

# Parallel External Powers in the European Community: From ‘Cubist’ Perspectives Towards ‘Naturalist’ Constitutional Principles?\*

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## I. Introduction

Today, international treaties constitute the principal instrument of foreign policy and international relations. In federal states, the field of ‘external relations’ will typically be within the exclusive or concurrent competence of the federation.<sup>1</sup> The capacity of international organizations to engage in treaty-making has been recognized as long ago as 1949 for the United Nations and seems now universally accepted.<sup>2</sup> Though the 1957 Treaty of Rome did acknowledge the legal personality of the new international organization,<sup>3</sup> the

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<sup>1</sup> In the American Constitution the exclusive nature of the external relations power of the federation is partly rooted in Article I §10 that states that ‘[n]o State shall enter into any Treaty, Alliance or Confederation’. According to L. Tribe, this provision is just the positive manifestation of ‘a general constitutional principle that, whatever the division of foreign policy responsibility *within* the national government, *all* such responsibility is ultimately reposed at the national level rather than dispersed among the states and localities’ (L. Tribe, *American Constitutional Law*: Vol. 1 (3rd edn., Foundation Press, 2000) at 656 (emphasis in original)). The federal constitution of Germany—under the regime established under Articles 32 and 73 (1) of the *Grundgesetz*—places the external powers at the disposal of the federal and state level. An interesting analysis of the federal state experience with international treaties can be found in J.H.H. Weiler, ‘The External Relations of Non-Unitary Actors: Mixity and the Federal Principle’, in *The Constitution of Europe* (CUP, 1999) 130 at 136–68 and R. Dehousse, *Fédéralisme et relations internationales: Use réflexion comparative* (Bruylant, 1991).

<sup>2</sup> Cf. *Reparation for Injuries suffered in the Service of the UN*, Advisory Opinion [1949] ICJ, 174. According to Article 6 of the 1986 Vienna Convention on the Law of Treaties, the treaty-making power of an international organization is governed by its foundational document. ‘The treaty-making capacity of international organizations is not the same for each organization, but is related to their competences, an organization may conclude agreements in those areas in which it is competent to act. In this respect, international organizations differ fundamentally from states.’ (H.G. Schermers and N.M. Blokker, *International Institutional Law* (3rd rev. edn., Martinus Nijhoff Publishers, 1997) at 1097)

<sup>3</sup> Art. 281 EC: ‘The Community shall have legal personality.’

Community's capacity to establish contractual links with third countries did not, however, by itself imply a general external competence for all matters falling within the scope of the Treaty. The *Herren der Verträge* had subjected the European Community's external ambitions to a strict enumeration principle: its external powers had to be specifically mentioned in its foundational document.

Prior to the Single European Act,<sup>4</sup> expressly enumerated external competences could be found in two instances only: the Treaty endowed the Community to define and pursue a common commercial policy *vis-à-vis* foreign countries; and, for this purpose, had laid down a number of provisions in Articles 131 to 134 EC.<sup>5</sup> Secondly, Article 310 EC authorized the Community to conclude 'association' agreements with third countries or international organizations.<sup>6</sup> These two mosaic stones represented the only dots on a white canvas. The restrictive allocation of external powers to the Community protected a status quo in which the Member States were to remain the protagonists on the international legal scene.

Yet, since the end of the foundational phase, the European Commission and the European Court have led a remarkable campaign to free the Community from the shackles imposed by this strict approach to enumeration. Finding the asymmetry between the richness of the Community's internal powers at

<sup>4</sup> Since the Single European Act, the EC Treaty has incorporated ever more legal bases that expressly grant external powers. See in particular Art. 111 (3) (agreements concerning monetary and foreign exchange regime matters), Art. 170 (co-operation in Community research with third countries or international organizations), Art. 174 (4) (co-operation with third countries and international organizations in environmental matters), Art. 181 (development co-operation agreements). The Treaty now also contains a variety of legal bases that encourage the Community 'to foster co-operation with third countries and the competent international organisations', so for example in: Art. 149(3), 150(3) (education, vocational training, and youth), Art. 151(3) (culture), Art. 152(3) (public health), and Art. 155 (3) (trans-European networks) of the Treaty.

<sup>5</sup> The original Art. 113 EEC read:

(1) After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies. (2) The Commission shall submit proposals to the Council for implementing the common commercial policy. (3) Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary 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. (4) In exercising the powers conferred upon it by the Article, the Council shall act by a qualified majority.

The Common Commercial Policy provisions are supported by Art. 26 EC dealing with the regulation of the common customs tariff—constituting 'a major commercial policy instrument of the Community'. (E. Stein, 'External Relations of the European Community: Structure and Process', in *Collected Courses of the Academy of European Law* (Nijhoff, 1990) Vol. I-1, 115 at 133).

<sup>6</sup> The original Art. 238 EEC read: 'The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures. These agreements shall be concluded by the Council, acting unanimously after consulting the Assembly. Where such agreements call for amendments to this Treaty, these amendments shall first be adopted with the procedure laid down in Article 236.'

odds with the scarcity of its treaty-making powers, the Court gave birth to a doctrine of parallel external powers to counteract the erosive potential of diverse international obligations for the unity of the common market. The danger of legal interferences from the external sphere was addressed in the *first* legal action between the Commission and the Council—the *ERTA* case.<sup>7</sup>

The European Court's ruling in *ERTA* still represents good law today (even if the readings given to the decision evolved in the course of time!). The ruling constitutes the first historic viewpoint to be assumed to understand the judicial and academic structuration of the external constitutional regime.<sup>8</sup> *ERTA* introduced one of the fundamental analytical distinctions for this area of Community law—the distinction between the existence and the nature of parallel powers. Unfortunately, in many rulings even today the Court only deals with one or the other (or merges the two) layers into one—a reality that has been the source of much confusion in the past. One might wish the Court to pay more heed to the existentialist insight that '*l'existence précède l'essence*'.

Absent philosophical rigour and due to various ambivalences in the early jurisprudence, the principles governing the division of powers between the Community and the national level in the external sphere remained fuzzy: 'The doctrine of implied powers developed in the jurisprudence of the Court ensured that the Community could enter into agreements in other areas within its internal competence: but the exact scope of the Community's implied powers, and the nature of the competence which arose from the operation of the

<sup>7</sup> *Commission v. Council (ERTA)*, Case 22/70, [1971] ECR 263.

<sup>8</sup> The academic literature on the subject-matter of external powers is as rich as it is diverse. The following articles and monographs will be referred to in particular in this chapter: P. Pescatore, 'External Relations in the Case-Law of the Court of Justice of the European Communities', [1979] 16 CML Rev., 615–45; M. Hardy, 'Opinion 1/76 of the Court of Justice: The Rhine Case and the Treaty-Making Powers of the Community', [1977] CML Rev., 561–87; M. Cremona, 'The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community', [1982] 2 OJLS 393–428; D. O'Keefe and H.G. Schermers (eds.), *Mixed Agreements* (Kluwer, 1983); K. Lenaerts, 'Les répercussion des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de "preemption"', in P. Demaret (ed.), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (Collège d'Europe No. 45, 1986) 39–62; E. Stein and L. Henkin, 'Towards a European Polity? The European Foreign Affairs System from the Perspective of the United States Constitution', in M. Cappelletti, M. Seccombe and J. Weiler, *Integration through Law*, Vol. I-3 (de Gruyter, 1986) 3–82; E. Stein, 'External Relations of the European Community: Structure and Process', in *Collected Courses of the Academy of European Law* (Nijhoff, 1990) Vol. I-1 115–88; N.A. Neuwahl, 'Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements', [1991] 28 CML Rev., 717–40; T. Tridimas and P. Eeckhout, 'The External Competence of the Community and the Case-Law of the Court of Justice: Principles versus Pragmatism', [1994] 14 YEL 143–77; I. Macleod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities* (Clarendon Press, 1996); D. McGoldrick, *International Relations Law of the European Union* (Longman, 1997); M. Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', in P. Craig and G. de Búrca, *The Evolution of EU Law* (OUP, 1999) 137–75; J.H.H. Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle', in J.H.H. Weiler, *The Constitution of Europe* (CUP, 1999) 130–87; A. Dashwood, 'The Attribution of External Relations Competence', in A. Dashwood and C. Hillion (eds.), *The General Law of E.C. External Relations* (Sweet & Maxwell, 2000) 115–38; A. Dashwood and J. Heliskoski, 'The Classic Authorities Revisited', in *idem* at 3–19; D. O'Keefe, 'Exclusive, Concurrent and Shared Competence', in *idem* at 179–99; A. Rosas, 'The European Union and Mixed Agreements', in *idem* at 200–20; P. Eeckhout, *External Relations of the European Union* (OUP, 2004).

principles developed by the Court were unclear and controversial.<sup>9</sup> One indeed needed a ‘cubist-like perspective’ to understand ‘the internal and external scaffolding of the complex processes that is the Community’.<sup>10</sup>

The very invention of ‘parallel powers’ and their respective relationships with the constitutional principles developed in the Community’s internal sphere have added an extra layer of complexity and abstraction—if not fictitiousness—to this corner of Community law. To expect a naturalistic painting—let alone a photograph—of the constitutional regime governing the external sphere of the Community is to hope for too much: even the recent jurisprudence of the European Court has not entirely succeeded in creating a unified single perspective from which to conceptualize the Community’s external powers. A multiplicity of historical viewpoints—along the jurisprudential lines leading from *ERTA* to the *Open Skies* ruling<sup>11</sup>—will have to be revisited to understand the various ‘building blocks’ inserted into the cubist picture of external relations, before one can attempt to identify some ‘naturalistic’ regions on the current legal canvass.

The following chapter will approach this task in two steps. In section II, we shall look at the invention of parallel external powers in the Community legal order and discuss three theories suggested to conceptualize them. After having explored the conditions for their coming into existence, section III will analyse the enigmatic constitutional nature of those parallel powers. While the European Court has chosen the language of exclusive parallel competences, we shall ponder whether the doctrine of pre-emption would not provide a better alternative to constitutionally justify the exclusion of Member States from the negotiation table.

## II. The Existence of Implied External Powers: the Doctrine(s) of Parallelism

The doctrine of parallelism has been defined in the following terms: ‘The Community may within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an

<sup>9</sup> I. Macleod, I.D. Hendry and S. Hyett, above n. 8, at 48.

<sup>10</sup> E. Stein, above n. 8, at 127.

<sup>11</sup> The most well-known rulings of the Court concerning the Community’s parallel external powers are: *Commission v. Council (ERTA)*, Case 22/70, [1971] ECR 263; Opinion 1/75 (OECD Local Cost Standards), [1975] ECR 1355; *Kramer*, Cases 3, 4 and 7/76, [1976] ECR 1279; Opinion 1/76 (Draft Agreement for the Laying-up Fund for Inland Waterway Vessels), [1977] ECR 741; Opinion 2/91 (ILO Convention No. 170), [1993] ECR I-1061; Opinion 2/92 (OECD National Treatment Instrument), [1995] ECR I-521; Opinion 1/94 (WTO Agreement), [1994] ECR I-5267; *Commission v. Council (FAO)*, Case C-25/94, [1996] ECR I-1469; Opinion 2/94 (Accession by the Community to the ECHR), [1996] ECR I-1759. The *Open Skies* cases include: *Commission v. United Kingdom*, C-466/98 [2002] ECR I-9427; *Commission v. Denmark*, C-467/98, [2000] ECR I-9519; *Commission v. Sweden*, C-468/98 [2002] ECR I-9575; *Commission v. Finland*, Case C-469/98 [2002] ECR I-9627; *Commission v. Belgium*, C-471/98 [2002] ECR I-9681; *Commission v. Luxembourg*, C-472/98 [2002] ECR I-9741; *Commission v. Austria*, C-475/98 [2002] ECR I-9797; and *Commission v. Germany*, Case C-476/98 [2002] ECR I-9855.

international organisation or a national of a third State.<sup>12</sup> While this generous allocation of external power has been adopted for the Euratom Treaty, the Treaty of Rome did not follow this generalist approach—an omission that posed a strong normative argument against parallel external powers in the EC legal order.<sup>13</sup> The EC Treaty did enumerate only two instances where the Community was expressly given the power to conclude international agreements. The legal possibility of implied external powers was therefore vital for the young supranational creature eager to assert itself on the international stage. According to an early commentator:

The question remained open whether the Community might conclude agreements also on other matters falling within its jurisdiction, but for which the Treaty has not expressly authorized it to enter into agreements with third States. Opinions were divided on this point, some authors drawing their inspiration from the *principe d'attribution*, whereas others thought that the competence in external matters should be coextensive with the Community's powers for internal purposes, which was conveniently expressed by a Latin phrase: *in foro interno, in foro externo*.<sup>14</sup>

The rigorous contours of strict enumeration were indeed soon to be softened—if not dissolved—with the assistance of a powerful doctrine of implied external powers spelled out in the *ERTA* ruling. The invention of parallel external powers in the Community legal order and the ultimate 'triumph of parallelism'<sup>15</sup> will be the subject of the present section. We shall briefly trace the judicial trajectory of this success story and thereafter reflect on the constitutional theories offered to justify it.

#### A. THE GENESIS OF IMPLIED EXTERNAL POWERS AND THE 'TRIUMPH OF PARALLELISM'

The legal background to the *ERTA* dispute is complex and will warrant a brief recapitulation: The European Road Transport Agreement (*ERTA*, or under its French acronym: *AETR*) had been designed to harmonize certain social aspects of international road transport and involved a number of Member States as potential signatories. The negotiations had (re-)started in 1967 and were conducted without involvement of the Community. Before the conclusion of the negotiations, the Council had enacted in 1969 a regulation dealing with the issue of road safety for the internal sphere of the Community. Since *ERTA* was still seen to be an important step in the same direction on the larger (regional) international plane, the Member States involved in the *ERTA* negotiations agreed to co-ordinate their positions within the Council, with

<sup>12</sup> Cf. Art. 101(1) of the Euratom Treaty.

<sup>13</sup> D. McGoldrick, above n. 8, at 48. As regards the ECSC, its founding treaty did not expressly confer this general treaty-making power but academic consensus seemed to assume it may have such a power across its entire scope of activities. (I. Macleod, I.D. Hendry and S. Hyett, above n. 8, at 42.)

<sup>14</sup> P. Pescatore, above n. 8, at 618

<sup>15</sup> A phrase used by T. Hartley, *The Foundations of European Community Law* (3rd edn., Clarendon Press, 1994) at 171.

the preceding Member State acting as spokesman. (A resolution had been adopted to give legal effect to this gentlemen's agreement.) The Commission felt excluded from its role as the Community's external broker, insisted on being implicated in the negotiations, and finally brought the matter before the European Court. There the Commission argued that the Community's powers under its transport policy included the external power of treaty-making and, moreover, that this power had become exclusive for the subject-matter of *ERTA* after the adoption of Community legislation in the form of the 1969 Council Regulation.

The innovative and combative legal reasoning was thus two-layered: the first layer concerned the *existence* of the Community's treaty-making powers, while the second centred on the *essence* or *nature* of such a power. Those two dimensions of the Community's (implied) external powers have structured the discursive terrain of the Community's external powers ever since. In this section, we shall only look at the principles that apply in dogmatically justifying the coming into existence of implied external powers.

In relation to the existence question, the Commission had argued that Article 71 EC 'conferred on the Community powers defined in wide terms with a view to implementing the common transport policy [which] must apply to external relations just as much as to domestic measures'.<sup>16</sup> This wide teleological interpretation of the wording of Article 71 EC was justified for 'the full effect of this provision would be jeopardized if the powers which it confers, particularly that of laying down "any appropriate provisions", within the meaning of subparagraph (1) (c) of the article cited, did not extend to the conclusion of agreements with third countries'.<sup>17</sup> The Commission's argument thus emphasized the need for an additional policy instrument to implement its objectives under the Community's transport competence. The Council opposed this *effet utile* interpretation contending that '[Article 71] relates only to measures *internal* to the Community, and cannot be interpreted as authorizing the conclusion of international agreements'. The power to enter into agreements with third countries 'cannot be assumed in the absence of an

<sup>16</sup> *ERTA*, para. 6. The original Art. 75 EEC read as follows:

(1) For the purpose of implementing Article 74, and taking into account the distinctive features of transport, the Council shall, acting unanimously until the end of the second stage and by qualified majority thereafter, lay down, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly: (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; (b) the conditions under which non-resident carriers may operate transport services within a Member State; (c) any other appropriate provisions. (2) The provisions referred to in (a) and (b) of paragraph 1 shall be laid down during the transitional period. (3) By way of derogation from the procedure provided for in paragraph 1, where the application of provisions concerning the principles of the regulatory systems for transport would be liable to have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities, they shall be laid down by the Council acting unanimously. In so doing, the Council shall take into account the need for adaptation to the economic development which will result from establishing the common market.

<sup>17</sup> *ERTA*, para. 7.

express provision in the Treaty'.<sup>18</sup> In its judgment, the European Court famously sided with the Commission's extensive stance:

To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.

Such authority arises not only from an express conferment by the Treaty—as is the case with [Article 133] and [ex-] Article 114 for tariff and trade agreements and with [Article 310] for association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions . . .

According to [Article 70], the objectives of the Treaty in matters of transport are to be pursued within the framework of a common policy.

With this in view, [Article 71(1)] directs the Council to lay down common rules and, in addition, 'any other appropriate provisions'.

By the terms of subparagraph (a) of the same provision, those common rules are applicable 'to international transport to or from the territory of a Member State or passing across the territory of one or more Member States'.

This provision is equally concerned with transport from or to third countries, as regards that part of the journey which takes place on Community territory.

It thus assumes that the powers of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned.<sup>19</sup>

The passage quoted speaks the language of teleological interpretation under the aegis of the *effect utile* logic: in the light of the general scheme of the Treaty, the Community's power to adopt 'any other appropriate provision' to give effect to the Community's transport policy objectives must be interpreted, in the perception of the Court, as including the legal power to enter international agreements.<sup>20</sup> According to the tenor of the above passage, treaty-making power seemed simply implied as an additional policy instrument that formed part and parcel of the 'internal' legislative competence.

Matters were, sadly enough, not so 'naturalistic' as this (isolated) component of the judgment suggests. The *ERTA* Court had been rather 'cubist' in its patchworking of various lines of reasoning. The resulting judgment appears at times more an edited than a coherent literary entity. First, the ruling remained ambivalent in relation to the role played by internal legislation in the *creation* of the external power of the Community. Whereas the Court, in the above quotation, firmly separates the existence of parallel external powers from the presence of Community legislation, other parts of the judgment suggested that the Community's treaty-making power would come into being only when and to the extent that internal legislation had been adopted.<sup>21</sup> Secondly, even

<sup>18</sup> *Ibid.*, paras. 9–10 (emphasis added).

<sup>19</sup> *Ibid.*, paras. 15–16 and 23–27.

<sup>20</sup> In the words of the *ERTA* Court: 'With regard to the implementation of the Treaty the system of internal Community measures may not therefore be separated from that of external relations' (para. 19).

<sup>21</sup> Consider the following parts of the ruling: 'Although it is true that [Articles 70 and 71] do not expressly confer on the Community authority to enter into international agreements, nevertheless

accepting the existence of implied external powers as being independent of the presence of internal legislation, the scope and meaning of the doctrine of implied (external) powers were still unclear. Would the doctrine permit the Community to imply a parallel (material) *competence*; or would the doctrine function to justify recourse to the additional policy *instrument* of treaty-making? And finally, what conditions had to be met before those implied powers, in whatever form, would come into being?

Two 1970s rulings of the European Court cleared the way for a doctrine of parallelism, separating the existence of implied external powers from the presence of Community legislation. In *Kramer* the Court dealt with the North-East Atlantic Fisheries Convention concluded to ensure the conservation of fish stocks through rational exploitation.<sup>22</sup> The Dutch authorities had implemented their international obligations by creating criminal offences, on the basis of which proceedings had been launched against two Dutch fishermen. The national measure's validity was challenged in three respects, the most important of which was the claim that the Member States had lost their competence to conclude the international convention in the face of the Community's exclusive treaty-making power in this area.<sup>23</sup> In a preliminary ruling on the issue the Court drew, just as in the *ERTA* case, inspiration from the 'general system of Community law in the sphere of external relations',<sup>24</sup> looked at 'the whole scheme of Community law no less than to its substantive provisions',<sup>25</sup> and concluded that the Community's external powers 'arise not only from an express conferment by the Treaty, but may equally flow *implicitly* from other provisions of the Treaty, from the act of accession and from measures adopted, within the framework of those provisions, by the Community institutions'.<sup>26</sup>

While the European Court used the language of implied powers, the precise constitutional source from which those external powers were to be implied was not yet absolutely clear. Looking at *all* the relevant legal provisions in primary *and* secondary law, the Court found that 'the Community has at its disposal, on the internal level, the power to take any measure for the conservation of the biological resources of the sea'.<sup>27</sup> 'In these circumstances', continued the Court, 'it follows from the very duties and powers which

the bringing into force, on 25 March 1969, of Regulation No. 543/69 of the Council on the harmonization of certain social legislation relating to road transport (OJ L77/49) necessarily vested in the Community power to enter into any agreement with third countries relating to the subject-matter governed by that regulation. This grant of power is moreover expressly recognized by Article 3 of the said Regulation which prescribes that: 'The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation.' Since the subject-matter of the AETR falls within the scope of Regulation No. 543/69, the Community has been empowered to negotiate and conclude the agreement in question since the entry into force of the said Regulation.' (*ibid.*, paras 28–30)

<sup>22</sup> *Kramer*, Cases 3, 4 and 7/76, [1976] ECR 1279.

<sup>23</sup> Apart from the claim that the national authorities had not been entitled to conclude the international convention for lack of concurrent treaty-making power, a second argument questioned the legality of the national measures in the light of the principle of pre-emption, while the free movement provisions provided the third ground of review.

<sup>24</sup> *Kramer*, para.16.

<sup>25</sup> *Ibid.*, paras. 19–20.

<sup>26</sup> *Ibid.* (emphasis added).

<sup>27</sup> *Ibid.*, paras. 30–3.

Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea.<sup>28</sup> The 'authority' to conclude the international convention was treated as a reflex to the 'duties and powers' within the Community's internal sphere.<sup>29</sup> The relationship between the creation of those external powers and Community legislation had, nevertheless, remained unresolved. Parallel external powers had emerged from an amorphous amalgam of primary and secondary law.<sup>30</sup>

The heart of the doctrine of parallelism was finally addressed in Opinion 1/76.<sup>31</sup> There the Court returned to the existence of external powers under the Community's transport title. The Commission had claimed that it followed from an analysis of the case law that the Community possessed the external power to conclude international agreements 'once the Treaty provides for an internal power even if the latter has not yet been the subject of developments of secondary legislation'.<sup>32</sup> The proposed international agreement would, moreover, as such 'introduce at one and the same time common rules into the Community and identical rules into those [third] countries'.<sup>33</sup>

Accepting that it was impossible to implement the objectives pursued by Article 71 EC without the participation of Switzerland, the Court famously declared that '*whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion*'.<sup>34</sup> While in *Kramer*, the constitutional source for the Community's implied external powers had still been an amorphous mixture of primary and secondary law, no Community legislation existed in the present case. The external powers simply flowed '*by implication from the provisions of the Treaty creating the internal power*'.<sup>35</sup> The parallel external power would not depend on whether or not 'common rules' existed.<sup>36</sup> Opinion 1/76 thus confirmed the independence of external powers from the

<sup>28</sup> *Ibid.*

<sup>29</sup> Only in a second step does the Court proceed to look at the nature of the competence, i.e. 'whether the Community institutions in fact assumed the functions and obligations arising from the Convention and from the decisions taken thereunder' (*ibid.*, para. 34). See Section III.A.(ii) below.

<sup>30</sup> 'While the *Kramer* case represented an advance from, or at least a clarification of, the *AETR* decision in so far as the Court recognised the implied treaty-making capacity of the Community even where the powers, though conferred, had not been used, the possibility remained that the Court might not have acknowledged the Community's capacity in the absence of the measures adopted (in particular Regulation No. 2141/70) and Article 102 of the Act of Accession.' (M. Hardy, above n. 8, at 587.)

<sup>31</sup> Opinion 1/76 (Draft Agreement for the Laying-up Fund for Inland Waterway Vessels), [1977] ECR 741.

<sup>32</sup> Commission submissions to Opinion 1/76, at 749.

<sup>33</sup> *Ibid.*, at 759.

<sup>34</sup> Opinion 1/76, para. 3.

<sup>35</sup> *Ibid.*, para. 4.

<sup>36</sup> The existence of Community legislation will only reinforce the assumption of parallel powers without, however, being constitutive for the implied external powers of the Community: 'While parallel powers would particularly arise in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. *It is, however, not limited to that eventuality.*' (*Ibid.* para. 4—emphasis added.)

presence of secondary law.<sup>37</sup> As a brilliant commentary prophesied in 1977, the ruling meant that ‘it will not now be possible for a Member State to contend that Community participation is legally impossible or *ultra vires* unless it also argues either that the agreement falls entirely outside the scope of the EEC Treaty, or that, though it comes within that scope, Community participation is not needed’.<sup>38</sup>

The ultimate triumph of parallelism was celebrated twenty years later in another advisory Opinion of the Court—Opinion 2/91.<sup>39</sup> Here, the European Court had been requested by the Commission to give an opinion on the compatibility of Convention No. 170 of the International Labour Organization ensuring safety in the use of chemicals at work. The Commission had claimed that the Community alone would be competent to conclude the Convention. The Court’s brief syllogistic reasoning in relation to the existence of a parallel external power has come to encapsulate the doctrine of parallelism in its purest form:

The field covered by Convention No 170 falls within the social provisions of the EEC Treaty which constitute Chapter 1 of Title III on social policy . . . *The Community thus enjoys an internal legislative competence in the area of social policy. Consequently, Convention No 170, whose subject-matter coincides, moreover, with that of several directives adopted under Article 118 a [new Article 138], falls within the Community’s area of competence.*<sup>40</sup>

From the very fact that the Community owns an internal power—in this case the competence to adopt social provisions—the Court implied an external power for all matters falling within the scope of the internal competence. The reasoning of the Court was based on the idea of a symmetric parallel power derived from the internal Community power. (Again, the existence of secondary legislation was reduced to having a reinforcing character.) This was the doctrine of parallelism in its purest form. The EC legal order would grant the Community institutions treaty-making powers whenever the EC possessed a material competence to pass internal legislation. The European Court created a doctrine according to which ‘Community treaty power is co-extensive with its internal domestic powers’, and that ‘cuts across all areas of its internal domestic competence listed in the Article 3 of the EEC Treaty’.<sup>41</sup>

#### B. TOWARDS A THEORY OF IMPLIED EXTERNAL POWERS: THREE COMPETING CONCEPTUALIZATIONS

The language of ‘parallel powers’ that frequently resurfaced in the above synopsis of the European Court’s jurisprudence is academically engineered.

<sup>37</sup> Commenting on Opinion 1/76, Pescatore captured the breakthrough of the doctrine of parallelism in the following words: ‘This puts an end to the uncertainty inherent in the *ERTA* judgement as to whether an external competence may be recognized also in cases where the Community, though having jurisdiction, has not yet covered the field by internal measures. *Opinion 1/76* makes it clear that the existence of a virtual capacity is sufficient in this respect, even if it has not yet been exercised for internal purposes.’ (P. Pescatore, above n. 8, at 621.)

<sup>38</sup> M. Hardy, above n. 8, at 595.

<sup>39</sup> Opinion 2/91 (ILO Convention No. 170), [1993] ECR I-1061.

<sup>40</sup> *Ibid.* paras. 15–17 (emphasis added).

<sup>41</sup> E. Stein, above n. 8, at 146.

The doctrine of parallelism is a term of art that has not (yet) been used by the European Court itself.<sup>42</sup> The demand for theoretical explanations created by the Court's invention of implied external powers has been met by a number of academic conceptualizations, three of which shall be discussed in the present section. Each theory can partly be defended by reference to a number of passages in the European Court's case law.

The classic version of the doctrine of parallel powers argues that 'the *competence* of the EC to enter into international agreements should run in "parallel" with the development of its internal competence—in [foro] *interno in foro externo*'.<sup>43</sup> According to this reading of the doctrine of parallelism, parallel powers are parallel *competences*.<sup>44</sup> This first theory of implied external powers introduced the idea of two distinct spheres of competences into the Community legal order: beyond the internal realm of the Community's internal competences exists a parallel legal universe of external relations competences. This competence dualism has found support, for example, in the European Court's ruling in Opinion 2/94, dealing with the EC's competence to accede the ECHR Convention.<sup>45</sup> There the Court declared that 'in the field of international relations, at issue in this request for an Opinion, it is settled case-law that the *competence of the Community to enter into international commitments* may not only flow from express provisions of the Treaty but also be implied from those provisions'.<sup>46</sup> The implication of a 'new' external competence would not, according to the Court, conflict with the enumeration principle.<sup>47</sup>

A second conceptualization of the implied powers doctrine starts from the distinction between 'competence' and 'power'—a useful theoretical distinction, sadly not coherently adhered to by the European Court of Justice. While

<sup>42</sup> In none of the cases analysed above does the Court refer to 'parallel powers' or the 'doctrine of parallelism' as the constitutional rationale for the assumption of implied external powers. This might be in the process of changing. See, for example, the pronouncement of Advocate General Tizzano in his opinion to the *Open Skies* cases: 'More specifically, it is my view that the necessity for an agreement must be determined in accordance with the procedure laid down for the exercise of the *parallel internal competence*, where such competence is already provided for, or, if that is not the case, in accordance with the procedure laid down in [Article 308] of the Treaty' (para. 52, emphasis added). And in summarizing the *ERTA* line of cases, he stated that according to 'that principle, particularly in view of the need to safeguard the unity of the common market and the uniform application of Community law, the Court also stated that once the Community has actually exercised its internal power by adopting common rules, its *parallel external competence* becomes exclusive, with the result that the Member States lose their freedom to undertake obligations with third countries which affect those rules. (Opinion of AG Tizzano, para. 64, emphasis added.)

<sup>43</sup> D. McGoldrick, above n. 8, at 48.

<sup>44</sup> Cf. D. Wyatt, 'Competence of the Community internal and external', [1977] 2 EL Rev., 47.

<sup>45</sup> Opinion 2/94 (Accession by the Community to the ECHR), [1996] ECR I-1759.

<sup>46</sup> *Ibid.* paras 25–6 (emphasis added).

<sup>47</sup> After having quoted Art. 5 EC—whose first paragraph codifies the enumeration principle—the Court found that the 'principle of conferred powers must be respected in both the internal action and the international action of the Community' (*ibid.*, para 24). Some academic authors have been critical about the constitutional tension between the doctrine of parallel competences and the principle of enumerated powers. In the opinion of E. Stein, the Court 'in effect rejected the principle of enumerated powers in favour of the doctrine that Community treaty power is co-extensive with the internal domestic powers and that it cuts across all areas of its internal domestic competence listed in the Article 3 of the EEC Treaty'. (E. Stein, above n. 8, at 146.)

the former concept is supposed to refer to the material policy field in which the Community can act, the latter concept stands for the legal instruments available to implement the policy objective.<sup>48</sup> Implied powers in the external sphere are not parallel *competences*, but parallel *instruments*. The ‘competence’—in the sense of the legal entitlement to act in a material policy field—is thereby located in the ‘internal’ competence. This perspective finds strong support in the *ERTA* ruling, discussed at length above.<sup>49</sup> There the Court treated the Community’s treaty-making power not as an independent (material) competence but rather as a policy *measure*—an additional instrument to implement its competence under the common transport policy.<sup>50</sup> Furthermore, the Delphic paragraph 81 of Opinion 1/94 in relation to services would, arguably, be less incomprehensible when viewed in the optic of this version of the parallelism thesis.<sup>51</sup>

<sup>48</sup> ‘Although, particularly in connection with external relations, the terms competence and powers are frequently treated as interchangeable, it has been stated that competence and powers are distinct concepts. The former refers to areas of possible action, whereas the latter refers to the legal instruments that are available and to the procedures to be followed in the exercise of competences. Neither the Treaty nor the case-law of the Court draws that distinction with any consistency, and it should not receive too much emphasis. For analytical purposes, however, it may have some value. With regard to external competence, there is a difference between the question whether the Community is capable of entering into international commitments by concluding an international agreement, and the question whether, from a substantive point of view, the Community has the competence to develop an external policy in a given area, e.g. international migration. The first question is concerned with the external powers of the Community, whereas the second relates to the substantive competence of the Community. The substantive competence of the Community may be exercised either by concluding an agreement or by adopting internal legislation.’ (T. Tridimas and P. Eeckhout, above n. 8, at 144.) This instrument-reading of the doctrine of parallel powers has received academic support from public international law, where international agreements have been described as ‘*instruments of external relations*’ (H.G. Schermers and N. M. Blokker, *International Institutional Law* (3rd rev. edn., Martinus Nijhoff Publishers, 1997), at 1092 (emphasis added)).

<sup>49</sup> See again in particular paragraph 19 of the *ERTA* ruling: ‘With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations.’

<sup>50</sup> The instrument thesis equally gained strength from Opinion 1/75 in the context of the Community’s express treaty-making powers. In exploring the Community’s powers under the common commercial policy provisions, the Court found the Community entitled ‘pursuant to the powers which it possesses, *not only to adopt internal rules of Community law, but also to conclude agreements with third countries*’ since a commercial policy was ‘made up by the combination and interaction of *internal and external measures*’ (Opinion 1/75, at 11, emphasis added). Consider also the Court’s remarks in Opinion 1/76 where the Court pointed out that ‘an agreement concluded by the Community with a third State is, as far as concerns the Community, an *act of one of the institutions* within the meaning of subparagraph (b) of the first paragraph of [Article 234] of the Treaty’. (Opinion 1/76, para. 18, emphasis added.)

<sup>51</sup> Coming to speak about the Community’s (exclusive) competence to conclude the GATS part of the WTO Agreement, the Court employed the following line of argument: ‘Unlike the chapter on transport, the chapters on the right of establishment and on freedom to provide services do not contain any provision expressly extending the competence of the Community to “relationships arising from international law” . . . [T]he sole objective of those chapters is to secure the right of establishment and freedom to provide services for nationals of Member States. They contain no provisions on the problem of first establishment of nationals of non-member countries and the rules governing their access to self-employed activities. One cannot therefore infer from those chapters that the Community has *exclusive competence* to conclude an agreement with non-member countries to liberalize first establishment and access to service markets.’ (Opinion 1/94, para. 81 (emphasis added).) Advocates of the instrument conceptualization of the doctrine

A third theory offered to explain the coming into being of the Community's implied external powers has recently been suggested by Dashwood. Arguing that the very notion of 'parallel powers' is misleading, the author has put forward an alternative conceptualization under the name of the 'doctrine of complementarity'.<sup>52</sup> Denying the idea of a symmetry between internal and external powers inherent in the logic of parallelism the author emphasizes

of implied external powers have argued that the passage 'illustrates that the implied power of the Community to conclude agreements is to be *dissociated from the substantive scope of its external competence*. In the area of services, for example, the principle of parallelism does not mean that the Community has conferred competence over external trade in services simply because of its competence in relation to internal movement of services. The principle only means that the Community may conclude an agreement on services in so far as the subject-matter of that agreement falls within its [internal] competence.' (T. Tridimas and P. Eeckhout, above n. 8, at 153–4 (emphasis added).) In a similar vein, P. Eeckhout has recently argued that Opinion 1/94 is thus 'not so much concerned with the power to conclude international agreements as with the question whether the Treaty chapters on right of establishment and freedom to provide services have a substantive external dimension' (P. Eeckhout, above n. 8, at 76). According to this interpretation of paragraph 81 of the WTO Opinion, the 'external dimension' must already lie within the (internal) competence before the Community will enjoy a parallel external power. This approach can, despite all its merits, not fully account for why Community harmonization measures in the area of establishment are then allowed to have just such an 'external dimension'. A. Dashwood has offered an alternative interpretation of paragraph 81 (cf. below n. 56). My personal reading of paragraph 81 of the WTO Opinion will be discussed below (see below, n. 76).

<sup>52</sup> According to A. Dashwood this is the principle that best explains the European Court's jurisprudence on implied external powers. Dashwood defines the 'principle of complementarity' in the context of his discussion of Opinion 1/76 in the following way: 'The Court is not saying, as it seemed to be in *AETR*, that Article 71 EC authorizes the use of all appropriate means, including acceptance of international commitments, in pursuing the action that is contemplated. The external competence implicitly conferred by the legal basis in question is here treated as being in a real sense *ancillary to the expressly conferred internal competence*: it is recognised only in so far as the latter may appear insufficient to achieve the specified objective in an optimal way. To call this, as most commentators do, the principle of "parallelism" or of "parallel competence" seems misleading. Things which are parallel, it has been pointed out, run alongside each other, without ever meeting: manifestly that does not convey the relationship between express internal and implied external competence, as explained in the quoted passage. The logic of that relationship is more accurately indicated by the name, "principle of complementarity", suggested in our discussion of the *Kramer* judgement.' (A. Dashwood and J. Heliskoski, above n. 8, at 12–13, emphasis in original.) A. Dashwood himself, however, favours what he calls 'the true construction principle', inviting the Court 'to abandon the logic of complementarity in favour of the straightforward principle that the existence of external relations competence in a given case depends on the true construction of the relevant power-conferring provision. The Court should not, as it did in *Kramer*, for instance, first consider whether competence exists to adopt internal legislation on the matters that are the subject of a contemplated agreement . . . It should go straight to the question: is the external action which is envisaged a natural and expected way of attaining any of the objectives authorised by the proposed legal basis? This is here referred to as "the true construction principle". Underlying the true construction principle is . . . that a legal basis in the Treaty which is silent as to the possibility of concluding international agreements, should not, therefore, be understood as conferring internal legislative power only.' (A. Dashwood, above n. 8, at 136.) This characterization comes indeed very close to the instrument version of the parallelism doctrine discussed above. However, Dashwood goes further than that theory in denying the 'implied' character of the Community's external competence/instrument altogether: 'I am not sure whether, after all, it is right to treat this as the recognition of implied Community powers, although this is how the Court itself seems to regard the matter. To my mind, the logic of implied powers is that they relate to matters which, it is assumed, would have been specifically mentioned in the text, if draftsmen were infinitely wise and prescient. Here, I suggest, the logic is different. The failure to mention external powers in the Treaty provisions on agriculture or

that the Community does not enjoy an external competence as an automatic reflex of an internal competence: 'The Community will be competent under the complementarity principle to conclude an agreement judged *necessary for the attainment of one or more of the objectives specified by the legal basis*.'<sup>53</sup> There is therefore no parallelism according to which the Community's external powers are co-extensive to its internal powers. The existence of the former is controlled by a 'necessity requirement' which deforms the logic of parallelism in the Community legal order.<sup>54</sup> This theory also finds a number of judicial pronouncements in its favour. In Opinion 1/76, the Community was granted implied external powers only 'in so far as the participation of the Community in the international agreement is . . . *necessary for the attainment of one of the objectives of the Community*'.<sup>55</sup> Even Opinion 1/94 has been invoked to confirm the logic of complementarity.<sup>56</sup>

What is striking about the three conceptualizations of the European Court's jurisprudence is that each of the three theories manages to explain better certain regions of the judicial picture than its rivals. The continuing vivid search for a unifying explanatory rationale for the Community's implied external powers in academic circles also shows that none of the three dogmatic competitors does (yet) represent *the* privileged viewpoint from which to interpret the 'cubist' judicial picture. The multiplicity of valid

transport, say, is not because the matter slipped the draftman's mind: it is because to confer powers in these policy areas that stopped short at the Community's frontiers would simply not have made any sense. In other words, a text that is silent on its external application should not be interpreted as one that expressly confers internal powers only: *the natural way of interpreting an express grant of powers is that they are to apply as needed, internally or externally, in furtherance of the objectives specified in the relevant Treaty Articles.*' (A. Dashwood, 'The Limits of European Community Powers', [1996] 21 EL Rev., 113, at 125, emphasis added.)

<sup>53</sup> A. Dashwood, above n. 8, at 132 (emphasis added).

<sup>54</sup> 'This case law is based on the doctrine that external competences should in principle run parallel to internal competences. However, contrary to true parallelism, the Court always applied a necessity test. Only where the external competence could be deemed as necessary or indispensable for efficient Community action does the Court dare to encroach upon Member State's sovereign rights.' (C.W. Herrmann, 'Common commercial policy after Nice: Sisypheus would have done a better job', [2002] 39 CML Rev., 7 at 9).

<sup>55</sup> Opinion 1/76, para. 4 (emphasis added). The same principle is repeated in Opinion 2/91: '[W]henever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments *necessary for the attainment of that objective* even in the absence of an express provision in that connection.' (Opinion 2/91, para. 7, emphasis added.)

<sup>56</sup> Commenting on the last sentence of paragraph 81 of Opinion 1/94 A. Dashwood claims that it 'should *not* be taken as implying that there might be non-exclusive competence to do so. The plain drift of the passage is that no competence of any kind to conclude an agreement designed to facilitate the international provision of services can be derived by implication from legal bases wholly focused on liberalisation within the internal market.' From this Dashwood draws the conclusion that 'the logic of parallelism contended for by the Commission cannot be right, otherwise the Community would have been competent to conclude the GATS' (A. Dashwood, above n. 8, at 130, emphasis added). This interpretation of paragraph 81 faces one challenge: the Court did not seem to deny a shared competence of the Community for the conclusion of GATS flowing implicitly from the existence of internal legislative competences in the service sector (or the Community's general legislative competences under Arts. 95 or 308 EC). The Court refused simply to imply an *exclusive* competence to conclude the agreement.

theoretical perspectives has been the result of the stratified character of the case law. In the last thirty years, the Court itself seems to have struggled to define *its* constitutional rationale for the existence of implied external powers—a fact that might explain the theoretical draw reached by the three competing conceptualizations. Can we nevertheless identify a tendentious preference of the Court for one of the three rationales discussed above? Or more generally, are there constitutional reasons why the Court *should* prefer one of the theories over the two others?

It is respectfully submitted that the ‘doctrine of complementarity’ overvalues the normative function of the ‘necessity’ criterion in the external sphere of the Community legal order. The determination of the latter has been left to the political organs of the Community with the Court employing a submissive ‘facilitative’ effects test, whose deforming impact on otherwise co-extensive parallel powers has been virtually nonexistent.<sup>57</sup> From a dogmatic perspective, moreover, there is a more serious objection to subjecting the coming into existence of implied external powers to a necessity criterion. What is the added value of introducing a necessity test at the *existence* level, when the *exercise* of all Community powers—whether internal or external—is always subjected to a proportionality check under Article 5(3) EC? When Article 5(3) EC stipulates that ‘[a]ny action of the Community shall not go beyond what is necessary to achieve the objectives of this Treaty’, one should assume that this general principle of Community law will function as a sufficient constitutional safeguard to limit external Community action to what is strictly needed. Why then duplicate the necessity test at the existence level for implied external powers?

This brings us to discussing the respective advantages of the two versions of the doctrine of parallelism. Earlier jurisprudence gave strong support to the

<sup>57</sup> From the very beginning, the necessity requirement has remained ambivalent in Opinion 1/76: ‘The issue which is inevitably raised by the Rhine case is: how is it to be determined whether the conclusion of an agreement by the Community is indeed necessary? How much choice is there and how is it to be exercised? . . . [Where] although the Commission favours Community participation, the Council does not, a difficult situation may arise. As in the AETR case, it will be open to the Commission, if it considers that the Council (or the Member States) have acted illegally as regards what it or they propose to do, to bring the matter before the Court. Much will depend on the particular facts involved and the reasons advanced; if the Council, by a considered decision taken in conformity, with the Treaty, concluded that Community participation was not “necessary”, though it might in certain respects be desirable, then it seems improbable that the Commission would seek to contest such a finding. . . . Under the Community system as set out in the Treaty the Council is given the major determining role with respect to external relations, including the final decision as to whether international agreements are to be concluded.’ (M. Hardy, above n. 8, at 594, 596, and 599.) The essentially political determination of the necessity test is admitted by Dashwood himself. Revisiting some passages in Opinion 1/76, *Kramer* and Opinion 2/92, the author finds that ‘in practice, the Court employs a test as to whether Treaty-making power is needed by the Community to ensure the external use, over time, of its expressly conferred internal competence. Such a test would be one of facilitation rather than of indispensability’ (ibid. 133, emphasis in original). The author concludes: ‘In the answer to the existence question which the Court has provided in the form of the principle of complementarity, the word [i.e. “necessary”] has the broader meaning of “tending to facilitate”: implied external competence arises, where this will help ensure the optimal exercise of the expressly conferred internal competence.’ (A. Dashwood, above n. 8, at 134.) A purely legislative definition of the necessity criterion has recently been championed by Advocate General Tizzano in his Opinion to the *Open Skies* cases (cf. below n. 133).

view that the Court considered parallel external powers as an additional policy instrument in the implementation of an 'internal' competence.<sup>58</sup> Recently, however, the Court has come to speak of the Community's shared or exclusive 'external competences' to conclude international agreements.<sup>59</sup> This betrays a judicial inclination in favour of the theory of parallel *competences* as opposed to parallel *instruments*. This preference for the classic version of the parallelism doctrine seems rooted in the way the Court conceptualizes the exclusion of the Member States in the external field once Community legislation has been adopted. As will be seen below,<sup>60</sup> the Court has chosen to go down the 'exclusive competence' road instead of explaining the loss of treaty-making power of the Member States by means of a doctrine of pre-emption. In doing so, it has foreclosed the instrument thesis of parallel powers. A theory that views the parallel external powers of the Community as parallel instruments is, after all, hard to bring in harmony with a jurisprudence that speaks of shared and exclusive powers.<sup>61</sup> The very language of shared or exclusive powers strongly suggests a *competence* reading of the doctrine of parallelism.

In the second section of this chapter, we shall now try to shed some light on the enigmatic nature of the Community's parallel competences in an attempt to find out *when* a parallel external competence is considered to pertain exclusively to the Community. After an archaeological reconstruction of two jurisprudential lines of exclusivity, we shall discuss the constitutional peculiarities of the current external competence paradigm. There, we shall return to the conceptual link between the Court's understanding of the nature of the Community's external powers and the debate about the 'better' version of the doctrine of parallelism.<sup>62</sup>

### III. The Enigmatic Nature of Parallel Competences: Exclusive, Shared, Joint?

If the dogmatic origin of the Community's implied external powers has been puzzling, their constitutional nature has been truly enigmatic. Normally, parallel external competences will be non-exclusive.<sup>63</sup> In the last three

<sup>58</sup> See Section II.A. above. <sup>59</sup> See, for example, Opinion 1/94 (paras. 77, 95).

<sup>60</sup> See Section III.B.(i) below.

<sup>61</sup> This critique can be extended to Dashwood's 'true construction principle': viewing the Community's 'external' powers simply as part of the internal competence makes it difficult to conceptualize exclusive external powers within an otherwise shared internal competence (unless one accepts the idea of a 'partial exclusivity' of a legislative competence).

<sup>62</sup> See Section II.B.(i) below.

<sup>63</sup> Shared competences are the 'normal' type of competence in the Community legal order. Consider, however, the following cryptic remarks by the early P. Pescatore: '[Though the Court] recognized that the dividing line between the competence of the Community and the jurisdiction of Member States may at times cut across a given agreement concluded with third States, the Court has made clear that in their own field Community powers are exclusive of parallel jurisdiction of the Member States . . . It appears, on balance, that though the Court does by no means

decades, a number of situations has nevertheless come to be recognized in which the Community will enjoy an 'exclusive' parallel external competence. The characterization of the nature of the Community's external powers is, of course, of vital import. Whereas a shared external competence on the part of the Community will only introduce the latter to the international diplomatic scene, the finding of an exclusive external power will also remove the Member States' chairs from the negotiating table.

With the benefit of hindsight, one can identify two separate judicial lines of exclusivity in the European Court's jurisprudence on parallel external powers. Under the *ERTA* doctrine, the Community's exclusivity has been constructed as a defence to protect the unifying impact of internal legislation from distorting external interferences. Under the Opinion 1/76 doctrine, on the other hand, the Court seems to have (recently) recognized the possibility of a naturally exclusive parallel competence that is derived from 'constitutional necessity'.

The historical evolution of both strands of exclusivity will be analysed first, before a second section will highlight the constitutional peculiarities of the current competence paradigm in the external sphere. There, it will be argued that the exclusionary effect of the *ERTA* doctrine could be better conceived in terms of the doctrine of pre-emption instead of using the (more exclusive!) language of exclusive competences. Lastly, we shall scrutinize the constitutional practice of mixed external action and ponder whether it threatens the idea of autonomous shared external powers of the Community.

#### A. HISTORICAL VESTIGES: THE TWO JURISPRUDENTIAL LINES OF EXCLUSIVE IMPLIED EXTERNAL POWERS

##### (i) 'Subsequently Exclusive' Parallel Powers through Internal Legislation: The *ERTA* Doctrine

The *ERTA* ruling was to set the linguistic codes for the evolving jurisprudence on the nature of the Community's parallel powers. While the *ERTA* Court appeared still undecided as regards the need to find internal legislation before parallel external powers could be implied, the exclusion of the national level hinged from the very beginning on the presence of secondary law. What the *ERTA* ruling had left in suspense was *when* the exercise of external powers by the Member States would be incompatible with Community law.

This central ambivalence of the *ERTA* doctrine has been aptly translated into a series of sharp questions by Stein:

If the Council, in the exercise of its internal competence, adopts a regulation (as it did in the *ERTA* case) are the Member States precluded from concluding international

disregard the fact that a given agreement may in some of its parts pertain to the province of the Community and in part to the jurisdiction of the Member States, there is no place in the system for the construction of "concurrent" or "parallel" powers. In other words, whenever and so far as the matter belongs to the Community's sphere, jurisdiction over it is exclusive of any concurrent power of the Member States.' (P. Pescatore, above n. 8, at 624.)

agreements on the entire subject which is thus 'pre-empted'—and if so, how does one define the 'subject', or 'the field' that is so pre-empted? Or, and this is an alternative interpretation, are the Member States only forbidden to act intentionally in violation of the specific Community rules set forth in the regulation?<sup>64</sup>

The first alternative—corresponding to an 'occupation of the field pre-emption'—gained some strength from one part of the judgment in which the Court adopted a conceptualist-federalist approach:

*Since the subject-matter of the AETR falls within the scope of Regulation No. 543/69, the Community has been empowered to negotiate and conclude the agreement in question since the entry into force of the said regulation. These Community powers exclude the possibility of concurrent powers on the part of the Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the common market and the uniform application of Community law.*<sup>65</sup>

By way of contrast, another part of the judgment supported the second alternative in the form of a 'conflict' criterion, itself characteristic of a pragmatic approach towards pre-emption: '[E]ach time', according to the Court, 'the Community adopts provisions laying down *common rules, whatever form these may take*, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries *which affect those rules*.'<sup>66</sup> From the duties enshrined in Article 10 EC it would follow that 'to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might *affect those rules or alter their scope*.'<sup>67</sup> But if one followed the second pre-emption road, what exactly were the judicial criteria for determining *when* the autonomous exercise of national external powers would conflict with the uniform application of Community law? Neither the term 'common rules' nor the amorphously contoured verb 'affect' were constitutionally pre-defined concepts.<sup>68</sup>

<sup>64</sup> E. Stein, above n. 8, at 157.

<sup>65</sup> *ERTA*, paras. 30–31 (emphasis added). K. Lenaerts has argued that the *ERTA* Court opted for this first alternative. Relying on the strong federalist conceptualist language of paragraph 31 of the ruling he identified a '*preemption très englobante*' (K. Lenaerts, above n. 8, at 60). The author drew two conclusions from this wide notion of pre-emption: 'Par conséquent, face à une action interne de la part de la Communauté, la compétence étatique externe se perd plus facilement que la compétence étatique interne ayant le même objet matériel.' Secondly, 'les limites précises d'une réglementation communautaire interne indiquent le point à partir duquel les Etats membres peuvent agir, à titre concurrent, tant sur le plan interne qu'internationale' (*ibid.*, at 59).

<sup>66</sup> *ERTA*, para. 18 (emphasis added). The Court continued as follows (emphasis added): 'As and when such common rules come into being, the Community *alone* is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.'

<sup>67</sup> *Ibid.* para. 22 (emphasis added).

<sup>68</sup> The expression 'common rules' appears in Art. 71(1)(a) of the Treaty. Originally, the phrase seemed to have no specific constitutional significance beyond the formal sense of rules that apply to all the Member States. In the aftermath of the *ERTA* ruling, the view was widely held that the Court had given a substantive meaning to the term (cf. D. McGoldrick, above n. 8, at 72–3).

Interestingly, the *ERTA* Court did not employ the language of exclusive powers at all, but only negatively excluded concurrent treaty-making powers on the part of the Member States.<sup>69</sup> The judicial reasoning rather drew on a pre-emption rationale that was gradually emerging in the Community legal order.<sup>70</sup> It was up to subsequent jurisprudence to clarify which of the two alternative versions of the pre-emption doctrine was to apply, and when and how. (Partial) answers to these fundamental constitutional questions took more than twenty years to emerge and resurfaced in two Opinions issued in 1994.

In 1994, the European Court had been requested to assess the division of external powers between the Community and the Member States in concluding the WTO Agreement and its annexes.<sup>71</sup> Having found those parts of GATT dealing with goods to fall within the ambit of the Community's common commercial policy and thus into the scope of its exclusive competence, the question arose whether the Community would also enjoy an *exclusive* treaty-making power in relation to trade in services and intellectual property aspects regulated by GATS and TRIPs respectively.<sup>72</sup>

In its advisory opinion, the Court reviewed three possible sources for such an exclusive external competence on the part of the Community with regard to GATS: the powers conferred on the Community institutions by the Treaty at the internal level, the need to conclude the agreement in order to achieve a Community objective, and, thirdly, the extent to which internal legislation

The concept of 'common rules' has thereby either been restricted to rules adopted under a common policy—such as transport policy—or has been constructed to refer to exhaustive Community legislation. Both attempts to give a substantive content to the concept have failed in the light of subsequent jurisprudence.

<sup>69</sup> *ERTA*, para. 31.

<sup>70</sup> So indeed J.H.H. Weiler, 'The Community System: the Dual Character of Supranationalism', [1981] 1 YEL. 267, at 277–9; M. Waelbroeck, 'The emergent doctrine of Community pre-emption—consent and re-delegation', in T. Sandalow and E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe* (OUP, 1982) Vol. II (1982) 548–80. In line with his constitutional definition of the notion of exclusivity, K. Lenaerts also saw the *ERTA* ruling through the lens of the doctrine of pre-emption: 'La question se pose alors de savoir si les Etats membres ont encore le droit d'ajouter de leur côté une dimension internationale à cet exercice—partiel puisque seulement interne—de la compétence communautaire. L'illustration la plus célèbre de cette hypothèse reste toujours l'arrêt *AETR* de 1971 . . . A cet égard, le test de la *preemption* paraissait décisif . . . En fait, il s'agit d'assurer la primauté du droit communautaire sur le droit nationale, ce dernier étant en l'espèce l'engagement de l'Etat membre *vis-à-vis* d'un pays tiers.' (Lenaerts, above n. 8, at 58.) See Section III.B.(i) below.

<sup>71</sup> Opinion 1/94 (WTO Agreement), [1994] ECR I–5267. The ruling has been very controversial and its interpretation has been marred. Because of 'the fact that the Court does not sufficiently distinguish between mere competence and exclusive competence, the legality of the Community's concluding the entire GATS becomes clouded. The Court simply states categorically that "the competence to conclude GATS is shared between the Community and the Member States", thus, neatly concealing to what extent the Community is (not) competent' (N.A. Neuwahl, 'The WTO Opinion and implied external powers of the Community: a hidden agenda', in A. Dashwood and C. Hillion, above n. 8, 139 at 145).

<sup>72</sup> For the purposes of the argument, we shall confine ourselves to the analysis of those parts of the judgment dealing with the Community's parallel external powers, i.e. paras. 72–105. Due to the substantial overlap in the reasoning of the Court with regard to TRIPs, the subsequent analysis of the ruling shall be confined to the GATS aspects of the opinion.

might accord the Community exclusive external power.<sup>73</sup> Only the first and the third arguments shall interest us at the moment.<sup>74</sup>

In relation to the first source of external power, the Commission had claimed that there was ‘no single or specific provision in GATS in respect of which the Community does not have corresponding powers to adopt measures at internal level’. Those internal powers could be found in the Treaty’s Chapters on establishment, services, and transport. Those internal powers, so the Commission claimed, would give the Community *exclusive* parallel competence.<sup>75</sup> The Court flatly rejected the automatically exclusive nature of the requested parallel powers with a refined *ad majorum* argument. The Community did not enjoy a naturally exclusive parallel power ‘even in the field of transport’. The Member States—whether acting individually or collectively—would only lose their right to assume obligations with non-member countries ‘as and when common rules which could be affected by those obligations come into being. *Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive.* However, *not all transport matters are covered by common rules.*’<sup>76</sup> The incomplete character of

<sup>73</sup> Opinion 1/94, para. 73. The Commission’s question comes somewhat ‘out of the blue’ and stemmed from a *very* imaginative reading of past jurisprudence. The Commission had claimed firstly ‘that the Community’s exclusive competence to conclude GATS and TRIPs flows implicitly from the provisions of the Treaty establishing its internal competence’; or, secondly, ‘from the exercise of legislative acts of the institutions giving effect to that internal competence’; or, thirdly, from the ‘need to enter into international commitments with a view to achieving an internal Community objective’. Finally, the Commission maintained that ‘even if the Community does not have the adequate powers on the basis of specific provisions of the Treaty or legislative acts of the institutions, it has exclusive competence by virtue of [the Community’s general powers under] [Articles 95 and 308] of the Treaty’ (*ibid.* para. 72).

<sup>74</sup> The second source of exclusivity will be discussed below in the context of the Opinion 1/76 doctrine. See below, Section III.B.(ii).

<sup>75</sup> Opinion 1/94, para. 74. The argument was truly innovative. The Court had never ruled—even in relation to the Community’s competence in the transport sector—that parallel powers could be automatically exclusive. The Commission must have tried to get the Court to create an exclusive external competence *à la Art. 133 EC*.

<sup>76</sup> *Ibid.*, para. 77 (emphasis added). In relation to the Community’s internal powers regarding freedom of establishment and services, the Court enigmatically stated that those provisions ‘do not contain any provision expressly extending the competence of the Community to “relationships arising from international law”’ and that the ‘sole objective of those chapters is to secure the right of establishment and freedom to provide services for nationals of Member States’. Those rules did not grant rights to third country nationals and for that reason ‘[o]ne cannot therefore infer from those chapters that the Community has *exclusive competence* to conclude an agreement with non-member countries to liberalize first establishment and access to service markets’ (*ibid.* para. 81, emphasis added). The paragraph has been subject to intense exegesis. Two alternative interpretations have already been presented above in the context of our discussion of the doctrine of parallelism (cf. above nn. 51 and 56). A third reading of the Court’s collective mind is suggested here: Opinion 1/94 introduced the idea that the Community will enjoy an *exclusive* external competence wherever a piece of secondary law either expressly grants treaty-making power or where it deals with third country situations. A finding of an external dimension in the legislative provisions will thus render the Community’s external competence exclusive. (This will be discussed in a moment under the name of the ‘WTO principle.’) Paragraph 81 seems to project this principle to the level of primary law. If this reading is correct, the Community would enjoy an (automatically) exclusive parallel competence for certain aspects of its transport policy. (The reading was, unfortunately, not tested in the *Open Skies* litigation, since the chapter on transport was held inapplicable to the dispute.) D. McGoldrick has argued in a similar direction:

internal Community legislation held particularly true for the Community's general legislative powers under Articles 95 and 308 EC.<sup>77</sup>

In response to the third argument, the Court browsed through various legislative measures adopted under the Community's internal powers regarding services, finding that:

[w]henever the Community has concluded in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on the institutions powers to negotiate with non-member countries, it acquires *exclusive external competence in the spheres covered by those acts*.

The same applies in any event, even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved *complete harmonization* of the rules governing access to a self-employed activity, *because the common rules thus adopted could be affected within the meaning of the AETR judgement if the Member States retained freedom to negotiate with non-member countries*.<sup>78</sup>

What strikes the attentive eye first is that Opinion 1/94 dressed the *ERTA* doctrine in the language of *exclusive* external competences. According to the above passage, the Community would acquire an 'exclusive external competence' in two distinct situations. First, where Community legislation expressly granted the power to conclude international agreements or where the legislative act covered external situations, the Community would enjoy exclusive external power 'in the spheres covered by those acts'. (In the subsequent analysis this shall be termed the 'WTO doctrine'.<sup>79</sup>) Secondly, where the Community had achieved complete harmonization, thus occupying the entire internal policy field through exhaustive Community legislation, the Community's parallel powers would also become exclusive. Not every exercise

'Essentially, then, the ECJ is distinguishing between some situations in which the EC has external objectives which require the participation of third states (use of resources which third states also use, conservation), and internal objectives which can be achieved within the Community context without the participation of third states (freedom of establishment and freedom to apply services for nationals of member states, internal harmonisation of intellectual property rights) . . . The distinction which the ECJ draws is that it can achieve its internal objectives in these areas without third party participation. Only if participation of a third state is necessary to achieve that "objective" will the EC have *exclusive* competence.' (D. McGoldrick, above n. 8, at 61 (emphasis in original).)

<sup>77</sup> Opinion 1/94, paras. 88–9. <sup>78</sup> *Ibid.*, paras. 95–6 (emphasis added).

<sup>79</sup> The thrust behind this principle might well have been inspired by the now outdated belief that all the Community's express external powers are exclusive. Writing in 1982, M. Cremona, for example, documented the common belief that '[i]t seems to be recognized that where the EEC Treaty gives the Community *express* external powers, then these powers are exclusive, and the Member States possess no concurrent jurisdiction.' (M. Cremona, *Doctrine of Exclusivity*, above n. 8, at 395.) In the light of subsequent constitutional developments, the statement certainly no longer holds true today. In the context of the WTO doctrine, D. McGoldrick has rightly pointed out that '[s]uch competence will normally be interpreted as being exclusive, but could not override any express provisions in the Treaty on competence. Exclusive competence is justified as reflecting the clear intention of the internal measure. Presumably, however, it could be possible for such an internal measure to be challenged as contrary to the terms of the treaty.' (D. McGoldrick, above n. 8, at 71.) I. Macleod, I.D. Hendry and S. Hyett comment on the Court's 'WTO principle' in the following words: 'The Court's dictum is in broad terms, but two qualifications may be noted. First, it is uncertain whether conferment of such a power in an internal act can remove the powers

of the Community's internal powers through a piece of legislation would thus render the parallel external power exclusive. Only insofar as the Community legislation *exhaustively* regulated the field would the 'common rules' in the sense of the *ERTA* jurisprudence be 'affected'. The reasoning of the Court thus demonstrated a guarded hostility towards the conceptualist-federalist reading of the *ERTA* doctrine.

The 'new perspective' on the canvass of parallel powers introduced by Opinion 1/94 was reinforced and elaborated by a second advisory opinion delivered in 1994. Opinion 2/91 constitutionally recognized the existence of 'subsequently exclusive competences' in the Community legal order.<sup>80</sup> The Commission had argued that through a number of legislative measures 'common rules' had come into existence and that they would be affected by international legal obligations undertaken independently by the Member States under the ILO Convention No. 170.

Citing its 1970 *ERTA* ruling, the Court glossed over the conceptualist-federalist language and fell back on a conflict criterion by specifying that 'where Community rules have been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might *affect those rules or alter their scope*.'<sup>81</sup> For the first time, it seemed, the Court was forced to spell out its definition of those judicial criteria that underpinned the amorphous verb 'affect'. However, the effect-centred analysis turned out to be unnecessary for legislation adopted under Article 138 EC: since the Community legislation as well as the international convention only established minimum standards and mutually permitted the introduction of stricter standards, the undisturbed co-existence of the two sets of legislation was guaranteed. Community legislation adopted under Article 138 EC would consequently not be 'affected' by the international legal standard and vice versa. The application of the *ERTA* doctrine could consequently be denied out of hand.<sup>82</sup> The smooth parallel existence of both legal orders could, on the other hand,

reserved to the Member States in Articles such as [Articles 174(4) and 181(2) EC]: probably it cannot. *Secondly, the precise terms of the power conferred on the Community institutions must be examined to determine whether the Community's competence is exclusive or not.* Just as it is open to the institutions to confer such a power, so it must be for them to set the limits of that power.' (I. Macleod, I.D. Hendry and S. Hyett, above n. 8, at 60 (emphasis added).)

<sup>80</sup> Opinion 2/91, para. 9. See Section III.B.(i) below.

<sup>81</sup> *Ibid.*, para. 9 (emphasis added).

<sup>82</sup> 'For the purpose of determining whether this competence is exclusive in nature, it should be pointed out that the provisions of Convention No 170 *are not of such a kind as to affect* rules adopted pursuant to [Article 138]. If, on the one hand, the Community decides to adopt rules which are less stringent than those set out in an ILO convention, Member States may, in accordance with [Article 138 (3)], adopt more stringent measures for the protection of working conditions or apply for that purpose the provisions of the relevant ILO convention. If, on the other hand, the Community decides to adopt more stringent measures than those provided for under an ILO convention, there is nothing to prevent the full application of Community law by the Member States under Article 19(8) of the ILO Constitution, which allows Members to adopt more stringent measures than those provided for in conventions or recommendations adopted by that organization.' (*Ibid.*, para. 18).

not be guaranteed for harmonization measures adopted under Articles 94 and 95 EC with which the Community had exhaustively regulated the field.<sup>83</sup> Drawing on its recent WTO ruling, the Court argued that there was no need to demonstrate a direct contradiction between the international convention and the existing Community legislation: it was enough that the commitments undertaken in Convention No. 170 were '*falling within the area covered by the directives*' since any interference with the Community's exhaustive regulatory system would automatically be 'of such a kind as to *affect the Community rules laid down in those directives*'.<sup>84</sup> Wherever the Community had laid down an exhaustive set of internal social standards its 'subsequently exclusive' internal competence was matched by a 'subsequently exclusive' external competence.

A set of bilateral agreements with the United States, known as 'open skies agreements', was at the centre of a series of cases dealing most recently with the nature of the Community's parallel external competences.<sup>85</sup> Internally, the Community had adopted three packages of legislative measures to ensure freedom to provide services in the air-transport sector on the basis of Article 76(2) EC. Since the early 1990s the Commission had pushed for a mandate from the Council to negotiate air transport with the United States in the hope of replacing the various national bilateral agreements with a single Community agreement. The Council refused the request arguing that the Member States retained full powers in the aviation sector,<sup>86</sup> subject only to the internal legislation already adopted. The issue went to Court.

Three separate lines of argument were advanced by the Commission to assert the Community's exclusive external competence in the aviation sector. It first asserted that a single Community agreement was 'necessary' in the meaning of the Opinion 1/76 doctrine. In the alternative, the Commission

<sup>83</sup> The Court mentioned, in particular, Council Directive 67/548/EC of 27 June 1967 on the approximation of laws, regulations and administrative practices relating to the classification, packaging, and labelling of dangerous substances (OJ, English Special Edition 1967, 234), adopted pursuant to Article 94 of the Treaty and Directive 88/379/EC of 7 June 1988 on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the classification, packaging, and labelling of dangerous preparations (OJ 1988 L187, 14) adopted pursuant to Article 95 EC. Even though both Directives were examples of complete harmonizations, the Court seemed, in para. 25, to envisage a less rigorous requirement than that of complete harmonization for the assumption of an exclusive Community competence. There it stated that the policy field at issue 'is already covered to a large extent by Community rules'. The phrase suggests that a threshold lower than exhaustive internal legislation may suffice to trigger exclusive external competence on the part of the Community. <sup>84</sup> Opinion 2/91, para. 26 (emphasis added).

<sup>85</sup> The *Open Skies* cases include: *Commission v. United Kingdom*, C-466/98 [2002] ECR I-9427; *Commission v. Denmark*, C-467/98, [2000] ECR I-9519, *Commission v. Sweden*, C-468/98 [2002] ECR I-9575, *Commission v. Finland*, Case C-469/98 [2002] ECR I-9627; *Commission v. Belgium*, C-471/98 [2002] ECR I-9681, *Commission v. Luxembourg*, Case C-472/98 ECR I-9741, *Commission v. Austria*, C-475/98 [2002] ECR I-9797; and *Commission v. Germany*, Case C-476/98 [2002] ECR I-9855. The following analysis will exclusively draw on the *Commission v. Germany* judgment when generically referring to the 'Open Skies cases'.

<sup>86</sup> The aviation sector is subject to a special regime under the Treaty. The provisions of the Community's common transport policy apply, according to Art. 80(1) EC, to transport by rail, road, and inland waterway only. The Council may, however, in following the procedure set out in the second paragraph of this article establish appropriate rules for transport by sea and air.

argued, the diverse bilateral agreements would ‘affect’ the common rules adopted by the Community in the aviation field—this was the *ERTA* line of reasoning. Finally, the Commission pointed to the numerous provisions in the relevant Community legislation that dealt with ‘external situations’ which would also give the Community an exclusive competence—this was the WTO doctrine. The European Court tackled all three arguments consecutively. For the purposes of this section, we shall limit our analysis to points two and three.<sup>87</sup>

The part of the judgment dealing with the *ERTA* doctrine confirmed the judicial preference for a pragmatic conflict reading of the doctrine. The ‘recognition of an exclusive external competence for the Community in consequence of the adoption of internal measures’ was only necessary in situations where the freedom of Member States to enter into international commitments was ‘affecting’ internal legislation and would thus ‘jeopardize the attainment of the objective pursued by those rules’.<sup>88</sup> The right question to be asked was therefore ‘under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue’.<sup>89</sup> The Court’s answer seemed again slightly ‘schizophrenic’. Beginning with a sweeping conceptualist-federalist statement according to which the scope of the common rules was affected ‘where the international commitments fall within the scope of the common rules’,<sup>90</sup> the remaining major part of the ruling returned to a pragmatic reasoning.

Three concrete judicial propositions are derived from Opinion 1/94 as to when common rules will be affected: first, ‘whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts’.<sup>91</sup> This was the WTO principle. Secondly, common rules will also be affected ‘where the Community has achieved complete harmonization in a given area’ or where the international agreement fell ‘within an area which is already largely covered by such rules’.<sup>92</sup> The Court here confirmed the extension of the Community sphere of exclusive external competences to the penumbra of exhaustive internal regulation. In a situation of exhaustive (or *quasi*-exhaustive) regulation, the Community legislative regime would be automatically affected ‘even if there is no contradiction between those [international] commitments and the common rules’.<sup>93</sup> Conversely, distortions of trade caused by a disparity in national policies would—and this constitutes the third proposition—‘*not in themselves*

<sup>87</sup> The ruling’s treatment of the Opinion 1/76 doctrine will be discussed in the following section (cf. section III.A.(ii)).

<sup>88</sup> *Commission v. Germany*, Case C-476/98 [2002] ECR I-9855, paras. 104–5.

<sup>89</sup> *Ibid.*, para. 107.

<sup>90</sup> *Ibid.*, para. 108. The Court expressly referred to para. 30 of the *ERTA* judgment.

<sup>91</sup> *Ibid.*, para. 109. The Court refers to Opinion 1/94 (para. 95) and Opinion 2/92 (para. 33) as precedents.

<sup>92</sup> *Ibid.*, para. 108.

<sup>93</sup> *Ibid.*

affect common rules adopted in that area', since there was nothing to prevent the Community legislator from prescribing common action by means of internal legislation.<sup>94</sup>

In the light of those three judicial criteria, the Court went on to examine the Commission's claim that Regulation No. 2407/92 and Regulation No. 2408/92 were affected by the national bilateral open skies agreements but quickly disapproved the contention. Since those Community measures did not govern air carriers from non-member countries operating in the Community, they 'cannot be regarded as affecting those regulations'. Nor could they be viewed as a complete harmonization of the field.<sup>95</sup> The Court, searching for a *conflict* between the bilateral agreements and the Community legislation, came close to employing a strict conflict criterion in determining whether there was an adverse affect on the existing Community legislation.<sup>96</sup> Yet, the Community could still, however, enjoy exclusive treaty-making powers where the internal

<sup>94</sup> *Ibid.*, paras. 111–12 (emphasis added).

<sup>95</sup> *Ibid.*, paras. 118–19.

<sup>96</sup> In his opinion to the *Open Skies* cases Advocate General Tizzano argued in favour of a strict semantic distinction between 'in conflict' and 'merely affect': 'For my part, I concur with the Commission that the *AETR* judgement is not confined to precluding the Member States from undertaking international obligations that are in conflict with common rules, especially as such conduct would in itself constitute a separate breach of Community law, which could be held unlawful even without regard to *AETR*. What the *AETR* judgement requires of Member States, and in clear terms, is not to assume obligations which may even merely "affect" the common rules. And there are other important precedents to the same effect, and in even more unequivocal terms, if that were possible.' (Opinion of AG Tizzano (*Open Skies*), para. 67.) Revisiting briefly Opinions 1/91, 1/92, and 1/94, the Advocate General finds that '[i]n these precedents, as may readily be observed, the Court did not stop to examine whether there were specific reasons for which the assumption of the international obligations could in fact impinge in some form on the Community provisions. For the Member States to be precluded from undertaking obligations of this kind, the Court deemed it sufficient, to use its own expressions, that the obligations "[fall] within the scope of" the Community rules, that they are "concerned with an area which is already covered to a large extent by Community rules", that they are "in the spheres covered by those acts" or that "the matters covered by the [agreements] are already the subject of internal legislation". All this is so, I would repeat, simply "because the common rules thus adopted could be affected within the meaning of the *AETR* judgement" ' (*ibid.*, para. 70). 'It must therefore be concluded that, in principle, in matters covered by common rules, the Member States may not under any circumstances conclude international agreements, *even if these are entirely consistent with the common rules, since "any steps taken outside the framework of the Community institutions" would be "incompatible with the unity of the common market and the uniform application of Community law"*. I appreciate that some may find—and have found—this conclusion unduly rigid and even over-formalistic; but I am unable to see any way to limit its implications, in any reasonable and credible manner, without undermining the coherence of the principles and of the system and, in particular, the fundamental requirement of the unity and uniformity of the common action which, as we have seen, the Court has made the cornerstone of its case-law on the matter' (*ibid.*, para. 71, emphasis added). However, a little later, the Advocate General admits that 'the question whether or not the agreement "affects" the common rules must be assessed in the light of the particular circumstances of each case; in other words, a specific assessment is required in each case to determine if the agreement *conflicts in some respect with the common rules or if it could otherwise in any way impinge on their correct application or alter their scope*' (*ibid.*, para. 75, emphasis added). And a little further down still, he writes that 'in order to establish that the common rules are "affected" it is not enough to cite general effects of an economic nature which the agreements could have on the functioning of the internal market; what is required instead is to specify in detail the aspects of the Community legislation which could be prejudiced by the agreements' (*ibid.*, para. 77). Paras. 78–108 of his opinion represent a concrete conflict analysis of whether the disputed agreements affect the relevant Community legislation.

legislation expressly granted such a power or covered external situations (the 'WTO principle'). The Court therefore proceeded to look inside the Community legislation in the search for provisions applying to 'external situations'. Those provisions were indeed spotted in relation to air fares<sup>97</sup> as well as computerized reservation systems (CRS),<sup>98</sup> both of which applied to non-Community carriers on intra-Community routes. With respect to those 'islands of exclusivity', the Court found that the Member States had violated their obligations under Article 10 EC by failing to facilitate the achievement of the Community's tasks and to abstain from any measure that could jeopardize attainment of the objectives of the Treaty.

In the *Open Skies* cases we thus encounter a very restrictive reading of the *ERTA* doctrine. While the Court clings to conceptualizing the effect of internal legislation through the lens of subsequently exclusive parallel competences, the actual scope of the *ERTA* doctrine has been significantly limited to mean the following. In the absence of (quasi-)complete harmonization of the (internal) field, only a direct conflict between the Member States' international obligations and existing Community legislation will exclude the possibility of shared external powers on the part of the Member States. The *Open Skies* ruling thus moved further away from the conceptualist-federalist reading of the *ERTA* ruling and consolidated the pragmatic approach based on a conflict criterion of 'inconsistency'.

(ii) *Naturally Exclusive External Powers through Constitutional 'Necessity': the Remarkable Transformation of the Opinion 1/76 Ratio Decidendi*

It is almost commonplace to find import in a judgment's lack of saying something. In the history of the European Court's jurisprudence only a few rulings, however, have come to fame by means of retrospectively projected meaning—a meaning that those rulings could not have had at the time the Court rendered its decision. Opinion 1/76 represents just such a singular ruling whose originality is ill-constructed and whose fame is premised on creative 'over-interpretation'.<sup>99</sup> The 'Opinion 1/76 principle' has come to represent a second source of exclusive external competence. The present section will

<sup>97</sup> The exclusive external competence resulted from Art. 1(3) of Regulation 2409/92: 'Accordingly, to the extent indicated in Article 1(3) of Regulation No 2409/92, the Community has acquired exclusive competence to enter into commitments with non-member countries relating to that limitation on the freedom of non-Community carriers to set fares and rates. It follows that, since the entry into force of Regulation No 2409/92, the Federal Republic of Germany has no longer been entitled to enter on its own into international commitments concerning the fares and rates to be charged by carriers of non-member countries on intra-Community routes.' (*Commission v. Germany (Open Skies)*, paras. 124–5.)

<sup>98</sup> As regards CRS the Court stated that 'it follows from Articles 1 and 7 of Regulation No 2299/89 that, subject to reciprocity, that regulation also applies to nationals of non-member countries, where they offer for use or use a CRS in Community territory. By the effect of that regulation, the Community thus acquired exclusive competence to contract with non-member countries the obligations relating to CRSs offered for use or used in its territory' (*ibid.*, paras. 128–9).

<sup>99</sup> On the issue of over-interpretation, see U. Eco, *Interpretation and Over-Interpretation* (CUP, 1992).

investigate the birth and maturation of this second line of exclusivity over the past three decades.

Let us revisit the factual scenery of the ruling. The provisions on the Community's common transport policy once again lay at the judicial table after a request from the Commission to deliver an advisory opinion on the legality of an agreement on inland navigation. Traffic on the Rhine River has been traditionally problematic and international efforts to decrease the transport activities date back to the 1930s. The revised Convention for Rhine Navigation (the 'Mannheim Convention') introduced some degree of international co-operation; yet, it did not permit the intervention of public authorities.<sup>100</sup> The problem of uneconomic freight rates had been identified by the Commission since 1964 and in 1971—after the *ERTA* decision—the Commission envisaged the possibility of concluding a bilateral agreement between Switzerland and the Community. Since the Council preferred a multilateral agreement, the negotiations opening in 1973 involved not only the Community and Switzerland but also six Member States of the Community (Belgium, France, Germany, Luxembourg, the Netherlands, and the United Kingdom). The negotiations were concluded in 1976 and had produced a draft 'Agreement establishing a European Laying-Up Fund for Inland Waterway Vessels'. The object of the draft agreement was to rationalize inland waterway transport—a policy that was clearly covered by Article 71 EC. For that purpose, the agreement would set up a public international organization vested with autonomous decision-making powers. Having originally given its approval to the draft and having transmitted it to the Council, a minute before midnight, the Commission became sceptical about the legality of the specific institutional arrangements in the agreement and asked the Court of Justice for an advisory opinion—the first occasion on which such an opinion was to be given.<sup>101</sup>

On the level of competence/power no objection could be made. Because of the traditional participation of vessels from Switzerland, it would have been 'impossible fully to attain the objective pursued by means of the establishment of common rules pursuant to Article 71 of the Treaty' and the only effective way ahead was 'to bring Switzerland into the scheme in question by means of an international agreement with this third state'.<sup>102</sup> Problems arose on two other fronts. First, the inclusion of a number of Member States as signatories to the agreement and the consequent choice of a mixed over a pure Community agreement could be criticized in the light of the Community's

<sup>100</sup> M. Hardy, above n. 8, at 562.

<sup>101</sup> Opinion 1/76 (Draft Agreement for the Laying-up Fund for Inland Waterway Vessels), [1977] ECR 741.

<sup>102</sup> *Ibid.*, para. 2. It will be re-called that the Opinion signalled the breakthrough of the doctrine of parallelism: absent an express power to conclude the agreement under the transport provisions, 'the power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community' (*ibid.*, para. 4). For a discussion of this aspect of the case, see Section II.A. above.

wide powers under its transport title.<sup>103</sup> Beyond that competence question hid a much more serious second constitutional problem, namely the respective political power of the Community and the Member States within the international organism. Let us take a look at both issues in turn.

The participation of the six Member States as *contracting* parties to the Inland Waterway Agreement—even if considered a ‘special problem’—was in fact less so in the eyes of the Court. The participation of specific Member States, together with the Community was justified by the existence of certain international conventions which preceded the EC Treaty. Those were capable of forming a legal obstacle to the attainment of the scheme laid down by the agreement. In Article 3 of the draft agreement, the six States had therefore promised to amend their previous international commitments so as to eliminate all incompatibilities with Community law:

This particular undertaking, given in view of the second paragraph of [Article 307] of the Treaty explains and justifies the participation in the agreement, together with the Community, of the six abovementioned States. Precisely because of that undertaking the obstacle presented by the existence of certain provisions of the Mannheim and Luxembourg Conventions to the attainment of the scheme laid down by the Agreement will be removed.<sup>104</sup>

Yet, the Court was eager to emphasize that the mixed character of the agreement ‘must be considered as being *solely for this purpose* and not as necessary for the attainment of other features of the system’.<sup>105</sup> The participation of the six States as *contracting* parties, consequently, did not as such encroach on the external power of the Community—at least to the extent to which Article 307 was applicable.<sup>106</sup>

The real ‘special problem’ for the legality of the draft Rhine Agreement concerned, however, the respective roles of the Community and the Member States within the decision-making process of the international organism.<sup>107</sup> The draft treaty envisaged the establishment of an autonomous organ endowed with decision-making powers to implement the objectives of the draft agreement. The decisions of the laying-up fund were to be generally applicable and binding in all the Member States of the Community and

<sup>103</sup> This aspect will be discussed in more depth in Section III.B.(ii) below.

<sup>104</sup> Opinion 1/76, para. 7. Art. 307 (2) EC reads: ‘To the extent that such agreements are not compatible with this Treaty, the Member State 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.’

<sup>105</sup> *Ibid.* (emphasis added).

<sup>106</sup> Arguably, the Member States would have been bound by Art. 307 EC as such so that there was ‘no absolute or inherent reason why they should be parties to the agreement containing such an undertaking [as Article 3 of the Draft Agreement]’ (M. Hardy, above n. 8, at 570).

<sup>107</sup> The Council had called it the ‘essential point’ to be settled by the Court (cf. Opinion 1/76, Council submissions at 750). The following discussion of the ruling will be confined to the problems arising from the delegation of *decision-making* powers to the Laying-up Fund. The agreement also envisaged the creation of a Fund Tribunal and consequently equally involved a judicial dimension. An extensive discussion of the latter can be found in P. Eeckhout, (above n. 8) External, 206–7.

Switzerland. (The Court saw no problems in establishing an institutional structure for the implementation of the agreement as such; nor did it reprimand the grant of decision-making powers to its organs.<sup>108</sup>) The Fund's Supervisory Board consisted of a delegate from each Member State—with the exception of Ireland—and from Switzerland, as well as one representative of the Commission. Decisions were to be taken by simple majority with each *national* representative having one vote. The Commission's function had been reduced to acting as (non-voting) chairman.

The institutional arrangements created by the draft agreement thus differed from those used hitherto by the Community in the exercise of its external powers.<sup>109</sup> The ability of the international organism to issue legally binding and directly applicable decisions in the Community legal order signified a *transfer* of legislative power to an *external* institutional body.<sup>110</sup> While the delegation of decision-making power to internal Community committees had been upheld (under certain conditions),<sup>111</sup> the *ERTA* Court had sounded a warning note that the Council could not simply decide to leave the 'Community channels' by its own volition.<sup>112</sup> Each legal base of the Treaty fixes a particular constitutional equilibrium of intergovernmental and supra-national elements, which defines the concept of 'common action'.<sup>113</sup> Through Article 7 EC the Member States had undertaken to respect this institutional balance for the 'tasks entrusted to the Community'.<sup>114</sup> The Council itself had pointed out in its submissions to Opinion 1/76 that 'these tasks must be performed by the institutions to which they have been given without their being able in their turn to make them [sic] over at will to organs outside the

<sup>108</sup> 'In order to attain the common transport policy, the contents of which are defined in [Articles 70 and 71] of the Treaty, the Council is empowered to lay down, any other appropriate provisions, as expressly provided in [Article 71(1)(c)]. The Community is therefore not only entitled to enter into contractual relations with a third country in this connexion but also has the power, while observing the provisions of the Treaty, to cooperate with that country *in setting up an appropriate organism such as the public international institution* which it is proposed to establish under the name of the "European Laying-up Fund for Inland Waterway Vessels".' (Opinion 1/76, para. 5, emphasis added.) 'The Community may also in this connexion, cooperate with a third country for the purpose of giving the organs of such an institution appropriate powers of decision and for the purpose of defining, in a manner appropriate to the objectives pursued, the nature, elaboration, implementation and effects of the provisions to be adopted within such a framework.' (Ibid.)

<sup>109</sup> M. Hardy, above n. 8, at 564.

<sup>110</sup> The Court denied the legislative quality of the powers transferred by pointing to their limited scope: 'In fact the provisions of the Statute define and limit the powers which the latter grants to the organs of the Fund so clearly and precisely that in this case they are only executive powers' (Opinion 1/76, para. 16). The passage reveals a rather idiosyncratic understanding of the concept of legislative power.

<sup>111</sup> *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Koster et Berodt & Co.*, Case 25/70 [1970] ECR 1161.

<sup>112</sup> 'Although the Council may, by virtue of these provisions [i.e. Articles 70 *et seq.*], 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' (*ERTA*, para. 70).

<sup>113</sup> The concept of 'common action' is a Community concept and must not be confused with simple 'co-ordinated action' under international law. In that respect, the *ERTA* Court had been generous in finding the requirement of 'joint action' (*ERTA*, para. 78) fulfilled (M. Cremona, 'Doctrine of Exclusivity', above n. 8, at 414, footnote 72).

<sup>114</sup> Cf. Art. 7 EC.

Community'.<sup>115</sup> In view of the marginal role played by the Community institutions in the decision-making of the Laying-Up Fund the Council concluded that:

[T]he decisions which are taken by the organs of the draft Agreement *cannot be considered as the action of the Community institutions* whatever the influence which they may in fact exert on their adoption. The feature which distinguishes a transfer of powers from a limited delegation is the direct applicability of the decisions adopted by the organs. There is no doubt that the Community may, in accordance with the Treaty, enter into international commitments and restrict the exercise of its power. It is however doubtful whether the Community may in addition transfer its own powers to external organs.<sup>116</sup>

The Court, while having initial doubts,<sup>117</sup> also considered the role given to the Community organs too limited to classify the decisions of the Fund as 'common action'. Noting that the role of the Community institutions within the decision-making organ was 'extremely limited' and that the 'determinative functions in the operation of the fund are performed by the States',<sup>118</sup> the Court identified two essential problems with the legality of the arrangement. First, the purely intergovernmental character of the international organism, in which several Member States could act '*in place* of the Community and its institutions in a field which comes within a common policy which Article 3 of the Treaty has expressly reserved to "the activities of the Community" '.<sup>119</sup> The institutional arrangement not only marginalized the *supranational element* in the decision-making process, it eliminated it! Secondly, the agreement discriminated in the amount of decision-making power given to each Member State in a way incompatible with the concept of 'common action'.<sup>120</sup>

<sup>115</sup> Opinion 1/76, Council submissions at 751.

<sup>116</sup> *Ibid.* at 750 (emphasis added).

<sup>117</sup> In order to rescue the terms of the agreement, a draft regulation had been adopted, whose Art. 5 was designed to remedy the unconstitutional effects of the Fund's structural arrangements. While acknowledging the effort in the right direction, the Court nevertheless persisted in its negative outlook: 'The Court has examined all aspects of this question and it has duly considered the difficulties which may arise in the search for a practical solution to the problems posed by the organization of a public international institution managed by the Community and a single third country while maintaining the mutual independence of the two partners. Doubtless the specific nature of the interests involved may explain the desire, within the context of organs of management, to have recourse to administrative bodies more directly concerned with the problems of inland navigations. *Does this objective justify the creation of a mixed organization in which the presence of national representatives on the supervisory board together with the chairman and the Swiss representative would ensure the defence of the interest of the Community? After considering the arguments for and against, the Court has reached the conclusion that it is no doubt possible to attain an appropriate balance in the composition of the organs of the fund but that this must not result in weakening the institutions of the Community and surrendering the basis of a common policy even for a specific and limited objective.* The possibility that the agreement and the Statute, according to the statements of the Commission, might constitute the model for future arrangements in other fields has confirmed the Court in its critical attitude: The repetition of such procedures is in fact likely progressively to undo the work of the Community irreversibly, in view of the fact that each time the undertakings involved will be entered into with third countries. It was for these reasons that an adverse decision finally prevailed within the Court *as regards this aspect of the proposal.*' (Opinion 1/76, para. 14, emphasis added).

<sup>119</sup> *Ibid.*, para. 11 (emphasis added).

<sup>118</sup> *Ibid.*, para. 9.

<sup>120</sup> The Court singled out three distortions that would compromise the 'normal' principles governing the horizontal distribution of powers within the Community system. Anxious to prevent

Those distortions in the vertical and horizontal distribution of decision-making power within the Community legal order effected by the draft agreement would call 'into question the power of the institutions of the Community and, moreover, alter in a manner inconsistent with the Treaty the relationships between the Member States within the context of the Community'.<sup>121</sup> Therefore, in view of the material jurisdiction of the Fund—having a clear independent policy function—the transfer of decision-making power from the Community to the international organism constituted 'both a *surrender of the independence of action of the Community in its external relations* and a *change in the internal constitution of the Community by the alteration of essential elements of the Community structure as regards both the prerogatives of the institutions and the position of the Member States vis-à-vis one another*'.<sup>122</sup> The changes in the vertical and horizontal division of power within the Community produced results 'which are *incompatible with the requirements implied by the very concepts of the Community and its common policy*'.<sup>123</sup>

But what did this formula mean for the nature of the Community's external powers? Was the Court saying that the Community would enjoy an exclusive external competence even in the absence of internal legislation? The Opinion never refers to exclusive external powers.<sup>124</sup> Indeed, under the doctrine of parallelism—celebrating its first triumph in that case—both the Member States and the Community possessed a *shared* power to conclude the Inland Waterway Agreement (with the possible exception of Article 3 thereof). However, what the Court insisted on in the Opinion was that international agreements must be in conformity with the fundamental structural and normative principles of the Community legal order.<sup>125</sup> According to this historical

the Member States from 'sourcing-out' certain tasks that the founding fathers had intended the Community to achieve, the Court declared the following structural aspects of the international organization incompatible with the concept of 'common action': (a) the complete exclusion, even voluntary, of a specific Member State (i.e. Ireland) from the decision-making process within the Fund; (b) the power of certain Member States to take no part in a matter, even if it was falling within a common policy; and (c) the privileged status accorded to certain States at variance with the principles governing the (horizontal) relations between Member States of the Community.

<sup>121</sup> Opinion 1/76, para. 10.      <sup>122</sup> *Ibid.*, para. 5 (emphasis added).

<sup>123</sup> *Ibid.*, para. 8 (emphasis added).

<sup>124</sup> 'It might be thought that in Opinion 1/76, on the facts of the case, the Court found that the Community had exclusive competence to conclude the draft agreement establishing a European laying-up fund, because common rules could only be adopted by concluding that agreement. Some passages of the Opinion may support that interpretation. It is difficult to see, however, why the Court should have taken that view in 1977, bearing in mind that transport policy, unlike commercial policy, is not an exclusive competence. The situation was not such that the Member States, by concluding the agreement only in their individual capacity, would have acted in breach of the Community's exclusive competence in the area of transport.' (T. Tridimas and P. Eeckhout, above n. 8, at 167.) In the same direction go the remarks by A. Dashwood and J. Heliskoski: 'The widely held view, apparently shared by the Court of Justice, that Community competence in the matter of establishing a laying-up fund was exclusive, seems puzzling to us.' (A. Dashwood and J. Heliskoski, above n. 8, at 13.)

<sup>125</sup> This is reflected in the wording of the operative part of the Opinion that does not refer to the Community enjoying an exclusive power but simply states that the draft agreement 'is incompatible with the EEC Treaty'.

reconstruction of Opinion 1/76's 'original meaning', the ruling should not be understood from the perspective of exclusive parallel powers but seen against the background of the European Court's attempt to set constitutional limits to the delegation of legislative powers outside Community channels.

How then did Opinion 1/76 come to be seen as a potential second source of exclusive parallel powers of the Community? An exact chronology of the gradual transformation of Opinion 1/76 is difficult to establish. Yet, a new reading of the *ratio decidendi* clearly saw the light in the Commission's submissions to the WTO Opinion. There the Commission identified 'two situations in which the Community has implied competence of an *exclusive* nature at international level'.<sup>126</sup> While an exclusive power would exist where the internal legislative competence had been exercised (the *ERTA* doctrine), the Community would equally have an exclusive parallel power where 'the Treaty provisions have conferred upon the Community institutions internal powers for the attainment of a specific objective and *the participation of the Community in the international agreement is necessary for the attainment of that objective*'.<sup>127</sup> This second source of exclusivity—expressly named the 'Opinion 1/76 doctrine'<sup>128</sup> by the Commission—would be derived from constitutional 'necessity'. Let us see how the Court dealt with this creative over-interpretation of the original Opinion 1/76 *ratio* by the Commission.

Surprisingly, the Court *did* accept the 'Opinion 1/76 doctrine' as a second source of exclusivity, albeit in a more restrictive format. 'Save where internal powers can only be exercised at the same time as external powers (see Opinion 1/76 and paragraph 85 above), internal competence can give rise to *exclusive* external competence only if it is exercised.'<sup>129</sup> In the eyes of the Court this was not the case for services in the present circumstances since the 'attainment of freedom of establishment and freedom to provide services for nationals of Member States is not *inextricably linked* to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community'.<sup>130</sup> While

<sup>126</sup> Cf. Opinion 1/94, Commission Submissions at 5318 (emphasis added).

<sup>127</sup> *Ibid.* (emphasis added), compare also paras. 73 and 82 of the Opinion.

<sup>128</sup> *Ibid.* The Council opposed this second line of exclusivity from the very beginning by arguing that 'the Commission's arguments regarding implied powers ignore the difference between the existence of powers and their exercise. *Only where the internal powers are exercised by the Community can the resulting external power be exclusive. Furthermore, if Member States retain their competences internally, they must also do so at international level*' (*ibid.*, emphasis added).

<sup>129</sup> Opinion 1/94, para. 89 (emphasis added). Para. 85 to which the Court refers as authoritative support of this statement reads as follows: 'Opinion 1/76 related to an issue different from that arising from GATS. It concerned rationalization of the economic situation in the inland waterways sector in the Rhine and Moselle basins, and throughout all the Netherlands inland waterways and the German inland waterways linked to the Rhine basin, by elimination of short-term overcapacity. It was not possible to achieve that objective by the establishment of autonomous common rules, because of the traditional participation of vessels from Switzerland in navigation on the waterways in question. It was necessary, therefore, to bring Switzerland into the scheme envisaged by means of international agreement (see Opinion 1/76, paragraph 2) . . . It is understandable, therefore, that external powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted.'

<sup>130</sup> Opinion 1/94, para. 6 (emphasis added).

the Court thus refused to grant the Community a *general* exclusive parallel external power *à la* Article 308 EC, the Court nevertheless positively acknowledged the existence of a second source of exclusivity for parallel powers. The Community could enjoy an exclusive parallel power where the achievement of an internal objective was 'inextricably linked' with the external sphere so that internal and external powers could only be effectively exercised at the same time.

This was the birth of a new rationale that would mature in subsequent cases. In Opinion 2/92 we thus find the Court giving the following meaning to the 'Opinion 1/76 doctrine':

It is true that, *as the Court stated in Opinion 1/76, the external competence based on the Community's internal powers may be exercised and may thus become exclusive*, without any internal legislation having first been adopted. However, this relates to the situation where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules (see Opinion 1/94, paragraph 85).<sup>131</sup>

The successful transformation of the doctrine into its present shape was accomplished in the *Open Skies* cases. Instead of following its Advocate General,<sup>132</sup> the Court accepted the new Opinion 1/76 rationale and therefore the possibility of exclusive parallel powers derived from constitutional necessity.

<sup>131</sup> Opinion 2/92, Section V, para. 4 (emphasis added).

<sup>132</sup> Advocate General Tizzano had strongly argue against the transformation of the Opinion 1/76 rationale into a new source of exclusive external power: Contesting the 'invention' of the Opinion 1/76 doctrine by the Commission his position is worth quoting in full: 'Let me say at once that I am unable to agree with the conclusions the Commission draws from Opinion 1/76 and, more generally, from the Court's case-law on the external competence of the Community. To begin with, I would recall that that opinion had been requested from the Court in order to establish, *inter alia*, whether the Community had power to conclude with Switzerland an agreement, already initialled by the contracting parties, "establishing a European laying-up fund for inland waterway vessels", even though there was no express provision in the Treaty conferring such a power, and the AETR decision could not be invoked since the Community had not adopted any internal measures in this domain . . . For the moment, I would like to stress that the conclusions drawn by the Commission from the case-law mentioned above stem, in my view, from a mistaken belief that in affirming the Community's competence in the situations referred to in Opinion 1/76, the Court also held this competence to be automatically exclusive. From a careful reading of the quoted passages, however, it is apparent that all the Court actually affirmed is that in those situations, despite the absence of any express provision, the "necessity" for an agreement in a given field may enable the Community to affirm its own external competence. But it will always and only be the specific recognition of such "necessity", that is to say, the actual exercise of that competence, which will render it exclusive. The reasons for this are the same as those for which this type of competence is usually established, that is to say, because the assumption of international obligations in the same field by the Member States could jeopardise the attainment of the objective of the Community for which the agreement was in fact considered necessary.' (Opinion of AG Tizzano (*Open Skies*), paras. 46–49, emphasis added.) The second part of the quote betrays the Advocate General's preference for transposing the *ERTA* principles to Opinion 1/76 situations.

In any case, the Advocate General championed a political definition of 'necessity', i.e. 'that the necessity for an agreement must be determined in accordance with the procedure laid down for the exercise of the parallel internal competence, where such competence is already provided for' (para. 52). The quest for determining the necessity of an agreement was functionally identical to determining the 'necessity' under the common market power of Art. 308 EC: 'To return to the parallelism I have mentioned above with specific respect to [Article 308], I would point out that that article does not confine itself to requiring a measure to be "necessary" if Community competence

The scope of this second source of external exclusivity was however interpreted restrictively. Looking at the 'Opinion 1/76 doctrine', the Court found that an exclusive parallel competence could only come into existence where the conclusion of an international agreement was necessary in order to attain objectives of the Treaty and 'cannot be attained by establishing *autonomous rules*'.<sup>133</sup> Clear constitutional preference was thus given to the implementation of Community objectives through *internal legislation* as opposed to harmonization by means of 'external law', that is international agreements.<sup>134</sup> The Court promptly denied the necessity of an *a priori* exclusive parallel competence for the field of air transport since:

There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to the United States of America, or to prevent them prescribing the approach to be taken by the Member States in their external dealings, so as to mitigate any discrimination or distortions of competition which might result from the implementation of the commitments entered into by certain Member States with the United States of America under the open skies' agreements.<sup>135</sup>

The Court did not find the freedom to provide transport services *within* the Community '*inextricably linked*' to achieving the freedom *vis-à-vis* third countries.<sup>136</sup> The Community would thus not enjoy any exclusive parallel

is to be justified, but lays down precise conditions and procedures for the determination of that necessity and, hence, whether it is capable of founding such competence. *I consider that the same approach is also indicated here. Besides, it seems obvious to me that if the Treaty has conferred a discretionary power on certain institutions and prescribed the procedures for its exercise, it follows that neither the power nor the procedures can be disregarded and, in particular, that no other entity can take the place of those institutions in the exercise of that power.* It may be debated, possibly even before the Court, whether in a specific case the assessment of the "necessity" for an agreement was properly carried out (or omitted), but there can certainly be no escaping the fact that the institutions empowered to carry out the assessment and the procedures to be followed are those specified in the Treaty . . . It must therefore be concluded from the foregoing that *unless and until the "necessity" for an agreement has been duly and specifically recognised by the competent institutions and in accordance with the prescribed procedures*, there can be no exclusive Community competence; consequently, the Member States remain free to assume international obligations in the relevant field, albeit, as we shall also see later, subject to their duty to cooperate in good faith with the Community institutions in accordance with [Article 10] of the Treaty.' (Opinion of the AG, paras. 53–4, emphasis added.)

<sup>133</sup> *Commission v. Germany (Open Skies)*, para. 83 (emphasis added). The notion of 'autonomous rules' refers to (internal) Community measures. The full para. 83 of the judgment reads as follows: 'In a subsequent opinion, the Court stated that the hypothesis envisaged in Opinion 1/76 is that where the internal competence may be effectively exercised only at the same time as the external competence (Opinion 1/94, paragraph 89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.' The 'necessity' criterion thus related not only to the scope of an implied external competence but also determines its nature as shared or exclusive competence.

<sup>134</sup> One might think here of the warning words of the Court in the WTO ruling in the context of the Common Commercial Policy (CCP): The Community must not use its external powers to evade procedural safeguards applicable to internal legislation. The significance of this constitutional safeguard is, of course, much more limited in the field of parallel external powers as a result of the near procedural parallelism imposed by Art. 300 EC.

<sup>135</sup> *Commission v. Germany (Open Skies)*, para. 85 (where the Court refers to Opinion 1/94, para. 79).

<sup>136</sup> *Ibid.*, para. 87 (emphasis added).

competence under its Opinion 1/76 doctrine, since the case did not 'disclose a situation in which internal competence could effectively be exercised only at the same time as external competence'.<sup>137</sup>

Let us recapitulate. Embedded in its historical context, the 'original rationale' behind Opinion 1/76 seemed a simple combination of a fully fledged doctrine of parallelism<sup>138</sup> and the prohibition to delegate Community powers outside Community channels by means of international agreements. Pushed by the Commission's ambitions in the external sphere, the function of the Opinion 1/76 doctrine has been transformed in recent jurisprudence. According to the new Opinion 1/76 doctrine, the Community will enjoy—under certain specified conditions—an exclusive parallel competence in the absence of internal legislation thanks to some sort of 'constitutional necessity'. In the words of an eminent commentator of the Community's external relations it is thus:

*a result of the Court's case law in Opinion 1/94 and Opinion 2/92, [that] one can conclude that the Community may acquire exclusive external competence on the basis of Opinion 1/76 where the participation of a non-member country or countries is 'necessary' to enable the Community to fulfil one of its objectives and specific Treaty objectives cannot be achieved by internal Community legislation as they would not be binding on the non-member country or countries.*<sup>139</sup>

As a consequence of the remarkable transformation of Opinion 1/76's *ratio decidendi* a second source of exclusivity, albeit fairly restricted,<sup>140</sup> has emerged—thanks to a feat of creative over-interpretation.

#### B. CUBIST PERSPECTIVES: THE CONSTITUTIONAL PECULIARITIES OF THE PARALLEL COMPETENCE PARADIGM

The Community's parallel powers have come to be classified along the dichotomy of exclusive and shared competences. In this section, we shall question this very conceptualization by comparing the nature of the Community's exclusive and shared external competences against the constitutional standard developed in the *internal* sphere of the Community legal order.

A first section will suggest that the *ERTA* line of jurisprudence may be best understood as a straightforward application of the doctrine of pre-emption as opposed to assuming (subsequently) exclusive parallel competences. The second section will proceed to look at the constitutional regime governing

<sup>137</sup> *Ibid.*, para. 88 (emphasis added).

<sup>138</sup> See Section II.A. above.

<sup>139</sup> D. O'Keefe, 'Exclusive, Concurrent and Shared Competence', above n. 8, at 190 (emphasis added).

<sup>140</sup> 'One has difficulty imagining cases where internal competence could not be exercised without concluding an international agreement within the strict parameters set by the Court. It is doubtful whether the agreement in issue in *Opinion 1/76* came within those parameters . . . [Since] could not the Council, here too, have arranged for concerted action towards Switzerland in the internal legislation, and could it not have prescribed the approach to be taken by the Member States in their external dealings with Switzerland on this issue?' (P. Eeckhout, 'External', above n. 8, 91.)

mixed agreements and argue that the common practice of facultative mixity undermines the autonomous nature of the Community's shared external competences.

(i) *Conceptual Antipodes: Exclusive Competence versus Doctrine of Pre-emption*

A competence is exclusive where it pertains to one public authority to the exclusion of any other. Exclusive competences are therefore double-edged provisions. Their positive side entitles one constitutional level to act, while their negative side prevents the other level from any action falling within the ambit of the competence. National legislation falling within the scope of one of the Community's exclusive competences will violate the Treaty—not secondary law. The 1957 Treaty contained no verbal reference to exclusive powers. Indeed, the concept of exclusivity originally seemed 'foreign' to the Community legal order.<sup>141</sup> However, when the judicial landmarks on parallel external powers were delivered in the 1970s, the European Court had just begun to design a nascent typology of legislative competences that recognized exclusive Community competences.

Absent any clear federal typology of competences, the exclusionary effect of Community law on national powers had partly come to be conceptualized under the lens of the US American constitutional doctrine of pre-emption. Analysing the emergent doctrine of pre-emption in the Community legal order, M. Waelbroeck memorably identified two alternative judicial approaches. According to the 'conceptualist-federalist approach', all national competence falling within the ambit of a Community competence would be automatically excluded. The Community's competence would then be exclusive. The 'pragmatic approach', on the other hand, allowed the Member States to 'retain a concurrent power to regulate matters falling within the reach of the Community's power, as long as in so doing they do not create a *conflict* with the rules adopted by the Community'.<sup>142</sup> While the conceptualist-federalist approach captured the 'pre-emption' phenomenon of primary as well as secondary law, the pragmatic approach to pre-emption was confined to conflicts at the level of national and Community *legislation*.

The following section will adhere to a rigid conceptual distinction between the doctrine of exclusive competences and the doctrine of pre-emption. The constitutional difference between the two doctrines lies in the respective nature of their exclusionary effect. When the Court discovers an exclusive competence—as in the area of the EC's common commercial policy—the Member States will automatically be excluded from adopting measures falling within the scope of the competence (unless the national authorities have been

<sup>141</sup> C. Stewing, *Subsidiarität und Föderalismus in der Europäischen Union* (Heymanns, 1992) at 104.

<sup>142</sup> M. Waelbroeck, 'The emergent doctrine of Community pre-emption—consent and re-delegation', in T. Sandalow and E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe* (OUP, 1982) Vol. II (1982) 548–80, at 551.

authorized to intervene). The very *existence* of a legislative competence pertaining to the European legislator will thus exclude national legislative action in the same field. The exclusionary effect originates in primary law and should be co-extensive with the scope of the competence.<sup>143</sup> The exclusive nature of a competence is set by the Constitution itself. No simple *legislative* act could change the *constitutional* nature of a competence—a conclusion directly derived from the logic of the hierarchy of norms. Since the classification of a competence into either exclusive or shared derives from the Constitution—its text or context—it cannot be influenced by hierarchically inferior constitutional phenomena, such as the pre-emptive effect of Community legislation.<sup>144</sup>

Correspondingly, the doctrine of pre-emption shall be conceptualized as a purely *legislative* phenomenon. Drawing heavily on the federal experience of US American constitutionalism, E.D. Cross has championed the following definition of the Community doctrine of pre-emption:

Pre-emption problems should be viewed . . . to include all instances of actual and potential conflict between Member State law and Community legislation. Pre-emption analysis should be understood as analysis of *competing legislation*; not as an analysis of conflicts that are strictly and exclusively between Member States law and Treaty provisions.<sup>145</sup>

<sup>143</sup> The criteria that make up an exclusive competence have been succinctly defined by the early K. Lenaerts: 'L'attribution d'une compétence à la Communauté est *exclusive*, lorsque les Etats membres perdent *immédiatement* (même si uniquement après l'écoulement d'une période transitoire) et *irréversiblement* toute prérogative se rapportant au domaine de la compétence attribuée. Il est sans importance à cet égard que la Communauté ait ou n'ait pas exercé sa compétence. L'attribution de compétence se veut définitive, parce que la constitution communautaire l'a conçue de cette manière. Seul un amendement formel de la constitution pourrait modifier ce caractère exclusif de 'l'attribution de compétence.' (K. Lenaerts, above n. 8, at 41 (emphasis in original).)

<sup>144</sup> 'La question de la *preemption* (un terme qui est emprunté directement au droit constitutionnel américain) concerne alors l'usage exhaustif ou non par la Communauté d'une compétence qui est attribuée à titre concurrent. Les Etats membres restent habilités à exercer la compétence en cause, pour autant que leur action n'entre pas en conflit avec l'exercice concret par la Communauté de sa compétence . . . Une conception évolutive des notions de compétence exclusive et de compétence concurrent en ce sens que la seconde notion tend vers la première dans la mesure même de l'exercice par la Communauté de la compétence en cause induit en erreur, puisque le caractère exclusif ou concurrent de toute compétence attribuée découle des seuls texte et contexte de la constitution communautaire. La distinction entre une compétence concurrente ayant une origine constitutionnelle, il paraît inconcevable que cette distinction soit tributaire d'une évolution quelconque résultant des options législatives prises par la Communauté à l'intérieur de sa sphère de compétence attribuée. Il importe dès lors de souligner que la notion évolutive d'exclusivité correspond en fait à la figure de la *preemption* du droit américain, qui implique que dans un système de compétences constitutionnellement *concurrentes* l'Union a le pouvoir de régler un certain sujet de façon *exhaustive*, ne laissant plus aucune marge aux Etats à maintenir des normes propres en la matière. Le terme *compétence exclusive* doit être réservé aux cas où les traités attribuent une compétence à la Communauté dans le but de dérober, par ce fait même, les Etats membres de toute compétence parallèle ou complémentaire.' (K. Lenaerts, above n. 8, at 42–3 (emphasis in original).) Lenaerts pointed out that the notion of an evolutionary exclusivity, while finding some support from the Court's jurisprudence, would give rise to an unfortunate 'confusion fonctionnelle' (ibid). In the meantime, the author has adopted a less categorical approach, see: K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 1999) at 96.

<sup>145</sup> E.D. Cross, 'Pre-emption of Member State Law in the European Economic Community: A Framework of Analysis', [1992] 29 CML Rev. 447–72, at 453 (emphasis added).

Let us now look at the present judicial picture. Whereas the language of exclusive parallel powers has been part of the Commission's and Council's vocabulary ever since *ERTA*,<sup>146</sup> the European Court only 'officially' adopted the exclusive power thesis twenty years later in its *WTO* ruling. With Opinion 2/91 the exclusive competence perspective celebrates its triumph: 'The exclusive or non-exclusive nature of the Community's competence', so the Court deposits, 'does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis.'<sup>147</sup> Within the limited scope of the 'transformed' Opinion 1/76 doctrine the Community legal order has further recognized a naturally exclusive parallel power. In the great majority of cases the exclusive character of the parallel external power will, however, be due to an 'exclusivity by exercise'.

The recognition of 'exclusivity by exercise' or 'subsequent exclusivity' has given rise to an academic view that identifies (unexercised) parallel competences with the constitutional type of concurrent competences known in the German federal legal order.<sup>148</sup> While such a conceptualization is open to discussion, a number of judicial pronouncements can be marshalled against it.<sup>149</sup> Instead of importing the German notion of 'concurrent' competence, the present section will remain loyal to the judicial classification of the Community's parallel competences as *shared* competences. These shared competences will according to the ECJ and under the conditions specified by the *ERTA* doctrine, become exclusive after the Community's internal competence has been exercised.

Though the European Court has chosen the language of 'exclusive powers', should one accept this conceptualization as the *non plus ultra* of judicial

<sup>146</sup> Compare the respective submissions of Commission and Council in *ERTA* (cf. *ERTA*, paras. 8 and 11).

<sup>147</sup> Opinion 2/92, para. 9.

<sup>148</sup> According to German constitutional doctrine, the exercise of a concurrent competence by the federation restricts the very existence of a (previously) held State competence. The Community's implied external powers have been classified as concurrent competences by some authors. M. Nettesheim, for example, has argued that '[d]ie Befugnisse, die die EU im auswärtigen Bereich hat, sind hier teilweise ausschließlicher, im Übrigen aber konkurrierender Natur: Die Inanspruchnahme der EU-Kompetenzen löst vom Primärrecht wegen Sperrwirkung aus.' (M. Nettesheim, 'Kompetenzen', in A. von Bogdandy (ed.), *Europäisches Verfassungsrecht* (Springer, 2003) 415–77, at 452, emphasis added.)

<sup>149</sup> The European Court has come to speak about 'shared' or 'joint' powers in its recent jurisprudence. See, for example, *WTO* Opinion (para. 98), Opinion 2/91 (para. 12) and Opinion 2/92 (operating part). More importantly, in those opinions the exclusionary effect stems from secondary, not primary law. Consider the following statement by M. Cremona: 'A picture is thus emerging, not so much of concurrent competence in the sense of separate compartments for the Community and the Member States (a picture suggested by the doctrine of pre-emption), but rather of shared and even complementary competencies, an absence of exclusivity which will imply an overlapping of competence to make rules, subject to the overriding obligation on the part of the Member States (derived both from [Article 10 EC] as well as explicit statements in the Treaty) that Member State action must be *compatible with the Treaty*.' (M. Cremona, 'External Relations', above n. 8, at 158, emphasis added.) See also D. de la Rochère, 'L'ère des compétences partagées de l'étendue des compétences extérieures de la Communauté européenne', (1995) 390 RMCUE 461–70.

wisdom; or, might one imagine alternative ways to constitutionally justify the exclusion of national action in situations governed by the *ERTA* doctrine? Underlying the constitutional idea of 'subsequent exclusivity' is the assumption that the exercise of a shared competence renders it (in parts) into an exclusive competence. Since the national regulator will in the future be prevented from using its competence in the area, 'islands of exclusivity'<sup>150</sup> emerge as a consequence of exhaustive European legislation. In the case of an occupation of the regulatory field, the monopolized regulatory power of the Community is, however, not the result of an attribution of an exclusive competence by the Constitution. The exclusive effect is not automatic, but gradually builds up until regulatory saturation is reached.

A number of theoretical objections may thus be advanced against the conceptualization of this legislatively generated exclusive effect as 'exclusive competence'. First, to identify the area of exclusivity formed by secondary law as an exclusive *competence* wrongly suggests that the policy field delineated could be used as a legal base itself.<sup>151</sup> This is, of course, not the case. Nor does the occupation-of-the-field phenomenon render the primary law competence (from which the secondary law emanates) exclusive. The exclusive effect is confined to the 'policy field' as set by the scope of the 'regulatory system' formed by secondary legislation and will not affect the shared nature of the primary legislative base.<sup>152</sup> The idea of subsequently exclusive competences also raises serious concerns from the perspective of a preordained constitutional hierarchy of norms. It seems dubious to permit a modification of the order of competences through secondary law, especially where this would allow the Community legislator to restrict the reach of the principle of subsidiarity.<sup>153</sup> The extension of the concept of exclusive *competence* to the

<sup>150</sup> A beautiful phrase used by J. Baquero Cruz, 'Disintegration of the Law of Integration in the External Economic Relations of the European Community', [1997] 3 *Columbia Journal of European Law* 257–82, at 260.

<sup>151</sup> This confusion between the scope of the primary legislative competence and the scope of the occupied field is often encountered, where authors simply speak of the 'exercise of a competence' thus suggesting that once the shared competence is exercised (through whatever legislative act) it will be transformed into an exclusive competence. The pre-emption phenomenon—and the form of exclusivity engendered by it—will, however, only take place within the scope of the concrete secondary law measure(s).

<sup>152</sup> Pre-emption of the field indeed follows a conceptualist-federalist logic. This is a characteristic the doctrine of pre-emption shares with exclusive competences. Both will prevent Member States not only from adopting *differing* national legislation but from adopting any national legislation at all. One should, however, not forget that in the case of pre-emption 'prüft der Gerichtshof in der fraglichen Entscheidung näher, ob die nationale Regelung das Gemeinschaftsrecht beeinträchtigt und verneint im konkreten Fall die Frage. Durch diese *konkrete Prüfung* der Vereinbarkeit mit dem einschlägigen sekundären Gemeinschaftsrecht unterscheidet sich die Konstellation von der einer echten ausschließlichen Kompetenz, bei der die Mitgliedstaaten generell ausgeschlossen sind. Dieser fundamentale Unterschied wird verwischt, wenn man auch die Fälle der Sperrwirkung mit dem Begriff der ausschließlichen Zuständigkeit belegt.' (H. D. Jarass, 'Die Kompetenzverteilung zwischen der Europäischen Union und den Mitgliedstaaten', [1996] 121 *AöR* 173–199, at 187.)

<sup>153</sup> 'Dieser Auffassung widerspricht nicht nur der Sinn und Zweck des Art.5 (ex-Art. 3b) EGV als kompetenzbegrenzende Norm. Vielmehr beruht sie auch auf der Annahme, dass das Prinzip der begrenzten Einzelermächtigung gem. Art. 5 I (ex-Art. 3b I) EGV—und damit die Kompetenzverteilung

phenomenon of occupation of the field pre-emption—and the consequently ‘dynamic’ understanding of the order of competences—would consequently cause a serious theoretical headache: the identification of exclusive competences is a constitutional question; they ought to be extended only by means of the classic constitutional amendment procedure. In contrast, the exclusionary effect of subsequently exclusive competences stems from the pre-emptive effect of secondary law that could be repealed using a normal legislative procedure. The ‘exclusivity’ generated through exhaustive legislation is therefore more fragile compared to real ‘naturally’ exclusive competences. In the light of those theoretical objections, it is submitted that the two constitutional phenomena should be strictly kept apart. The phenomenon of pre-emption should, in other words, not be couched in the language of exclusive *competences*.

Why not (re-)read the *ERTA* doctrine as a straightforward application of the principle of pre-emption? D. O’Keeffe has aptly captured the strange analytical divergence in the constitutional principles applied in the internal and external hemisphere of the Community legal order: ‘Where internal Community rules completely or exhaustively regulate a particular area, the Member States are therefore precluded from legislating in the area. At the internal level, this is described as pre-emption; on the external level, the Community measures give rise to exclusive Community competence externally for that area.’<sup>154</sup> Why has the Court created two different conceptualizations of the effects of Community legislation in the internal as opposed to the external sphere? Why does it not also refer to the doctrine of pre-emption in the external sphere, arguing that through exhaustive legislation the Community has occupied a regulatory field internally and externally?

The pre-emption conceptualization of the *ERTA* doctrine would have a number of advantages. First, it would better recognize the fragile exclusive aspect of parallel powers being generated by internal legislation and not constitutionally enshrined. The external competence of the Member States therefore revives to the extent that ‘common rules’ have been revoked.<sup>155</sup> Secondly, the WTO principle (assuming an exclusive parallel competence wherever a legislative act directly or indirectly grants a treaty-making power to the

in der Gemeinschaft—aus den Angeln hebt. Denn danach sind bestimmte Kompetenzen . . . durch das *Primärrecht* des Vertrages, mithin die “Verfassung” der Gemeinschaft, als ausschließliche und andere als konkurrierende definiert. Diese primärrechtliche Definition kann aber nicht einfach durch das Setzen von Sekundärrecht verändert werden.’ (C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (2nd edn. Nomos, 1999) at 95.) Some authors ‘solve’ this constitutional problem by simply restricting the scope of the subsidiarity principle to naturally exclusive competences thereby excluding those areas of subsequently exclusive competences from the application of Article 5(2) EC. Discussing Opinion 2/91 of the Court K. Lenaerts and P. van Nuffel, for example, argue as follows: ‘Depending upon the extent to which the Community exercises its power, it may confer upon it an “exclusive nature”, even though exclusive competence has not been transferred to the Community within the second paragraph of Article 5 (*ex Article 3b*) of the E.C. Treaty.’ (K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 1999) at 96).

<sup>154</sup> D. O’Keeffe, ‘Exclusive, Concurrent and Shared Competence’ above n. 8, at 183.

<sup>155</sup> ‘[N]on-existent rules can hardly be “affected” by a Member State’s acts or by conclusion of an agreement.’ (I. Macleod, I.D. Hendry and S. Hyett, above n. 8, at 62.)

Community) could be explained by reference to the type of pre-emption known as 'express pre-emption'.<sup>156</sup> Lastly, the refusal to locate the exclusionary effect in the *nature* of the parallel *competence* would allow the Court to embrace the more suitable and easier doctrine of parallel *instruments*. The power of the Community to act by means of internal and external action could then be rooted in the same ('internal') legal competence. A preference for a doctrine of pre-emption will thus make the fictitious invention of a set of parallel 'competences' superfluous. Moreover, the doctrine of pre-emption—in tandem with the doctrine of parallel instruments—could equally better account for the pre-emptive effect of directly effective international agreements on national powers.

In conclusion, the *ERTA* line of jurisprudence could well be (re-)interpreted as the 'logical extension' of the principle of pre-emption.<sup>157</sup> Transposing the pre-emption analysis from the internal to the external sphere could arguably provide a clearer dogmatic justification for the restriction of national foreign relations power than the creation of subsequently exclusive implied external competences.<sup>158</sup> Instead of having recourse to the 'metaphysical distinction'<sup>159</sup> between exclusive and concurrent powers, the Court therefore should base its parallel powers jurisprudence on the dual doctrines of supremacy and pre-emption. The carefully worded concluding remarks of the European Court in the *Open Skies* cases may represent a small step in the right direction.<sup>160</sup>

(ii) *Excursus: 'Mixed up' in the Luxembourg Compromise—Shared Powers versus Mixed Agreements*

Constitutional lawyers employ the concept of competence to refer to a public authority's entitlement to adopt 'autonomous' legal acts within a certain

<sup>156</sup> Express pre-emption is the most straightforward in doctrinal terms—even though it does not spare in practical problems in deciding extent and scope of the pre-emption clause: here, the federal legislation itself forbids state regulation of certain kinds or, alternatively, requires federal legislation to be exclusive. 'Express preemption clauses typically command that "no state shall adopt" certain requirements or that "no [requirement of a particular kind] shall be imposed" by any state.' (Note, 'A Framework for Preemption Analysis' [1978–9] 88 YLJ 363, at 364.)

<sup>157</sup> D. McGoldrick, above n. 8, at 72–4.

<sup>158</sup> Surely, this proposition only holds once the principle of pre-emption has assumed a clearer profile in Europe's constitutionalism.

<sup>159</sup> W. Cohen, 'Congressional Power to Define State Power to Regulate Commerce: Consent and Pre-emption', in T. Sandalow and E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe, Vol II* (OUP, 1982), 523 at 530

<sup>160</sup> The Court concluded the first part of the judgment dealing with the implied external powers in para. 137 in the following way: 'It follows from the foregoing considerations that, by entering into international commitments concerning air fares and rates charged by carriers designated by the United States of America on intra-Community routes and concerning CRSs offered for use or used in German territory, the Federal Republic of Germany has *failed to fulfil its obligations under [Article 10] of the Treaty* and under Regulations Nos 2409/92 and 2299/89' (emphasis added). This reference to Art. 10 EC as the dogmatic source of the identified violation of the international agreements with the Treaty was confirmed in the operating part of the judgment. This might be seen as a cautious move away from the language of exclusive external competences towards conceptualizing the issue through the lens of the pre-emption doctrine. A reference to Article 10 EC can already be found in para. 21 of the *ERTA* ruling.

policy field.<sup>161</sup> While exclusive competences reserve this right to a single public body, in the case of *shared* competences *two* or more public authorities are equally entitled to act in the same field and at the same time. Possible conflicts between the independent regulatory claims are resolved at the level of conflicting legislation by means of the twin constitutional doctrines of supremacy and pre-emption. An important characteristic of shared competences—at least within the Community's internal sphere—lies therefore in their ability to vest each owner with the *autonomous* legal capacity to act. Transposing this definition of 'shared competence' to the external sphere, a shared external competence would therefore represent a policy field in which both the Community and the Member States can conclude international agreements *on their own*. Consequently, a shared competence does not at all require the co-operation of the various competence owners through 'mixed action'. Constitutionally, mixed action will only be necessary in cases where the competence for a certain legal act is divided between various legislators in such a way that none of them possesses the full competence and only the adding up of the complementary competences fragments will provide sufficient legal entitlement to achieve the regulatory objective.<sup>162</sup>

The concept of mixity has long been part of the Community legal order—both in its internal and its external sphere. Internally, it has been employed as a form of co-operation in areas such as education and culture. Here the Community's powers were originally extremely fragmentary, and, since some common action was nevertheless desired, mixity was used to bridge the competence gaps through recourse to so-called 'mixed acts' adopted by the *Council and the national Ministers meeting in the Council*. The latter constituted a 'legal hybrid' and its 'mixed acts' were '“communitarised” intergovernmental acts'.<sup>163</sup> Decision-making was by unanimity and, in accordance with classic international legal doctrine, the role of the Community

<sup>161</sup> General discussions of the legal concept of 'competence' can be found in A. von Bogdandy and J. Bast, 'The European Union's order of competences: The current law and proposals for reform', [2002] 39 CML Rev., 227–68; F.C. Mayer, 'Die drei Dimensionen der Europäischen Kompetenzdebatte', [2001] ZaöRV 577–640, especially at 578–9; and, M. Nettesheim, 'Kompetenzen', in A. von Bogdandy (ed.), *Europäisches Verfassungsrecht* (Springer, 2003) 415–77.

<sup>162</sup> The ambivalence of the notion of 'shared competence' in the external sphere seems an outgrowth of linguistic sloppiness that treats the concepts of 'shared' and 'joint' (or 'complementary') competence synonymously. (The European Court itself appears to use the two types as interchangeable. Consider for example the following judicial statement: 'Finally, an agreement may be concluded in an area where *competence is shared* between the Community and the Member States. In such a case, negotiation and implementation of the agreement require *joint action* by the Community and the Member States' (Opinion 2/91, para. 12, emphasis added)). In line with the use of the concept in the Community's internal constitutional (hemi-)sphere, the notion of shared competence should be confined to situations where two (or more) autonomous public authorities enjoy the *full* competence to a certain action. The notion of joint (or complementary) competence could be reserved to cases, where *none* of the two (or more) public authorities possesses the entire competence for a certain legal action, making the joining of the two (or more) competences necessary.

<sup>163</sup> B. de Witte, 'The Scope of Community Powers in Education and Culture in the Light of Subsequent Practice', in R. Bieber and G. Ress (eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts* (Nomos, 1987) 261, at 274 and 276.

institutions was marginal. For the constitutional lawyer of the EC's internal sphere it will come as no surprise that a more confident Community, whose competences have been expanding ever since its coming into operation in 1958, has less and less had recourse to mixed action for matters considered fully within the scope of its internal legislative competences.

The decline of mixity in the Community's internal sphere has, however, not been matched by a simultaneous retreat of mixed action in the external sphere of the Community. Here, mixed agreements, that is agreements to which both the EC and some or all of its Member States appear as contracting parties,<sup>164</sup> still enjoy widespread popularity even today.<sup>165</sup> Originally conceived for agreements covering issues which partly fell outside the Community's external competence, mixity developed into a widespread constitutional practice wherever the division of external powers was uncertain or where the participation of the Member States simply seemed expedient.<sup>166</sup> In the light of this practice, one might distinguish two classes of mixed agreements.<sup>167</sup> *Obligatory* mixed agreements will be the order of the day where the Community does not have sufficient external power to conclude the agreement on its own

<sup>164</sup> A. Rosas, above n. 8, at 200. The practice whereby only some Member States conclude the agreement together with the Community has been termed 'partial mixity' (P. Eeckhout, 'External' above n. 8, 223).

<sup>165</sup> A useful, though outdated, survey of the practice of mixed agreements up to 1982 can be found in J.J. Feenstra, 'A Survey of the Mixed Agreements and their Participation Clauses', in D. O'Keefe and H.G. Schermers (eds.), *Mixed Agreements* (Kluwer, 1983) at 207–48.

<sup>166</sup> Already in 1982, C.D. Ehlermann noted the at times purely political reasons behind mixity: 'Member States wish to continue to appear as contracting parties in order to remain visible and identifiable actors on the international scene. Individual participation is therefore seen as a way of defending and enhancing the prestige and influence of individual Member States.' (C.D. Ehlermann, 'Mixed Agreements: A List of Problems', in D. O'Keefe and H.G. Schermers (eds.), *Mixed Agreements*, above n. 8, at 6.) Consider also the more recent statement by A. Rosas: 'The Member States, sometimes because of general considerations of visibility, prestige and defence of national competences, sometimes simply because they wish to preserve the need for unanimity and thus a veto power are often keen on obtaining the mixed character of a given agreement.' (A. Rosas, above n. 8, at 202.)

<sup>167</sup> Various theoretical typologies of mixed agreements have been suggested in the course of time. Twenty years ago, H.G. Schermers cultivated the distinction between 'true' and 'false' mixed agreements: 'False agreements are mixed agreements in a field where the Community has exclusive competence, and therefore should be the sole partner. The mixity is false as the co-partnership of the Member States has no legal substance. The Member States having no power in the field concerned, their participation in the treaty cannot stand for any rights or obligations' (cf. H.G. Schermers, 'A Typology of Mixed Agreements', in D. O'Keefe and H.G. Schermers (eds.), *Mixed Agreements*, above n. 8, at 27). More recently, A. Rosas has elaborated a typology of mixed agreements according to different types of competences. The Community would enjoy 'parallel competences' in instances where it 'may adhere to a treaty, with full rights and obligations as any other Contracting Party, this having no direct effect on the rights and obligations of Member states being parties to the same treaty'. Shared competences, by way of contrast would imply 'some division, between the Community and the Member States, of the rights and obligations contained in the agreement'. The author further sub-divides this latter category into coexistent and concurrent competences. The former would refer to the case where the agreement covered an exclusive competence of either the Community or the Member States. The latter refers to the event that the agreement 'forms a whole which cannot be separated into two parts' and in particular where there is a non-exclusive Community competence covering the whole agreement. Only for coexistent competences would a mixed agreement be obligatory. Mixity for parallel and concurrent competences is facultative (A. Rosas, above n. 8, at 203–07).

but desires to become a contracting party. The Member States' competences are needed to fill in the gaps to conclude the entire agreement. *Facultative* mixed agreements, by way of contrast, have been used where the Community's powers 'are all-embracing but not exclusive' so that the Community cannot prevent the Member States from becoming a party besides the EC.<sup>168</sup> While it originally appeared that the European Court would demand specific justification for mixed external action in place of a pure Community agreement,<sup>169</sup> there nevertheless 'never emerged a clear legal philosophy underlying the phenomenon of the mixed agreement'.<sup>170</sup> Mixity has become a common practice even for agreements that squarely and fully fall within the Community's competence. In stark contrast to the (predominantly) independent exercise of its shared competences in its internal sphere, the Community's shared external competences are thus often exercised *together* with the Member States through mixed action—a phenomenon to which the European Court has given its constitutional blessing.

The judicially unchecked recourse to mixed external action in non-obligatory situations entails a significant anti-Communitarian consequence. While pure Community agreements will normally be ratified by a qualified majority in the Council,<sup>171</sup> mixed agreements have been taken to also require the ratification by *all* (participating) Member States.<sup>172</sup> Where a signatory Member State fails to secure national approval, the delicate constitutional problem arises whether the failing Member State would nevertheless be indirectly bound through the ratification of the international agreement by the Community. The theoretical answer ought to be in the affirmative. If the Community is held to enjoy an autonomous (shared) external competence, its exercise

<sup>168</sup> C. W. Herrmann, 'Common Commercial Policy after Nice: Sisyphus would have done a better Job', [2002] 39 CML Rev., 7–29 at 10.

<sup>169</sup> Cf. Opinion 1/76 paras. 6–8 (cf. above n. 105). Consider also the following analysis by P. Eeckhout: 'What the Court may have observed in *Opinion 1/76* is that, once the decision to exercise Community competence by way of concluding an international agreement is taken, *participation by the Member States as contracting parties is permissible only if some parts or provisions of the agreement are not covered by Community competence at all*. That does not mean that the Community's competence is exclusive, for if the Community decides not to exercise it, the Member States retain their full rights.' (P. Eeckhout, 'External Relations', above n. 8, 69, emphasis added.)

<sup>170</sup> N.A. Neuwahl, above n. 8, at 726.

<sup>171</sup> Originally, the procedural steps for the conclusion of international agreements under the Community's parallel external powers were not entirely clear. Ex-Art. 228 EEC was agnostic about the voting requirement and so the voting arrangement was 'borrowed' from the internal legal base. Today, Art. 300 EC represents the procedural code covering all essential aspects of the negotiation and conclusion of international agreements. The regime is set out in the somewhat complex Art. 300 (1) and (2) EC: '(1) . . . In exercising the powers conferred upon it by this paragraph, the Council shall act by a qualified majority, except in the cases where the first subparagraph of paragraph 2 provides that the Council shall act unanimously. (2) Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. *The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for agreements referred to in Article 310*' (emphasis added). The 'procedural parallelism' is indeed the most appropriate constitutional solution for parallel external powers.

<sup>172</sup> P. Eeckhout, 'External Relations', above n. 8, 199.

cannot be dependent on the legal approval of the agreement by national authorities. In line with Article 300(7) EC, the non-ratifying Member State should therefore still be bound by the agreement qua Community law.<sup>173</sup> The practical answer is, however, in the negative. Present 'constitutional convention' has it that the Council concludes mixed agreements on behalf of the Community only once *all* the Member States have themselves ratified the agreement in accordance with their constitutional traditions.<sup>174</sup> While this constitutional practice might be legitimate for compulsory mixed agreements, the self-restraint of the Community *vis-à-vis* facultative mixed agreements boils down to a prolongation of the controversial Luxembourg compromise in the external sphere. Reduced to 'unanimous' decision-making out of national expediency, the Community's system of external powers still awaits its supranational spring.

In the face of the distortions of the division of external powers between the Community and the national level caused by the uncontrolled use of *facultative* mixed agreements, the benevolent stance of the Community institutions in the past comes as a surprise. Admittedly, the Commission has tried to break away from the submission to consensus politics via pushing the limits of the Community's exclusive external competences to new horizons.<sup>175</sup> The Council and the Court, on the other hand, have largely remained indifferent to the substitution of mixed decision-making for the Community road. With the general ascendancy of qualified majority voting in the Council, the judicial tolerance of the unanimity regime strongly resembles the 'period of judicial indifference' that characterized institutional practice within the internal sphere up until 1987.<sup>176</sup> The constitutional convention of making the ratification of a mixed agreement by the Community dependent on ascertaining all national ratifications enfeebles the Community's *shared* treaty-making powers. The solution to strengthening the Community's independence in the external sphere does not therefore necessarily lie in claiming exclusive external powers. Much would already be gained if Council and Court would insist on the *autonomy* of the Community's *shared* treaty-making powers by outlawing the anachronistic Luxembourgian remnant of the national

<sup>173</sup> Article 300(7) EC: 'Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community *and on Member States*.' (Emphasis added.)

<sup>174</sup> The legal inspiration of this constitutional convention lies, according to C.D. Ehlermann, in Art. 102 of the Euratom Treaty stating that mixed agreements 'shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements . . . have become applicable in accordance with the provisions of their respective national laws' (C.D. Ehlermann, 'Mixed Agreements: A List of Problems', in D. O'Keefe and H.G. Schermers (eds.), *Mixed Agreements* above n. 8, at 16–17). See also P. Eeckhout, above n. 8, at 218–19.

<sup>175</sup> This strategy has been applied to all the Community's external powers. Consider, for example, the wide teleological interpretation given to the common commercial policy provisions by the Commission (cf. Opinion 1/94). For the extensive interpretation of the Community's exclusive parallel powers, see Section III. A. above.

<sup>176</sup> R. Schütze, 'Organized Change towards an "Ever Closer Union": Article 308 EC and the Limits to the Community's Legislative Competence', [2003] 22 YEL 79, at 99–101. Judicially, the transition from a 'soft' to a 'strict' subsidiary nature of Art. 308 EC found expression in the *Generalized Tariff Preferences* case (cf. *Commission v. Council*, Case 45/86, [1987] ECR 1493).

veto for mixed agreements. This courageous move would also clear up the vertical division of competences in the external sphere through the constitutional phenomenon of legal basis litigation, well known in the Community's internal sphere.

While it is not argued to abandon mixity in the external sphere altogether (the usefulness of mixed action in the case of complementary competences of the Community and Member States is undisputed), facultative mixed agreements should be avoided as much as possible as 'an unnecessary burden making the EU a more cumbersome and inflexible international actor'.<sup>177</sup> The Court has tried to strengthen the co-operative bonds between the Community and the Member States by means of a sophisticated 'duty of co-operation'.<sup>178</sup> Recourse to a general legal principle will, however, not redress the current constitutional opacity and distortions outlined above. The Community should pluck up the courage and play by the normal constitutional rules developed in its internal sphere. Once Europe is asserting a stronger role as an international actor, this will undoubtedly entail some sacrificing of the (ever more symbolic) external political sovereignty of its Member States. With Eastern Enlargement having taken effect as from 1 May 2004, the paralysing normative effects inherent in mixed external action will become even more obvious. The transition from unanimity to a (qualified) majority rule for the bigger part of the treaty-making powers of the Community may thus come to be seen as an unavoidable political step—even by Member States nostalgically attached to a bygone era of an exclusively *national* foreign policy.

#### IV. Conclusion—Towards Constitutional Naturalism in the External Hemisphere?

The various ambivalences and *Leerstellen* encountered in the early judgments on parallel external powers—reinforced by a pronounced gap between

<sup>177</sup> P. Eeckhout, above n. 8, at 224. J.H.H. Weiler, by way of contrast, originally celebrated the practice of mixed agreements as 'a near unique contribution to true federalism' and 'the greatest departure of the Community from federal-state practice': 'Mixity, despite the dangers of abuse and the complex internal and external legal ramifications and difficulties, expands the pluralistic posture of the Community's external relations. It enables the Community to bridge a difficult gap which both classic international legal doctrine and internal Community law would seem to impose: either Community agreements or Member State agreements. Mixity, alongside pure Community agreements and pure Member State agreements, establishes an additional option for the conduct of external relations by non-unitary entities whether statal or otherwise' (J.H.H. Weiler, above n. 8, at 130, 176, 186).

<sup>178</sup> The duty of co-operation mitigates the intergovernmental tendency of the current constitutional regime at least to some extent. The doctrine has been summed up by the European Court in its Opinion 1/94 in the following way: '[W]here it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the

constitutional theory and practice<sup>179</sup>—have been the source of learnt commentary ever since *ERTA*. In the absence of a privileged visual perspective on the cubist legal picture, a multiplicity of competing interpretations has emerged in the past. This chapter has tried to systematize the European Court's case law and the accompanying academic conceptualizations of the Community's parallel powers up to the *Open Skies* cases. Though some of the previously acceptable interpretations have been discredited by recent judicial developments, the debate on parallel powers remains open. Different legal perspectives from which to look at the judicial canvass of parallel external powers continue to be valid both in relation to their 'existence' as well as their 'essence'. Yet, a number of more concrete 'naturalistic' regions, it should be noticed, have emerged in the legal picture of this area of Community law. In this final part, let us connect some of the points made in the two interrelated discussions on the existence and the nature of the Community's parallel external powers.

In relation to the first dimension, it should be beyond dispute today that the existence of parallel external powers for a given policy field is independent of the existence of internal legislation on the matter. External powers are implied from internal *powers*. The Community therefore enjoys the authority to engage in the negotiation and conclusion of international treaties for all matters falling within its internal sphere. Three competing theories were presented to locate the constitutional *raison d'être* of the Community's implied external powers. Relegating the necessity criterion to the control of the *exercise* of the parallel power (in conformity with the general constitutional principle of proportionality), the *existence* of external powers can best be described by reference to a doctrine of parallelism. More difficult was the question *which* version of the parallelism doctrine is to be preferred in the conceptualization of parallel powers. According to the doctrine of parallel competences an autonomous legal competence is implied to achieve the Community's objectives through action in the external sphere. The doctrine of parallel instruments, on the other hand, locates the 'internal' competence as material base for the conclusion of international treaties, viewing the treaty-making power as an additional policy instrument to implement the

requirement of unity in the international representation of the Community' (Opinion 1/94, para. 108, emphasis added). The above judicial statement suggests that the duty of co-operation only comes into operation in situations of a compulsory mixed agreement, but it seems reasonable to assume that the duty also covers facultative mixed agreements. An extensive treatment of the duty of co-operation can be found in P. Eeckhout, above n. 8, at 209–15.

<sup>179</sup> Writing in 1986, E. Stein found 'evidence that, except for agreements falling squarely within the area of commercial policy, the Council has been reluctant to rely on Community powers as declared in the *ERTA* case and in *Opinion 1/76*, preferring instead to invoke the less controversial "necessary and proper" clause of [article 308]' (E. Stein and L. Henkin, above n. 8, at 50). M. Cremona commented on this divergence between constitutional rhetoric and practice in the following manner: '[W]hatever the rhetoric, mixed agreements were in fact widely accepted . . . Although in theory the transitional doctrine of exclusivity is based in the principle of a "separation of powers" between the Community and the Member States, when applied to international agreements, the doctrine does not seem in practice to have discouraged the joint participation of the Community and the Member States in the negotiation and conclusion of agreements.' (M. Cremona, 'External Relations', above n. 8, at 154.)

Community's objectives. While both perspectives remain legitimate conceptual competitors, the European Court seems to have recently sided with the parallel competence view. This judicial preference for the competence reading of the Community's parallel external powers can be explained by the inability of the instrument thesis to account for the distinction between shared and exclusive powers.<sup>180</sup> The very language of shared and exclusive parallel powers, it was suggested, imposes a competence perspective on the doctrine of parallelism.

The second part of the chapter moved to the nature (or 'essence') question surrounding parallel external powers. What is the nature of the Community's implied external competences: exclusive, shared, or joint? Two jurisprudential lines granting exclusivity were identified. The *ERTA* doctrine generates subsequently exclusive external powers through the pre-emptive effect of internal legislation. The Opinion 1/76 principle, by way of contrast, envisages naturally exclusive parallel powers through constitutional necessity.

Within the first jurisprudential line of exclusivity we witnessed a judicial retreat from the conceptualist-federalist reading of the 1970 *ERTA* ruling. The European Court has shown a self-restraining approach in the last decade leaving the issue of 'exclusivity' to the political discretion of the Community legislator. Briefly, no judicial 'pre-emptive strikes' against Member States' shared external powers for all matters falling within the scope of internal legislation. Under the *ERTA* doctrine, the Member States will be prevented from exercising their shared external powers wherever such exercise would conflict with existing Community legislation. 'Each time', according to the *ERTA* Court, 'the Community adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries *which affect those rules*.'<sup>181</sup> In the post-WTO Opinion jurisprudence, this enigmatic formula has been restrictively interpreted to come very close to a substantial conflict criterion. Two qualifications must be added to this. First, where Community legislation itself grants (expressly or implicitly) an external competence to the Community, this competence will be considered exclusive.<sup>182</sup> Secondly, the Community will enjoy an exclusive external competence as a reflex of a (quasi-) exhaustive regulation in the internal sphere. Put the other way around, as long as the Member States remain co-legislators in the internal sphere, so long will they enjoy a shared competence in the external realm.

<sup>180</sup> See Section II.B. above.

<sup>181</sup> *ERTA*, para. 18 (emphasis added). It is hoped that the Court will at some future point abandon the anachronistic reference to 'common rules' and simply refer to Community legislation.

<sup>182</sup> This leads to the remarkable constitutional result that the division of external powers is at the disposal of the Community legislator. In the words of P. Eeckhout (above n. 8, at 97): '[T]he recognition that the legislature may legislate on external competence is remarkable from a constitutional perspective. *Kompetenz-Kompetenz* does not seem to be limited to the Member States as *Herren der Verträge* (Masters of the Treaties).'

The principal exception to this synchronization of internal and external competences has been the result of the creative transformation of the Opinion 1/76 ratio. According to today's Opinion 1/76 doctrine, the Community can enjoy an exclusive parallel competence in the absence of internal legislation. Derived from 'constitutional necessity' those implied external powers seem exclusive by nature. This constitutional anomaly has rightly been criticized by P. Eeckhout in a series of alarming questions:

But how can there be exclusive 'external' competence where the 'internal' competence is not exclusive? In an area where the powers of the Community and the Member States are generally concurrent (let us take environmental protection as an example), what could be the justification for considering that, if the Community's competence can only be exercised usefully through the conclusion of an international agreement, the competence to conclude such an agreement is exclusive? Suppose there is a desire to protect tropical rainforests. The Community on its own is clearly unable to provide for such protection through the mere adoption of internal legislation. But on what grounds should that be a justification for exclusive Community competence to conclude an international agreement on the subject?<sup>183</sup>

There is indeed something inherently shady about the idea of deriving an exclusive parallel power out of 'constitutional necessity' and the Court has tried to mitigate this constitutional anomaly by constructing the scope of the doctrine very restrictively. The Community will only enjoy a naturally exclusive parallel competence where the objectives of the Treaty 'cannot be attained by establishing autonomous rules'.<sup>184</sup> The external sphere must be 'inextricably linked' with the internal sphere in such a way that the 'internal competence could effectively be exercised only at the same time as external competence'.<sup>185</sup> Clear constitutional preference is therefore given to the adoption of internal legislation and, consequently, the normal road to 'exclusivity' in the shape of the *ERTA* doctrine.

While an obituary for the Community's exclusive parallel powers would certainly be premature,<sup>186</sup> the current judicial approach in relation to the Community's parallel external powers betrays a guarded self-restraint. The Court defers, in principle, to the Community legislator's decision as to when the Community alone should be competent in the external sphere. The present chapter has championed the doctrine of pre-emption as the most suitable constitutional device to understand the essence of the *ERTA* doctrine. The open introduction into the Community legal order of the doctrine of pre-emption would remove the extra layer of complexity and legal cubism involved in dogmatically justifying the existence of 'implied (subsequently) exclusive external competences'. A courageous advance by the Court,

<sup>183</sup> P. Eeckhout, *ibid.* at 78.

<sup>184</sup> *Commission v. Germany (Open Skies)*, para. 83.

<sup>185</sup> *Ibid.* paras. 87–8.

<sup>186</sup> See Article I-12(2) draft Constitutional Treaty: 'The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal union act.' Article I-12(2) consequently codifies the WTO doctrine, the Opinion 1/76 doctrine, and the *ERTA* doctrine.

embracing the pre-emption analysis, could consequently enhance the clarity of legal argumentation and speed up the transition from a cubist past towards an era of constitutional 'naturalism' in the external sphere. It would be so much more coherent and beautiful<sup>187</sup> if the *same* constitutional principles applied in the internal and external hemisphere of the Community legal order.

<sup>187</sup> The importance of aesthetic considerations in paradigmatic changes, even in the most 'objective' sciences, should not be underestimated (cf. T.S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1996) at 156–9).

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