should be in the negative. The Court did not treat the Convention as an integral part of the Community legal order. First, in contrast to the constitutional integration of international treaties *concluded by the Community*,¹³³ the Convention could not interact with Community law. 'This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are *or will be* contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts.'¹³⁴ Secondly, the Court of Justice had no *inherent* jurisdiction over Community Conventions—a power that would naturally be attached to all EC law.¹³⁵ The Convention thus stayed *outside* the Community legal order. The extension of constitutional attributes, such as supremacy over national law and direct effect, while *shared with* Community law, could not turn the Convention *into* Community law.

This reading has received support from subsequent legislative practice. In the last decade there has been a move to replace (draft) Community Conventions with EC legislative instruments.¹³⁶ The most important fruit of this endeavour has been Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the

¹³¹ Joined Cases 9 and 10/77, *Bavaria Fluggesellschaft Schwabe & Co KG and Germanair Bedarfsflugfabrik GmbH & Co KG v Eurocontrol* [1977] ECR 1517, para 4: '[t]he principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with [Article 293] of the E ... C Treaty, which is at its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the Court in the context of the Brussels Convention'.

¹³² Case 150/77, *Bertrand v Paul Ott KG* [1978] ECR 1431, para 16.

¹³³ Case 181/73, *Haegeman v Belgium* [1974] ECR 449.

¹³⁴ Art 57(3) Brussels Convention (emphasis added). For matters outside the scope of this provision, academic controversy about the normative relationship of the Convention with EC law continued. In line with his open conception of Community law, Wuermeling argued in favour of the *lex posterior* rule (Wuermeling, J, above n 117, 132); others preferred an analogous application of Art 307 EC (see Meng, W 'Artikel 236' in Von der Groeben, H, Thiesing, J and Ehlermann, C-D *Kommentar zum EWG-Vertrag* (Baden-Baden, Nomos, 1991) 5834, 5857 (rn 78)).

¹³⁵ Case 80/83, *Habourdin International SA and Banque Nationale de Paris v SpA ItaloCremona* (Order of the Court) [1983] ECR 3639.

¹³⁶ Eg EC Regulation 1346/2000 on Insolvency Proceedings (OJ 2000 L 160/1) replaced 'its' Convention based on Art 293 which had been opened for signature in 1995, but had not entered into force. On 14 Jan 2003 the Commission issued a Green Paper on the conversion of the Rome Convention (Law applicable to Contractual relations) into a Community instrument, COM(2005)650 final. The draft Rome II Convention has been channelled into Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/49.

'Brussels Regulation') based on Article 65 EC.¹³⁷ The Brussels Regulation belatedly 'communitarised' the Brussels Convention.¹³⁸ Today, 'there does not seem to remain any space left for the application of Article 293 fourth indent EC in the area of judicial cooperation in civil matters outside the scope of Article 65'.¹³⁹ The ambivalent status of Community Conventions and their problematic normative relationship with EC law seems, thus, to have become a problem of the past. With enlargement, the constitutional practice of waiting for every Member State to ratify Community Conventions before they enter into force will send Article 293 EC into a constitutional coma from which it is unlikely ever to awake.

3. *The Constitutional Regime Governing Inter se Agreements of Some Member States*

International cooperation between *some* Member States continued in the form of international agreements after 1958. The existence of Article 306 EC had not, *argumentum e contrario*, constitutionally ruled out all other forms of inter se cooperation within a closer circle of Member States.¹⁴⁰ Moreover, the continuing conclusion of bilateral double taxation agreements between *some* Member States demonstrated the legitimacy of cooperation between some Member States for subject matters that fell into the scope of Article 293 EC.¹⁴¹ In contrast to international cooperation *erga omnes*, these agreements appeared less dangerous to the autonomy and integrity of the Community legal order. Could Member States therefore freely 'reinforce' their inter se cooperation through a bilateral or trilateral agreement? Would they even be entitled to modify some of their EC law obligations along the lines of Article 41 Vienna Convention?

From the very beginning, the Community legal order was less ambivalent towards inter se agreements concluded between only *some* of its

¹³⁷ Art 65 EC gives the Community competence to adopt measures in the field of judicial cooperation in civil matters having cross-border implications. Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJ 2001 L 12/1) was adopted on this legal base.

¹³⁸ For a first assessment of this change see Stadler, A 'From the Brussels Convention to Regulation 44/2001: Cornerstones of a European Law of Civil Procedure' (2005) 42 *CML Rev* 1637.

¹³⁹ Basedow, J 'The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam' (2000) 37 *CML Rev* 687, 701.

¹⁴⁰ De Witte, B 'Old-Fashioned Flexibility: International Agreements between Member States of the European Union' in de Búrca, G and Scott, J (eds) *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford, Hart, 2000) 31, 40: '[i]nter-se agreements are allowed, for the simple reason that to hold otherwise would be a drastic curtailment of the Member States' treaty-making competences that cannot be assumed to have taken place in the absence of any clear indication in the founding treaties'.

¹⁴¹ *Contra*, Schwartz, IE 'Artikel 220' in Von der Groeben, H, Thiesing, J and Ehlermann, C-D, above n 134, 5517, 5525 (rn 5).

Member States. First, the EC Treaty—the supreme constitution of the Community legal order—could not be modified *inter se*.¹⁴² Second, the supremacy of Community law over bilateral agreements was confirmed in relation to Community legislation.¹⁴³ Indeed, the *integrationist* purpose of the Community was in direct conflict with the idea that Member States could ‘contract out’ of their obligations by establishing a looser form of cooperation than that set by the Community gold-standard.¹⁴⁴ However, what about *inter se* cooperation between some of the Member States *above* the Community standard? Would a *closer* cooperation conflict with the purpose of the EC Treaty?

The relationship between *inter se* cooperation and the non-discrimination principle stands at the centre of this constitutional question. The prohibition of discrimination—the constitutional principle behind the European project—outlaws (unjustified) discrimination on grounds of nationality within the scope of the EC Treaty.¹⁴⁵ Did this principle imply that all reciprocal advantages conferred on nationals of two cooperating Member States would have to be extended to all Community citizens? Did the prohibition of discrimination on grounds of nationality require bilateral treaties to be ‘multilateralised’?¹⁴⁶ Was there, in other words, a ‘most-favoured-nation’ principle implied in all *inter se* relations of the Member States of the Community?

This argument has been made.¹⁴⁷ Critics have invoked the reciprocity principle as a limit to extending the benefits granted under a bilateral

¹⁴² Case C-336/96, *Gilly v Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793. The Court acknowledged that in the absence of a Community Convention under Art 293 EC, the Member States had remained competent to conclude international agreements to eliminate double taxation (and indeed had concluded many bilateral conventions). However, in the exercise of their retained powers, the Member States would have to respect Community law. See Case 270/83, *Commission v France (avoir fiscal)* [1986] ECR 273, where the Court clarified that the fundamental freedoms did not ‘permit those rights to be made subject to condition of reciprocity imposed for the purpose of obtaining corresponding advantages in other Member States’: *ibid*, para 26.

¹⁴³ The rights conferred under Community legislation ‘are unconditional and a Member State cannot make their observance subject to an agreement concluded with another Member State’: Case C-294/99, *Athinaiki Zythopoiia AE v Elliniko Dimosio* [2001] ECR I-6797, para 32. The Community legislation at issue was Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225/6). The bilateral agreement at stake was the double taxation agreement concluded by the Hellenic Republic and the Kingdom of the Netherlands.

¹⁴⁴ This would even be uncontroversial under the ‘ordinary’ international solution of Art 41 VC and has been applied to the ECHR legal system: see above n 50.

¹⁴⁵ Art 12 EC.

¹⁴⁶ Tietje, C ‘Die Meistbegünstigungsverpflichtung im Gemeinschaftsrecht’ (1995) 30 *Europarecht* 398, 399.

¹⁴⁷ *Ibid*, 406, 412–3: ‘[i]m folgenden wird sich unter systematischen und teleologischen Gesichtspunkten zeigen, daß es sich bei einer Meistbegünstigungsverpflichtung eben doch um eine Form der Nichtdiskriminierung handelt und die Verpflichtung zur Meistbegünstigung

treaty.¹⁴⁸ The Court has shown a nuanced approach. In *Matteucci*,¹⁴⁹ a cultural agreement between Belgium and Germany had established an exchange system between the two countries that offered scholarships to selected candidates. The Belgian authorities refused to consider Ms Matteucci, an Italian national living and working in Belgium, for selection. Without much ado, the Court testified to a violation of Article 7(2) of Regulation 1612/68, granting a migrant worker the same social advantages as national workers. The extension of the benefits conceded under the bilateral agreement did not affect the balance or reciprocity of the agreement, for the number of scholarships agreed remained the same.

In *Bachmann*,¹⁵⁰ a German national employed in Belgium was not allowed to deduct contributions paid, before his arrival in Belgium, to a German insurance company covering sickness, invalidity and life insurance. Under Belgian revenue legislation, only sickness and invalidity insurance contributions and pension and life insurance contributions paid in Belgium could be deducted from occupational income. Would that restriction violate the fundamental freedoms guaranteed in the EC Treaty? The Court indeed certified the national legislation as being of a discriminatory character; yet it found the measure justified in the public interest of ensuring the cohesion of the national tax system.¹⁵¹

What was interesting about this conclusion was that Belgium had concluded bilateral agreements with France, Luxembourg and the Netherlands, whereby contributions paid in these countries could be deducted from

im Falle bestehender inter-se Abkommen im Gemeinschaftsrecht daher nach Art.6 EGV zu beurteilen ist ... Diesem Ergebnis zufolge können sich Unionsbürger auf Art.6 EGV berufen, um sich einer Ungleichbehandlung aufgrund unterschiedlicher Regelungen in Doppelbesteuerungsabkommen oder auf sie bezogener Personenkontrollen nach dem zweiten Schengener Übereinkommen zu erwehren.'

¹⁴⁸ In this sense see Kemmeren, E 'The Termination of the "Most Favoured Nation Clause" Dispute in Tax Treaty Law and the Necessity of a Euro Model Tax Convention' (1997) 6 *EC Tax Review* 146, 147–8: '[t]he basis for this point of view is found in the special nature of a bilateral tax treaty between a Member State and another State, whether this State is a Member State or not. Such an agreement is the result of a negotiating process between both states by which the rights and obligations are laid down on the basis of the reciprocity principle. Such a treaty underlies a (well-)provided balance, also with respect to the financial consequences'; and Vogel, K, Gutmann, D and Paula Dourado, A 'Tax Treaties between Member States and Third States: "Reciprocity" in Bilateral Tax Treaties and Non-discrimination in EC Law' (2006) 15 *EC Tax Review* 83, 87: '[s]uch a way of reasoning relies on the aforementioned idea that a tax treaty is a coherent set of rules established by two contracting parties with conflicting interest. It assumes that those Contracting Parties have reached an economic balance through negotiation. The consequence of this approach to tax treaties is that their structure should not be jeopardised on the basis of hazardous comparisons with the situation of third State residents'.

¹⁴⁹ Case 235/87, *Matteucci v Communauté française of Belgium and Commissariat general aux relations internationales of the Communauté française of Belgium* [1988] ECR 5589.

¹⁵⁰ Case C–204/90, *Bachmann v Belgium* [1992] ECR I–249.

¹⁵¹ *Ibid.*, para 27.

occupational income in Belgium. In the view of the Court this made no difference:

It is true that bilateral conventions exist between certain Member States, allowing the deduction for tax purposes of contributions paid in a contracting State other than that in which the advantage is granted, and recognising the power of a single State to tax sums payable by insurers under the contracts concluded with them. *However, such a solution is possible only by means of such conventions or by the adoption by the Council of the necessary coordination or harmonisation measures.*¹⁵²

Did this mean that the advantages granted to nationals of *certain* Member States under bilateral agreements would *not* have to be 'multilateralised' to all Community citizens? The issue remained ambivalent for a decade.

The normative tension between inter se closer cooperation and the Community non-discrimination principle was again placed on the judicial table in *D*.¹⁵³ Mr D, a German national, had claimed that the Dutch law on wealth tax was discriminatory and thus violated the freedom of capital as set out in Articles 56 ff of the EC Treaty. The Dutch legislation granted only residents, and non-residents holding the majority of their wealth in the Netherlands, a tax allowance. The Court found that the unilateral measure differentiated on objective grounds and was thus not discriminatory.

However, this was not the whole picture. The Grand Chamber of the European Court also had to address the bilateral Convention between Belgium and the Netherlands for the avoidance of double taxation of income and property and for the regulation of certain other taxation matters signed in 1970. Under Article 25(3) of the Convention, a person resident in Belgium would have been entitled to allowances and other tax benefits which the Netherlands granted to its own residents. Would Community law require the *Dutch* authorities to treat a *German* national like a *Belgian* national?

The scope of the bilateral tax convention was limited to the natural or legal persons referred to in it, but the Court accepted the *Matteucci* rationale that "there are situations where the benefits under a bilateral convention may be extended to a *resident of a Member State which does not have the status of party to that convention*".¹⁵⁴ However, the present case concerned the question whether a *non-resident* can be compared to another *non-resident*

¹⁵² *Ibid*, para 26 (emphasis added).

¹⁵³ Case C-376/03, *D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2005] ECR I-5821.

¹⁵⁴ *Ibid*, para 55 (emphasis added).

who received special treatment under a double taxation convention. This was a different situation and the Court reasoned as follows:

Similar treatment with regard to wealth tax in the Netherlands of a taxable person, such as Mr D., resident in Germany and a taxable person resident in Belgium, presupposes that those two taxable persons are regarded as being in the same situation. It is to be remembered that, in order to avoid the same income and assets being taxed in both the Netherlands and Belgium, Article 24 of the Belgium-Netherlands Convention allocates powers of taxation between those two Member States and Article 25(3) lays down a rule under which natural persons resident in one of those two States are entitled in the other to the personal allowances which are granted by it to its own residents.

The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands. *A rule such as that laid down in Article 25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance.*¹⁵⁵

The refusal to extend the mutual benefits of the bilateral agreement to Community citizens not resident in either state did, thus, not violate the non-discrimination principle. International cooperation can legitimately bring some Member States *closer to each other without automatically violating the equality principle on which the Community legal order is based.*

However, are there other constitutional limits on inter se cooperation via international agreements between some Member States?¹⁵⁶ Should the Court seize the mechanism of ‘enhanced cooperation,— now constitutionalised in Article 11 EC¹⁵⁷—and force all inter se cooperation onto

¹⁵⁵ *Ibid*, paras 59–62.

¹⁵⁶ D Thym has proposed ‘five commandments’ that would establish the constitutional frame for inter se cooperation by means of international agreements: see Thym, *D Ungleichzeitigkeit und europäisches Verfassungsrecht* (Baden-Baden, Nomos, 2004) 308–18.

¹⁵⁷ Art 11 EC reads: ‘(1) Member States which intend to establish enhanced cooperation between themselves in one of the areas referred to in this Treaty shall address a request to the Commission, which may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so. (2) Authorisation to establish enhanced cooperation as referred to in paragraph 1 shall be granted, in compliance with Articles 43 to 45 of the Treaty on European Union, by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament. When enhanced cooperation relates to an area covered by the procedure referred to in Article 251 of this Treaty, the assent of the European Parliament shall be required. A member of the Council may request that the matter be referred to the European Council. After that matter has been raised before the European Council, the Council may act in accordance with the first subparagraph of this paragraph. (3) The acts and decisions necessary for the implementation of enhanced cooperation activities shall be subject to all the relevant provisions of this Treaty, save as otherwise provided in this Article and in Articles 43 to 45 of the Treaty on European Union.’

Community channels? Only future jurisprudence will tell. In the absence of judicial clarification, the constitutional regime for inter se cooperation between some Member States retains a charm of sweet ambivalence.

B. International Agreements between Member States and Third States

The normative tensions between the autonomous treaty-making powers of the Member States and the integrity of the Community legal order reach a climax in relation to subsequent international agreements concluded with third states. When the EC was founded, it obviously did not replace the Member States in the external relations sphere. On the contrary, the paucity of the treaty-making powers originally granted to the Community would protect a status quo in which the Member States were the protagonists on the international scene. What would happen where a Member State had concluded an agreement with a third state that violated EC law?

There are two dimensions to the normative tension between EC law and this class of international agreements. First, to what extent must Member States 'multilateralise' reciprocal benefits granted to their nationals under international agreements with third states? Will the constitutional principles developed for inter se agreements equally apply to agreements with third states? This dimension concerns the question whether the personal scope of the agreement has to be extended due to the Community principle of non-discrimination.

The second dimension, on the other hand, concerns the hierarchical solution in the event of a substantive conflict. How will the Community legal order treat subsequent international agreements with third states the material content of which violates EC law? Will it extend the supremacy of EC law—developed for unilateral national measures—to international agreements of its Member States? Or, alternatively, will it extend the solution developed under Article 307 EC to avoid international responsibility of the Member States?

1. International Agreements with Third States and the Non-discrimination Principle

Should the non-discrimination principle be extended to international agreements with third states? Will the Community legal order impose the same degree of 'multilateralisation' that we encountered for inter se agreements—even if that may have notable consequences for the relationship between EU Member States and third states? Pure constitutional logic may suggest the following: because the Court *does* allow inter se cooperation between Member States to favour their nationals/residents over other Community citizens, this should be all the more so for cooperation between a Member State and a third state (*argumentum a maiore ad minus*). However, the

life of the law has not always been logical. What has the experience of the Community legal order thus been?

Let us take a closer look at this issue. In *Saint-Gobain*,¹⁵⁸ the German tax authorities refused a French applicant an exemption from German corporation tax for dividends received from the United States and Switzerland. Germany justified its refusal on the ground that the bilateral treaties for the avoidance of double taxation that it had concluded with each of these two third states were restricted to German companies. *Saint-Gobain* argued that this violated the principle of non-discrimination in the form of Articles 52 and 58 EC.

In the absence of Community legislation, the Court argued:

The Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means, *inter alia*, of international agreements.

However, in the exercise of that competence, Member States must not disregard Community law.¹⁵⁹ The non-discrimination principle also applied to double taxation agreements between a Member State and a third state. Consequently, Germany had to extend the personal scope of the bilateral agreements to permanent establishments of non-resident companies. However, the Court found it important to point out that the Community extension of the personal scope of the agreement did not affect the balance and reciprocity of the agreements:

[T]he obligations which Community law imposes on the Federal Republic of Germany do not affect in any way those resulting from its agreements with the United States of America and the Swiss Confederation. The balance and the reciprocity of the treaties concluded by the Federal Republic of Germany with those two countries would not be called into question by a unilateral extension, on the part of the Federal Republic of Germany, of the category of recipients in Germany of the tax advantage provided for by those treaties, in this case corporation tax relief for international groups, since such an extension would not in any way affect the rights of the non-member countries which are parties to the treaties and would not impose any new obligation on them.¹⁶⁰

This solution was confirmed in *Open Skies*.¹⁶¹ Here, Germany was found to have violated Article 52 of the Treaty by concluding a bilateral agreement with the US that allowed the latter to refuse the extension of rights

¹⁵⁸ Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161.

¹⁵⁹ *Ibid.*, para 57.

¹⁶⁰ *Ibid.*, para 59 (emphasis added).

¹⁶¹ Case C-476/98, *Commission v Germany (Open Skies)* [2002] ECR I-9855.

accorded to German companies to Community companies permanently established and resident in Germany.¹⁶² However, this did not tell us whether the non-discrimination principle was equally operative for *non-resident* Community companies. Has the Court extended its approach in *D* to situations where a third state is involved?

The closest the Court has come to answering this question is in the area of social security conventions. Regulation 1408/71,¹⁶³ while expressly allowing for subsequent inter se conventions between the Member States,¹⁶⁴ had remained silent on the normative status of bilateral agreements between Member States and third states.¹⁶⁵ The Court has held that the Regulation was intended to exclude such conventions from its field of application.¹⁶⁶ This 'neutrality'¹⁶⁷ left it to the European Courts to define the Community legal order's stance in relation to this category of agreement.

In *Borowitz*, the Court held that the recognition of social security periods by one Member State pursuant to a bilateral convention with a third state would *not* require other Member States to take account of them.¹⁶⁸

However, the Court's originally negative position has changed recently.¹⁶⁹ Mrs Gottardo, a French national, had worked in Italy, Switzerland and

¹⁶² 'It follows that Community airlines may always be excluded from the benefit of the air transport agreement between the Federal Republic of Germany and the United States of America, while that benefit is assured to German airlines. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the Federal Republic of Germany, accords to its own nationals. Contrary to what the Federal Republic of Germany maintains, the direct source of that discrimination is not the possible conduct of the United States of America but the clause on the ownership and control of airlines, which specifically acknowledges the right of the United States of America to act in that way': *ibid*, paras 153–154.

¹⁶³ Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1971 L 149/2.

¹⁶⁴ Art 8 of the Regulation, *ibid*, entitled 'Conclusion of conventions between Member States', states: '(1) Two or more Member States may, as need arises, conclude conventions with each other based on the principles and in the spirit of this Regulation. (2) Each Member State shall notify, in accordance with Article 96 (1), any convention concluded with another Member State pursuant to paragraph 1.'

¹⁶⁵ The scope of the Regulation was limited by Art 1(k) of the Regulation. It defines the concept of social security convention as 'any bilateral or multilateral instrument which binds or will bind two or more Member States exclusively, and any other multilateral instrument which binds or will bind at least two Member States and one or more other States in the field of social security, for all or part of the branches and schemes set out in Article 4 (1) and (2), together with agreements, of whatever kind, concluded pursuant to the said instruments'.

¹⁶⁶ Case C-23/92, *Grana-Novoa v Landesversicherungsanstalt Hessen* [1993] ECR I-4505, para 24.

¹⁶⁷ Jesús-Gimeno, B 'International and Community Obligations of the Member States in the Field of Social Security Schemes: Which Impact for Migrant Workers?' in Kronenberger, V (ed) *The European Union and the International Legal Order* (The Hague, TMC. Asser, 2001) 297, 311.

¹⁶⁸ Case 21/87, *Borowitz v Bundesversicherungsanstalt für Angestellte* [1988] ECR 3715, para 26.

¹⁶⁹ Case C-55/00, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* [2002] ECR I-413.

France and had applied for an Italian old-age pension pursuant to Italian social security legislation. The Italian social security authorities only took into account the periods of insurance completed in France, in accordance with Article 45 of Regulation 1408/71. However, the aggregation of the Italian and French periods would not enable her to achieve the minimum period of contributions required under Italian legislation for entitlement to an Italian pension.

Interestingly, in 1962 Italy and Switzerland had signed a bilateral social security convention that would allow Italian and Swiss nationals to enjoy equal treatment with regard to the rights and obligations under old-age pensions. Mrs Gottardo would have been entitled to an Italian old-age pension if account were also taken of the periods of insurance completed in Switzerland pursuant to the aggregation principle established in the Italo-Swiss Convention. How would the Court decide this matter? Surprisingly, the Court did find discrimination in place:

[W]hen 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.

It follows from all of the foregoing that, when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, *the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so ...*

*Disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country may, it is true, constitute an objective justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from that convention[.]*¹⁷⁰

Since Italy failed to demonstrate that ‘the obligations which Community law imposes on it would compromise those resulting from the commitments which the Italian Republic has entered into vis-à-vis the Swiss Confederation’, the multilateralisation to workers who were nationals of other Member States was required by Community law.¹⁷¹

¹⁷⁰ *Ibid.*, paras 33–34, 36 (emphasis added).

¹⁷¹ *Ibid.*, para 37.

The ruling was extraordinary in a number of ways. First, if the solution is confirmed outside the field of social security law, it seems to sit uneasily with the Court's more lenient position towards the Member States' treaty-making powers *inter se*. Does it make constitutional sense to curtail the Member States' treaty-making powers with third states more severely than their contractual powers *inter se*? Is this counter-intuitive contrast perhaps caused by the chronology of judicial events? Has *D* overruled *Gottardo*? Secondly, what did the Court mean when admitting that '[d]isturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country may ... constitute an objective justification'?¹⁷² Did this phrase acknowledge a specific 'mandatory requirement' for violations of the non-discrimination principle by international agreement? And if the latter was accepted, would this not 'relativise' the supremacy of Community law?¹⁷³ Future jurisprudence will have to attend to these ambivalences.

2. *Material Conflicts With EC Law—A Flight into Dual Federalism?*

International law still suffers from its nineteenth century obsession with sovereign subjects.¹⁷⁴ 'The law of treaties is thus geared to equal subjects; it follows that these are also closed or "impermeable" subjects, like states, since their—divergent—internal features cannot play a role.'¹⁷⁵ In a federal state, there are potentially two levels that can engage in international relations with third states. In legal orders that accept the supremacy of federal law, the external relations of the non-federal entity will, by definition, become problematic under international law.

Imagine the following scenario: a sub-federal state within a federation enjoys international personality and is endowed with certain treaty-making powers under the federal constitution. Having concluded a valid international treaty with a third state for a matter coming within its power, the federal state subsequently decides to adopt a federal law that conflicts with these treaty obligations. Being constitutionally prevented from implementing its treaty obligations, the sub-federal entity cannot plead the legislative development to justify a breach of contract under international law and will, therefore, incur international liability. To avoid this unenviable normative dilemma, some federal states reserve foreign affairs exclusively to the federal level.¹⁷⁶ Others have permitted a degree of external relations

¹⁷² *Ibid*, para 36.

¹⁷³ The question is: could an international agreement with a third state be justified under the free movement rules, while the equivalent unilateral national measure could not?

¹⁷⁴ Koskenniemi, M *From Apology to Utopia* (Cambridge, CUP, 2005) esp. ch 4.

¹⁷⁵ Brölmann, C 'The Legal Nature of International Organisations and the Law of Treaties' (1999) 4 *Austrian Review of International & European Law* 85, 111.

¹⁷⁶ This has traditionally been the position in the US: see Art I, sect 10, cl 1 US Constitution: 'No State shall enter into any Treaty, Alliance, or Confederation'.

federalism, but have made the conclusion of international agreements by a sub-federal state dependent on the consent of the federal level.¹⁷⁷

How has EC federalism addressed this problem? Which of these techniques did the Community legal order develop? The Community legal order has employed three main techniques.¹⁷⁸ The first technique is based on ex ante control by means of an authorisation procedure. It could be seen in Article 75 ECSC. The provision recognised the treaty-making powers of the Member States in the area of the Common Commercial Policy, but required them to inform the Community of proposed commercial agreements. Where a proposed agreement contained clauses which would conflict with or 'hinder the future implementation of this Treaty', the Community would require the necessary legislative corrections from the state concerned.¹⁷⁹ Similarly, the external relations chapter in the Euratom Treaty provided:

Member States shall communicate to the Commission draft agreements or contracts with a third State, an international organisation or a national of a third State to the extent that such agreements or contracts concern matters within the purview of this Treaty. If a draft agreement or contract contains clauses which impede the application of this Treaty, the Commission shall, within one month of receipt of such communication, make its comments known to the State concerned. *The State shall not conclude the proposed agreement or contract until it has satisfied the objections of the Commission or complied with a ruling by the Court of Justice, adjudicating urgently upon an application from the State, on the compatibility of the proposed clauses with the provisions of this Treaty.* An application may be made to the Court of Justice at any time after the State has received the comments of the Commission.¹⁸⁰

The EC Treaty contained no provisions that would require Member States to submit their draft agreements for Community consent. It has been claimed that the insertion of this ex ante technique into the EC Treaty 'would have

¹⁷⁷ This has been the solution adopted in Germany. Dealing with foreign relations, Art 32(3) German Constitution states: 'Insofar as the Länder have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states'.

¹⁷⁸ The technique of 'Community clauses' will not be discussed here. These clauses were developed in the context of the Common Commercial Policy and would approximately read as follows: '[l]orsque les obligations découlant du traité instituant la Communauté économique européenne et relatives à l'instauration progressive d'une politique commerciale commune de rendront nécessaire, des négociations seront ouvertes dans le plus bref délai possible afin d'apporter au présent accord toutes modifications utiles': Council Decision of 20 July 1060, quoted in Pescatore, P 'Les Relations extérieures des Communautés européennes' (1961) 103 *Recueil des Cours d'Académie de Droit International de La Haye* 7,168. The Community could only require its Member States to negotiate the inclusion of such a clause. Where the third state refused to add such a clause into the international agreement, this ex ante mechanism would fail.

¹⁷⁹ Art 75(2) ECSC.

¹⁸⁰ Article 103 Euratom (emphasis added).

been politically unviable if it intended to give the Commission a right of veto or the right to request a binding ruling from the Court'.¹⁸¹ However, in certain fields, a version of this ex ante mechanism has been embedded in EC legislation.¹⁸² As a general constitutional mechanism, however, this technique would still seem to be politically 'off limits'—even if the Council was given the veto power. In addition, the analogous application of Article 300(6) EC to international agreements to be concluded by the Member States has never been accepted.¹⁸³

The second ex ante technique borrows from the philosophy of dual federalism. Normative conflicts are avoided by means of a strategy of exclusive powers. The Member States will lose their very competence to conclude those international agreements that could potentially conflict with present or future Community legislation.¹⁸⁴ Traditionally, the European Court has extensively cultivated this technique in the external relations sphere of the Community through the concept of a priori and subsequently exclusive treaty-making powers.¹⁸⁵ This 'flight into dual federalism' avoided the complex questions of supremacy within the external relations sphere.

¹⁸¹ Gaja, G, Hay, P and Rotunda, RD 'Instruments for Legal Integration in the European Community—A Review' in Cappelletti, M, Seccombe, M and Weiler, J (eds) *Integration through Law: Europe and the American Federal Experience Vol.1 Methods, Tools and Institutions* (Berlin, de Gruyter, 1986) 113, 148.

¹⁸² Eg Regulation 847/2007 on the Negotiation and Implementation of Air Service Agreements between Member States and Third Countries, OJ 2004 L 157/7. Art 1 lays down a notification requirement for Member States' air service agreements, while Art 4 deals with the conclusion of Member States' agreements. The provision reads: '(1) Upon signature of an agreement, the Member State concerned shall notify the Commission of the outcome of the negotiations together with any relevant documentation. (2) Where the negotiations have resulted in an agreement which incorporates the relevant standard clauses referred to in Article 1(1), the Member State shall be authorised to conclude the agreement. (3) Where the negotiations have resulted in an agreement which does not incorporate the relevant standard clauses referred to in Article 1(1), the Member State shall be authorised, in accordance with the procedure referred to in Article 7(2), to conclude the agreement, provided that this does not harm the object and purpose of the Community common transport policy. The Member State may provisionally apply the agreement pending the outcome of this procedure.'

¹⁸³ However, this solution has been suggested by CWA Timmermans. See his intervention in Bleckmann, A and Ress, G (eds) *Souveränitätsverständnis in den Europäischen Gemeinschaften* (Baden-Baden, Nomos, 1980) 210: '[i]ch glaube, das ist eine richtige Interpretation, die es ermöglicht, [Artikel 300 (6)] für eine Lösung solcher Kompetenzkonflikte heranzuziehen'.

¹⁸⁴ The perhaps most explicit exponent of this technique has been Vedder, CW *Die auswärtige Gewalt des Europa der Neun* (Göttingen, Schwartz & Co, 1980) 123 (emphasis added): '[d]a jeder Vertragsschluß durch die Mitgliedstaaten auf Gebieten innergemeinschaftlicher Rechtsetzungsbefugnisse der EWG den Bestand des Gemeinschaftsrechts gefährden bzw. dessen weitere Entwicklung behindern würde, führt eine konsequente Anwendung des Art. 5 Abs. 2 EWGV dazu, daß Mitgliedstaaten verpflichtet sind, solche Verträge nicht mehr zu schließen.' To fill the gap created by the total loss of all treaty-making powers of the Member States for matters within the legislative competence of the Community, the Community's implied external powers should be correspondingly extended: *ibid.*, 125.

¹⁸⁵ Schütze, R *From Dual to Cooperative Federalism: The Changing Structure of the Legislative Function in the European Union* (Florence, EUI Thesis, 2005) chs 5 and 6.

It elegantly cut the Gordian knot of the relationship between EC law and international agreements of the Member States: a conflict between Community legislation and international agreements of the Member States would simply never arise. Exclusivity thereby promised to avoid another complex issue: the question of Member State responsibility for a breach of its treaty with a third country that had come into conflict with subsequent Community legislation. Gratuitously, the philosophy of dual federalism maintained—at least symbolically—the myth of the ‘sovereign’ nature of either international person within their respective sphere of competence.

Finally, the Court has also developed the supremacy doctrine as a third technique to control international agreements of Member States with third states. Under this *ex post* mechanism, Member States remain competent to conclude international agreements. However, international agreements concluded by the Member States will be treated—*within the Community legal order*—like unilateral acts of the Member States with the status of national legislation. This *Community* vision does not automatically reject a monistic relationship between Community and international law. However, in order to protect the integrity of the Community legal order, a distinction is drawn between Community agreements and Member State agreements. The former enjoy a hierarchical rank above Community legislation,¹⁸⁶ while the latter would be hierarchically subordinate to Community legislation. This *ex post* control of international agreements could cause intricate legal problems. What would happen to the international responsibility of Member States, where the supremacy of Community law prevented them from implementing their international obligations under national law? After the decline of the Luxembourg compromise—which had allowed a *political* solution to this normative problem¹⁸⁷—a *constitutional* solution was required.

Which technique has been predominant? In the last decade, the Community legal order has moved towards a more cooperative federalism in the external relations sphere too.¹⁸⁸ The Court has, consequently, partly shifted its attention from the second to the third technique. In developing the supremacy of EC law over international agreements concluded by the Member States, the Community had two polarised options: it could

¹⁸⁶ This hierarchical position in between primary and secondary Community law follows from the fact that the European Court uses (directly effective) international agreements as a standard of review for the legality of Community legislation. In Case C-61/94, *Commission of the European Communities v Federal Republic of Germany* [1996] ECR I-3989, para 52, the Court spoke expressly of the ‘primacy of international agreements concluded by the Community over provisions of secondary Community legislation’.

¹⁸⁷ ‘[A] Member State bound by an agreement with a third State will reasonably refrain from voting in favour of a Council act which may lead to an infringement of any obligation under the agreement and will also insist on a vote being taken only unanimously’: Gaja, G, Hay, P and Rotunda, RD, above n 181, 147.

¹⁸⁸ Schütze, R, above n 185

either impose the supremacy of Community law or it could 'suspend' it. If the latter approach were to be followed, the Court would have to apply Article 307 EC *analogously*, for the wording of the provision precluded its direct application to subsequent international agreements of the Member States.

How, then, did the Community legal order deal with these normative tensions? In *Kramer*,¹⁸⁹ the Dutch measure at issue had been adopted in the performance of the international commitments of the Netherlands within the framework of the North-East Atlantic Fisheries Convention. The international treaty had been signed on 24 January 1959, ie *after* the coming into force of the EC Treaty. The Convention bound all Member States, except Italy and Luxembourg, and seven third states. How would the Court treat a national measure that implemented international obligations assumed after 1958? Finding that the Member States (still) had the power to assume commitments within the framework of the North-East Atlantic Fisheries Convention, the Court attested them 'the right to ensure the application of these commitments within the area of their jurisdiction'.¹⁹⁰ Did this mean that they were protected under Article 307 EC, applied analogously? No. Referring to the duties stemming from Article 10 EC, the Member States were 'not to enter into any commitment within the framework of these conventions which could hinder the Community in carrying out the tasks entrusted to it'.¹⁹¹ From there, the Court proceeded to a normal compatibility analysis under EC law.

The Court also reviewed the compatibility of a post-1958 international treaty with Community legislation in *Arbelaiz-Emazabel*.¹⁹² France had concluded a fisheries agreement with Spain in 1967 as a *voisinage* agreement under the London Fisheries Convention of 1964.¹⁹³ Under the terms of the agreement, Spanish fishermen 'enjoyed a permanent right to fish' for all species in the area between 6 and 12 miles off the Atlantic coast of France. In a preliminary ruling, a French court had to consider the impact of interim Community legislation for Spanish fishermen—at that time still third country nationals—in particular, a Community licensing system.¹⁹⁴ Criminal charges had been brought against the master of a Spanish vessel that had fished without the required licence.

¹⁸⁹ Joined Cases 3, 4 and 6/76, *Cornelis Kramer and others* [1976] ECR 1279.

¹⁹⁰ *Ibid*, para 39.

¹⁹¹ *Ibid*, paras 44–45.

¹⁹² Case 181/80, *Procureur général près la Cour d'Appel de Pau and others v Arbelaiz-Emazabel* [1981] ECR 2961.

¹⁹³ General Agreement on Fishing concluded between France and Spain by exchange of Notes on 20 Mar 1967 [1967] JORF 7807.

¹⁹⁴ See, in particular: Regulation 2160/77 laying down interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain, OJ 1997 L 250/17.

In the first two instances, the French judiciary had acquitted the accused on the ground that French fishing relations with Spain were more lenient than the Community regime and did not require any licence. The *Cour d'Appel* had found that the Community legislation contravened the Franco-Spanish Agreement on the basis that, contrary to the provisions of the London Fisheries Convention, Spain had not been notified of the Community rules. The case was referred to the European Court of Justice, which was asked to determine whether France could insist on complying with its international obligations as the Community had only *subsequently* developed a legislative system that happened to conflict with France's international obligations.

The Court referred to its *Kramer* ruling and held that, at the time of conclusion, in the absence of any Community regulation on fishing, France had been entitled to sign both the London Fisheries Convention and the bilateral agreement with Spain. The Court then moved to Article 10 of the London Fisheries Convention, permitting the establishment of a specific *inter se* regime for Community Member States, from which it deduced that the parties to the Convention:

[M]ust have known that as from a particular time the power to adopt conservation measures under Article 5 of the Convention would, as far as the Member States of the Community are concerned, be exercised by the Community institutions.¹⁹⁵

By means of a detour, the Court then described the negotiation history of a draft Community agreement with Spain which was to be signed in 1980 (and would finally enter into force in 1981), as well as the laborious invention of an interim Community regime in which Spain had been actively involved. From that 'legislative context', the Court concluded that:

The interim regime which the Community set up under its own rules falls within the framework of the relations established between the Community and Spain in order to resolve the problems inherent in conservation measures and the extension of fishery limits and in order to ensure reciprocal access by fishermen to the waters subject to such measures. Those relations, which were confirmed by the agreement on fisheries concluded by the Community and Spain ... replaced the prior international obligations existing between certain Member States, such as France, and Spain. *Accordingly, Spanish fishermen may not rely on prior international agreements between France and Spain in order to prevent the application of the interim regulation adopted by the Community in the event of any incompatibility between the two categories of provisions.*¹⁹⁶

This was not too clear a constitutional message. However, it seemed that the French bilateral agreement could not affect the Community legislation.

¹⁹⁵ *Arbelaz-Emazabel*, above n 192, para 13.

¹⁹⁶ *Ibid.*, paras 29–31 (emphasis added).

The case has consequently been seen as a manifestation of the supremacy of Community legislation over a Member State's international agreements concluded with third states after 1958.¹⁹⁷ This was confirmed in *Commission v Belgium & Luxembourg*,¹⁹⁸ where a normative conflict arose between an agreement concluded by the Belgo-Luxembourg Economic Union and Malaysia on maritime transport and the Community Regulation on services in maritime transport.¹⁹⁹ The Community act had entered into force on 1 January 1987, the international agreement on 29 June 1987. The Court simply found that in concluding the agreement, the two Member States had violated Community legislation.²⁰⁰

The supremacy of Community law vis-à-vis an international treaty concluded by a state after it has become a member of the EC has been described as 'not entirely satisfactory':

The dissatisfaction arises out of what is a general—and still not satisfactorily resolved—problem of the relationship between Community law and treaties concluded by individual member States *after* they have become members of the EC (so that [Article 307] is not relevant) but *before* the Community has developed a comprehensive policy and obtained (exclusive) treaty-making powers in relation to the subject matter of such a policy ...

While the European Court is entitled to ignore such treaties as not being part of the Community legal order, things are not so straightforward for member States. A member State may well be faced with a conflict between its E . . . C obligations and its obligations under the treaty with a third State ... Here Community law at present does little to help a member State avoid such a conflict. Often the member State concerned will not really be to blame for such a conflict arising. *Because of the evolutionary nature of the Community, the state of Community law in the future is not easy to predict. A member State may conclude a treaty relating to a particular subject matter years before the Community develops a comprehensive policy in the same subject area and before the development of such a policy could be foreseen.*²⁰¹

In the light of the danger of international responsibility of Member States towards third countries, various early commentators in the literature had

¹⁹⁷ Churchill, RR and Foster, NG 'European Community Law and Prior Treaty Obligations of Member States: The Spanish Fishermen's Cases' (1987) 36 *International & Comparative Law Quarterly* 504, 519.

¹⁹⁸ Joined Cases C-176 and 177/97, *Commission v Kingdom of Belgium and Grand Duchy of Luxembourg* [1998] ECR I-3557.

¹⁹⁹ Regulation 4055/86 of 22 Dec 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ 1986 L 378/1.

²⁰⁰ Joined Cases C-176 and 177/97, above n 198, para 37.

²⁰¹ Churchill, RR and Foster, NG, above n 197, 519 and 523 (emphasis added).

therefore championed the *analogous* extension of Article 307 EC to this type of situation. '[T]here would be every reason to apply [Article 307] of the E. ... C. Treaty by extension or analogy, e.g. in the case of conflicts between an agreement entered into by a member State and a non-member State after the entry into force of the E... C. Treaty on the one hand, and rules of "secondary law", such as a "Regulation", enacted subsequently to such an agreement, on the other (provided always that the agreement is not *per se* incompatible with the Treaty).'²⁰² The supremacy of Community legislation should be suspended to allow a Member State to fulfil its international obligations agreed *after 1958*.

The main constitutional thrust behind the argument is that it protects the effective exercise of the treaty-making powers of the Member States—'otherwise the Member States could not conclude any international treaty without running the risk of a subsequent conflict with Community law'.²⁰³ This has been criticised: there would simply be no reason why the 'normal' constitutional principles characterising the relationship between Community law and unilateral national acts should not also apply to this class of international agreements.²⁰⁴ A middle position has proposed limiting the analogous application of Article 307 EC to situations where the conflict between post-1958 international treaties of Member States and subsequently adopted Community legislation was 'objectively unforeseeable' and could therefore not be expected.²⁰⁵

None of these proposals, as we saw above, has yet been mirrored in the jurisprudence of the European Court of Justice. The Court has unconditionally upheld the supremacy of the Community legal order against international agreements concluded by the Member States after 1958. In the light of the potential international responsibility of the Member States, is this a fair constitutional solution? Should it make a difference whether a rule is adopted by means of a unilateral national measure or by means of

²⁰² Van Panhuys, JHF 'Conflicts between the Law of the European Communities and Other Rules of International Law' (1965–6) 3 *CML Rev* 420, 434. The same solution has been proposed by P Daillier advocating '*comme date critique pour "l'antériorité" de l'établissement de la politique commune des pêches, soit 1979. Deux arguments peuvent être invoqués au bénéfice de la deuxième solution: le principe de bonne foi exige que les tiers aient été alertés par une affirmation concrète de la compétence communautaire; et la jurisprudence Kramer, 1976, admet la compétence des Etats membres pour négocier des accords de pêche avec les Etats tiers au moins jusqu'à cette date, et même jusqu'en 1976*': Daillier, P 'Le régime de la pêche maritime des ressortissants espagnols sous juridiction des états membres de la C.E.E. (1977–1980)' (1982) 256 *Revue du Marché commun* 187, 190.

²⁰³ Pache, E and Bielitz, J 'Das Verhältnis der EG zu den völkerrechtlichen Verträgen ihrer Mitgliedstaaten' (2006) 41 *Europarecht* 316, 327 (translation by the author).

²⁰⁴ Bülow, E 'Die Anwendung des Gemeinschaftsrechts im Verhältnis zu Drittländern' in Clauder, A (ed) *Einführung in die Rechtsfragen der europäischen Integration* (Bonn, Europa Union Verlag, 1972), 52, 54.

²⁰⁵ Petersmann, E-U 'Artikel 234' in Von der Groeben, H, Thiesing, J and Ehlermann, C-D (eds) *Kommentar zum EWG-Vertrag* (Baden-Baden, Normos, 1991) 5725, 5731 (rn 6).

an international agreement with a third state? Instead of 'suspending' the supremacy of Community law in the latter scenario, better solutions need to be found to solve the Member States' normative dilemma of choosing between the Scylla of liability under the EC Treaty and the Charybdis of international responsibility for breach of contract. Should the EC legal order, therefore, be given an *ex ante* authorisation mechanism for Member States' international agreements? Should the Community share financial responsibility for breach of contract with the Member State concerned?²⁰⁶ Perhaps, faced with the alternative of exclusive treaty-making powers being transferred to the Community, the Member States will—more or less happily—accept the risk of international liability as a price worth paying for their presence on the international scene? These are difficult constitutional questions. They await future constitutional answers.

For the time being, one *legislative* answer can be seen in the inclusion of 'express savings' clauses in the relevant Community legislation. A good illustration of this technique is Article 28 of Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II).²⁰⁷ The provision reads:

Relationship with existing International Conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

This clause constitutes a legislative extension of Article 307 EC: the Community legislation will not affect international agreements of the Member States with third States concluded *after* 1958 but *before* the time when the Regulation was adopted. However, the protective effect of this provision is confined to conflicts arising between these international conventions and that Regulation. This legislative technique will, therefore, not provide a constitutional shield against potential conflicts with other Community legislation.

²⁰⁶ This solution has been tentatively suggested by P Daillier in the form of the following question: '*[c]omment concilier les obligations internationales des Etats membres et leurs obligations en vertu du droit communautaire? Dans la mesure où l'incompatibilité des textes successifs résulte d'initiatives tant communautaires que nationales, faut-il envisager un partage de responsabilités internationales entre le CEE et les Etats membres, et si oui, sur la base de quels critères?*': Daillier, P, above n 202, 191.

²⁰⁷ OJ 2007 L 199/40.

IV. CONCLUSIONS: EC LAW AND INTERNATIONAL AGREEMENTS OF THE MEMBER STATES—A MATURED RELATIONSHIP

International law, wedded to the idea of the sovereign equality of its subjects, has inherent difficulties in dealing with divided power systems.²⁰⁸ The relationship between international law and the Community legal order, therefore, seemed destined to be complex and ambiguous from the start.

The EC was established on the basis of an international treaty that, nonetheless, had created 'its own legal system'.²⁰⁹ Casting itself as 'a new legal order of international law',²¹⁰ the EC still had to define its relationship to the 'old' legal order of international law. The need to show colours was particularly urgent in relation to the treaty-making powers of its Member States, as the *internal* division of competences between the Community and the Member States did not correspond to the international law view that accorded *external* sovereignty to the Member States. Could the Member States amend or modify the EC legal order by means of inter se agreements? How would the Community legal order deal with international treaties concluded by its Member States with third states before or after its establishment? Has the originally ambivalent relationship between EC law and the treaty-making powers of the Member States been cured?

This chapter has suggested the following conclusions.

First, while the Community legal order had, early on, successfully differentiated itself from 'ordinary' international law by imposing its supremacy over (unilateral) national law, it took more time and intellectual effort to subject the international treaty-making powers of the Member States to a *Community* regime. This required the Community legal order to take further distance from the old legal order of international law.

Secondly, the lowest degree of normative ambivalence between EC law and international treaties of the Member States existed in relation to agreements concluded before 1958 (or accession). Here, the *lex posterior* rule would apply, with the rights of third states being protected under Article 307 EC. This solution was uncontroversial and reflected the 'ordinary' international law solution. However, even here, there was and remains a degree of ambivalence in relation to the doctrine of Community succession. The *when*, *where* and *how* aspects of this doctrine have remained fuzzy.

²⁰⁸ This had long been obvious from its 'ambivalent' relationship to the external relations of federal states: see Wildhaber, L. *Treaty-making Power and Constitution: An International and Comparative Study* (Basel, Lichtenhahn, 1971), Pt II. For an analysis of the constitutional problems within federal states see also Weiler, JHH 'The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle' in Weiler, JHH (ed) *The Constitution of Europe* (Cambridge, CUP, 1999) ch 4.

²⁰⁹ Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585, 593.

²¹⁰ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, 12.

Thirdly, major ambivalences existed in the relationship between EC law and subsequent inter se agreements between *all* Member States. For matters falling within the scope of the Treaty, should the Member States be allowed to organise their activities outside the Community channels, thereby precluding the involvement of the supranational institutions of the Community? For provisions that would affect the EC Treaty, the Community legal order has defended its integrity against a flight into international law by forcing *erga omnes* Member State cooperation into 'Community channels'. The impossibility of informal treaty amendments was confirmed in *Defrenne*. Would the exclusivity of the Community channels also hold true for inter se agreements that could affect Community *legislation*? While *ERTA* had remained ambivalent on the issue, recent jurisprudence points towards a less constitutionally aggressive solution: where the Community does not enjoy an exclusive competence 'the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it'.²¹¹ *Erga omnes* cooperation will, thus, only be subjected to the twin doctrines of supremacy and pre-emption.

Fourthly, Community Conventions are inter se agreements. While they may share some of the attributes of Community law, they are neither primary nor secondary Community law. The ambivalences surrounding Article 293 EC will largely be a matter of the past, since the Community legal order has shown a tendency to 'communitarise' these Conventions.

Fifthly, inter se agreements between some Member States cannot modify the obligations of these Member States under the EC Treaty. The Court does not accept the international law doctrine of the relative validity of international agreements: '*inter-se* agreements must yield to EC law in the same way as purely national laws must, so that diverging *inter-se* regimes, even where they do not directly affect the rights of other Member States, are in breach of EC law and should be disapplied'.²¹² However, mutual advantages agreed under a bilateral inter se agreement will not automatically be 'multilateralised', as Community law will not inject a most-favoured-nation clause into every inter se agreement.

Sixthly, the most complex normative problems for the Community legal order lie in its relationship with international treaties between Member States and third states after the creation of the EC legal order. Here, the problem is outside the constitutional circle established by Community membership. While the ECSC and Euratom had subjected the exercise of Member States' treaty-making powers to an ex ante control mechanism, nothing of that sort existed for the EC. In order to avoid the normative conflicts between EC law and international agreements, the European Court

²¹¹ Joined Cases C-181 and 248/91, *Parliament v Council (Emergency Aid)* [1993] ECR I-3685, para 16.

²¹² De Witte, B, above n 140, 31, 47.

has traditionally pushed the boundaries of *ERTA* exclusivity. However, this strategy of exclusive powers has limits under a constitutional philosophy of cooperative federalism. The Community legal order has, therefore, extended its supremacy doctrine to international agreements between the Member States and third states. This technique has its own constitutional disadvantages, especially as regards the question of international responsibility for breach of contract of the Member States.

Nonetheless, the overall relationship between EC law and the international agreements of the Member States has much matured in the last thirty years. The second 'infant disease' of the Community legal order has largely been cured.²¹³ Yet, the relationship between EC law and the international agreements of the Member States has stayed a much-neglected problem. This article has tried to shed some light on the constitutional relationships in that area of EC federalism. Future academic analysis and jurisprudence will further reduce the shadows in this obscure corner of the EC legal order.

²¹³ This is equally true for the first infant disease: the doctrine of direct effect. For a recent overview of that doctrine across the legal instruments of the Community see Schütze, R. 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 *Yearbook of European Law* 91.