Chapter 4
Rules Governing the Joint Participation of the Community, Next to the Member States, in "Mixed Agreements" and the Activities of International Organizations

4.1 Introduction

In the past three decades the Community has enhanced its involvement in international environmental and oceans affairs and has participated together with its member states in all major negotiations. Currently, the Community and its member states speak with one voice on a growing number of marine environmental issues and have become one of the most influential players on the international scene. Nevertheless, their joint participation in the international decision-making still creates practical problems and raises issues both under EC and international law. The purpose of this Chapter is to outline the general rules governing the accession and joint participation of the Community and the member states in so-called "mixed agreements" and international organizations (IOs).

This Chapter begins by discussing the division of external competence among the Community and the member states and its legal implications. Since there is copious literature on this topic, the analysis does not pretend to be exhaustive. The EC Treaty does not contain clear rules on how to divide the respective spheres of power and how things should work in areas outside the exclusive competence. To fill these gaps, the Court has developed a rather ambiguous doctrine, which does not provide any clear-cut and uniform answers but requires case-by-case solutions. This is among the most critical and disputed aspects of EC law and is particularly complicated in relation to ocean matters. The jurisprudential rules, indeed, have developed by the Court in a different context and is not always clear to what extent they may be applicable to marine environmental issues.

To overcome the difficulty in drawing a clear allocation of external competence the Court has pointed attention to the conclusion by the Community and the member states of mixed agreements and/or their joint accession to IOs (the so-called phenomenon of "mixity"). Although mixity has become the common way in which the Community conducts its external relations, there is still some confusion surrounding their joint action and its legal consequences. Some indications may be provided by the mixed agreement itself by means of "participation clauses", which will be briefly discussed in Para. 4.3.1. Instead of establishing rigid rules on how the Community and the member states should behave at the international level, the Court has emphasised on the duty of close cooperation in the various phases of the life of the mixed agreement. However, it has not shed much light on how this cooperation should work in practice and what its legal consequences are. The central part of the Chapter addresses the procedural rules, as developed in the day-by-day practice of the Community, on how to apply the duty of close cooperation to the negotiation, conclusion, entry into force and implementation of mixed agreements. These are mainly practical rules and vary to a great extent depending on the agreement, negotiation or even meeting in question. The lack of clear and uniform rules, however, is the direct consequence of the need to ensure the maximum level of flexibility in the manner in which the Community and the member states participate in international negotiations.

4.2 The Division of External Competences between the Community and the Member States

4.2.1 The Legal Effect of the "Exclusive" External Competence of the Community

As the Court has pointed out, in areas under the Community's "exclusive" competence, such as fisheries, member states have "fully and definitively" transferred their power to the Community and are no longer entitled to take individual actions outside the EC framework.[467] In these matters, therefore, member states have lost their concurrent external powers and can no longer conclude international agreements or undertake obligations with third countries or *inter se*, nor can they pursue their own interests or adopt positions which are different from those of the Community when they act at the international level.[468] In areas such as fisheries, therefore, it is for the Community, represented by the Commission, to negotiate, conclude and implement international agreements or become a member of an international organization.[469] If the Commission does not take action, the EC institutions and the member states may bring it to Court, on the basis of Article 232 EC, for not fulfilling its obligations under the Treaty. The transfer of competence is irreversible and the mere fact that the Community abstains from taking action does not mean that powers return to the member states.[470]

Exclusivity, however, does not rule out member states' international action *in toto,* but simply prevents them from acting outside the Community framework. Therefore, there may still be some room left for member states' residual action.[471] Firstly, in policy areas under its exclusive competence the Community may always decide whether and how to act. As a consequence it may expressly authorize member states to act on its behalf at the international level, by negotiating, concluding and implementing an agreement with third parties.[472] Member states, however, always need to act in close cooperation with the Commission and their action must be limited to the minimum necessary to protect common interests.[473] Secondly, member states may be authorized on an interim basis to act at the international level in areas under EC exclusive competence whenever the Community is not able to take timely action.[474] Thirdly, member states may be required to act whenever the Community *alone* is not entitled to conclude an international agreement or to become a member of an international organization because of the absence of an "accession clause" for

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[467] Case C-804/79 *(Fisheries Case)*, paras 17 and 18. On the legal effects of the external exclusive competence of the Community see: I. Macleod et al. (1996), pp. 61-3.

[468] E.g., Case C-22/70 (*ERTA* Case), Para. 17. See also: Opinion 1/75, at 1364. For sake of clarity it is worth mentioning that all those considerations do not apply in respect of the member states' dependent territories which remain outside the scope of the EC Treaty.

[469] As a consequence, the Commission alone has become a member of most RFMOs. Conversely, the EC has become a member to the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) alongside some member states. This is because CCAMLR does not only regulate fisheries, but is also involved in ecosystem management including the conservation of species, such as penguins, which are not covered by EC wildlife legislation. In addition, the member states retain their powers to act with regard to their dependent territories. Denmark, for instance, has acceded to several fisheries agreements on behalf of the Faeroe Islands and Greenland next to the Community.

[470] Case C-804/79 (*Fisheries Case)*, Para. 20. However, according to I. Macleod et al. (1996), p. 62, the member states' competence revives to the extent that common measures have been revoked.

[471] See A.T.S. Leenen (1992), p. 104; A. Nollkaemper (1987), p. 80; P. Mengozzi (1997), p. 380 and A. Neuwahl (1996), p. 671.

[472] E.g., Case C-41/76, *Dockerwolke*, Para. 32 and Case C-131/73 *Grossoli*, Para. 7.

[473] E.g., Case C-804/79 (*Fisheries Case)*, paras 22-3. That requires the duty to consult with the Commission, to seek its approval in good faith and to abstain from any action in case of objections, reservations or conditions manifested by the Commission (*ibid*, Para. 31).

[474] E.g., Case C-804/79 (*Fisheries Case)*, paras 9, 22-3, and Case C-61/77, *Commission v. Ireland*, paras 66-7.

regional economic integration organizations (REIOs).[475] Fourthly, the member states may participate in an agreement under the EC's exclusive competence whenever the Community does not have the sufficient administrative or financial capacity to take upon itself all the obligations stemming from that convention.[476] Finally, as will be discussed later in the chapter, even within agreements covering areas under the EC's exclusive competence there may always be subject-matters which still remain within the member states' concurrent powers and require their concurrent action.[477] In all these cases the member state's external action is based on the duty of cooperation laid down in Article 10 EC Treaty as well as on the need to protect the interests of the Community in international forums and to ensure the proper functioning of the EC system.[478]

However, what would be the legal consequences if a member state takes unilateral action by contracting international obligations with third countries or agreeing upon international measures in an area of exclusive external competence, without express authorization, or pursuing their own interests, or going beyond what is necessary to attain the common objectives? If the validity of these obligations and agreements is not likely to be affected under international law, this is not the same under Community law.[479] In general, the unilateral actions of member states in an area within the exclusive Community competence represents a violation of the EC Treaty, which entitles the Commission or another member state to bring an action before the ECJ under, respectively, Articles 226 and 227 EC.[480] As the Court has pointed out, exclusivity derives directly from the principle of the supremacy of the Community legal order.[481] As a consequence, national measures concluding or implementing an international agreement in an area which falls under the EC's exclusive competence cannot be applied by national courts.[482]

These situations may occur with regard to fisheries or commercially-related issues, but not to marine environmental matters where competences are normally

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[475] H.G. Schermers (in D. O'Keeffe and H.G. Schermers (1983), p. 27), refers to these as "false mixed agreements". As the Court made it clear in its ILO Opinion 2/91 (paras 36-39), in these cases the Community needs to act through its member states.

[476] In Opinion 1/78 (*Rubber Case*), the ECJ made it clear that member states can take upon themselves the financial burden of administrative expense. However, this does not affect the division of powers between member states and the Community.

[477] In WTO Opinion 1/94, the Court considered the division of powers between the Community and the member states to conclude the WTO Agreements, in particular GATs and TRIPs. The Commission claimed the EC's exclusive competence because the WTO Agreement fell under the scope of Article 113. The Court rejected this argument stating that not all aspects of trade in services and intellectual propriety covered by GATs and TRIPs fall under the scope of Article 113. Therefore, it considered the Community to be exclusively competent only for the conclusion of multilateral agreements on trade in goods (paras 22-34) and jointly competent for GATs (paras 36-53) and TRIPs (paras 54-71).

[478] E.g., Case C-804/79 (*Fisheries Case)*, paras 9, 22-3 and 28, and Case C-61/77, *Commission v. Ireland*, paras 66-67. A prohibition for member states to act as a result of the transfer of powers would result in the total blocking of the EC and member states' external activities.

[479] See, in general, J. Klabbers in: E. Cannizzaro (ed.) (2002), p. 173; A.T.S. Leenen (1992), pp. 106-7 and A. Neuwahl (1996), p. 671.

[480] Individuals could also bring an action before national courts whenever an international measure adopted unilaterally by a member state in areas under the EC's exclusive competence violates their rights as granted under EC law. The remedies available to individuals for a breach of EC law, however, depend on the national juridical systems. See, in general, A. Neuwahl (1996), p. 670.

[481] E.g., Case C-106/77, *Simmenthal*. See also: A. Neuwahl (1996), p. 673 and Chapter 2.2.2 of this study.

[482] In joined cases C–10-22/97 IN.CO.GE, the Court stated that if there is a clash between EC and national rules, the latter cannot apply, but it is for the national court to decide what will happen next (e.g. to annul the measure).

shared. Presumably, however, all the considerations mentioned so far also apply in relation to the Community's implicit exclusive competence stemming from EC legislation on the basis of the "pre-emption" doctrine, which is discussed below.

4.2.2 Pre-emptive Effects of Community Law

As discussed in Chapter 2.3.3, in its case law the Court makes a distinction between the Community's exclusive powers deriving directly from primary law and those implicitly stemming from secondary law on the basis of "pre-emption". In the case of "pre-emption" the transfer of powers results implicitly from the exercise by the Community of its internal competence, either through the adoption of EC legislation or through the conclusion of international agreements, and unlike "exclusivity" it only covers specific subject-matters. "Pre-emption", however, does not confer on the Community any new "exclusive" competence and it does not alter the division of powers under the Treaty, but simply regulates the exercise of these powers. The objective is to preserve the unity and efficiency of the EC regime by pre-empting member states from acting autonomously at the international level whenever their concurrent action would hamper the achievement of the Community's objectives. As already mentioned, pre-emption seems to produce the same legal effects of "exclusivity" under primary law.[483] Not surprisingly, the concept of pre-emption has been viewed with suspicion by member states in the Council and supported by the Commission, which always tries to increase the Community's exclusive external competence to the maximum extent. There is extended literature on this topic, which will not discussed in detail in this study.[484] However, it is worth briefly describing the main criteria that trigger pre-emption and whether or how do they apply to ocean issues.

4.2.2.1 "Minimum", "Total" or "Exhaustive" Harmonization?

As the Court pointed out in the leading case *ERTA*, any time that the Community has adopted common rules on the basis of its internal powers member states are "pre-empted" from assuming, outside the EC framework, any international obligations which would "affect" these rules or "alter their scope" (the *ERTA or Affect Doctrine*).[485] As a consequence the Community acquires an implicit exclusive competence to act. The main condition for pre-emption to arise is that the unilateral action of member states may "affect" or "alter the scope" of common rules. Therefore, there is still some room left for concurrent member state external action on the same subject-matter as long as it does not jeopardize the EC's objectives.

First of all, it is necessary to determine "when" and "whether" member states' individual actions at the international level may "affect" common rules or "alter their scope". Initially, the Court adopted a rather broad approach according to which the adoption of common rules, "*whatever form these may take*", could trigger pre-

[483] I. Macleod et al. (1996), p. 60. See also Opinion 2/91, paras 25 and 26. Most of the Court's case-law generally refers to "exclusive" competence also to indicate the powers of the Community as resulting from "pre-emption".

[484] See, in general, P. Eeckhout (2004), pp. 58-94; E.D. Cross (1992), p. 447-72; A. Dashwood in: M. Koskenniemi (ed.) (1998), pp. 113-25; J. Helinskoski (2001), pp. 30-45; R. Frid (1995), pp. 98-111; N.A. Neuwahl (1991), pp. 717-40; K.R. Simmonds (1989), pp. 19-40; A. Maunu (1995), pp. 115-28; J. Temple Lang (1986), p. 193; A. Nollkaemper (1987) 63-6; A. Nollkaemper in: H. Ringbom (ed.) (1997), pp. 172-76; and M.J Dolmans (1985), pp. 17-25.

[485] Case 22/70 (*ERTA*), Para. 22.

emption.[486] To avoid an undesirable loss of external competence the member states have often been reluctant to agree on common rules, such as in the field of shipping and dumping, and this added an extra constraint on the EC decision-making process. Aware of the risk of such a wide interpretation, the Court has progressively adopted a stricter approach.[487] As pointed out in WTO Opinion 1/94, member state international action "affects" common rules and it is, therefore, pre-empted only when it would render EC rules "ineffective" and make it "impossible" to achieve the Community's objectives.[488] In addition, the Court draws a distinction between "total" and "minimum" harmonization.[489] Member states are pre-empted from acting outside the Community framework and the Community acquires an implicit exclusive competence only in relation to matters of an international agreement that had been "totally harmonized" at the EC level.[490] As discussed in Chapter 2.2.3, this is normally the case of directives which do not allow for any derogation other than those expressly allowed in the directive itself (so-called "total harmonization directives").[491] Even though regulations go far beyond "total harmonization", but set forth a complete "unification" of national legislation in certain areas, they have the same pre-emptive effects of total harmonization directives. "Total harmonization" directives and regulations are quite frequent in the field of maritime transport and maritime safety, but are not that common in other marine environmental areas.[492]

Conversely, member states' international actions are not likely to "affect" Community legislation laying down minimum rules and pre-emption does not normally occur. According to the Court, indeed, in a case of minimum harmonization

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[486] In Case 22/70 (*ERTA*), Para. 17, for instance, the Court referred to all mandatory rules of substantive law "*whatever form these may take*" (emphasis added), including the Treaty, secondary legislation or international agreements concluded by the Community. This has been recently confirmed in Case C-468/98 (*Open Skies*), Para. 73. Moreover, international instruments "affect" common rules not only in the case of direct conflict, but also when they interfere with the operation of these rules, making it more difficult, complicated or less satisfactory to attain the full achievement of their objectives. See on that: M. Dolmans (1985), p. 33; J.T. Lang (1986), p. 193, and A. Nollkaemper (1997), p. 173.

[487] In ILO Opinion 2/91, paras 22 and 25-6, the ECJ made it clear that in order to determine whether the conclusion of an international agreement affects common rules and pre-empts member states' concurrent action it is necessary to look at: (a) whether common rules "*cover to a large extent"* the same subject-matters dealt with in the international agreement and (b) whether EC rules were adopted with a view to achieving "*an ever greater degree of harmonization*".

[488] See WTO Opinion 1/94, Para. 86. For a more detailed analysis of the case see, e.g., P. Pescatore (1999), pp. 387-405; and A. Maunu (1995), pp. 122-3.

[489] On the difference between "minimum" and "total" harmonization see: Chapter 2.1.3 of this study.

[490] In WTO Opinion 1/94, the Court held that, since the subject-matters covered by the GATs and TRIPs had not been totally harmonized at the EC level, the Community had no exclusive competence to sign WTO Agreements, but shared this competence with its member states (e.g., paras 77, 96 and 103). However, the rather restrictive approach of the Court in the WTO Opinion has been influenced by the Court's unwillingness to decide on such a politically delicate issue, thereby preferring to leave this task to the other EC institutions (see Para. 79 of the WTO Opinion 1/94). Moreover, in ILO Opinion 2/91 (paras 17, 25-26) the Court recognized that since the subject-matter of Part III of ILO Convention 170 was "totally harmonized" at the Community level, the ILO provisions were of such kind as to "affect" common rules and pre-empt member states from signing unilaterally the ILO Convention and making commitments on these matters outside the Community framework. In Opinion 2/92 the Court uses the same arguments to declare the exclusive competence of the EC to participate in the third revised decision of the OECD on national treatment. See, in general, P. Eeckhout (2004), pp 69-87; A. Nollkaemper (1996), p. 174; J.H. Jans (2000), pp. 86-7 and R. Frid (1995), p. 101.

[491] See: P.J. Slot (1996), p. 382.

[492] Maritime transport legislation will be discussed in Chapter 6. See also EURATOM Regulation 1493/93 on shipments of radioactive substances between member states; and the EURATOM Directive 3/92 on the supervision and control of shipments of radioactive waste between member states and into and out of the Community and Chapter 2.2.3, at n. 22.

member states are substantially free to undertake higher international commitments or conclude international agreements containing more stringent rules than those laid down at the EC level.[493] This is the case for all environmental directives based on Article 175 EC which always allows member states to maintain or introduce more stringent protective standards acting either on the national or international level.[494] The same also applies to legislation based on Article 95 (ex Article 100) EC.[495] However, this is not the end of the story. More recently, the Court came to the conclusion that the mere fact that a directive lays down minimum standards does not mean that the subject-matter has not been "exhaustively" harmonized.[496] Member states are not allowed to agree on more stringent international standards that would otherwise interfere with the scope of the directive and jeopardize the full achievement of its objectives. In order to determine to what extent member states retain a concurrent external competence it is therefore necessary to look at the specific "scope" of the directive and at whether or not it intends to exhaustively regulate the subject-matter, although by means of minimum standards. This is not always possible and adds an element of confusion.

So far, the Court's general trend has been to restrict rather than extend the implied exclusive external competence of the Community and to preserve member states' concurrent actions. Nonetheless, in its latest case law, the Court seems to have reversed this trend and has returned to its original broad approach in the *ERTA* case. In the *Open Skies* cases the Court indeed makes it clear that the Community acquires an implicit exclusive competence whenever the international agreement enters within an area which is "*largely covered by EC rules*".[497] Once again, however, the Court does not define the term "largely". Presumably, it is not necessary that an international agreement covers exactly the same subject-matter as the EC legislation, but it is sufficient that the area is covered by a sufficient amount of Community legislation. Even though this case law relates to commercial agreements, it could be transposable to (marine) environmental conventions. Finally, in its most recent case law (February 2006) the Court has made it clear that the fact that the international agreement covers an area which has been largely harmonized at the EC level does not necessarily trigger an exclusive competence of the Community to act, but it is necessary to assess whether the international agreement in question affects the uniform and consistent application of EC rules and the proper functioning of the system which they establish.[498] Once again, in the absence of clear legal criteria, determining the nature of the EC's competence is largely left to flexible policy considerations.

4.2.2.2 International Rules: Minimum or Maximum Standards?

The fact that EC legislation lays down minimum standards is not per se sufficient to rule out pre-emption. According to the Court, in order to determine whether or not pre-emption occurs, it is also necessary to look at whether the international standards discussed at the international level are maximum or minimum standards. Member

[493] In ILO Opinion 2/91 (Para. 17), the ECJ made it clear that this does not affect the member states' compliance with the less stringent EC standards. See, e.g, A. Nollkaemper (1997), p. 175; A. Nollkaemper (1987), p. 84; and J.H. Jans (2000), p. 87.
[494] Article 176 EC entitles member states to maintain or "introduce" more stringent protective measures than those laid down in directives.
[495] See Article 95 (4) and (5) EC on the approximation of laws.
[496] E.g. Case C-1/96, *Compassion in World Farming*, paras. 56-58. See: J.H. Jans (2000), p. 102.
[497] In this case pre-emption occurs even though there is no conflict between the international agreement and the EC rules. See, e.g., C-468/98 (*Open Skies*), Para 73 and C-476/98, (*Open Skie)*, paras. 104-6.
[498] See: Opinion 1/03, on the Ec's exclusive competence to conclude the Lugano Convention (Para 133).

states are pre-empted from participating individually in the negotiation of international agreements containing maximum standards, which would make it impossible for them to comply with the more stringent Community requirements.[499] Their individual accession would affect EC rules and prevent the further development of higher EC standards. The Community therefore becomes exclusively competent to conclude the agreement and to take action within its framework. Conversely, pre-emption does not occur with regard to international agreements containing minimum standards, whether they be either higher or lower than those of the EC, which do not preclude the application and further development of stricter EC rules.[500] In this case, member states are still entitled to take concurrent action at the international level. This applies to all regional seas conventions, which normally set out the minimum level of protection throughout the area, but always allow contracting Parties, including the EC, to adopt higher standards. Conversely, the "minimum or maximum standards" criterion finds difficult application with regard to other international agreements dealing with ocean issues (e.g., LOSC; IMO regulatory instruments and the CBD). As will be discussed in further detail in the case-study chapters, these conventions may contain minimum or maximum standards depending on whether they apply to flag, port or coastal States, and also depending on the maritime zone and the activities concerned. Moreover, most of these conventions (e.g. IMO conventions) make no distinction between flag, port and coastal States making it very difficult to determine a clear allocation of external powers between the Community and the member states on the basis of the "minimum or maximum standards" criterion.[501]

4.2.2.3 The "Necessity Test"

As pointed out in Chapter 2.3.2.2, the Court has made it clear that the "existence" of Community external competence does not depend on the prior adoption of common rules (*Kramer/Opinion 1/76 Doctrine*).[502] The Community is implicitly entitled to conclude an international agreement or undertake commitments with third States on matters which are under its internal competence at any time when the external action appears to be "necessary for the attainment of one of the Community objectives" (the so-called Necessity Test).[503] In the original interpretation by the Court, the Community's external action becomes "necessary" whenever Community objectives cannot be effectively achieved by internal measures alone, but require the adoption of international measures which are also applicable to third countries. The protection of the marine environment is clearly a Community objective which requires cooperation with third countries. In order to be effective EC measures should indeed apply to all ships using Community waters, including vessels flying the flag of third States. A broad reading of necessity would therefore confer on the Community an almost unlimited external competence in international forums discussing ocean issues. "Necessity", moreover, is a highly political concept that provides the Community institutions with a large degree of discretion as to whether to act. This may distort the delicate balance which forms the basis of the EC legal system and affect the principle of attribution. The Court, therefore, has subsequently narrowed down its original

[499] See Opinion 2/91, Para. 17; J.H. Jans (2000), p. 87; E. Hey in M. Evans and D. Malcom (eds.) (1997), pp. 281-85; and I. Macleod et al. (1996), p. 66.
[500] ILO Opinion 2/91, Para. 17.
[501] See: Chapter 6 of the present study, sections 7 and 9; A. Nollkaemper (1997), pp. 175-6 and A. E. Hey and A. Nollkaemper (1995), pp. 290-91.
[502] Opinion 1/76, and Joined Cases 3-4 and 6/76 (*Kramer)*.
[503] Opinion 1/76, Para. 17 and ILO Opinion 2/91, Para.7.

approach by saying that the Community's external action is "necessary" only when there are no alternatives available and the same result could not be achieved by the coordinated action of the member states.[504] In addition, the international agreement in question must be directly related to the "specific objective" of an internal legislative measure (not to the general objectives of the EC)[505] and the Community and international objectives must be "inextricably linked".[506] If these conditions are met, the Community may acquire an implicit external competence also in the absence of internal measures.

However, it is still controversial whether the Necessity Test also applies to the "nature" of the Community's external competence.[507] As the Court pointed out in WTO Opinion 1/94 the Community's "exclusive" external competence does not automatically flow from the existence of internal powers, but "only in so far as common rules have been established at internal level does the external competence of the Community become exclusive".[508] In the absence of internal measures, therefore, member states cannot be pre-empted from acting and the Community does not become exclusively competent in the negotiation and conclusion of an international agreement.[509] However, the Court seems to suggest that as soon as the Community enters into the international agreement on the basis of the Necessity Test, it acquires an exclusive competence for its implementation.[510] As a result, member states are no longer allowed to take implementing measures, to negotiate an agreement or to undertake international obligations on the same subject-matter outside the EC framework.[511] The Community used the Necessity Test to accede, *inter alia*, to the 1974 Paris Convention on the control of marine pollution from land-based sources. Such an accession, however, has not triggered pre-emption and the Community has never exercised any exclusive competence in the implementation of that convention.[512]

The narrow reading of the Necessity Test is part and parcel of the general trend of the Court to restrict the implied exclusive external competence of the Community. Therefore, it may be used by member states, together with the principles of

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[504] WTO Opinion 1/94, Para. 79.
[505] ILO Opinion 2/91, Para. 7.
[506] WTO Opinion 1/94, paras 86 and 89, and C-467/98 (*Open Skies*), paras 56-57.
[507] This does not seem to be the original intention of the Court which in both Opinion 1/76 and *Kramer* Case formulated the Necessity Test to verify the "existence" not the "nature" of the EC's external powers and not to exclude concurrent member states' actions. See, e.g., P. Eeckhout (2004), pp. 68-9; J. Heliskoski (2001), pp. 43-4; R. Frid (1995) pp. 105-9; Dolmans (1985), pp. 20-1; and J.T. Lang (1986), p. 157 (footnote 3). *Contra:* A. Nollkaemper (1997), p. 177 and A. Maunu, (1995), pp. 121-23. Also Article I-13 (2) of the EU Constitution seems to suggest that the Necessity Test may provide the EC with exclusive external competence.
[508] WTO Opinion 1/94, paras 77 and 89. See also ILO Opinion 2/91, Para. 9 where the Court in determining the exclusive or non-exclusive nature of the Community's competence only recalls the ERTA doctrine but makes no reference to the Necessity Test. See also the Opinion of Avocate General Tizzano in Case C-466/98 (*Open Skies*), paras 46-59 and P. Eeckhout (2004), pp 89-91.
[509] See M. Dolmans (1985), p. 34 and D. Thieme (2001), pp. 252-264, p. 253. Of a different opinion is I. Macleod et al. (1996), p. 61.
[510] In WTO Opinion 1/94, Para. 85, the Court, recalling the *Kramer/Opinion 1/76 Doctrine*, observes that where internal powers can only be effectively exercised at the same time as external powers "…external powers may be exercised, and *thus become exclusive*, without any internal legislation having first been adopted" (emphasis added).
[511] See, in general R. Frid (1995) pp. 104-7.
[512] See COM (84) 673 (in OJ C116/7). On the accession and participation of the EC to the Paris Convention see: A. Nollkaemper (1987), pp. 73-75. See also supra Chapter 2.3.3, at n. 279.

subsidiarity and proportionality, as a means to limit the Community's external action and to preserve their concurrent competences.[513]

4.2.3 Member States' Residual Powers in Matters under their Exclusive competence or outside EC Legislation

For the sake of completeness it is worth making a quick reference to the capacity left to member states to take international action outside the Community framework. Generally speaking, in areas that remain under their exclusive competence as well as in the absence of EC measures or outside their scope, member states are substantially free to adopt national environmental rules and to conclude international agreements with third States as long as they do not interfere with intra-Community trade. Article 28 EC indeed prohibits *any* quantitative restriction on imports of "goods" or "any measure having equivalent effects".[514] Following the broad interpretation of the Court, anti-pollution and maritime safety standards, such as construction standards for vessels (CDEMs), port state control restrictions or any environmental prohibitions which hinder intra-Community trade (e.g., the prohibition of destructive fishing practices) might be considered as "measures having equivalent effect" and, therefore, may enter within the scope of that prohibition. Similarly, according to the Court, waste is a "good" in the sense of Article 28.[515] Ocean dumping restrictions therefore seem to fall within the scope of this provision.

Article 30 EC, however, allows certain "non-discriminatory" trade restrictions which are necessary, *inter alia*, "to protect health or life of humans, animals or plants".[516] Presumably, the Treaty entitles member states to adopt non-discriminatory measures which are necessary, *inter alia*, to ensure maritime safety, to prohibit ocean dumping of hazardous wastes and to protect marine biodiversity even though these may hinder intra-Community trade. In addition, the Court has extended the possibility for member states to go beyond Article 30 by introducing the "rule of reason" ground of justification for the "mandatory requirements" of Community law.[517] The Court, moreover, has entitled member states to rely on both Article 30 and "mandatory requirements" to protect the environment *per se* and to use "mandatory requirements" to justify *de facto* discriminatory measures as long as they are based on objective justifications.[518] More recently, moreover, the Court has recognized the possibility to rely on the environmental grounds of justification to adopt extraterritorial measures which are necessary to achieve "global" environmental objectives.[519] Combating ocean

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[513] A. Nollkaemper (1997), p. 181.

[514] Article 28 is the core provision of the entire EC Treaty. Its scope, therefore, has been initially interpreted quite extensively by the Court as including measures which are not, *per se*, discriminatory. The Court interpreted a measure having an equivalent effect to a trade restriction as: "any measure capable to hinder, directly or indirectly, actually or potentially, intra-Community trade", Dasonville, C-8/74(1974). Article 29 EC, moreover, extends the prohibition of quantitative restriction to exports of goods. For a general overview of Articles 28, 29, 30 and "rules of reason" see in detail: L. Kramer (2000), pp. 75-930; L. Kramer (1997), Chapter 9, and J.H. Jans (2000), pp. 232- 67.

[515] See: Case C-2/90 *(Walloon Waste*).

[516] These measures, however, are only allowed provided that they are not "means of arbitrary discrimination or a disguised restriction to trade" (Article 30 EC).

[517] The "mandatory requirements" exception was established by the Court in Case- C 120/78, *Cassis de Dejon* Case.

[518] E.g.: Case C-302/86 (*Danish Bottle)* and Case C-2/90 *(Walloon Waste*). Article 30 and the "mandatory requirements" in their original formulation did not include the protection of the environment as such and could only justify non-discriminatory measures.

[519] In *Preussen Elektra Case* (Para. 74) the Court justified a national "discriminatory" measure which is in line with the international environmental policy in the energy sector. This is an important change of

degradation is clearly a global environmental objective and member states seem to be entitled to adopt unilateral measures affecting intra-Community trade which are necessary to protect the marine environment both within and outside their jurisdiction.[520] Presumably, unilateral measures may also include international commitments undertaken with third countries, international agreements and related implementing measures. Nevertheless, it would be rather difficult for member states to convince the Court that these measures are objectively justified.[521]

4.2.4 The Legal Effects of Shared Competences

As discussed in Chapter 2.3.3, in the field of marine environmental protection the Community and the member states have shared competence to act at the international level. According to Article 174 (4) EC, in environmental matters the Community and the member states may conclude international agreements and undertake contractual relations with third Countries "within their respective spheres of competence" and "without prejudice to the competence of the member states to negotiate in international bodies and to conclude agreements".[522] That means that neither of them is exclusively competent as regards the subject-matter of the agreement or the activities of an international body, but that they are rather both entitled to act. However, there are no further indications in the Treaty as to how to define "the respective spheres of powers" and what may be "prejudicial" to the member states. According to the Court in matters of shared competences member states are entitled, "but not legally required", to use the EC institutions.[523] That means that, in principle, they may decide whether to enter into multilateral treaty relations with third countries by acting unilaterally or through the EC institutions.[524] In which circumstances and to what extent member states may take autonomous action is still controversial. However, it seems that they are not entirely free in their decision, but they must act consistently with EC law, in the first place, with the duty of cooperation under Article 10 EC.[525]

In the absence of specific rules in the EC Treaty, it is not entirely clear what the legal implications of shared competences are in practice. The Court, for political reasons, has always been evasive and quite reluctant to clarify the matter, but has preferred to highlight the duty of close cooperation and the phenomenon of "mixity". Both issues will be examined separately in the following paragraphs.

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approach since the Court's traditional case law (e.g., *Kramer; Red Grouse; Hedley Lomas* and *Compassion in World Farming*) excluded the possibility for member states to rely on Article 30 or "mandatory requirements" to protect the environment outside their territory.

[520] See, for instance, the German ban on imports of products made from *corallium rubrum*, which is a species of coral living in the Mediterranean Sea. According to the Commission such a ban does not violate Articles 28 and 30 EC.

[521] National measures may be justified under Article 30 or "mandatory requirements" only in the absence of Community legislation or outside their scope, for non-economic proposes and as long as they are proportional, see: A. Nollkaemper (1997), 181.

[522] However, Declaration No. 10 contained in the Final Act of the 1996 IGC (in: O.J. 1992 C 191/100) makes it clear that Article 174(4) in no way affects the principles resulting from the *ERTA* case. The fact that Declaration 10 only refers to the *ERTA* case suggests that member states were not ready to expressly recognize the application of the *Kramer-Opinion 1/76 Doctrine* (Necessity Test).

[523] See Case C-316/91, European Parliament v. Council, paras 26 and 34.

[524] See e.g., J. Heliskoski (2001), p. 26 and A. Nollkaemper (1996), p. 182.

[525] Article 10 seems to require, as a minimum, consulting the EC institutions before becoming a party to or implementing a convention in the area of shared competence (Case C-316/91, paras 26 and 34).

4.2.4.1 The Duty of Cooperation and Close Coordination

The EC Treaty places member states and the Community institutions under a general duty to cooperate. This general duty (also called the principle of loyalty) is laid down in Article 10 EC (former Article 5) which requires member states to take all appropriate measures to ensure the fulfilment of the obligations arising from the Treaty, to facilitate the achievement of the Community's tasks and to abstain from taking any measures which could jeopardize the attainment of the Community's objectives. The Court has constantly emphasised the duty of cooperation as one of the pillars of the Community's legal order and the Community's external policies.[526] This duty stems directly from the principle of supremacy, which requires member states to avoid conflicts between EC law and commitments undertaken with third countries.[527]

Strictly linked to the duty of cooperation is the duty of close coordination at the international level. Such a duty is only explicitly mentioned in Title V of the EU Treaty in relation to the CFSP (second pillar).[528] According to Article 19 EU "member states *shall coordinate their action* in international organizations and international conferences. They shall uphold the *common positions* in such fora" (emphasis added).[529] As will be discussed in further detail in Chapter 5, the action of the Community within the framework of the LOSC and its participation in the law of the sea debate within the UN (i.e., UNGA and ICP) is treated as an area of foreign policy where the duty of coordination should thus apply.[530] However, as discussed in Chapter 2, the CFSP, unlike the first pillar (EC), is not subject to ECJ judicial control and the member states could not be brought to Court for violating the duty of coordination.

The Court, supported by the Commission, has extended the duty of coordination to all aspects of external relations, also outside the CSFP.[531] In the view of the Court, this duty stems directly from the need for unity in the international representation of the Community. More precisely, whenever an international agreement or the activities of an international body cover matters under shared competence or for which neither the Community nor the member states are entirely competent, there should be a "close association" between the institutions of the Community and the member states.[532] As a consequence they have to cooperate and coordinate their action in all phases of the life of the agreement including its negotiation, conclusion, application and implementation, as well as in activities of

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[526] *E.g., Case 22-70 (ERTA)*, paras 21-22; Joined Cases 3- 4-6/76 *(Kramer)*, paras 42-45; WTO Opinion 1/94, paras 106-110; case C-25/94 (*FAO Case*), paras 106-09; and Case C-468/98 (*Open Skies*), paras 107-108. See, in general, P. Eeckhout (2004), pp. 209-15 and N.A. Neuwahl (1996), p. 677.

[527] E.g., WTO Opinion 1/94, Para. 21. In Case C-25/94 (*FAO Case*) the Court held that the Community is in a position to impose on member states specific obligations of cooperation even in fields which remain under their exclusive competences (such as the registration of fishing vessels).

[528] See, in general, G. Loibl in: H. Somsen (ed.) (2002), pp. 226-7.

[529] Moreover, Article 11(2) EU requires that "Member States shall refrain from any action which is contrary to the interests of the Union or is likely to impair its effectiveness as a cohesive force in international relations".

[530] The mandate of the COMAR makes it clear that questions arising within the framework of the LOSC or UNGA which fall under EU foreign policy are governed by Title V EU. The COMAR mandate is contained in Annex III to the Council Decision 98/392 on the Community's conclusion of the LOSC. See, in general, Chapter 5.2.7.3 and *infra* n. 293.

[531] See, e.g., European Commission, Report on the Operation of the Treaty of the European Union, Brussels, 10.05.1995, (SEC (95)) and A. Maunu (1995), p. 126. The unitary international representation, according to the Commission, is a *conditio sine qua non* for the effectiveness of the EC's external actions.

[532] See ILO Opinion 2/91, Para. 36 and Opinion 1/78, paras 34 and 36.

international bodies.[533] Such a duty, according to the Court, is particularly important when the Community cannot accede to an international agreement or be a member of an IO or when the rights and obligations of the Community and of the member states under an agreement are strictly linked.[534] However, in order to allow the Community and the member states to take a pragmatic approach and to reach practical solutions tailored to the circumstances of each case the Court deliberately wanted to keep the concept of cooperation as flexible as possible and has never provided clear indications as to how the duty of close cooperation should work in practice.

4.2.4.2 The Phenomenon of "Mixity"

"Mixity" has no explicit legal basis in the EC Treaty, but is a practical invention endorsed by the ECJ. It refers to a situation where the Community participates together with all or some of its member states in a multilateral agreement, a so-called "mixed agreement", with third States or in the activities of an international body.[535] There are different factors influencing mixity primarily of a legal nature.[536] International agreements or the Statute of an IO hardly fit in the distribution of competences under Community law and normally cover matters outside the EC's exclusive competence on which the Community is not entitled to act alone. In addition, mixity is a direct legal consequence of the difficulty in defining "shared competence" and clearly allocates the respective spheres of the powers of the Community and its member states. In most of cases the scope of the agreement (or the IO) does not correspond to the subject-matter of EC legislation.[537] A mixed agreement is therefore generally defined as "any treaty to which an international organization, some of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence".[538]

Political considerations, just like legal factors, played a decisive role in establishing the practice of mixity. Member states in the Council have been traditionally reluctant to renounce their position as international actors in favour of the Community and supported mixity as a means to preserve their influence and visibility in the international scene.[539] This is particularly evident within the framework of marine environmental agreements where member states, especially maritime nations (e.g., Greece) as well as the coastal State-oriented countries (e.g., Germany, Sweden and Denmark) have been trying to preserve their concurrent external competence and their capacity to defend their interests and promote their priorities at the international level. Conversely, the Commission has traditionally encouraged the conclusion of "pure" Community agreements as the most effective means to achieve common objectives. Nevertheless, supported by the EP,[540] it has accepted mixity as a way to

[533] WTO Opinion 1/94, Para. 108, makes it clear that the entire life of a mixed agreement is a joint affair on the part of the Community and the member states. See also ILO Opinion 2/91 and Case C-25/94 (FAO Case).
[534] WTO Opinion 1/94, Para 109. See also supra n. 10.
[535] See M. Dolmans (1985), p. 1. The term "mixity" was introduced at the Leiden Colloquium on Mixed Agreements, organized by the Europa Institute of Leiden University in 1982.
[536] See, in general, C.D. Ehlermann in: D. O'Keeffe and H.G. Schermers (eds.) (1983), pp. 3-21 and P. Eeckhout (2004), pp. 198-99.
[537] See A. Nollkaemper (1997), p. 183.
[538] H.G. Schermers in: D. O'Keeffe and H.G. Schermers (1983), p. 25.
[539] See, *inter alia*, J. Heliskoski (2001), p. 81 and C.D. Ehlermann (1983), p. 6.
[540] The EP has traditionally been against a clear demarcation of powers between the Community and the member states, but supports a clarification of the respective spheres of competence in the field of external relations in order to provide the public and non-EC counterparts with a clearer idea of "who does what" in the EU and to achieve greater efficiency and effectiveness in the EU international action,

avoid disputes with member states over the allocation of external powers and to facilitate the adoption of international agreements. Likewise, the Court has endorsed mixity as a means to avoid defining a strict allocation of powers between the Community and the member states.[541] At the end of the day, mixity is a practical solution which allows the Community and the member states to participate in international agreements or in the activities of an international body with a considerable degree of flexibility.

Mixity, moreover, has been influenced to a large extent by external factors.[542] The participation of the Community in the international decision-making confronted the non-EC contracting parties with a new reality. In the past (e.g., at UNCLOS III), third Parties refused to negotiate with the Community alone because of a lack of understanding with regard to its legal status; the existence, scope and nature of its competence; and the relation between the EC and international legal regimes. For a long time, moreover, some countries, especially the Eastern European States, for political reasons refused to accept the Community as an international legal entity and an autonomous negotiating partner. In order to defend the interests of non-EC Parties, therefore, some international conventions (e.g., LOSC) or statutes of IOs (e.g., FAO) link Community accession to ratification by one or more of its member states making "mixity", *de facto*, necessary.[543]

Mixity has become a well-established concept of Community law and the common way in which the Community conducts its external relations. Except for some fishing-related instruments, the Community has concluded all marine environmental treaties in the form of mixed agreements together with one or more of its member states. Nevertheless, there is still some confusion surrounding the joint participation of the Community and its member states in mixed agreements or IOs. Vis-à-vis non-EC contracting Parties, relevant issues have to be regulated under international law; while internally they have to be solved by EC law.

Different from the "classical mixity" discussed so far, is the so-called "cross-pillar mixity", which arises in negotiations covering matters respectively under the EC Treaty and the EU Treaty. As will be discussed in detail in Chapter 5, this situation arises with regard to the Community's participation in the UN discussions under the agenda item "oceans and the law of the sea", which is treated as an area of common foreign policy under the second pillar of the EU Treaty. Reasons of space do not allow for a detailed examination of cross-pillar mixity, but relevant observations will be made in Chapters 5.2.7.4 and 6.8.7 of this study.

4.3 Joint Participation of the Community and Member States in Mixed Agreements

4.3.1 Joint Participation under International Law: the "Participation Clauses"

There are no specific and uniform rules under international law on how the Community and the member states should participate in the negotiation, conclusion

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see, e.g., EP Committee on Constitutional Affairs, Report on the division of competences between the European Union and the Member States (2001/2024 (INI), p. 30).

[541] See Opinion 1/78, Para. 38. See, in general, I. Macleod et al. (1996), p. 145. According to N.A. Neuwahl (1996), p. 667, the Court always preferred to avoid the issue of the allocation of external powers suggesting that this issue should be solved at the institutional, rather than jurisdictional level.

[542] See: N.A. Neuwahl (1991), p. 718 and J. Temple Lang (1986), pp. 157-8.

[543] E.g., K.R. Simmonds (1986), p. 524.

and implementation of a mixed agreement.[544] Their joint participation varies according to the rules of each agreement. Many international treaties allowing the Community to become a party (as well as the Statutes of IOs providing for Community membership) contain so-called "participation clauses" whereby they define the terms and the conditions of the joint participation.[545]

Currently, third States have become increasingly familiar with the Community and its legal order and seem to have realized that, no matter what struggle the Community and the member states are facing internally, their external relations with third countries are governed by public international law.[546] Nevertheless, until recently, mixity has confronted non-EC Parties with many questions regarding the allocation of competence between the Community and the member states and "who is responsible for what". Non-EC Parties were afraid that an unclear division of competence could undermine the full implementation of the commitments under the agreement and wished to avoid a situation where the Community or the member states might hide behind each other. Moreover, they feel that the additional participation of the Community could provide the EC member states with double-representation, *uti singuli* and as EC members, and confer on them a privileged position compared to the other parties of the agreement. Worried about losing part of their influence in the international decision-making, moreover, non-EC parties traditionally opposed the Community acting as a block especially within the framework of regional conventions.[547] The "participation clauses" intended to address these concerns ensuring that the Community participates in the agreement with the same rights and obligations on matters within its sphere of competence as any other party. In principle all aspects of Community participation may be regulated.

4.3.1.1 Declaration of Competence

To avoid the situation where the unclear internal demarcation of the exact competence between the Commission and its member states could result in 'implementation gaps', non-EC Parties to a mixed agreement have often demanded a more specific statement on the delimitation of their respective powers. Most of the conventions adopted within the framework of the UN, including the LOSC, CBD and the Fish Stocks Agreement, require the Community (or both the Community and its member states) to declare, at the time of signature, accession or ratification, their respective sphere of competence and responsibility vis-à-vis other Parties.[548] Conversely, none of the regional seas conventions concluded by the Community provide for a similar declaration.

The EC institutions have always been fairly reluctant to proceed towards a clear demarcation of competence.[549] These kinds of declarations, indeed, eliminate some of

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[544] See, in general, J.J. Ruiz in T. Scovazzi (ed.) (2001), pp. 58-77 and A. Bleckmann in: D. O'Keeffe and H.G. Schermers (1983), p. 155.

[545] "Participation clauses" are not a prerogative of mixed agreements, but they may be included in treaties concluded by the Community alone.

[546] See M. Björklund (2001), pp. 373-402.

[547] See, e.g., J. Sack (1995), pp.1235-37.

[548] See LOSC, Articles 2 and 5 of Annex IX. The LOSC was the first mixed agreement to require such a declaration. See also UNFSA, Article 47(2); CBD, Articles 34(3) and 35(2); Basel Convention, Article 22 (2) and (3); and Article 26 of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region. The EC signed the Convention together with the UK, France and the Netherlands which are parties with respect to their dependent territories (COM (83) 733 in OJ C5/1(1984)), but has not yet become a party. A similar declaration is also required by the 1985 Ozone Layer Convention, Article 13(3); Espoo Convention,Article 17(5); Transboundary Watercourses Convention, Article 35(3); UNFCCC, Article 22(3); and UNCCD, Article 34(3).

[549] See, in general, P. Eeckhout (2004), pp. 216-218 and J. Heliskoski (2001), pp. 97-100.

the main advantages of the conclusion of mixed agreements, such as flexibility in international actions and the prevention of internal discussions on the division of powers.[550] The evolutionary nature of the Community's external powers, moreover, would make it particularly difficult to draw a complete list of matters under the respective spheres of competence and this kind of declaration would soon become obsolete. A clear demarcation of powers, moreover, would hinder the further development of the Community's external competences.[551] Aware of this risk, some agreements require the Community to promptly disclose any substantial modification in the extent of its competence.[552]

Traditionally, also the Court discouraged these kinds of declarations, suggesting that there is no need to explain and define the division of powers to other parties. The exact nature of such a division, according to the ECJ, is a domestic issue and as long as the implementation of the mixed agreement is not incomplete, then non-EC Parties have no need to intervene in these matters.[553] On the other hand, the Court has always encouraged the EC institutions and the member states to sort out questions of competence in mutual agreements, on the basis of the general duty of cooperation.[554]

However, when a mixed agreement so requires, the Community is under an international obligation to submit a declaration of competence. This declaration takes the form of a public statement and is normally contained in an Annex to the Community instrument of formal approval or accession. It indicates the matters regulated by the Convention which are under the competence, exclusive or shared, of the Community. The EC's competences, however, are described in general terms by referring to the relevant provisions of the Treaty or internal legislative measures. The declarations are normally so widely formulated and ambiguous as to be not very helpful in clarifying the division of the respective powers between the Community and the member states.[555] In addition, they usually clarify that the EC's competence is evolutionary in nature and they reserve the right of the Community to make further declarations.

4.3.1.2 The Link between Community and Member States' Participation

To ensure the full implementation of the obligations stemming from the agreement, several mixed agreements contain a special clause making Community accession dependant on the previous participation of all, the majority or several of its member states. The Community participation alongside all its member states would be the best guarantee for non-EC parties. However, such an option may create a deadlock situation and actually block Community accession.[556] As a compromise solution, therefore, many mixed agreements, such as the LOSC, are open to the Community together with

[550] J. Temple Lang, (1986), p. 174 and I. Macleod et al. (1996), pp.160-1.
[551] See K.R. Simmonds (1986), p. 531 and J. Temple Lang (1986), pp. 160 and 172-4.
[552] E.g., Basel Convention, Article 22(3); Ozone Layer Convention, Article 13(3); Transboundary Watercourses Convention, Article 35(3); UNFCCC, Article 22(3), UNCCD, Article 34(3); and Espoo Convention, Article 17(5).
[553] See Opinion 1/78, Para. 35.
[554] In Case C-25/94 (FAO Case) the Court also stressed the duty to elaborate a suitable strategy on how to proceed within the framework of the mixed agreement.
[555] I. Macload et al. (1996), p. 161.
[556] See C.D. Ehlermann (1983), p. 12.

the majority of its member states.[557] In addition, as a guarantee for non-EC parties, most mixed agreements provide that if the Community becomes a party without any of its member states, it shall be bound by all the obligations under the Convention.[558]

4.3.1.3 Exercising Rights and Obligations (the Responsibility Clause)

Mixed agreements may contain more specific provisions on the exercise of the rights and obligations stemming from the agreement. Some conventions, like the LOSC, for example, make it clear that the Community shall exercise the rights and perform the duties concerning matters for which competence has been transferred by member states.[559] Most mixed agreements contain a standard formula providing that the Community and its member states "*shall decide* on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member states *shall not* be entitled to *exercise rights* under the convention *concurrently*" (emphasis added).[560] This is something different from the declaration of competence discussed above.[561] Such a decision, indeed, does not interfere with the allocation of the respective competences, but only with the exercise of such competence. This formula, moreover, seeks to avoid the situation where the Community and the member states exercise the rights under the convention "simultaneously" and guarantees against any privileged position of EC member states as a result of double representation.

4.3.1.4 Voting Rights

The participation clauses may also regulate the exercise of voting rights within the decision-making bodies established by the agreement. In order to avoid the risk of double representation for the EC and its member states, most mixed agreements (e.g., LOSC, OSPAR, 1992 Helsinki and BARCON) provide for an alternative voting mechanism. According to this mechanism the Community is provided with a number of votes equal to the number of member states which are parties to the Convention, but has to abstain from voting when its member states do so and *vice versa*.[562] This mechanism, moreover, intends to avoid the situation where the joint participation of the Community and the member states may influence or obstruct the work of the body established by the agreement. The alternative voting, however, does not completely eliminate the risk of the Community forcing and/or blocking decisions on matters under its exclusive competence, when it may vote on its own. This risk is particularly great in the context of mixed agreements, like the OSPAR Convention, where decisions are taken by QMV and the EC member states represent the large majority of the contracting Parties.

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[557] E.g., LOSC, Articles 2 and 3(1) of Annex IX. See also the FAO Statute. As will be discussed in Chapter 5, the OSPAR, Helsinki and BARCON do not link Community accession to the majority of its member states.

[558] See, e.g., LOSC, Article 5; CBD, Article 34(2); UNFSA, Article 47(2)(ii); Basel Convention, Article 22(2); Espoo Convention, Article 17(4); Ozone Layer Convention, Article 14(4); International Watercourses Convention, Article 35(2) and UNCCD, Article 34(2).

[559] E.g., LOSC, Article 4(3) and UNFSA, Article 47(2)(ii).

[560] E.g., CBD, Article 34(2); International Watercourses Convention, Article 35(3); Ozone Layer Convention, Article 13 (2); UNFCCC, Article 22(3); Basel Convention, Article 22(2); Espoo Convention, Article 17(4) and UNCCD, Article 34(2).

[561] See, in general, J. Temple Lang (1996), pp. 170-72.

[562] See also CBD, Article 31(2) and FAO Statute, Paras. 8-10. Other conventions, such as the Antarctic Treaty (Article 12(4)), make it clear that when the EC participates alone in the decision-making process it has only one vote. See in general, J.J. Ruiz in T. Scovazzi (ed. (2001), pp. 71-73; J. Sack (1995), p. 1243 and A.T.S Leenen (1992), p. 95.

4.3.2 Joint Participation in Mixed Agreements under EC Law: Procedural Aspects

At the EC level mixity gives rise to difficulties of a procedural nature with regard to who is going to conduct negotiations and how; who has to speak on behalf of the Community; how the EC delegation should be composed; who is entitled to sign/ratify the agreement; and who has to act in the body established by the mixed agreement.[563] The EC Treaty, unlike the EURATOM Treaty, does not contain specific rules on the negotiation, conclusion and implementation of mixed agreements.[564] In principle, the procedural rules laid down in Article 300 EC with regard to purely Community agreements (i.e., those concluded by the Community alone) are also valid for mixed agreements. In practice, these rules find difficult application with regard to mixed negotiations.

As the Court has clarified in its case law, the Community and the member states are responsible for the negotiation, conclusion, and implementation of the provisions of a mixed agreement and they exercise the rights and perform the duties stemming from the agreement within their respective areas of exclusive competence. The relevant case law, however, mainly relates to commercial and association agreements. Within these kinds of agreements it is normally possible to clearly identify and separate the subject-matters under the respective exclusive competence of the Community and the member states.[565] These rules, therefore, are not entirely transposable to marine environmental agreements that are predominantly under the shared competence of the Community and the member states and it is difficult or even impossible to clearly separate the respective spheres of powers. As already mentioned, to overcome these difficulties, the Court has emphasized the duty of close cooperation in all phases of the mixed agreement, but has never spelled out in clear terms how such cooperation should work in practice and what the legal effects are. Relevant rules and mechanisms have been developed in the day-by-day practice of the Community's external relations and they are far from uniform.

4.3.2.1 The Pre-negotiation Stage

The duty of cooperation seems to arise even before the stage of negotiations. Whenever a forthcoming agreement covers matters under the Community's exclusive or shared competence, Article 10 EC requires member states to do their best to ensure the participation of the EC. At this stage, it is common practice for the Commission to start informal and exploratory talks with other Parties of the future agreement even without Council authorization. On the basis of these talks the Commission submits a

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[563] There have been a number of unsatisfactory attempts to draw up codes of conduct in the context of mixed agreements. The best known example is PROBA 20, an informal gentlemen's agreement concluded between the Commission and the Council for the negotiation of and participation in the Community and the member states in a group of commodity agreements negotiated within the framework of UNCTAD. PROBA 20 gave the Commission the role of a speakperson and negotiator. See J. Heliskoski (2001), pp. 82-85; N.A. Neuwahl (1996), p. 679 and J. Sack, (1995), p. 1253.

[564] Article 102 EURATOM, without referring specifically to "mixed agreements", lays down provisions for Treaties that have to be concluded by the EURATOM together with the member states. On the participation of the Community in mixed agreements in general see: H.G. Schermers in: D. O'Keeffe and H.G. Schermers (eds.), (1983), pp. 27-8; E.L.M. Volker, C.W.A. Timmermans et al. (1981); A. Rosas in: M. Koskenniemi (ed.) (1998), pp. 125-148; N.A. Neuwahl (1991), pp. 717-740; I. Macleodt al. (1996), pp.142-64, P. Eeckhout (2004), pp. 191- 225; P.N. Okowa in: M. Evans (ed.) (1997), pp. 301-329; J. Vogler (1999), pp. 24-48.

[565] On the different typologies of mixed agreements see: M. Dolmans (1985), pp.40-3; H.G. Schermers (1983), pp. 26-28 and R. Frid (1995), p. 112.

proposal to the Council asking for a mandate to commence formal negotiations. The cross-secoral nature of many environmental agreements, especially in the field of the marine environment, normally requires inter-service consultations within different DGs of the Commission (e.g., environment, transport, fisheries and trade). The conflicting interests on the table often result in tension between the various DGs and EC institutions involved in the process. Normally, already at the pre-negotiation stage the EC institutions emphasize the need for coordination and the uniform representation of the Community at the international level.[566]

4.3.2.2 The Council's Authorization

The EC Treaty (Article 300(1)) makes it clear that in order to participate in the negotiation of an international convention the Commission always needs authorization from the Council.[567] This also seems to be valid for mixed negotiations. The negotiating mandate is based on a recommendation by the Commission, which explains why it is important for the Community to accede to the agreement and suggests the guidelines for conducting the negotiations. The Commission's recommendation is normally discussed first within the competent Working Group of the Council, secondly within the COREPER and, finally, within the Council. There is no formal involvement of the EP at this stage.

The Council's authorization is normally adopted by QMV, unless the agreement covers matters that require unanimity at the EC level, and takes the form of a decision.[568] As will be discussed in the case-study Chapters, this authorization is not always easy to obtain.[569]

In the mandate, which usually follows a standard formula, the Council calls for close cooperation between the EC institutions and the member states during the negotiations and lays down so-called negotiating directives for the Commission.[570] Article 300(1) EC, however, refers to "such directives as the Council *may* issue" to the Commission (emphasis added), making it clear that the mandate does not always need to set out negotiation guidelines. Negotiation directives are intentionally broad and only indicate the objective which the Community wants to achieve from the negotiations, leaving the Commission with a free choice with regard to the strategy

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[566] The Commission's proposal for a Council mandate usually contains the following standard formula: "as the draft Convention also covers matters outside Community competence, the Commission and the member states *will*, by means of close cooperation during the negotiation process, *ensure unity in the international representation* of the Community" (emphasis added). See: D. Thieme (2001), p. 257.

[567] This Chapter refers to the terms "mandate" and "authorization" as synonymous. Article 300(1), however, expressly refers to an "authorization". See, for a general discussion, P. Eeckhout (2004), pp. 169-74; J. Vogler (2004), p. 68; F. Pocar in: E. Canizzaro (ed.) (2002), pp. 3-15 and D. Thieme (2001), pp. 256-57.

[568] This is a decision *sui generis*, which differs from a decision under Article 249 EC because it does not bind member states, but only EC institutions. See Chapter 2.2.3 of this study.

[569] See, for instance, the failed attempt by the Commission to obtain the Council's authorization to negotiate the EC accession to the 1972 Oslo Dumping Convention, infra Chapter 7.5.2.

[570] Normally the Council's mandate states that: "The European Community will participate in the negotiation of a Convention on (…), the Commission will conduct these negotiations on behalf of the European Community for matters covered by Community competence, in consultation with a special committee appointed by the Council to assist it in this task and within the framework of the appended negotiating directives, and with regard to matters under the Draft Convention which fall in part within the jurisdiction of the Community and partly within the jurisdiction of the member states, the Presidency, the Commission and the Member States *shall ensure close cooperation* during the negotiation process (by means of coordinating their view)" (emphasis added). See in general, D. Thieme (2001), p. 257 and P. Eeckhout (2004), p. 171. The negotiating directives are usually annexed to the Council authorization, after a standard text.

which should be adopted. This is, in part, in order to leave the Commission with more room to maneuver, in part not to prejudice the outcome of the negotiations since the text of the mandate may be available to a large number of officials. However, in order to protect the Community's position during the negotiations, normally the mandate is not made public.

When the mixed agreement relates to matters like marine environmental issues, the Council may, subject to shared competence, either authorize the Commission to conduct the entire negotiations without prejudice to the division of competences,[571] or to negotiate only that part of the agreement which is under the Community's exclusive competence. In the latter case, member states participate in the negotiations next to the Commission in relation to the areas under their exclusive competence.[572]

In the authorization the Council may also give general instructions on the negotiation of the participation clauses eventually envisaged in the mixed agreement. In order to ensure legal certainty and to prevent future conflicts with regard to the division of competence, the mandate may include a reference to the respective spheres of power. So far, however, this has been quite exceptional.[573] The Council's mandate may be granted for a single or a series of negotiations, in this latter case it is called a "permanent mandate".[574] The Council may always modify the mandate at a later stage.

Finally, it is worth mentioning that member states have on several occasions proposed that the negotiation directives should be determined in the Council's conclusions instead of in the Council's authorization.[575] Such an option, however, has no legal basis in the EC Treaty and, with regard to environmental agreements, it is a legal anomaly. First of all, Council's conclusions are not regulated anywhere in the EC Treaty. Secondly, they are always adopted by unanimity, while the Council's authorization to conduct environmental negotiations is adopted by QMV. Reportedly, the Commission is very annoyed at this practice and has the firm intention to resist it.

4.3.2.3 "Community Coordination" and "Common Positions"

As a general rule, the Community and the member states may negotiate independently with regard to the part of the mixed agreement that is under their respective exclusive competence. However, the general duty of cooperation under Article 10 EC requires them, as a minimum, to inform each other as to their respective positions.

With regard to matters under the EC's exclusive competence the Commission and the member states are under a duty to reach common positions (Article 300(2) EC).[576] This seems to include matters that have been totally harmonized at the EC level. Common positions are normally adopted by the Council acting on QMV, unless they concern matters which require unanimity. With regard to matters under shared competence, on the other hand, the Commission and the member states must

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[571] See infra n. 592.

[572] Reportedly, in the past the Commission used to ask for a general negotiating mandate, while the current trend is to request very specific authorization on definite points of the negotiations which may affect the *acquis communautaire*.

[573] For instance, the Council Decision (Council Doc. No. 10887/95 ENV, 30.10.1995) authorizing the Commission to negotiate the Biosafety Protocol contains an Annex listing the issues of the Protocol under the respective sphere of competence. This, however, has remained an isolated case.

[574] For instance, the mandate for the negotiation of the Climate Change Convention extends to the adoption of future Protocols.

[575] Reportedly, this has been discussed in the ENV Council of 10 March 2005 with regard to the mandate for the Arhus Convention and the Cartagena Protocol. See the Council Conclusions at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/envir/84322.pdf, pp. 16-17.

[576] So far, the adoption of common positions under mixed agreements has not received much attention in the legal literature. For a general discussion see: J. Heliskoski (2001), pp. 101-05.

coordinate their actions.[577] Presumably, this does not mean that they must reach common positions, but simply that they have to "use the best endeavours" to do so.[578] Normally, common positions on matters under shared competence are adopted by unanimity.[579] This may prove to be very difficult with regard to ocean issues where the conflict of interests between the member states and the EC institutions is particularly strong. If, in spite of the efforts, it is not possible to agree upon common views, member states may act and speak on behalf of their governments.[580] However, they are strongly discouraged from doing so because the presentation of different positions within the EU may undermine the Community negotiation role.

Only when the Community is unable to act because it is not entitled to accede to the mixed agreement (or to become a member of an IO) are member states required to reach common positions, otherwise they must refrain from acting.[581] However, it is still controversial whether the duty to reach common positions only applies to matters under the exclusive competence of the Community or also to those under shared competence.[582]

In addition, as already mentioned, Title V (Article 19) of the EU Treaty requires member states to reach common positions on matters under the CFSP.[583]

Coordination takes place within meetings known as "Community coordination" where representatives of the member states and the Commission try to elaborate common views.[584] When the mixed agreement requires a declaration of competence, the Commission and the member states also have to decide on the allocation of their respective powers and responsibilities.[585]

The meetings take place in Brussels (so-called pre-coordination) and/or directly "on the spot". In Brussels, Community coordination in areas under shared competence normally takes place within the framework of the competent Working Group or Working Party of the Council and is chaired by the Presidency.[586] If necessary, issues may be brought to the COREPER. In areas under the EC's exclusive competence (e.g., fisheries) coordination is carried out by the Commission under the chairmanship of the

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[577] See, in general, I. Macleod et al. (1996), pp. 148-150; N.A Neuwahl (1996), p. 679; and A. Nollkaemper (1997), p. 184.

[578] The Court seems to support this conclusion in WTO Opinion 1/94 (Para 109) where it suggests that the duty to cooperate can be more imperative in some cases than in others. See also I. Macleod et. al. (1996), pp. 149-50 and D. O'Keefe (1999), pp.7-36.

[579] See, e.g., Agreement between the Council and the Commission Regarding the Preparations for FAO Meetings and Statements and Voting, 19.12.1991 (FAO Agreement), Para. 2.3.

[580] See, e.g, FAO Agreement, Para. 2.4.

[581] See, e.g., ILO Opinion 2/91, paras 36-39. In these cases the Court has indeed stressed the importance of the duty cooperate closely (see: WTO Opinion 1/94, Para. 109). See also supra n. 475.

[582] According to R. Frid (1995), pp. 221-22, the duty of cooperation excludes any unilateral action by the member states also on matters of shared competence. See also, infra, Chapter 6.9.3 on EC co-ordination in IMO.

[583] As will be discussed in Chapter 5.2.7.3, the mandate of the COMAR includes coordination among member states "with a view to drafting common positions on issues of general interest coming under the CFSP" (Article 2, Council Decision 98/392).

[584] In general, see: P. Eeckhout (2004), pp. 184-86; J. Vogler (2004), p. 70; G. Loibl (2002), pp.224-40 and I. Macleod et al. (1996), p. 148. In these meetings they may also decide upon some administrative matters, such as the composition of the delegation or who is going to speak for the Community.

[585] Generally the Commission tends to postpone internal discussions on the division of competence until after the entry into force of the agreement in order to avoid excessive delays, e.g., WTO Opinion 1/94, Para. 106.

[586] As far as marine environmental matters are concerned, coordination takes place mainly within the WGIEI or in the COMAR. These groups meet on a regular basis, not only in order to prepare the negotiations.

competent DG.[587] On the spot, the Community and the member states coordinate their positions outside the negotiations, during early-morning and late-evening meetings or coffee/lunch breaks. These meetings are chaired by the Presidency with the close assistance of the Commission.[588]

Community co-ordination has both positive and negative implications. By speaking with a single voice and presenting itself as being united vis-à-vis the rest of the world, the Community may play a stronger role in the negotiations. A good coordination at the EC level, moreover, may facilitate and speed up the negotiation process to the advantage of all concerned. For third States it is certainly easier to negotiate with a single entity, rather than with 25 uncoordinated member states. On the other side, EC coordination may be a source of great frustration and major delays in the negotiating process. The 25 member states, unlike other contracting Parties, cannot be quick and creative negotiators, but they have to report to and ask directions from Brussels and their capitals. This may be particularly irritating for third States who have to wait until the EU has put its house in order.[589] This, however, is the inevitable corollary of the Community participation in the international decision-making.

4.3.2.4 Delegations

There are no uniform rules as regards the composition of the Community's delegation in mixed negotiations or in IOs and the practice changes according to the forum and the situation.[590]

The Community and the member states may participate in the negotiations with separate delegations (so-called "bicephalous" delegation). The EC delegation may have different compositions and include representatives from the Commission alone or, as in the case of UNCLOS III, together with civil servants from the Council. Representatives of member states may also join the EC delegation.[591]

Alternatively, the Community and the member states may participate in mixed negotiations with a single delegation composed of representatives from both the Commission and governmental officials (the so-called "Rome formula") or from the Commission alone.[592] This formula is without doubt more effective in terms of uniform representation at the international level. However, it requires a higher degree of coordination and the previous adoption of common positions. In ocean matters, where the interests of the Community and the member states often seriously conflict, the Rome formula might cause excessive delays in the negotiation process. As a consequence, the "bicephalous" delegation has been the standard formula for the negotiation of marine environmental treaties.

Finally, at the political level, especially in the UN and the main political forums, the EU delegation normally meets in the so-called Troika format, which is

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[587] See: G. Loibl (2002), p. 228. As will be discussed in Chapter 6, EC coordination in preparation for the IMO meetings on matters under shared competence takes place within the Commission (DG TREN).

[588] Often the representatives of the member states who participated in the pre-coordination in Brussels are not the same as those who attend the international meeting making it necessary to reconfirm the common positions.

[589] J. Vogler (2004), p. 68.

[590] See J. Groux in D. O'Keefe and H.G. Schermers (1983), p. 93; I. Macleod et al. (1996), p. 175; D. Thieme (2001), p. 258. In agreements concluded exclusively by the Community, such as fisheries agreements, there is only a single Community delegation composed of the representatives of the Commission (DG FISH).

[591] See I. Macleod et al., (1996), p. 175 and D. Thieme (2001), p. 258.

[592] In the latter case the Commission needs a mandate from both the Council and representatives of the governments of the member states and acts on behalf of both the EC and the member states. See: J. Heliskoski (2001), pp. 79-82.

composed of the current and the incoming Presidencies, the Secretary-General of the Council and the European Commission.

4.3.2.5 The Right to Conduct Negotiations and the Right to Speak

As a general rule, the Commission conducts negotiations and expresses common positions on matters under the Community's exclusive competence. Member states may speak in order to support and/or add to the Commission's statement. However, when the agreement does not allow for EC participation, the Presidency may speak for the Community on behalf of the Commission.[593] Moreover, when the nature of the Community's competence is controversial or when matters are on the table which are only in part under the EC's exclusive competence, the Commission may leave the negotiations to the member states. On the other hand, on matters of shared competence it is normally for the Presidency of the Council to conduct the negotiations and to present common positions, unless the Commission has been authorized to act on behalf of both the Community and the member states.[594] In exceptional cases the Presidency may also negotiate on matters which are mainly under the exclusive competence of the member states, but contain some elements of Community competence.[595] Member states and the Commission may speak in order to support and/or to add to the Presidency statement.[596] Finally, member states speak on matters under their exclusive competence. Normally they express their views after the Presidency has spoken.

It is worth stressing that these are practical rules with no legal basis in the Treaty and they are mainly driven by political considerations and the circumstances of the case. In some cases, the Commission, due to a lack of personnel, expertise or simply to avoid confrontation with member states, might find it more convenient to allow them to conduct negotiations on specific subject-matters. Conversely, in areas where the interests are more uniform, as in the field of marine biodiversity, member states might find it more effective to allow the Community to take the lead, either through the Presidency or the Commission. The forms of mixed participation, therefore, may change from forum to forum and sometimes even during the same negotiations or within the same meeting. Apparently, both EC Institutions and the member states want to retain this flexibility to the maximum extent.

4.3.2.6 Special Consultation Committees

According to Article 300(1) EC, in conducting negotiations the Commission shall act in consultation with a special committee appointed by the Council.[597] These committees are normally permanent and their role should be merely consultative. Once the committee has been consulted, it is for the Commission to decide how to proceed in the negotiations. In policy areas other than the environment, these consultation committees are well organized and this mechanism seems to work successfully. Conversely, in the environmental policy a permanent committee has never been established, but the Council appoints *ad hoc* committees for each negotiation.[598] These

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[593] E.g., J. J. Ruiz in T. Scovazzi (ed.) (2001), pp. 69-71 and D. Thieme (2001), p. 258.
[594] See Chapter 4.3.2.2, n. 571.
[595] The Presidency, for instance, negotiated on behalf of the member states within the CBD-COPs during the rounds of negotiations on the Biosafety Protocol to the CBD. See: ENB at: www.iisd.ca/vol09/ and D. Thieme (2001), p. 262-63.
[596] See Council Conclusions of 2 March 1992, Bull. EC 3-1992, at 49; L.J. Brinkhorst in: D. Curtin and T. Heukels (eds) (1994), p. 613. See also the FAO Agreement, Para. 2.3.
[597] Article 300(1) does not contain any special indication on the composition of these committees.
[598] So far the only "real" consultative committee in the sense of Article 300(1) has been appointed for the negotiations on the UNFCCC (Council Doc. No. 9781/94; PV7CONS; 65 ENV 274).

committees are normally composed of the same representatives of the member states acting in the working groups of the Council. Each member state's representative inevitably tends to defend the interests of his/her government just as if it is a discussion within the Council, transforming these consultation meetings into real EC coordination. As a result of this practice the Commission has to act as a double negotiator: with the other parties to the agreement, on the one side, and with the member states, on the other. This does not seem to be the original intention of the EC Treaty.[599]

4.3.2.7 Conclusion, Signature and Ratification

Once the negotiations are concluded, both the Community and the member states have to sign and ratify the mixed agreement according to the respective constitutional procedures. The EC procedure is laid down in Article 300 EC, which is also valid for mixed agreements and expressly applies to the conclusion of environmental conventions (Article 174(4) EC).

On the basis of a "proposal" from the Commission, the Council concludes the international agreement acting on QMV, unless it covers a field for which unanimity is required for the adoption of internal rules (Article 300(2) EC).[600] After the entry into force of the Treaty of Nice, this procedure now also applies to the adoption of binding decisions by the bodies established by an agreement to which the Community is a party.[601] These include decisions of the COPs/MOPs having legal effects (e.g., formal amendments), but exclude recommendations or political declarations (e.g., HELCOM recommendations). It follows that in order to adopt binding decisions by an international body such as, for instance, OSPARCOM, the Council needs a Commission proposal fixing the line which should be followed in order to defend the EC's interests and objectives. This, so far, has never occurred.[602] The Commission is currently promoting the wider use of Article 300(2) EC.[603]

The standard procedure for the conclusion of international environmental agreements is consultation with the EP, while for the adoption of binding decisions from bodies established by the agreement the EP only has to be "immediately and fully informed" (Article 300(3) EC). Given the frequency of these kinds of decisions, the duty to consult the EP would excessively delay the process and affect the role of the

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[599] Article 300(1) expressly refers to a "committee", not a "Council working group". Reportedly, in environmental matters these meetings work like discussions within a Council working group where the Commission speaks after the member states and its role is diminished to that of a simple observer.

[600] Article 300(2) refers to a "proposal" from the Commission, which is something more formal than a simple "recommendation" under Article 300(1) and leaves less discretion for the Council. The Council cannot conclude the agreement without the Commission's proposal. See, in general, P. Eeckhout (2004), pp. 175-81.

[601] Before the Treaty of Nice, Article 300(2) only referred to decisions of a body set out by an association agreement. See, in general, P. Eeckhout (2004), p. 175-77; J. Heliskoski (2001), pp. 101-03 and B. Martenczuk in: V. Kronenberg (ed.) (2001), p. 152.

[602] Reportedly, Article 300(2) has been applied only once with regard to the CITES. This agreement, however, covers trade-related matters under the EC's exclusive competence and, since the EC is not a party, the member states needed to know what was the line which should be followed in order to defend the EC's interests and objectives.

[603] The Commission is currently promoting the use of Article 300(2) within the Groupe interservices compétences externes (GICE) formed from representatives of various DGs. Reportedly, the Council's Legal Service has only once drawn attention to Article 300(2) when the Commission adopted a decision by NAFO without involving the Council. In a note the Legal Service said that on the basis of Article 300(2) also decisions on matters under the EC's exclusive competence, such as fisheries, require a formal proposal from the Commission and a decision of the Council. The Commission is now using this precedent to require that all decisions have to be adopted on the basis of a Commission proposal.

Community in the negotiations.[604] The Council must have "due regard" for the EP recommendations, but it may set a time-limit for the delivery of the EP's opinion "according to the urgency of the matter". If the EP does not respect such a time-limit, the Council may proceed without the EP's opinion.[605] Although the EP may be informally involved in the negotiation of international agreements, its role remains rather marginal and largely depends on the political will of the Council and Commission.[606] However, "by way of derogation" international agreements that entail an amendment of existing EC legislation adopted in co-decision require the express assent of the EP (Article 300(3) EC). The same applies to "other agreements establishing a specific institutional framework by organizing co-operation procedures" (*ibidem*). The meaning of this phrase is not entirely clear, but it seems to be broad enough to include marine environmental agreements establishing an institutional structure.[607] As will be discussed later in the Chapter, the Treaty establishing the EU Constitution reinforces the EP's external powers to a great extent and requires the EP's consent for all agreements covering a field like the environment or transport, for which a co-decision is required for the adoption of internal measures, even if these measures do not yet exist.[608]

Consent to be bound is usually expressed by the Presidency, but also the Commission may sign of behalf of the Community, if this is agreed.[609] Normally, the instrument of ratification (or "conclusion" according to EC terminology) is included in a decision[610] or a regulation, especially when the agreement contains provisions having direct effect.

The EC Treaty, unlike EURATOM, does not require member states to first ratify.[611] However, in order to avoid conflicting international obligations, it is common practice for the Community to deposit its instrument of approval only after the member states have done so. The Commission and the Council have frequently expressed preference for a simultaneous ratification which seems to be more in line with the

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[604] See P. Eeckhout (2004), p. 185 and A. Dashwood (1999), p. 207.

[605] Failure to consult the EP constitutes a breach of the procedural requirement and leads to the invalidity of the EC instrument concluding the agreement. Also Parliament has some duties in this respect. It has to look carefully and pay due attention to the Commission's proposal and "cooperate sincerely" with the Council (See, *inter alia*, Case C-70/88, *Parliament v. Council,* paras 21-3 and Case C-38/79, *Roquette Freres v. Council*,).

[606] The Commission and the Council have developed a series of informal procedures for the involvement of the EP in the negotiation and conclusion of international agreements. The EP has to be kept regularly and fully informed during all phases of the negotiations, including the preparation of the negotiation directives, and its views have to be taken into account. See, e.g., the Framework Agreement on Relations between the European Parliament and the Commission (2001), in: OJ C 121/122, Annex 2; Communication on the role of the Parliament in the preparation and conclusion of international agreements and accession treaties (1982), in: Bull. EC 5/1982, paras 2.4.2 to 2.4.7; and Solemn Declaration on the European Union (1981), in: Bull. EC 6/1983, Para. 2.3.7. On the limited role of the EP see, in general, P. Eeckhout (2004), pp. 177-79.

[607] EP assent, for instance, has been requested for the conclusion of the LOSC (see: Chapter 5.2.4 of this study). Conversely, the OSPAR Convention, the 1992 Helsinki Convention and BARCON have been adopted in simple consultation with the EP even though they establish an institutional framework. According to I. Macleod et al. (1996), p. 102, Article 300(3) EC refers to those mixed agreements establishing close cooperation between the EC and the member states, on the one side, and third parties, on the other . This is not the case for the OSPAR Convention, Helsinki Convention and BARCON.

[608] See Article III-325 of the Treaty establishing the EU Constitution.

[609] See Case C-327/91, France v. Commission (Para. 28). See on that I. Macleod et al. (1996), pp. 92-3.

[610] This is a decision *sui generis,* see supra n. 105. The decision may also contain provisions concerning Community representation in bodies and organs set out in the agreement.

[611] See: Article 102 EURATOM.

general duty of cooperation.[612] Member states, however, have been fairly reluctant to accept legal obligations to ratify at a particular time or in a certain manner.

4.3.2.8 Future Modifications, Amendment and Withdrawal

Amendments to an international agreement, like the agreement itself, have to be ratified by both the Community and all the member states which are parties in accordance with their respective constitutional procedures. The ratification of amendments may be a rather time-consuming process. Article 300(4) EC therefore provides that the Council may, at the time of concluding the agreement and "by way of derogation" from the general rule, authorize the Commission to approve future modifications on behalf of the Community when such modifications take place by means of a simplified procedure.[613] Most marine environmental agreements, including IMO regulatory instruments, provide for a simplified procedure for amending technical Annexes and Appendixes. Delegating to the Commission for the adoption of minor changes to an international agreement would seem to be the most logical and effective option. So far, however, the Council has been quite reluctant to issue this kind of authorization to the Commission, showing that there is still strong resistance from member states concerning the expansion of the Community's external powers.[614] The EP does not seem to favour this option either, given is traditional opposition to any form of delegating powers from the Council to the Commission, certainly concerning powers in which it is not directly involved.[615]

Finally, Article 300 EC does not contain any provisions on withdrawal,[616] which is normally regulated in the international agreement itself. In the absence of specific provisions, the general rules of international law as codified in the Vienna Convention on the Law of the Treaties will apply.[617]

4.3.2.9 Implementation

As discussed in Chapter 1, international environmental agreements are not "self-executing", but require contracting Parties to take action to implement their provisions. These actions range from adopting implementing legislation, reporting and monitoring, and participating in the work of the bodies established by the agreement.

As a general rule the Community and the member states are responsible for the implementation of a mixed agreement according to their respective sphere of competence and acting in close cooperation.[618] The subsidiarity principle plays a fundamental role in the implementation of the provisions of the mixed agreement that

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[612] See, e.g., Decision of the Council of 8.06.1998 concerning the ratification by the Community of the UNFSA. See also: Article 3 of Council Decision 88/540 on the conclusion of the Ozone Layer Convention and the Montreal Protocol; and Council Decision 94/69 (OJ 33 [1994]) on the conclusion of the UNFCCC (last para. of the preamble). See, in general, J. Heliskoski (2001), pp. 92-95; P. Eeckhout (2004), p. 219 and I. Macleod et al. (1996), p. 155.

[613] See: P. Eeckhout (2004), p. 185 and I. Macleod et al. (1996), pp. 92-3.

[614] As will be discussed in Chapter 5 there has been an attempt to delegate such a power to the Commission within the framework of the OSPAR Convention.

[615] As discussed in Chapter 3.5.2, n. 448, the EP is the main opponent of so-called "comitology procedure". Article 300(4) is a form of comitology at the external level. Presumably, the EP could only support the use of Article 300(4) if it had a role in the delegation process.

[616] However, Article 300(2) contains provisions on suspending the application of an agreement, which follow the same procedure as its conclusion, but without any involvement of the EP.

[617] On withdrawal, suspension and reservations see, in general, A. Rosas in M. Koskenniemi (ed.) (1998), pp. 135-38 and P. Eeckhout (2004), p. 186.

[618] Case C-25/94 (FAO Case), paras 35-36. The EURATOM Treaty (Article 115), unlike the EC Treaty, expressly requires cooperation in the implementation of a mixed agreement.

are under shared competence. Therefore, at the EC or national level action which seems to be the most effective to achieve the objective of the agreement will be taken. Generally, it is for the Community to adopt legislation implementing the mixed agreement, including binding decisions of the bodies established therein, while monitoring and reporting are normally left to the individual member states.

The joint participation of the Community and member states in the work of the bodies established by a mixed agreement is governed by the same rules as those discussed with regard to mixed negotiations. In sum: representatives of the Community and the member states participate in the decision-making within these bodies and they have the right to speak and vote on matters under their respective sphere of competence.[619] When matters under shared competence are on the table, they have to do their best to coordinate their positions, but they are not legally obliged to do so.[620]

4.3.2.10 Responsibility vis-à-vis Non-EC Parties

Under EC law the Community and the member states are responsible for performing the obligations arising from the mixed agreement according to their respective sphere of competence.[621] Vis-à-vis the non-EC Parties to the agreement, the situation is different.[622] In the view of the Court whenever the Community and the member states jointly contract international obligations in a field falling under shared competence, they are jointly liable for the implementation of these commitments.[623] However, in the opinion of Advocate-General Jacobs, the joint liability rule should apply to the entire mixed agreement regardless of whether it covers matters under exclusive or shared competence "unless the provisions of the agreement point to the opposite conclusions".[624] This would be the case for the LOSC and all agreements requiring the Community and the member states to declare their respective spheres of competence. Conversely, in the absence of any explicit indication (e.g., regional seas conventions), the obligations and rights of the Community and the member states vis-à-vis non-EC Parties should be taken as an "undivided whole".[625] The Court in its case-law seems to implicitly endorse this view.[626]

The legal implications of this joint liability, however, are still unclear. Following a broad approach, in the case of a violation of whatever provision of the agreement, non-EC Parties would be entitled to seek full satisfaction from the Community or from the member states regardless of the division of their internal competences. This would lead to the unacceptable result of the Community or the member state being held responsible in matters outside their competence. Under the

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[619] For a general discussion on Community participation in the adoption and implementation of COP/MOPs decisions see: N. Lavranos (2002), pp. 44-50.

[620] See, C.D. Ehlermann (1983), p. 14.

[621] See, in general, P. Eeckhout (2004), pp. 222-23; I. Macleod et al. (1996), pp. 158-60;

[622] For a critical analysis of the issue, see M. Björklund (2001), pp. 373-402.

[623] See Case C-31/91, *Parliament v. Counci*l, Para. 29. The case refers to the Lomé Convention, which is essentially a bilateral agreement between the EC and the member states for the one part, and the ACP States for the other. In this particular case, therefore, the EC and the member states are a single entity and are jointly responsable. It is not clear whether this judgment may be applied to all mixed agreements.

[624] See the Opinion of Advocate-General Jacobs in Case C-31/91, *Parliament v. Counci*l, Para. 69.

[625] *Ibid.* See also: G. Gaja in D. O'Keeffe and H.G. Schermers (1983), p. 137 and P. Eeckhout (2004), pp. 222-23; C. Tomuschat in: E. Canizzaro (ed.) (2002), p. 185. Conversely, according to I. Macleod et al. (1996), p. 159 and J. Temple Lang (1986), p. 163, joint responsability should always be the rule regardless of the express indication of the division of competence. See also, in general, E. Neframi in: E. Canizzaro (ed.) (2002), pp. 193-230.

[626] Opinion 1/78, Para. 35.

rule of law, each party to an agreement is responsible for the performance of its own obligations and joint liability cannot be presumed. However, some authors have argued that "the special circumstances of the Community and the Member States may amount to an exception to this rule".[627] Internally, the Community and the member states will always be able to regulate their mutual relations on the basis of the respective division of competences and initiate an infringement proceeding before the Court for a violation of EC law. As Schermers pointed out, "in that respect the mixed agreement is a problem shifter…the division of the competence and of the liability is postponed until the application of the agreement".[628]

4.4 The Legal Effects of a Mixed Agreement within EC Law

According to Article 300(7) EC, international agreements concluded by the Community (alone) are binding on the EC institutions and on the member states. As has been consistently held by the Court, these agreements form an integral part of the Community's legal order and acquire the same characteristics of EC law.[629] As a consequence, they have primacy over conflicting national legislation and bind all member states regardless of their individual participation in the agreement; they are subjected to the exclusive jurisdiction of the Court as far as their interpretation and application are concerned and may constitute the legal basis for the judicial procedures under the Treaties.[630] In certain circumstances, moreover, rights and duties stemming from international agreements may have direct effect and be enforceable before national courts also by individuals. According to the Court, however, the relevant provisions must be sufficiently precise, clear and not subject to any subsequent measure of implementation.[631]

As the Court has made clear, the same legal consequences of purely Community agreements also apply to parts of the mixed agreements which are under the Community's exclusive competence, whether explicit or implicit (pre-emption).[632] In the recently delivered *MOX Plant* case the Court has recognized that also parts of a mixed agreement (in that case the OSPAR Convention) which fall under the shared competence of the Community form an integral part of the Community legal order and acquire the same characteristics of EC law.[633] However, it is still quite controversial whether provisions of a mixed agreement which are under shared competence may bind all the member states regardless of their individual participation in the agreement.[634] The issue is particularly important in relation to the regional seas conventions, which normally cover matters under shared competence and have been concluded by the Community with only some of its member states. The Court's case law is rather ambiguous and does not shed much light on this matter. Nevertheless, it

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[627] According to I. Macleod et al. (1996), p. 159, "special circumstances" refer to the difficulty in determining the delimitation of competence and the convenience of joint liability for third parties.

[628] See H.G. Schermers in: D. O'Keeffe and H. Schermers (eds.) (1982), p. 170.

[629] E.g., Case C-181/73 *Haegeman*, Para. 3, and Case C-12/86, *Demirel*, Para 7. See, in general: I. Macleod et al. (1996), pp. 133-37 and Chapter 2.2.3 of this study.

[630] Case C-104/81, *Hauptzollamt Mainz v. Kupferberg, inter alia, paras 3 and 23*

[631] E.g., Case C-12/86, *Demirel*, Para. 14 and Joined cases 21-24/72 *International Fruit Company*, Para. 20.

[632] See, Case C-239/03, *Commission v. French Republic*, Para. 25; Case C-13/00, *Commission v. Ireland*, paras 14-15 and Case C-12/86, *Demirel,* Para. 9.

[633] See: MOX Plant case (Case C-459/03) Commission v. Ireland, decision delivered on 30.05.2006, Para. 126. See also, in general: N. Lavranos (2005), pp. 219-21.

[634] It is clear that provisions that fall under the member state's exclusive competence do not form an integral part of EC law and can only bind member states which are parties *uti singuli.* See: e.g, LOSC, Article 4(5) of Annex IX and, in general, M.J. Dolmans (1985), p. 64.

has been suggested that as soon as the Community adopts legislation implementing the mixed agreement all member states, including those who did not ratify, become bound by all its provisions, regardless of whether they are under shared or exclusive competence.[635] In the view of this author, the same conclusion should also apply in the absence of implementing legislation. By acceding to a mixed agreement (e.g. a regional seas convention) on the basis of Article 174(4) EC the Community indeed assumes an international duty to ensure that its member states comply with the relevant standards when conducting activities under its competence, whether exclusive or shared, in waters controlled by that agreement. The Court, on several occasions, including the *MOX Plant* case, has emphasized that Article 10 EC requires member states to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the Treaty's objectives.[636]

Another controversial issue is whether and to what extent the Court has jurisdiction to interpret and apply provisions of the mixed agreement which fall under shared competence or the exclusive powers of the member states.[637] Traditionally, the Court has been quite reluctant to clearly pronounce on this issue and has described its jurisdiction in very broad terms.[638] It is clear that the Court has no jurisdiction in relation to parts of a mixed agreement which remain under the exclusive competence of the member states such as, for instance, the provisions of the LOSC related to maritime boundary delimitation.[639] Presumably, the Commission cannot start an infringement proceeding against member states under Article 226 EC for a violation of these provisions because the Community has no competence whatsoever in these matters. Conversely, the Court has recently affirmed that it has jurisdiction to deal with disputes relating to the interpretation and application of the provisions of a mixed agreement (i.e., OSPAR and BARCON Protocol on Land-Based Pollution) which cover matters under shared competence and to assess a member state's compliance with these provisions.[640] The Commission, therefore, is entitled to start an infringement proceeding under Article 226 EC against a member state for not complying with the provisions of marine environmental agreements, such as the OSPAR, BARCON or LOSC, covering matters under shared competence.[641]

For a long time, it has been highly controversial whether the jurisdiction of the Court is exclusive in the sense of Article 292 EC and represents the only means of dispute settlement available between member states.[642] This issue arises with regard to

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[635] See: L. Granvik in: M. Koskenniemi (1998), pp. 266-8.

[636] MOX Plant case, Para. 174 and Opinion 1/03, Para. 119.

[637] See, in general, J. Heliskoski (2001), pp. 52-61; J. Heliskoski (2000), pp. 395-412 and P. Eeckhout (2004), pp. 233-56.

[638] The leading cases on the issue, however, exclusively relate to association agreements which cover commercial matters which are predominantly under the EC's exclusive competence, see, e.g., Case C-181/73 *Haegeman*, paras 4-6; and Case C- 12/86, *Demirel* (paras 8 and 9).

[639] See: Case C-379/92 (Peralta) and Case C-12/86 *Demirel,* Para. 12, and, in general, N. Lavranos (2005), p. 220 and I. Macleod et al. (1996), p. 157. For a different view see: J. Heliskoski (2001), p. 55 and A. Rosas in M. Koskenniemi (1998), pp. 140-41.

[640] See, e.g., MOX Plant case, Para.121. See also Case C-239/03, *Commission v. French Republic*, paras. 29-31. This Case refers to the failure of France to fulfil obligations arising from Articles 4(1) and 8 of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources. According to France the Court had no jurisdiction since there is no EC legislation on the matters covered by Articles 4(1) and 8 (para 22). The Court rejected this argument saying that the Protocol falls under shared competence and relates to a field which is covered in large measure by EC legislation. See also Case C-13/00, *Commission v, Ireland*, paras 14-20.

[641] Case C-13/00, *Commission v. Ireland*, Para 20.

[642] According to Article 292: "member states undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for

those mixed agreements, such as the LOSC or the OSPAR Convention, which establish their own dispute settlement bodies and procedures. In the view of the Commission, the Court's jurisdiction is always exclusive and member states cannot bring a dispute before any other judicial body.[643] This, in principle, only applies to internal disputes between member states and/or EC institutions, not to third countries.[644] This issue has been examined by the Court in the *MOX Plant Case*.[645] On 30 October 2003, the Commission instituted an infringement proceeding against Ireland for submitting a dispute against the UK before a tribunal outside the Community legal order (i.e., the Arbitral Tribunal under Annex VII of the LOSC). In the view of the Commission, in this way Ireland had violated its obligations under Articles 10 and 292 EC.[646] Almost three years later, on 30 May 2006, the Court delivered its judgement, which fully endorsed the position of the Commission.[647] According the judgement, the OSPAR provisions in question form an integral part of EC law and are therefore within the exclusive jurisdiction of the Court. By bringing an action before the Annex VII Arbitral Tribunal, Ireland had failed to fulfil its obligations under Article 10 and 292 EC.[648]

On several occasions the Court has made it clear that it has jurisdiction to interpret all the provisions of a mixed agreement regardless of whether they fall within the exclusive or shared competence of the Community.[649] This is necessary in view of the need to secure uniformity in interpretation. However, the Court has expressly acknowledged that in interpreting an international agreement as part of the Community legal order, it is bound by the decisions of the judicial organ eventually established by the agreement.[650] However, when they establish such a judicial organ, the member states and the Community must ensure that the pre-eminent role of the Court under the Treaties is not prejudiced.[651]

Finally, it seems that also provisions of mixed agreements which are subject to shared competence may have direct effect as long as they are sufficiently precise, clear

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therein". For a full discussion on this point see: N. Lavranos (2005), pp. 221-25 and N. Lavranos (2005), pp. 240-46.

[643] See *MOX Plant case.*

[644] Similarly, the ECJ's exclusive jurisdiction, in principle, does not apply to disputes between the Community and third countries concerning matters under the EC's exclusive competence. See, e.g. *Swordfish case, ITLOS Case No. 7, (Chile v. European Community*), infra Chapter 5.2.7.1, n. 85. I should be said that the Community has been always quite hesitant to have its legal order adjudged by non-EC juricial bodies. Reportedly, this was the premise of both the continuing suspension of the Swordfish case and the dismissal of jurisdiction by the 1998 Spain v. Canada Judgement.

[645] Case C-459/03, *Commission v. Ireland*, 30 October 2003 (in OJ C 7/24, 10.01.2004), The dispute concerns the international movement of radioactive materials from the MOX Plant, located at Sellafield, and the protection of the marine environment of the Irish Sea.

[646] In 2001 Ireland initiated a proceeding against the UK before an Arbitral Tribunals constituted under Annex VII of the LOSC (www.pca-cpa.org/ENGLISH/RPC/). Pending the constitution of the Annex VII Tribunal Ireand requested the ITLOS to adopt provisional measures (Case No. 10, for the documentation see: www.itlos.org/start2_en.html). The proceeding before the Annex VII Arbitral Tribunal has been suspended pending the ECJ decision on the matter. For a detailed discussion of the MOX Plant case see: B. Kwiatkowska (2003), pp. 1-58.

[647] MOX Plant case. Also the reasoned Opinion of Advocate General Poiares Maduro in the Case C-459/03 (decision delivered on 18.01.2006) supported the view of the Commission.

[648] MOX Plant case, Paras 126, 152 and 153.

[649] See Case C-53/96 *Hermés*, paras 32-33. For a critical analysis of the judgment, see J. Heliskoski (2000), pp. 408-12. See also Case C-239/03, *Commission v. French Republic*, and cases C-300/98 and C-392/98, *Dior and Others*, paras 33 and 35.

[650] See, e.g., Opinion 1/91 (EEA Agreement I), paras. 39-40.

[651] See: Opinion 1/91, paras. 44-46.

and not subject to any subsequent measure of implementation.[652] Framework agreements (e.g., the LOSC, CBD, OSPAR, the Helsinki Convention and the BARCON) are not capable of having direct effect, but those provisions of their Protocols or Annexes which are sufficiently precise could have direct effect.

4.5 The Community and International Organizations (IOs)

Before concluding it is worth making a brief reference to the Community's accession and participation in the activities of IOs. The EC Treaty does not contain specific provisions on this matter.[653] The Court, however, has made it clear that the powers conferred by the Treaty on the Community include the capacity, within the scope of its competence, to participate in the establishment of an international organization and to become a member.[654]

For the Community to become a member of an IO it is, first of all, necessary that the Statute of the organization provides for the participation of "*regional economic integration organizations*". Only a limited number of IOs covering matters (prevalently) under the EC's exclusive competence, such as the FAO, the WTO or regional fisheries organizations contain such a clause.[655]

Even when IOs, such as the FAO, cover matters that are prevalently under the exclusive competence of the Community there are always areas which remain under the shared or exclusive competence of the member states. In these cases, therefore, the Community accedes to and participates in the activities of that organization alongside its member states. The joint participation in IOs is governed by the same rules discussed with regard to mixed agreements. The division of competence is a central issue also in this context since it determines who is entitled to speak and vote in the organization. Generally speaking, the Community, in matters under its exclusive competence, has the same status and exercises the same rights as any other State which is a member of the IO. The Community and the member states represent themselves in the organs of the organization and exercise their right to speak and vote on matters falling under their respective exclusive competence. In matters subject to shared competence they have to act in close cooperation and coordinate their positions. The specific terms of the joint participation of the Community and the member states in IOs vary according to the rules of each organization. The Statute of the FAO, for instance, sets out participation clauses similar to those contained in mixed agreements, including a declaration of competence and an alternative voting mechanism.

Most of the existing IOs, within and outside the UN, reserve full membership exclusively to states. Normally, therefore, the Community participates in the activities of IOs as an observer. In particular, the Community holds observer status in nearly all institutions within the framework of the UN, including its principal organs (e.g., the UNGA); subsidiary organs (e.g., the UNEP); and specialized agencies (e.g., the IMO).[656] The position of the Community as an observer depends on the rules of each

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[652] See:, e.g., Case C-239/03, *Commission v. French Republic*, [2004].

[653] The only relevant rules are: Article 281 EC on the international legal personality of the Community; Article 302 allowing the Commission to maintain appropriate relations with organs and specialized agencies of the United Nations; Article 303 on cooperation with the Council of Europe, and Article 304 on cooperation with the OECD. See, in general, P. Eeckhout (2004), pp. 199-209; S. Marchisio in E. Canizzaro (ed.) (2002), pp. 231-35; R. Frid (1996); I. Macleod et al. (1996), Ch. 7; and J. Sack (1995).

[654] See Opinion 1/76, Para. 5. See I. Macleod et al. (1996), p. 169, and J. Sack (1995), p. 1229.

[655] The FAO is the only UN agency which allows the EC to become a member. The EC'saccession, however, required an amendment to the FAO Constitution. See, *inter alia*, R. Frid (1996),pp. 229-76.

[656] The EC has no status in the Security Council, neither in the Trusteeship Council nor in the International Court of Justice. It holds observer status in UNCTAD; the Economic Commission for

organization. Generally, the Commission is invited to attend the meetings of the organization whenever issues of Community interest are at stake. At the meetings, it may express its view after other members of the IO have done so, but has no right to vote. In these cases, the Court has emphasized the need for close cooperation. Member states have to coordinate their views in preparation for these meetings and try to reach common positions in order to defend the Community's interests.[657] Except for administrative costs, the Community normally has no financial obligations.

Generally, there is formal cooperation between the Commission and the Secretariats of IOs where the Community holds observer status. This cooperation takes place by means of regular contacts, an exchange of documents and information and consultation on matters of common interests.[658] The Commission, moreover, has established permanent missions to several IOs, such as the UN in New York, the IMO in London and the FAO in Rome.

Finally, the Community may be invited to participate in global or regional conferences whenever matters under its competence (exclusive or shared) are on the agenda. Also in this case, the role played by the Community varies according to the rules of the conference and is regulated by the same rules discussed for mixed agreements.[659]

4.6 The EU Constitution and Mixed Agreements

The Treaty establishing the EU Constitution, if ever adopted, would introduce some important clarifications and new mechanisms that might contribute to enhancing the effectiveness of the EU's external actions. Firstly, the EU Constitution brings about a clearer and more transparent allocation of external powers between the Community and the member states by listing areas which are under the exclusive competence of the Community, areas under shared powers and those that remain under the exclusive competence of the member states.[660] Secondly, it clarifies the legal consequences of the division of competences and codifies the pre-emption doctrine as developed by the Court.[661] Thirdly, the Constitution introduces some changes to the procedure for

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Europe; ILO; WHO; WIPO and UNIDO; and outside the UN, in the OECD and Council of Europe. See, in general, R. Frid (1995), pp. 170-73.

[657] The member states, for instance, regularly coordinate their actions at the UN. This coordination has gradually increased and now covers all six main committees of the UNGA and its subordinate bodies. More than a thousand internal EC coordination meetings take place each year. See: EU paper on model UN conferences, April 2005, available at:http://europa-eu-un.org/articles/en/article_1245_en.htm.

[658] See, for instance, the cooperation between the EC and UNEP which was formalized in an exchange of letters between the Executive Director of UNEP, Dr Mostafa K. Tolba, and the President of the Commission, Gaston E. Thorn, in June 1983. See Commission of the European Communities (CEC) (Serial), "Directory of the Commission of the European Community", Luxembourg, Office for Official Publications of the European Communities (1989), "Relations between the European Community and International Organizations", pp. 85-6.

[659] The Community has, for instance, been allowed to participate in the work of UNCED with a status of "full participant" without voting rights. See: UNGA Decision 6/470, 12.04.1992 amending the draft rules of procedure of UNCED; Bull. EC 2 1992, points 1.3.153 and Bull EC 3 1992, point 1.2.120, and, in general, J. Heliskoski (2001), pp. 76-77, J. Volger (2004), pp. 67-68 and R. Frid (1996), p. 183.

[660] See, in particular, the Treaty establishing the EU Constitution Article I-13(1) (the EC's exclusive competences) and Article I-14 (shared competence). Artcile I-17 lists under the category of "areas of supporting, coordinating and complementary action" matters that remain under the exclusive competence of the member states.

[661] I.e., Treaty establishing the EU Constitution, Article I-12 (categories of competence) and Article I-13(2) reading : "The Union shall also have *exclusive competence* for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union *or* is *necessary to enable*

negotiating and concluding mixed agreements and establishes a mechanism to ensure that, as far as possible, the Union expresses a single position and is represented by a single delegation.[662] Broadly speaking, the Council would authorize the opening of negotiations on the basis of a recommendation from the Commission or from a newly established Union Minister for Foreign Affairs when the negotiations relate exclusively or principally to the CFSP. The Council, moreover, would nominate the Union negotiator or head of the Union's negotiating team. The agreement would be signed and concluded by the Council on the basis of a proposal by the negotiator, who might also be authorized by the Council to approve future amendments on behalf of the Union. Additionally, as mentioned in Chapter 4.3.2.7, the new procedure would require the EP's consent for the adoption of all agreements covering fields where co-decision apply to the adoption of internal measures.

As has emerged during the drafting of the new procedure, when the negotiations cover matters under shared competence, the Community and the member states would be free to act with separate delegations. However, they should always try to establish a single delegation and to reach common positions.[663] It seems that, apart from an increased role of the EP in the international decision-making, the EU Constitution does not bring about any substantial changes to the existing situation. This indicates that neither the EC institutions nor the member states are willing to determine rigid rules on how to conduct mixed negotiations and how to coordinate actions in matters under shared competence, but that they wish to preserve the maximum level of flexibility.

4.7 Conclusions

In the past two decades, the EC has become increasingly proactive at the international level and has taken the lead in most international environmental negotiations. In the course of the 1990s, Community coordination has been substantially improved in order to push the EC environmental agenda to the international level. Currently the EC speaks with a single voice on most environmental issues and its role as a single and highly influential actor is widely acknowledged. On the other side, the mixed participation of the Community and its member states in the international scene is still rather chaotic and creates some problems both internally and for third Parties.

Internally, in the absence of clear provisions in the EC Treaty and due to the ambiguity of the Court's case law, it is still not perfectly understood what "shared competence" actually means in practice and what the legal consequences of the division of powers between the Community and its member states are. The allocation of external powers is not a situation where either the Community or the member states are fully competent, but requires pragmatic and case-by-case solutions. The situation is particularly confusing with regard to ocean issues. The jurisprudential rules of the Court have indeed been formulated with regard to policy areas under the EC's exclusive competence, such as trade and fisheries, and are not entirely transposable to

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the Union to exercise its internal competence, or insofar as its conclusion may *affect* common rules or alter their scope" (emphasis added). See also Article III-323 (international agreements).

[662] The new procedure is set out in the Treaty establishing the EU Constitution, Article III-325 which merges the existing procedures under Article 300 EC and Article 24 EU (the conclusion of agreements under the CFSP). This "merger" would not alter the existing division of competences between the EC and the EU on one side, and the EC and the member states, on the other and would not confer any extra competences on the Community. See: e.g., Final Report of the Working Group III on Legal Personality, Working document 29, 24.09.2004, (WG III-WD 29), Para. 37, available at: http://european-convention.eu.int/dynadoc.asp?lang=EN&Content=WGIII.

[663] Ibid., paras 37 and 38.

marine environmental matters, which generally fall under shared competence and where the pre-emption criteria (e.g., maximum or minimum international standards) are difficult to apply. On the basis of the Court's latest case law, moreover, the determination of the nature of the Community's external competence is a highly discretionary process, largely based on policy considerations. This, on one hand, guarantees a large degree of flexibility, but on the other, increases confusion.

Instead of proceeding towards a clear definition of shared competence and the respective spheres of powers of the Community and the member states the Court has highlighted the duty of close cooperation in all phases of mixed agreements. However, it has not provided strict directions on how such a duty should work in practice, thereby creating uncertainty among member states with regard to whether and how far they have to coordinate their positions and may take autonomous action at the international level. On the other hand, the doctrine of mixity as developed by the Court responds to the need to ensure the maximum level of flexibility in joint participation in international negotiations. So far, the Court, supported by the EC institutions and the member states in the Council, has intentionally avoided establishing uniform and rigid rules on how the EC institutions and the member states should behave at the international level concerning matters under shared competence. In these matters the action of the Community and the member states is mainly driven by political and practical considerations and requires flexible and pragmatic solutions tailored to the circumstances of each negotiation. For that reason, they wanted to keep the division of external competence as dynamic as possible.

In the absence of uniform procedural rules under EC law, the forms of mixed participation vary according to the circumstances and the agreement in question creating confusion for third States with regard to "who is speaking for whom". Uncertainties, ambiguities and the lack of coordination may affect the entire decision-making process and the role of the Community in the negotiations. The Community, moreover, by its very nature cannot be a speedy and impulsive negotiator, but needs to coordinate the positions of its member states. EC coordination inevitably adds an extra layer to the negotiation process and may be a source of major delays and frustration for third States.

All these problems illustrate the complex nature of the Community as an international actor and they are the inevitable corollary of the Community participation in international decision- making.