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# EU LEGAL PERSONALITY IN FOREIGN POLICY?

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#### ABSTRACT

This article examines whether the European Union (EU) already had legal personality PRIOR TO the EU's Constitutional Convention's statement in the autumn of 2002 on the need to provide the EU with legal personality. Abolition of the distinction between the Union and the two surviving Communities is an essential aspect of simplifying the Treaties, and making the European constitutional order easier to understand for those subject to it. It follows that there has to be a single Union legal personality; but recognition of this would not, in itself, entail any extension of the Union's powers. However, one wonders whether, by giving the conferment of legal personality such a prominent place in the EU Constitutional Treaty, the draftsman may regard this as more than the purely technical matter, which it ought to be. Efforts go back to 1996, with a study presented in the form of a draft treaty for the European Parliament, and coordinated by scientists at the Robert Schuman Centre of the European University Institute in Florence: "A Unified and Simplified Model of the European Communities Treaties and the Treaty on European Union in Just One Treaty." However, simplification of the treaties today means more than having just one treaty. Following a merger of legal personalities and of Treaties, if necessary, it would be anachronistic to retain the current pillar structure of the EU. Doing away with this pillar structure would help to simplify the architecture of the Union considerably.

#### I. INTRODUCTION

The purpose of this article is to discuss whether the European Union ("EU") already had legal personality PRIOR TO the EU's Constitutional Convention's statement in the autumn of 2002 on the need to provide the EU with legal personality.<sup>1</sup> By legal personality, this article means the

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<sup>1</sup> This is a hotly debated issue among scholars and practitioners. Some authors argue that the EU does have legal personality through Article 24 TEU. Among the many authors who have studied this issue are A. Tizzano, *La Personalité Internationale de l'Union Européenne*, Issue No. 4 REVUE DU MARCHÉ UNIQUE EUROPEEN 11 (1998) (Fr.); Sommet d'Amsterdam: conclusion de la CIG, LETTRE MENSUELLE SOCIO-ECONOMIQUE, Bruxelles, No. 27, September 1997, pp. 16-27; Remiro Brotons, A. "Consideraciones sobre la Conferencia Intergubernamental de 1996," GACETA JURÍDICA DE LA CE, Boletín, Madrid, No. 110, February

capacity to enter into contractual and other relations with third States, and to bear full responsibility for one's actions. In this respect, two disclaimers need to be made: first, the article will analyze this issue mainly from the angle of foreign policy, and not trade policy, because in the case of external trade policy it is the European Community ("EC")<sup>2</sup> and not the EU, that concludes international trade agreements; second, throughout this article, the terms *European Union* and *European Community* appear continuously. It is important to clarify the difference between them; Part II will draw this distinction.

With two remaining Communities<sup>3</sup> (currently there are only two

1996, pp. 7-18; Matthias Pechstein, *Une Personnalité Internationale pour l'Union Européenne?*, Issue No. 3 REVUE DES AFFAIRES EUROPEENES 229 (1996) (Belg.); Eduardo Vilariño Pintos, *Representación Exterior y Cooperación Diplomática y Consular en el Tratado de la Unión Europea*, 22 REVISTA DE INSTITUCIONES EUROPEAS 47 (1995) (Spain); Karel De Gucht, *The Common Foreign and Security Policy (CFSP): Is There Room for New Perspectives in the Aftermath of Maastricht?*, 50 STUDIA DIPLOMATICA 49 (1997) (Belg.).

<sup>2</sup> The most important of three European Communities, the European Community was originally founded on March 25, 1957 by the signing of the Treaty Establishing the European Community (Treaty of Rome), Mar. 25, 1957, 298 U.N.T.S. 11 under the name of European Economic Community. In 1992, "Economic" was removed from its name by the Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, 31 I.L.M. 247, which at the same time effectively made the European Community the first of three pillars of the European Union, called the Community (or Communities) pillar.

<sup>3</sup> In the 1950s, six European countries decided to pool their economic resources to set up a system of joint decision-making on economic issues. To do so, they formed three organizations. *European Communities* is the name given collectively to these three organizations, i.e., the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom), which were first merged under a single institutional framework with the Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 1348 U.N.T.S. 81 [hereinafter *Merger Treaty*]. They formed the basis of what is today the European Union.

The EEC soon became the most important of these three communities, and was eventually renamed simply the European Community. Subsequent treaties added further areas of competence that extended beyond purely economic areas. The other two communities remained extremely limited. For that reason, little distinction is usually made between the European Community and the European Communities as a whole. Furthermore, in 2002, the ECSC ceased to exist with the expiration of the Treaty of Paris which had established it. Because it was seen as redundant, no effort was made to retain it—its assets and liabilities were transferred to the EC, and coal and steel became subject to the EC Treaty.

With respect to trade, it should also be noted that the WTO Agreement was concluded by the European Communities and not by the European Community. It was thought that, to the extent the Uruguay Round Agreements concerned matters falling within the scope of the ECSC or the Euratom Treaty, these agreements fell outside the competence of the European Community.

Communities,<sup>4</sup> since the European Coal and Steel Community Treaty expired on July 23, 2002),<sup>5</sup> one Union, and three different pillars<sup>6</sup> of competences<sup>7</sup> and decision-making, it is no wonder that third parties are often

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<sup>4</sup> In fact, the two remaining Communities work as one entity which functions in the framework of two Treaties, even though they are legally different. In this sense, legally binding agreements concluded by the EC are still signed on behalf of one or both of the existing Communities. It must be stated clearly that the EC, and not the EU, is a member of the World Trade Organization and regional fisheries organizations, to give just two examples. In this respect, see Jörn Sack, *The European Community's Membership of International Organizations*, 32 COMMON MKT. L. REV. 1227 (1995) (Neth.).

<sup>5</sup> See Decision of the Representatives of the Governments of the EU Member States, Meeting within the Council No. 2002/234/ECSC of 27 Feb. 2002, 2002 O.J. (L 79) 42 (discussing the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_079/l\\_07920020322en00420059.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_079/l_07920020322en00420059.pdf).

<sup>6</sup> Later in this article, I will elaborate on what Ramòn Torrent calls the “fourth pillar” of the EU. The pillar illustration has become widely known as metaphorically being part of a Greek temple, symbolising the EU’s institutional structure. This Hellenic architectural illustration is a creation of Sir Geoffrey Howe, former UK Secretary of State for Foreign and Commonwealth Affairs. The European Union takes decisions in three separate domains (policy areas), also known as the three pillars of the EU:

1. The first pillar is the “Community domain,” covering most of the common policies, where decisions are made by the so-called “Community method” involving the Commission, Parliament and the Council. The Community method is the EU’s usual method of decision-making: the Commission makes a proposal to the Council and Parliament, and the Council and Parliament then debate the proposal, propose amendments and eventually adopt it as EU law. In the process, they will often consult other bodies such as the European Economic and Social Committee and the Committee of the Regions.
2. The second pillar is the common foreign and security policy, where decisions are made by the Council alone.
3. The third pillar is “police and judicial cooperation in criminal matters,” where, once again, the Council makes the decisions.

Within the first pillar, the Council normally makes decisions by qualified majority vote. In the other pillars, the Council decision has to be unanimous and can therefore be blocked by the veto of any one country. The Council can also decide to use the so-called “Community bridge” to transfer certain matters from the third to the first pillar. This procedure for transferring certain matters from the third pillar of the EU to the first pillar is done so that the matters can be dealt with using the Community method. Any decision to use the Community bridge has to be taken by the Council, unanimously, and then ratified by each Member State.

<sup>7</sup> The term “competence” appears very often throughout this paper. It originates from the French term *competence* to refer to the authority or power to do or develop something. Thus, EC competence, as opposed to national competence, is the authority conferred on the EC, as opposed to a national government, to be in charge of a certain policy or issue.

confused.<sup>8</sup> In order to avoid this chaos, the Amsterdam Intergovernmental Conference of 1996-1997 proposed to create a single legal entity, the European Union,<sup>9</sup> just like the United Nations (“UN”) or the World Trade Organization (“WTO”).<sup>10</sup> This proposal was perceived as a possi-

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<sup>8</sup> For a comprehensive study on the ramifications of the expiration of the ECSC, see Benedetta Ubertaini, *The End of the ECSC*, 8 EUROPEAN INTEGRATION ONLINE PAPERS (2004), available at <http://eiop.or.at/eiop/texte/2004-020a.htm> (last visited Oct. 25, 2006); Nico Groenendijk & Gert-Jan Hospers, *A Requiem for the European Coal and Steel Community*, 150 DE ECONOMIST 601 (2002) (Neth.). See also Patrick Meunier, *La Communauté Européenne du Charbon et de L'acier est Morte, Vive la Fédération Européenne!*, Issue No. 450 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 509 (2001) (Fr.); Walter Obwexer, *Das Ende der Europäischen Gemeinschaft für Kohle und Stahl*, 2002 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 517 (F.R.G.); Maria Cervera Vallterra, *La Disolución de la Comunidad Europea del Carbón y del Acero: Estado Actual*, 12 REVISTA DE DERECHO COMUNITARIO EUROPEO 393 (2002) (Spain).

<sup>9</sup> The European Union or EU is an intergovernmental and supranational union of 27 European countries, known as EU Member States. The European Union was established under that name by the Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, 31 I.L.M. 247 [hereinafter Maastricht Treaty or TEU]. The European Union's activities cover all areas of public policy, from health and economic policy to foreign policy and defense. However, the extent of its powers differs greatly between areas. Depending on the area in question, the EU may therefore resemble:

1. a federation (for example, on monetary affairs, agricultural, trade and environmental policy);
2. a confederation (for example, in social and economic policy, consumer protection, home affairs); or
3. an international organization (for example, in foreign policy).

Since the TEU came into force on November 1, 1993, the use of the expression “European Union” has been generalized. At the same time, among the experts, the use of “pillars of the European Union” is very much *a la mode*. These two phenomena are regrettable because they tend to create confusion (with an indiscriminate use of the expression “European Union”) or they tend to introduce a kind of false compartmentalization (i.e., division of competences in the EU by pillars) of the institutional reality to which these expressions make reference. The reasons that make this regrettable are mainly political: the fact of knowing who does what, and therefore who is responsible for certain issues, constitutes the *conditio sine qua non*, on one hand, for policymakers to master the nature of their decisions and, on the other hand, for a minimum of democratic control to be possible.

<sup>10</sup> Since the creation of the ECSC and the adoption of the Euratom and EEC Treaties, efforts have been made to join the European Communities: the Treaty of Rome, which established certain institutions common to all three Communities (such as the Court of Justice, or the Parliamentary Assembly); the Treaty of Brussels of April 8, 1975, which joined the then three Communities' executive powers in one Commission and administration; and, most recently, the fusion of the treaties of the EU into the EU Constitutional Treaty, thereby granting legal personality to the EU. This union would then be able to represent both the EU and its Member States, conclude international agreements, and become a member of international

ble transfer of sovereignty in the field of Common Foreign and Security Policy (“CFSP”). Unfortunately, this discussion focused on the question of the exercise of competence, and the idea of the EU as a single actor (legal person) does not prejudge the powers of the EU in, say, the common foreign and security policy.

Instead of being faced with two international organizations (the remaining two Communities) and the EU as an umbrella concept for these organizations as well as the second and third pillars, third States are now facing two organizations (the Communities) and a third (perhaps legal?) person in the form of the EU. This situation hardly corresponds to the basic institutional principles of the TEU, such as Article 1.3 TEU<sup>11</sup> or Article 3.2 TEU.<sup>12</sup> From this, we can deduce that there is a need for clarification and for more coherence in the institutional image of the EU in the outside world.<sup>13</sup>

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organizations beyond the case of the WTO or FAO. In other words, the EU would finally be able to take action and assume responsibility on behalf of its Member States.

<sup>11</sup> TEU art. 1.3 predicates that “[t]he Union shall be founded on the European Communities.”

<sup>12</sup> TEU art. 3.2 reads that “[t]he Union shall in particular ensure the consistency of its external activities as a whole.”

<sup>13</sup> There is a vast body of literature on this matter, especially the work of the European Convention on the future of Europe, Working Group III on the EU’s legal personality, guided by Professor Amato. See *The European Convention, Working Group III*, available at [http://european-convention.eu.int/doc\\_register.asp?lang=EN&Content=WGIII](http://european-convention.eu.int/doc_register.asp?lang=EN&Content=WGIII) (last visited January 30, 2007). Other literature, Manuel Ramamontaldo, *International Legal Personality and Implied Powers of International Organizations*, 1970 BRIT. Y.B. INT’L L. 111; what follows is a non-exhaustive indication of readings I have come across in the field of EC external trade relations: JAMES JAY ALLEN, *THE EUROPEAN COMMON MARKET AND THE GATT* (1960); EUROPE AND GLOBAL ECONOMIC INTERDEPENDENCE (Léonce Bekemans & Loukas Tsoukalis eds., 1993); KLAUS HEIDENSOHN, *EUROPE AND WORLD TRADE* (1995); STANLEY HENIG, *EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY: ASSOCIATIONS AND TRADE AGREEMENTS* (1971); PROTECTIONISM AND THE EUROPEAN COMMUNITY (E.L.M. Völker ed., 2d ed. 1987); RELATIONS EXTÉRIEURES DE LA COMMUNAUTÉ EUROPÉENNE ET MARCHÉ INTÉRIEUR: ASPECTS JURIDIQUES ET FONCTIONNELS (Paul Demaret ed., 1986); E.L.M. VÖLKER, *BARRIERS TO EXTERNAL AND INTERNAL COMMUNITY TRADE* (1993); STEPHEN WOOLCOCK, *TRADING PARTNERS OR TRADING BLOWS? MARKET ACCESS IN EC-U.S. RELATIONS* (1992); Jacques H.J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echter Nach Procession*, 32 COMMON MKT. L. REV. 763 (1995); Alan Dashwood, *External Relations Provisions of the Amsterdam Treaty*, 35 COMMON MKT. L. REV. 1019 (1998); Von Horst Günter Krenzler & Hermann da Fonseca-Wollheim, *Die Reichweite der Gemeinsamen Handelspolitik nach dem Vertrag von Amsterdam: Eine Debatte ohne Ende*, 1998 EUROPARECHT 223; Pierre Pescatore, *Opinion 1/94 on “Conclusion” of the WTO Agreement: Is there an Escape from a Programmed Disaster?*, 36 COMMON MKT. L. REV. 387 (1999); Torrent, R. *Droit et Pratique des*

The genesis and *raison d'être* of this article is that I have noticed that lawyers, academics, and international civil servants alike often times confuse the terms European Community (EC) and European Union (EU), especially when it comes to international relations and international law. I start my analysis with a legal distinction between the EC and the EU, focusing on foreign policy more generally first, and then on external economic policy. To conclude whether the EU has legal personality, I then test arguments for and against the existence of the EU's legal personality by analyzing Article 24 of the Treaty on European Union.

## II. A COMPARISON BETWEEN THE EUROPEAN UNION AND THE EUROPEAN COMMUNITY

### A. General Overview

Most people wrongly believe that the EC has been replaced by the EU. This is inaccurate because both entities co-exist. The main difference between the two is that, technically speaking, only the EC has legal personality and, therefore, as we will see later, can conclude international agreements, buy or sell property, sue and be sued in court.<sup>14</sup> All these are competences which the EC has, but the EU does not. The EU comprises the EC and its Member States. The European Union is the political and institutional framework in which the EC's and certain Member States' competences are exercised. In the case of Member States, the competences within the institutional framework of the EU are the second and third pillars (Common Foreign and Security Policy, and police and judicial cooperation in criminal matters, respectively) of the EU. The EU,

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*Relations Economiques Exterieures dans l'Union Europeenne* (1998), available at <http://www.ub.es/dpecp/ep/livreTorrent.html>; Ernst-Ulrich Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 COMMON MKT. L. REV. 397 (1983); Piris, J.-C. "La Capacité de l'Union Europeenne de s'engager et d'agir en Matiere de Relations Economiques Exterieures: l'exemple de l'OMC", Florence, Academy of European Law, Conference given by Jean-Claude Piris, Jurisconsult of the Council of the European Union, on the July 15, 1998.

<sup>14</sup> On the implications of international legal personality, see Arangio-Ruiz G., *Diritto internazionale e personalità giuridica*, Clueb, Bologna, 1971, 255; Pierre Pescatore, *Les relations extérieures des Communautés européennes. Contribution à la doctrine de la personnalité des organisations internationales*, 103 RECUEIL DES COURS 9, 137 (1961); Rama-Montaldo, *supra* note 13; Finn Seyersted, *International Personality of Intergovernmental Organizations: Do their Capacities really depend upon their Constitutions?*, 4 INDIAN J. INT'L L. 1, 39 (1964); Finn Seyersted, *Is the International Personality of Intergovernmental Organizations Valid vis-a-vis Non-Members?*, 4 INDIAN J. INT'L L. 233, 260 (1964). See also Lena Granvik, *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness*, in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION (Martti Koskenniemi ed., 1998).

established by the Treaty<sup>15</sup> on European Union (hereinafter “TEU” and

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<sup>15</sup> Treaties are usually composed of articles, Protocols and Declarations. As an example we have the Treaty of Amsterdam, composed of 15 articles, 13 Protocols and 58 Declarations. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam]. In the case of the EU, there are currently founding treaties, amending treaties, accession treaties and budgetary treaties. There is also an EU Constitutional Treaty, which seeks to consolidate, simplify and replace the existing set of overlapping treaties. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1. It was signed in Rome on October 29, 2004 and is due to come into force in the near future, conditional on its ratification by all EU Member States. In the meantime, or if the EU Constitutional Treaty fails to be ratified by all EU Member States, the EU will continue to work on the basis of the current treaties. As for the founding treaties, there are four of them: Treaty Establishing the European Coal and Steel Community (Treaty of Paris), Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty] (expired 2002); Treaty Establishing the European Atomic Energy Community (Euratom Treaty), Mar. 25, 1957, 298 U.N.T.S. 169; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty] (these last two treaties are known as the Treaties of Rome, however, when the term “Treaty of Rome” or the acronym “TEC” are used, it is to mean only the EEC Treaty); and TEU (changing the name of the European Economic Community to simply “the European Community” and introducing new intergovernmental structures to deal with the aspects of common foreign and security policy, as well as police and judicial cooperation. The structure formed by these so-called Three Pillars (Community pillar; foreign and security policy; police and judicial cooperation) is the European Union, whose scope then became more overtly political as well as economic). There are also four amending treaties: Merger Treaty, (providing for a Single Commission and a Single Council of the then three European Communities); 1987 Single European Act, Feb. 28, 1986, O.J. (L 169) 1 [hereinafter SEA] (providing for the adoptions required for the achievement of the Internal Market); Treaty of Amsterdam (simplifying decision-making in addition to further integrating the common foreign and security policy concept; amending and renumbering the TEU and EC Treaty); and Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1 [hereinafter Treaty of Nice] (again extending qualified majority voting to more areas and abolishing a national right to veto in some policy areas). A concept of “enhanced co-operation” was introduced for countries wishing to forge closer links in areas where other EU Member States disagreed. The accession treaties came into being for every enlargement of the EU. As for budgetary treaties, there have been two: Treaty Amending Certain Budgetary Provisions of the Treaties Establishing the European Communities and of the Treaty Establishing a Single Council and a Single Commission of the European Communities (Budgetary Treaty of 1970), Apr. 22, 1970, 1377 U.N.T.S. 210 (giving the European Parliament the last word on what is known as “non-compulsory expenditure”); and Treaty Amending Certain Financial Provisions of the Treaty Instituting the European Coal and Steel Communities, Treaty Establishing the European Economic Community, and Treaty Establishing the European Atomic Energy Community (Budgetary Treaty of 1975), July 22, 1975, 1435

also known as the Treaty of Maastricht)<sup>16</sup> now has twenty-seven Member States<sup>17</sup> and a complex structure, including both integrationist and inter-governmental elements, known as “pillars.” According to the TEU, the Union is founded on the European Communities (Article 1) and is served by a single institutional framework (Article 3).<sup>18</sup> However, there are important legal differences between the European Communities and the EU (of which the Communities form a part, and are referred to as the first pillar).<sup>19</sup>

As described below, many people find the institutional system of the EU to be confusing, not only the citizens of the Union but also those who direct the Union, those politically responsible for it, and the civil servants of the European Institutions. As a result, we must approach the institutional system of the EU from two perspectives: a *legal* side and a *political* side. We must understand the legal side because one cannot direct or guide a system without knowing the rules of the game, and we must understand the political side, because one must know the reasons for why a system malfunctions.

Ambassador Hugo Paemen<sup>20</sup> has described the importance of making a terminological distinction between the EC and the EU when dealing with external relations:

I should make a clear distinction between the terms “European Community” (or “EC”) and “European Union.” After all, until the Treaty of Amsterdam comes into force, only the European Community will grant it legal personality. Therefore, please forgive me if occasionally I use the term European Union where it is not correct.

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U.N.T.S. 245 (Euratom) (giving the European Parliament the power to reject the budget as a whole and creating the European Court of Auditors).

<sup>16</sup> The Treaty of Maastricht, establishing the European Union, transformed the European Economic Community into the European Community (Article G), including the European Coal and Steel Community and the European Atomic Energy Community. This required complex planning in order to take into account the specifics of the three founding treaties, and especially to make the EC the first of the three pillars of the EU.

<sup>17</sup> The six founding countries of the EU were France, West Germany, Belgium, The Netherlands, Luxembourg and Italy. The UK, Ireland and Denmark joined in 1973. Greece joined in 1981 and Spain and Portugal joined in 1986. East Germany reunited with West Germany in 1990 and consequently became part of the EU. Austria, Sweden and Finland joined in 1995. The last group of countries to join the EU were Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Malta and Cyprus, all of whom joined in 2004. More countries are expected to join in the near future: Bulgaria and Romania in 2007, and Turkey is an official candidate to join the EU.

<sup>18</sup> Treaty on European Union, July 29, 2002, O.J. (C 191) 29.

<sup>19</sup> See TOM KENNEDY, *LEARNING EUROPEAN LAW: A PRIMER AND VADE-MECUM* 49-53 (1998).

<sup>20</sup> Former Head of the European Commission Delegation to the United States.

We went through a very painful adjustment period to go from the European Community to the European Union, so it is somewhat difficult now to make the distinction.<sup>21</sup>

In relation to the potential legal personality of the European Union *vis-à-vis* the European Community, it can be stated that European Community law, as well as the European Community, still exists alongside the European Union. So far, according to Article 281 EC,<sup>22</sup> the Community has legal personality. Under international law, international organizations can have international personality, that is, rights and duties under the public international system of law.<sup>23</sup> In this respect, the major international law precedent on the international personality of public international law institutions is the Advisory Opinion of the International Court of Justice in the *Reparations for Injuries Suffered in the Service of the United Nations* case.<sup>24</sup> Because the EC is an international organization, it can explicitly be given legal personality by a treaty which has created it. As concerns third States, what matters is the international practice of the organization and the links that such an organization creates with these third States. This practice and its links will (or will not) create the organization's international legal personality.

In September 1948, a gang of private terrorists killed Count Bernadotte, the Chief United Nations Truce Negotiator in Jerusalem. The United Nations General Assembly sought an advisory opinion from the International Court of Justice to bring an international claim regarding injuries suffered by its employees in circumstances where a State might have responsibility.<sup>25</sup> Although the UN Charter does not expressly confer legal personality on the United Nations Organization, the Court examined the Charter as a whole and concluded that the UN was an international entity holding international rights and obligations, and capable of maintaining its rights by bringing international claims.<sup>26</sup> The Court pronounced itself as follows:

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same as saying that it is a State, which it certainly is not, or that its legal personality and

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<sup>21</sup> See Hugo Paemen, *The European Union in International Affairs: Recent Developments*, 22 *FORDHAM INT'L L.J.* S136 (1999).

<sup>22</sup> Treaty Establishing the European Community art. 281, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty] ("The Community shall have legal personality.").

<sup>23</sup> See HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 976-82 (3d ed. 1995); N.D. WHITE, *THE LAW OF INTERNATIONAL ORGANISATIONS* 27-56 (1996).

<sup>24</sup> *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

<sup>25</sup> DOMINIC MCGOLDRICK, *INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION* 27 (John Usher ed., Longman European Law Series 1997).

<sup>26</sup> See *Reparations*, *supra* note 24.

rights and duties are the same as those of a State. . . Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.<sup>27</sup>

So the question is: what, then, is the European Union? For the time being, it is just the institutional and political framework in which all EC's and certain (and only certain) Member States' competences are exercised. In the near future, once the EU Constitutional Treaty is implemented – or a similar legal document, if the EU Constitutional Treaty will never see the light of day – the Union will be more than just a simple framework and, therefore, will become an actor with its own legal personality and competences. Let me try to explain this argument by giving the example of former Yugoslavia.

Firstly, if we think of sending military forces, then we are dealing with the twenty-seven Member States of the Union acting outside the institutional system of the Union. However, one should not exclude the possibility that sending troops to former Yugoslavia may have a link with the common foreign and security policy. The borderline between Member States acting on their own, outside the institutional framework of the Union, and Member States acting within the political and institutional framework of the Union, is not very clear. Secondly, if we refer to the “European Administration” of the town of Mostar, then we are dealing with Member States' competences in the framework of the EU. Thirdly, if we look at the commercial regime applicable to the republics of former Yugoslavia, then we are dealing with the EC's competences.

These examples should illustrate the danger of an indiscriminate use of the expression “the European Union does. . .” Such an expression does not let us know who really does what: what does the EC *as such* do? What do the twenty-seven Member States together do in the framework of the Union? What do both Member States and the Community *together* do? Obviously, it would be even worse to use the expression *European Union* when making reference to the Member States outside the EU's institutional framework. Again, knowing the precise answer to these questions is vital, since the nature, as well as the legal and political consequences of this action, is completely different, depending on who acts.<sup>28</sup> To defend this argument, allow me to suggest two examples:

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<sup>27</sup> *Id.* at 179-80.

<sup>28</sup> Torrent, R., *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*, 1998, chapter 1, subtitle 1.1., available at <http://www.ub.es/dpecp/ep/livreTorrent.html>

*Example 1:* “The European Union reacts to the Helms-Burton<sup>29</sup> and d’Amato Acts.”<sup>30</sup> This statement could mean:

- a. that the Community and the Member States both react to these two legislations, each with their own legal and political means; or
- b. that Member States cede their responsibilities to appear behind a single action conducted by the Community. As a matter of fact, the Community has very limited competences regarding such issues as the Helms-Burton or d’Amato Acts. Therefore, its action has very little effect or repercussion.

*Example 2:* “Agreements between the European Union and MERCOSUR,<sup>31</sup> and agreements between the European Union and the Andean Community.”<sup>32</sup>

This expression does not reveal the main difference between both agreements. The agreement with MERCOSUR is an agreement signed between the EC AND the Member States on the European side, and MERCOSUR and its Member States on the South American side, whereas the agreement with the Andean Community and its Member States has been signed only by the EC on the European side. In other words, EC Member States have not participated in this second agreement. Therefore, the first agreement has a greater scope than the second one. The same difference exists between the Euro-Mediterranean Agree-

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<sup>29</sup> Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), Pub. L. No. 104-114, 110 Stat. 785 (1996) (strengthening and continuing the United States embargo against Cuba).

<sup>30</sup> Iran and Libya Sanctions Act of 1996 (d’Amato Act), Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. 1701 (1996)) (referring to the U.S. government’s economic embargo against companies of third countries investing in gas or oil in Iran and Libya).

<sup>31</sup> MERCOSUR stands for *Mercado Comun del Sur* (Common Market of the Southern Cone) and is composed of Brazil, Argentina, Paraguay and Uruguay. On December 9, 2005, Venezuela was accepted as a new member, and it will be made an official member in late 2006. MERCOSUR was founded by the Treaty of Asuncion, also know as the Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 I.L.M. 1041, which was later amended and updated by the 1994 Protocol of Ouro Preto, also known as the Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR, Dec. 17, 1994, 34 I.L.M. 1244. Its purpose is to promote free trade and the fluid movement of goods, peoples, and currency.

<sup>32</sup> The Andean Community is a trade bloc comprising until recently five South American countries: Venezuela, Colombia, Peru, Ecuador and Bolivia. In 2006, Venezuela announced its withdrawal, reducing the Andean Community to four member states. The trade bloc was called the Andean Pact until 1996, and came into existence with the signing of the Cartagena Agreement in 1969. Andean Subregional Integration Agreement, May 26, 1969, *available at* [http://www.comunidadandina.org/ingles/normativa/ande\\_trie1.htm](http://www.comunidadandina.org/ingles/normativa/ande_trie1.htm) (last visited Oct. 25, 2006). Its headquarters are located in Lima, Peru.

ments<sup>33</sup> of the EC and its Member States with Tunisia,<sup>34</sup> Morocco,<sup>35</sup> Israel,<sup>36</sup> and other countries, as well as the Euro-Mediterranean Agreement with the Palestinian Liberation Organization (PLO).<sup>37</sup> The latter Agreement was signed by only the EC (and not the EC and its Member States), and has a lesser scope than the former Agreements, since the EU Member States do not participate in the agreement.

It is thus of vital importance to make certain linguistic clarifications in order to improve the understanding of what we are trying to explain:

- a. the expression “The UNION does humanitarian work” actually means “The Community and/or its Member States, acting together in the framework of the European Union, do humanitarian work;”
- b. the expression “The Union and its Member States” is rather confusing since the Union includes the Member States; however, we can speak of “the Community and its Member States.” Here we mean twenty six different legal entities (the twenty five Members States plus the one Community), each one of them having legal personality;
- c. the expression “The Union and its Member States act individually;” by this we understand activities carried out within the framework of the Union (by the Community and/or the Member States acting together), and activities carried out by the Member States outside the framework of the Union.

## B. *A Note on Foreign Policy*

The success of the EU regarding unity in commercial policy seems to be inextricably linked to its success with a coherent foreign policy. In fact, as is evidenced in the famous bananas<sup>38</sup> and hormones disputes,<sup>39</sup> both the political and economic aspects of the EU’s external relations are inseparable. At what was called the European Summit<sup>40</sup> in The Hague in

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<sup>33</sup> Euromediterranean agreements are association agreements concluded between the EC and its Member States, on the one hand, and a number of Mediterranean countries, on the other hand.

<sup>34</sup> Council and Commission Decision 98/238, 1998 O.J. (L 97) 1.

<sup>35</sup> Council Regulation 2211/78, 1978 O.J. (L 264) 1.

<sup>36</sup> Council Regulation 1245/75, 1975 O.J. (L 136) 1. This was a free trade and cooperation agreement.

<sup>37</sup> Council Decision 97/430, 1997 O.J. (L 187) 1.

<sup>38</sup> EC — Bananas III (WT/DS27/AB/R).

<sup>39</sup> EC — Hormones (WT/DS26/AB/R, WT/DS48/AB/R).

<sup>40</sup> European (or EU) Summits are the meetings of heads of State and government (i.e., presidents and/or prime ministers, depending on what their national constitutions indicate) of all EU countries, plus the President of the European Commission. In today’s EU politics, summits are embodied in the European Council, which meets, in principle, four times a year to agree upon overall EU policy and to review progress. The European Council is the highest-level policy-making body in the European Union, which is why its meetings are often called “summits.”

December 1969, the heads of State and Government of the six original Member States asked their ministers of foreign affairs to study how progress could best be made in the area of political unification.<sup>41</sup> Their report was a proposal for cooperation in the area of foreign policy, which became the basis of what, for twenty five years, would be called European Political Cooperation (EPC).<sup>42</sup> The procedure was purely intergovernmental and based on unanimity, a constraint reflecting a strong belief that foreign policy decisions remained under the sovereign competence of national governments.<sup>43</sup>

John Peterson and Helene Sjursen argue that:

[t]he move from European Political Cooperation (EPC) - in retrospect, a strikingly anodyne construction - to the Common Foreign and Security Policy (CFSP) was propelled by ambitions to create a "common" EU foreign policy analogous to, say, the common agricultural policy or common commercial policy. Yet, French *national* foreign policy decisions to test nuclear weapons in the Pacific, send troops to Bosnia, or propose a French candidate to head the European Central Bank could be viewed as far more momentous and consequential than anything agreed upon within the CFSP between 1995 and 1997. It is plausible to suggest, as David Allen does, that the EU simply does not have a "foreign policy" in the accepted sense of the term. Going one step further, the CFSP may be described, perhaps dismissed, as a "myth." It does *not*, as the Maastricht Treaty promises, cover "all areas of foreign and security policy." Obviously, it is not always supported "actively and unreservedly by its Member States in a spirit of loyalty and mutual solidarity."<sup>44</sup>

That said, and knowing that the presumption in the European Union is to have collective action, is there really a "common" European interest? If so, is this interest so great as to assume that in certain circumstances Member States will act with a single voice? Do Member States have enough proximity in their national interests to act with one voice in the international sphere?

Following Peterson and Sjursen, the European Union has still to "reach[ ] its apogee in terms of its ability to act with power and unity in

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<sup>41</sup> See EUROPEAN FOREIGN POLICY: THE EUROPEAN COMMUNITY AND CHANGING PERSPECTIVES IN EUROPE (Walter Carlsnaes & Steve Smith eds. 1994).

<sup>42</sup> For a description and analysis of such foreign policy coordination, see EUROPEAN POLITICAL COOPERATION IN THE 1980S: A COMMON FOREIGN POLICY FOR WESTERN EUROPE? (Alfred Pijpers et al. eds. 1988).

<sup>43</sup> See L'UNION EUROPEENNE ET LE MONDE APRES AMSTERDAM (Marianne Dony ed. 1999).

<sup>44</sup> John Peterson & Helene Sjursen, *Conclusion: The Myth of the CFSP?*, in *A COMMON FOREIGN POLICY FOR EUROPE? COMPETING VISIONS OF THE CFSP*, 169 (John Peterson & Helene Sjursen, eds. 1998) (quoting David Allen, *Who Speaks for Europe? The Search for an Effective and Coherent Foreign Policy*, in *id.*).

international affairs.”<sup>45</sup> However, some competences are exclusively of the European Community. Customs duties and protective non-tariff barriers (NTBs)<sup>46</sup> such as quantitative limits, safety norms, health, and hygiene standards, were and are fixed by the Union as a whole, not by the individual Member States.

Although the Single European Act in 1987 established a legal basis for EPC,<sup>47</sup> it remained largely unchanged and intergovernmental. Only when the EC faced the challenge of Central and Eastern Europe and the Iraqi crisis in 1990 and 1991 was more thought given to increasing cooperation in foreign policy. The result was the “implementation of a common foreign and security policy including eventual framing of a common defence policy.”<sup>48</sup> The fact that Title V of the Treaty on the European Union (TEU) brought foreign policy under the umbrella of the EU represents a step forward in clarity. Having more transparent instruments is the result of requiring Member States to conform to common positions of the Council of Ministers.<sup>49</sup> Through joint actions the Member States are committed to acting in support of these common positions. Finally, provisions of the Treaty of Amsterdam give the CFSP a clearer character by creating a High Representative of EU Foreign Policy, assisted by a new policy planning and early warning unit in the Secretariat of the EU Council.<sup>50</sup>

At Maastricht, it was not possible for Member States to accomplish a common foreign and security policy in the framework of the traditional mechanisms of Community institutions and Community law.<sup>51</sup> The second pillar<sup>52</sup> of the EU does not presently provide for a real supranational decision-making by majority voting. It utilizes unanimity as a decision-

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<sup>45</sup> See Peterson & Sjursen, *supra* note 44.

<sup>46</sup> NTBs are government measures or policies other than tariffs that restrict or distort international trade. Examples are import quotas, discriminatory government procurement practices, technical and scientific barriers related to plant health, environmental labelling, codes and standards, *inter alia*.

<sup>47</sup> Single European Act, *Official Journal L 169 of 29 June 1987*.

<sup>48</sup> TEU art. B (as in effect 1992) (now art. 2).

<sup>49</sup> A Council common position is the provisional position agreed by the EU Council after the first reading stage of legislation, that is, after taking account of any amendments proposed or opinions offered by the European Parliament.

<sup>50</sup> Treaty of Amsterdam at 132; TEU title V.

<sup>51</sup> These mechanisms are known in the Community institutions as those of the “first pillar.”

<sup>52</sup> The so-called “second pillar” refers to the CFSP in the EU.

making system with the possibility of common positions<sup>53</sup> (TEU art. 12)<sup>54</sup> and joint actions<sup>55</sup> (TEU art. 13).<sup>56</sup>

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<sup>53</sup> The common position in the context of the CFSP is designed to make cooperation more systematic and improve its coordination. The EU Member States are required to comply with and uphold such positions which have been adopted unanimously at the Council. For reasons of simplification, the EU Constitutional Treaty, which is in the process of being ratified, restricts CFSP instruments to European decisions and international agreements. Once the EU Constitutional Treaty enters into force, common positions and their implementation will be based on European decisions (non-legislative instruments) adopted by the Council of Ministers.

<sup>54</sup> TEU art. 12 reads:

The Union shall pursue the objectives set out in Article 11 by:

- defining the principles of and general guidelines for the common foreign and security policy,
- deciding on common strategies,
- adopting joint actions,
- adopting common positions,
- strengthening systematic cooperation between Member States in the conduct of policy.

<sup>55</sup> Joint action, which is a legal instrument under TEU title V CFSP, means coordinated action by the EU Member States whereby all kinds of resources (human resources, know-how, financing, equipment, et cetera) are mobilized in order to attain specific objectives set by the Council, on the basis of general guidelines from the European Council.

For reasons of simplification, the EU Constitutional Treaty, which is in the process of being ratified, restricts CFSP instruments to European decisions and international agreements. Once the EU Constitutional Treaty enters into force, joint actions and the implementation of such action will therefore be based on European decisions (non-legislative instruments) adopted by the Council of Ministers.

<sup>56</sup> TEU art. 13 reads:

1. The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.
2. The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.

Common strategies shall set out their objectives, duration and the means to be made available by the Union and the Member States.

3. The Council shall take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council.

The Council shall recommend common strategies to the European Council and shall implement them, in particular by adopting joint actions and common positions.

The Council shall ensure the unity, consistency and effectiveness of action by the Union.

It is the Treaty of Amsterdam<sup>57</sup> which attempts to strengthen these mechanisms without implying major changes in this respect.<sup>58</sup> A main change is that the Council of the EU may adopt joint actions or common positions by qualified majority if they are based on a common strategy decided upon by the European Council.<sup>59</sup> However, in adopting a common strategy, the European Council<sup>60</sup> must be unanimous, which diminishes the practical importance of this innovation. In addition, any Member State can declare that for important and qualified reasons of national policy, it will oppose the adoption of a decision to be taken by qualified majority, in which case such decision shall not be taken.

Another important change at Amsterdam is that the Secretary-General of the Council will assist the Presidency of the Council<sup>61</sup> in matters dealing with the CFSP.<sup>62</sup> It is still unknown whether the High Representative for the common foreign and security policy will bring more coherence to the EU. One wonders how much coherence can be found in a system in which the *Presidency* will continue to assert its own role, the *High Representative* wishes to play an important role, and the *Commission* continues to be the representative of the EC in the first pillar,<sup>63</sup> as well as fully associated with the second pillar and, therefore has its own voice.

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<sup>57</sup> Treaty of Amsterdam.

<sup>58</sup> See Jörg Monar *The European Union's Foreign Affairs System after the Treaty of Amsterdam: A "Strengthened Capacity for External Action?"* 2 EUR. FOREIGN AFF. REV. 413, 434 (1997) ("[f]or the European Union's foreign affairs system the Treaty of Amsterdam brings only fragments of a reform").

<sup>59</sup> Allan Rosas, *The External Relations of the European Union: Problems and Challenges*, in THE FORUM FOR US-EU LEGAL-ECONOMIC AFFAIRS 62 (The Mentor Group, 1998).

<sup>60</sup> Not to be confused with the Council of the EU, the European Council consists of the Heads of State and Government of the twenty five Member States of the European Union.

<sup>61</sup> The Presidency of the Council of the European Union has in broad terms three essential functions:

1. Organizing and chairing meetings of the Council and its working groups;
2. Representing the Council, both in its work with the other institutions and bodies of the EU, and internationally, for example in the United Nations and the World Trade Organization. The Presidency also represents the EU in its relations with countries outside the Union; and
3. Ensuring that outstanding negotiations from the previous Presidency are taken forward, and if necessary are handed on to the following Presidency.

The Presidency rotates among the EU Member States every six months.

<sup>62</sup> TEU art. 18(3) reads: "The Presidency shall be assisted by the Secretary-General of the Council who shall exercise the function of High Representative for the common foreign and security policy."

<sup>63</sup> This is the so-called Community pillar.

The Treaty of Amsterdam also implies that parts of the third pillar<sup>64</sup> have been transferred to the first pillar.<sup>65</sup> This means that community competence and supranational community law are growing. The matters transferred from the third to the first pillar cover the entry of third-country nationals (visas, asylum, and immigration policy).<sup>66</sup> This shows that, although the transfer of the second pillar to the first may still seem remote, a gradual merger in one form or another of the two pillars seems inevitable for the construction of Europe.

The whole purpose of the creation of the CFSP was to enable the EU Member States to speak with one voice by creating a new entity which would do this on their behalf.<sup>67</sup> The Amsterdam Treaty brought limited majority voting for implementing foreign policy once it has been agreed to in outline by unanimity (Title V of the consolidated version of the Treaty of Amsterdam),<sup>68</sup> and the definition and implementation of a foreign policy position have been helped further along by the existence of EC policy instruments, in particular, the budget. For example, the EC instruments advanced external policy with respect to the Mediterranean and to the New Transatlantic Agenda<sup>69</sup> between the EU and the U.S., and enhanced cooperation with Asia through the ASEAN Initiative (Association of Southeast Asian Nations Declaration, of August 8, 1967).<sup>70</sup> In addition, the EU's political relations with Central and Eastern Europe have been focused through Europe Agreements<sup>71</sup> negotiated under the EC's competence.

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<sup>64</sup> The so-called "third pillar" refers to matters of police and judicial cooperation in the EU.

<sup>65</sup> The first pillar contains the EC Treaty title IV on "Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons."

<sup>66</sup> See EC Treaty title IV.

<sup>67</sup> R. Wessel, "The Multi-Level Constitution of European Foreign Relations", EUI Workshop Paper, April 2002, pp. 1-35, at 22.

<sup>68</sup> TEU title V.

<sup>69</sup> New Transatlantic Agenda, U.S. Department of State Dispatch, Vol. 6, No. 49, 894-96 (December 4, 1995).

<sup>70</sup> Association of Southeast Asian Nations Declaration, Aug. 8, 1967, 6 I.L.M. 1233. ASEAN is composed of 10 members. The six Founding Countries of ASEAN are Malaysia, Indonesia, The Philippines, Singapore, Thailand and Brunei. The rest of countries are Vietnam, Laos, Cambodia and Myanmar. The aims and purposes of the Association are to accelerate economic growth, social progress and cultural development, and to promote regional peace and stability.

<sup>71</sup> These specific types of Association Agreements were concluded between the EC and the countries of Central and Eastern Europe in the first half of the 1990's. They cover trade-related issues, political dialogue, legal approximation and various other areas of co-operation. The Europe Agreements aimed to establish free trade between the EC and the associated countries, and provided for progressive alignment with Community rules as well as a number of specific provisions in areas such as capital movement, rules of competition, intellectual and industrial property rights, and public procurement.

The EU's achievements in assisting other nations have been significant. Under the CFSP in 1995, the EU gave Russia USD\$ 1.5 billion to assist its transition to democracy. In 1996 European humanitarian aid totaled almost USD\$ 2 billion. Because Member States have proved reluctant to contribute to CFSP action from national budgets, EC financing has become the norm, which means that *de facto*, there is an indirect communitarization of CFSP as the Commission presents the budget, and the European Parliament decides non-obligatory expenditures. In theory, CFSP has augmented the EU's competence to act in external matters. In practice, without the political will necessary to adapt the decision-making machinery or to use it effectively, CFSP has done more to raise and to disappoint expectations than it has to enhance the EU's international role.<sup>72</sup>

However, unity in foreign policy is a dramatic step forward and has made it easier for the EC to unify on commercial issues. As mentioned earlier, there are several areas where this cohesion is likely to spill over and impact the international arena. One example is that of competition policy, an area in which the Commission has been active since the early 1960s. With increasing worldwide economic interdependency and the emergence of global markets for a large number of products, more competition cases involve actions that take place outside of the EU, like the Boeing and McDonnell Douglas merger.<sup>73</sup> In this respect, the EC-U.S. Cooperation Agreement<sup>74</sup> (which provides the background for the McDonnell Douglas case) is worth mentioning. Competition authorities on both sides of the Atlantic examined the issue and came to different conclusions. This case shows that even in carrying out policies that have traditionally been domestic, the EU is increasingly influencing economic matters in other parts of the world.

In addition, nowhere is the effect of domestic policies likely to be as relevant as with the Economic and Monetary Union (EMU).<sup>75</sup> The EMU is essentially a domestic issue. However, EC authorities hope that the euro will benefit *international* trade by having a major impact both on international markets and on the weight attributed to the EU as an international actor. That said, the variable geometry of the EMU with its ins and outs poses a challenge for the unity of external representation in the

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<sup>72</sup> THE TREATY OF AMSTERDAM: TEXT AND COMMENTARY (Andrew Duff ed., 1997).

<sup>73</sup> PIET EECKHOUT, THE EUROPEAN INTERNAL MARKET AND INTERNATIONAL TRADE: A LEGAL ANALYSIS (1994).

<sup>74</sup> Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws, Sept. 23, 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995).

<sup>75</sup> PAUL BRENTON ET. AL., INTERNATIONAL TRADE: A EUROPEAN TEXT (1997).

economic sphere.<sup>76</sup> To better understand the implications of the unitary character of the EU, or lack thereof, we must look at the legal interpretation of its role and responsibility.

### C. *The Case of External Economic Relations*

The European Parliament, as well as other institutions, uses the term *European Union* when referring to the EC's external trade relations. However, lawyers should know that it is the European Community, and not the European Union, which has competence in the field of international trade relations. The EC is part of the EU, but the latter does not have international legal personality *stricto sensu*. The EU therefore is not a member of international organizations.<sup>77</sup> That is why it is said that the EU does not negotiate in the World Trade Organization's agreements – it is the Commission that does so instead – and is not a member of such an organization. It may be politically convenient to refer to the EU rather than to the EC as an international economic actor, but it is incorrect.<sup>78</sup>

EC external relations are not limited to the field of trade policy. The Treaty is not very explicit about these other dimensions, but the European Court of Justice has attempted to clarify them. In the famous ERTA case on road transportation (Case 22/70, *Commission v. Council*), the Court ruled that a matter already regulated by the EU institutions could not be dealt with internationally without Community participation and approval, precisely because it has been regulated by an EU institution.<sup>79</sup> External activity can take three main forms: 1) autonomous legislation, to set out rules for relations for the outside world; 2) negotiation, to arrive at agreements with third parties; and 3) dialogue, to gain a better understanding of other parties in order to better determine their own attitudes.<sup>80</sup> It was the dialogue that gained importance in the late 1970s.

In this context, we see that the EU now has diplomatic delegations in many capitals as well as in the U.N. headquarters (where it obtained official observer status in 1975). Since 1973, the EU has conducted a systematic dialogue with the U.S., Japan, Canada, Australia and New Zealand, separate from the periodic discussions that take place regularly within the OECD.<sup>81</sup> Since 1977, the EU has also been involved in the economic

<sup>76</sup> NICHOLAS EMILIO & DAVID O'KEEFFE, *THE EUROPEAN UNION AND WORLD TRADE LAW: AFTER THE GATT URUGUAY ROUND* (1996).

<sup>77</sup> See Paemen, *supra* note 21.

<sup>78</sup> See Van den Bossche, P.L.H., "The European Community and the Uruguay Round Agreements" in Jackson, J. & Sykes, A. *Implementing the Uruguay Round*, Clarendon Press Oxford, 1997, footnote 1, p. 23.

<sup>79</sup> Case 22/70, *Comm'n v. Council*, 1971 E.C.R. 263.

<sup>80</sup> Jacques H.J. Bourgeois, *External Relations Powers of the European Community*, 22 *FORDHAM INT'L L.J.* S149 (1999).

<sup>81</sup> The Organization for Economic Cooperation and Development (OECD) is a forum of 30 countries for discussion of economic policies between industrialised

world summits of the seven major industrialized nations, the so-called G7.<sup>82</sup>

Already in the late 1970s, the EC had become an important interlocutor, not only in trade but also in areas such as energy, fisheries and development policies. The EC was already a major actor in most world *fora*, often speaking with one voice, even if some aspects of the debate were not under its direct competence. Examples of this were the Conference on International Economic Cooperation (the so-called “North-South Dialogue”) in Paris in 1976-1977, when the Community had one single delegation to cover all points of the agenda, and the Euro-Arab dialogue.<sup>83</sup>

During the period of the Tokyo Round (1973-1979), the U.S. continued to have much influence in world trade. Some of the early initiatives toward the Tokyo Round, such as the William Commission, came from the American side. That said, the EC and the U.S. held informal discussions on various issues throughout the Tokyo Round to avoid major potential confrontation. When the U.S. and EC did not cooperate, there was a deadlock in the negotiations of the Tokyo Round because they each had effective veto power. When the U.S. and the EC adopted a unified position, the combined efforts of others had minor chances of changing the outcome.<sup>84</sup>

Looking back to the 1950s, what is most surprising is the place the EC now holds in world affairs. When the process of European integration started, the role of the EC in the international arena was minimal. As time has gone by, it has developed a greater role in international *fora*.

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market economies, sharing a commitment to democratic government and the market economy.

<sup>82</sup> The main difference between the G8 and the G7 (both coexist) is that the G8 deals with political matters and includes Russia as a member, whereas the G7 is for economic matters, and Russia is excluded.

<sup>83</sup> The Euro-Arab Dialogue as a forum shared by the European Community and the League of Arab States arose out of a French initiative and was launched at the European Council in Copenhagen in December 1973, shortly after the “October War” and the oil embargo. As the Europeans saw it, it was to be a forum to discuss economic affairs, whereas the Arab side saw it rather as one to discuss political affairs. There was a need for innovation as the Community and the League had at that time very little experience with structured dialogues with other institutions. Thus the main bodies of the Dialogue were created: the “Ministerial Troika,” “General Committee,” and working committees.

<sup>84</sup> SIDNEY GOLT, *THE GATT NEGOTIATIONS 1973-1979: THE CLOSING STAGE 1* (London, British-North American Committee)(1978); GILBERT R. WINHAM, *THE PRENEGOTIATION PHASE OF THE URUGUAY ROUND, IN GETTING TO THE TABLE: THE PROCESSES OF INTERNATIONAL PRENEGOTIATION*, EDITED BY JANICE GROSS STEIN, (1989), PP. 289-90; D.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 *Am. J. Int'l L.* 51, 70-71(1983).

There are a few important examples of EC action in the international arena in 1997. In the trade sector, the EC played an important role in two significant WTO agreements: the Telecommunications Service Agreement,<sup>85</sup> which covers about 90% of world revenues in the telecommunications sector and the Agreement on Financial Services,<sup>86</sup> which covers about 95% of trade in the banking, insurance, and security sectors.

In the same year, the EU donated \$438 million in humanitarian aid, and an EU special envoy was sent to support the Middle East Peace Process. The EU has adopted a strong position with regard to problematic states such as Cuba and Burma and led the industrialized nations in their decision to reduce greenhouse emissions by the year 2010 at the Kyoto Summit on Climate Change<sup>87</sup> in the Conference of the Parties to the Framework Convention on Climate Change, Kyoto Protocol, in December 1997.<sup>88</sup> Clearly the EU has developed into a significant actor in many international spheres.

However, it is important to note that more than just traditional external policies will define the EU's role. As the EU has integrated to create a single European Market with a single currency, its domestic policies are increasingly influencing its role in the international arena.<sup>89</sup> Since 1958, the vision of the EEC founders has been expanding geographically as the EU has grown from six members to the current twenty five. With the Single European Act<sup>90</sup> and the completion of the single market, economic integration has created a cohesive entity. By 1973, with the first enlargement of the EC to nine Member States, the EC had become the world's largest trading bloc.

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<sup>85</sup> Fourth Protocol to the General Agreement on Trade in Services (WTO), 36 I.L.M. 354, 366 (1997).

<sup>86</sup> Fifth Protocol to the General Agreement on Trade in Services, 3 December 1997.

<sup>87</sup> Rafael Leal-Arcas, *Is the Kyoto Protocol an Adequate Environmental Agreement to Solve the Climate Change Problem?*, 10 EUR. ENVTL. L REV. (issue 10) 282-294 (2001).

<sup>88</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22 (1998).

<sup>89</sup> David O'Keeffe, *Community and Member State Competence in External Relations Agreements of the EU*, 4 EUR. FOREIGN AFF. REV. 7 (1999).

<sup>90</sup> The SEA was signed on February 17, 1986 in Luxembourg by representatives of the then twelve EC Member States. The Danish Parliament had rejected the project of institutional reform, but the Danish people approved it by referendum on February 27, 1986. Apart from minor modifications, this Treaty was the first profound and wide-ranging constitutional reform of the EU since the 1950s. The SEA introduced measures aimed at achieving an internal market (for instance, harmonization) plus institutional changes related to these (such as a generalization of qualified majority voting and a cooperation procedure involving the European Parliament). It also provided legal form for European Political Cooperation. SEA *supra* note 15.

The 12-member EC of 1986 was already the largest trading power in the world. However, the EC, just like the U.S., shows some significant internal weaknesses to the outside world: although the European Commission has the power to initiate and execute decisions for its Member States in international trade negotiations, its proposals must, by law, first be approved by the EU Council. Some authors argue that this internal division is detrimental for the EC's role as leader in the international trading system.<sup>91</sup> Toward the end of the Uruguay Round the U.S. leadership was being weakened. President Clinton applied protectionist pressures which slowed the moves toward a Uruguay Round agreement. By contrast, Leon Brittan, EU Trade Commissioner at the time, adopted a more assertive role. This made the leadership between the U.S. and the EC in the framework of the Uruguay Round more balanced.

In the late 1990s, the EC devoted important efforts to encouraging other countries to launch a comprehensive WTO round. One of the reasons for the EC to favor a more comprehensive and broader agenda was that it believed there would be more opportunities for cross-cutting agreements among sectors. It would also facilitate progress in the negotiations themselves. However, the EC had neither the economic power nor the unity of purpose to replace the U.S. as a leader in the world trading system. Thus, a degree of consensus was necessary between the U.S. and the EC if a new WTO round was to be possible. The U.S. and the EC had both become highly dependent on trade and they both had a shared interest in launching the new WTO round at Doha.<sup>92</sup>

#### D. *A Debate on Competences in Foreign Economic Policy*

Within the EU, there is exclusive and non-exclusive Community competence. In addition, Torrent speaks of other competences of the Member States which are exercised outside the institutional framework of the EU. However, in those cases where Member States exercise their competences outside the institutional framework of the EU, they must respect the obligations imposed by EC law (and by the Maastricht Treaty as well). As we can deduce from this framework, the actors with a given legal personality and competences are the EC and its Member States. On the one hand, the Community always acts in the framework of the EU, because its institutional system has been made by the TEU into an institutional system of the Union. On the other hand, its Member States may act outside the EU's institutional system.

Examples where Member States act outside the EU's institutional system are numerous. For instance, when in January 2000 the German Foreign Affairs Minister, Joschka Fischer, went to Moscow to see the Prime Minister of Russia, Vladimir Putin, the German Minister visited Moscow

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<sup>91</sup> T.H. Cohn, *Governing Global Trade. International institutions in conflict and convergence*, Ashgate 282 (2002).

<sup>92</sup> *Id.* at 284.

on a bilateral basis and not representing the EU. Another example is the decision adopted by fourteen EU Member States against Austria in February 2000 because of the creation of a new government in Vienna with a national socialistic coalition. Measures at the highest political level were taken to show the fourteen Member States' disagreement with the creation of such a government in Vienna. Again, these measures were taken individually by each and every Member State of the then EU-15. The humanitarian aid individually donated by Member States to Rwanda in response to the terrible events that occurred there in 1997 is another example of Member States acting outside the EU's institutional system.

However, in certain cases Member States' competences can be exercised within the institutional system of the Union.<sup>93</sup> Here one should understand that there are two functions of the Treaty establishing the European Community ("TEC")<sup>94</sup> which must be distinguished: 1) scope of application of the TEC and 2) scope of competence of the TEC. For example, although criminal law is not outside the scope of application of the TEC, it is a competence of the Member States. Another clear example is with education policies. At the moment, there is no common education policy in the EU. Therefore, it is an issue of national competence. However, it is no longer possible to discriminate against other nationals of any Member State of the Union when applying for a post as a teacher by virtue of not being nationals of the country where the application is taking place. In other words, it is no longer possible to restrict eligibility to a public teaching post on the basis of nationality within the EU.

It is obvious that there is a commitment among the Member States to put into practice all the necessary tools in order to achieve the goals of the EC Treaty. Perhaps this table might clarify in a visual way what has been said so far:

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<sup>93</sup> See R. Torrent, *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*, chapter 1, available at <http://www.ub.es/dpecp/ep/livreTorrent.html> (1998).

<sup>94</sup> 298 U.N.T.S. 11.

Scope	Actors	Competence
<b>Inside</b> the European Union's <sup>95</sup> institutional framework	European Community <sup>96</sup> (European institutions and EU Member States) <sup>97</sup>	Exclusive EC Competence <sup>98</sup> Non-exclusive (shared) Competence <sup>99</sup>
	Member States <sup>100</sup> (Government, national Parliament and interest groups)	CFSP, <sup>101</sup> police and judicial cooperation in criminal matters <sup>102</sup> 4th Pillar <sup>103</sup>
<b>Outside</b> the European Union's institutional framework	Member States act <b>independently</b> from the EU <sup>104</sup>	Exclusive Member States' competence <sup>105</sup>

It is also important to say a few words about what Torrent calls the “fourth pillar” of the EU’s institutional structure. If the reader studies the Maastricht Treaty,<sup>106</sup> he or she will perceive that the CFSP has a very

<sup>95</sup> This new entity embraces both the Treaty of Rome and the two pillars of intergovernmental activity: Common Foreign and Security Policy and Justice/Home Affairs.

<sup>96</sup> As mentioned above, the EC is a supranational organization, i.e., one to which the Member States have transferred specific legislative and executive powers and whose decisions are binding on them and their citizens. For further details, see H. DROST, *WHAT’S WHAT AND WHO’S WHO IN EUROPE* 207 (1995).

<sup>97</sup> By European institutions, we understand those institutions which deal with European issues and which are not national institutions. In the Community terminology, the first pillar deals with the European Communities (I should like to remind that throughout this dissertation, the term European Community is used to refer to the two remaining European Communities), whereas the second and third pillars have an intergovernmental character and, therefore, Member States deal with them.

<sup>98</sup> See LEAL-ARCAS, R. *Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice*, *Legal Issues of Economic Integration*, 30(1): 3-14, (2003), as well as Leal-Arcas, R. “The European Community and Mixed Agreements,” 6, issue 4 *EUR. FOREIGN AFF. REV.* 483-513, (2001).

<sup>99</sup> *Id.*

<sup>100</sup> Member States, as actors in EC legislation, deal with CFSP and police and judicial cooperation in criminal matters, which are forms of intergovernmental co-operation. They retain full sovereign rights, and hence, decision-making is by unanimity. For further details see DROST, *supra* note 96, at 207.

<sup>101</sup> CFSP stands for Common Foreign and Security Policy. TEU title V.

<sup>102</sup> TEU title VI.

<sup>103</sup> The idea of the “fourth pillar” is a creation of Ramon Torrent. See Ramon Torrent, *Le ‘quatrième pilier’ de l’Union européenne*, in *LA COMMUNAUTÉ EUROPÉENNE ET LES ACCORDS MIXTES, QUELLES PERSPECTIVES?* 49-63, (Jacques H.J Bourgeois, Jean-Louis Dewost and Marie-Ange Gaiffe eds., 1997)

<sup>104</sup> However, formally speaking, Member States have to follow the EC legal order. Even if Member States act bilaterally, they will be affected by the EC legal order.

<sup>105</sup> This covers areas in which the EC Treaty forbids the EC to legislate.

<sup>106</sup> The numbering of the Maastricht Treaty Articles is not the original one, but follows the changes made by the post-Maastricht Intergovernmental Conferences.

large scope, and that it covers the actions of EU Member States in the areas of external economic relations.<sup>107</sup> In fact,

1. Article 12 (formerly Article J.2) of the Maastricht Treaty refers to “any matter of foreign and security policy” and to “action in international organizations and at international conferences” without exception (therefore, without excluding economic conferences);<sup>108</sup>
2. Article 13 of the Maastricht Treaty also has a general scope;<sup>109</sup> and finally,
3. Article 3 of the Maastricht Treaty establishes that “[t]he Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies.”<sup>110</sup>

<sup>107</sup> See REFORMING THE TREATY ON EUROPEAN UNION: THE LEGAL DEBATE (Jan A. Winter, et al. eds. 1996).

<sup>108</sup> Maastricht Treaty art. 12 reads:

1. Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that their combined influence is exerted as effectively as possible by means of concerted and convergent action.
2. Whenever it deems it necessary, the Council shall define a common position. Member States shall ensure that their national policies conform to the common positions.
3. Member States shall coordinate their action in international organizations and at international conferences. They shall uphold the common positions in such fora. In international organizations and at international conferences where not all the Member States participate, those which do take part shall uphold the common positions.

<sup>109</sup> TEU art. 13 reads:

1. The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.
2. The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.

Common strategies shall set out their objectives, duration and the means to be made available by the Union and the Member States.

3. The Council shall take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council.

The Council shall recommend common strategies to the European Council and shall implement them, in particular by adopting joint actions and common positions. The Council shall ensure the unity, consistency and effectiveness of action by the Union.

<sup>110</sup> TEU art. 3 reads:

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*. The Union shall in particular ensure the consistency of its external activities as a whole in the

However, no one has given such a broad interpretation of the CFSP. Why is this so? An authentic interpretation of the CFSP is one that addresses, in the best of all possible ways, the interests of those civil servants who had to put the CFSP in action:

1. From the point of view of the EU's national Ministries of Foreign Affairs, the idea was to "keep" the CFSP for themselves, even if they did not like it so much;
2. From the point of view of the Commission, there was only one strategy concerning the external economic relations, i.e., to extend the exclusive competence of the EC as far as possible. This strategy was incompatible with an efficient coordination of the external economic policies of the Member States in the framework of the CFSP.

It is this restrictive interpretation of the CFSP which necessarily provokes the development of what Torrent calls the "fourth pillar" of the EU.<sup>111</sup> The term *restrictive* does not suggest a possible inclination of the CFSP toward the EC competences, but rather toward the side of the Member States acting outside the institutional framework of the EU. The so-called "fourth pillar" shows how within the institutional framework of the EU, the *de facto* common exercise of Member States' competences is mainly, but not exclusively, on issues of external economic relations. We may illustrate this with two very significant examples taken from multilateral and bilateral relations:

1. When dealing with the management of the World Trade Organization Agreements, it is the Council of Ministers of the European Union which acts not only on behalf of the EC, but also on behalf of the Member States in the matters in which they are competent;
2. The Association Agreements with the republics of the former Soviet Union deal mainly with the agreed treatment of the enterprises.<sup>112</sup> This issue reveals Member States' competences. Proof of the Member States' competences lies in Opinion 2/92 of the European Court of Justice of March 24, 1995,<sup>113</sup> which deals with the competence of the Community or of one of its institutions to participate in the third

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context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

<sup>111</sup> One interesting point by Professor Torrent is the fact that making reference to the "fourth pillar" of the Union shows how the language of "three pillars" does not let us comprehend correctly the nature of the European Union.

<sup>112</sup> See, e.g., Agreement between the European Economic Community and the Russian Federation on Trade in Textile Products, OJ L 123/94,528; Agreement between the European Community and the Republic of Belarus on Trade in Textile Products, OJ L 123/94, 120.

<sup>113</sup> Opinion 2/92, E.C.R. I-521.

revised decision of the Council of the OECD<sup>114</sup> concerning national treatment. These agreements have been negotiated, and are integrally managed after their final conclusion, by the Council of the European Union and the European Commission.

Torrent justifies the existence of a fourth pillar by saying that the exercise of Member States' external economic competences within the institutional framework of the EU does not show signs of being part of the "third pillar," "second pillar,"<sup>115</sup> or "first pillar."<sup>116</sup> Therefore, we must speak of a fourth pillar if we wish to continue the linguistic usage of pillars.

However, there are at least three comments to make regarding what has been said so far:

*First comment:* In order to fully understand the above table, a clear distinction between the scope of EC competences and the range of application of the EC Treaty must be made. Here are two examples that explain this distinction.

Example one: Articles 149,<sup>117</sup> 150 (education, vocational training, and

<sup>114</sup> The Organization for Economic Co-operation and Development (OECD) is a forum of 30 countries for discussion of economic policies between industrialized market economies, sharing a commitment to democratic government and the market economy.

<sup>115</sup> Even less so in the second pillar if we take into account the restrictive interpretation which has been given to the CFSP.

<sup>116</sup> It could not be part of this pillar because we are dealing precisely with the exercise of Member States' competences, and not with that of the Community's.

<sup>117</sup> EC Treaty art. 149 reads:

1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.
2. Community action shall be aimed at:
  - developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,
  - encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,
  - promoting cooperation between educational establishments,
  - developing exchanges of information and experience on issues common to the education systems of the Member States,
  - encouraging the development of youth exchanges and of exchanges of socioeducational instructors, and
  - encouraging the development of distance education.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education, in particular the Council of Europe.
4. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

youth),<sup>118</sup> 151 (culture),<sup>119</sup> and 152 EC (public health),<sup>120</sup> limit the Community's competence. Any kind of harmonization of legal provisions of

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- acting in accordance with the procedure referred to in Article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
  - acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.

<sup>118</sup> Treaty Establishing the European Community art. 150, Mar. 25, 1957, 1997 OJ C 340 reads:

1. The Community shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.
2. Community action shall aim to:
  - facilitate adaptation to industrial changes, in particular through vocational training and retraining,
  - improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market,
  - facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,
  - stimulate cooperation on training between educational or training establishments and firms,
  - develop exchanges of information and experience on issues common to the training systems of the Member States.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.
4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt measures to contribute to the achievement of the objectives referred to in this article, excluding any harmonisation of the laws and regulations of the Member States.

<sup>119</sup> EC Treaty art. 151 reads:

1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
  - improvement of the knowledge and dissemination of the culture and history of the European peoples,
  - conservation and safeguarding of cultural heritage of European significance,
  - non-commercial cultural exchanges,
  - artistic and literary creation, including in the audiovisual sector.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

the Member States is excluded from the scope of these Articles. How-

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4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.
  5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:
    - acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251,
    - acting unanimously on a proposal from the Commission, shall adopt recommendations.

<sup>120</sup> EC Treaty art. 152 reads:

1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.

The Community shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

2. The Community shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1.

1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this article through adopting:

- (a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;
- (b) by way of derogation from Article 37, measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;
- (c) incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt recommendations for the purposes set out in this article.

ever, this limitation does not mean that national legislations in culture, education or health exceed the range of application of the treaties. Such legislation must respect the general principle of non-discrimination based on nationality and its specific translation in the field of the four freedoms in EU law.<sup>121</sup>

Example two: concerning the criminal legislation of Member States, the European Court of Justice (“ECJ”) has established that Member States must respect the general principles of EC law. If, for example, an infraction to customs regulations before January 1, 1993 – the date of completion of the internal market – was liable for a fine applicable to intra-Community trade, it should respect the principle of proportionality.<sup>122</sup> The conclusions by the Advocate-General Van Gerven in the case 212/88 include a general appreciation of the Court’s decisions over this issue.<sup>123</sup>

The distinction to be drawn from these two examples is that Community treaties have two different functions. First, the typical function of an international treaty, i.e., to limit the exercise of the competences of the contracting parties (in other words, of the Member States when they are competent). Second, it performs the specific function of transferring a competence to the Community. This function of transferring competences to the Community is very specific, but not exclusive of Community treaties. The fact that this distinction has not been made has generated generalized mistakes in the analysis of the distribution of external competences between the Community and its Member States. There has been no distinction between the range of application of the treaties and the scope of EC competences. This mistake had terrible consequences when it was combined with the also-mistaken thesis by which non-exclusive EC competences become exclusive competences when there is a need to act

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5. Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care. In particular, measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

<sup>121</sup> Let us remember for the non-specialised reader that the four freedoms are the free movement of goods, the free movement of persons, the free movement of capital and the freedom to provide services. This is certainly one of the great achievements of the EU, which has been able to create a frontier-free area within which people, goods, services and money can all move around freely.

<sup>122</sup> The principle of proportionality implies that any action by the EC should not go beyond what is necessary to achieve the objectives of the EC Treaty. It should not be confused with the principles of subsidiarity, which enables the resolution of the considered action’s level (national or Community level), while the principle of proportionality concerns the size of the action. This principle has appeared in Court decisions since 1956. *See* Case 8/55, *Fédération Charbonnière de Belgique v. High Authority*, 1954-56 E.C.R. 245 (1956).

<sup>123</sup> Case 212/88, *Criminal Proceedings Against F. Levy*, 1989 E.C.R. 3511.

at the international level. The combination of these two mistakes resulted in the notion that all the Agreements of the Uruguay Round were exclusive EC competence.

*Second comment:* It should be emphasized that there is a fine line between what EU Member States do outside and what they do inside the institutional system of the EU. The earlier example of the former Yugoslavia is helpful here. Certain EU Member States decided to send troops outside the institutional system of the Union. But to what extent have the diplomatic initiatives from the various EU Member States been inside or outside the framework of the CFSP? And who pays for what in this same example? The same case would apply *mutatis mutandis* to the participation of the peace process in the Middle East. The best example of Member States' activity which straddles the border with the Union's institutional system is the EU's participation in the UN.

*Third comment:* The table shown above is divided into three columns: 1) the scope of the EU's institutional framework; 2) the actors, and 3) their competences. It is not divided by issues. If we take the Schengen Agreement as an example, we can observe how this agreement used to be based outside the institutional framework of the EU.<sup>124</sup> Nowadays, the agreement is inside the institutional framework of the EU. The issues dealt with in the Schengen Agreement are, therefore, treated inside the institutional framework of the EU as Member States' competences. Some of these issues are also treated as Community competence.<sup>125</sup> This is a very important point when it comes to external relations: very often a specific problem of international politics can be treated in various ways. The way it is treated has both legal and political consequences. The means taken and the foreseeable results differ.

Experience has proven that one of the bigger mistakes of the usage of pillars is that it prevents the same issue from being used in different ways. With the system of pillars in mind, people often ask to which pillar a specific issue belongs. Because a good number of national administrations (and certain services of the EU institutions) are organized by pillars instead of by issues, it is no surprise that this question causes internal conflicts of power and jealousy. This is why it is apparent to national and Community civil servants that the political dialogue with third States belongs to the second pillar. However, joint declarations, which create this political dialogue, do not limit their scope to questions which, inside the Union, are treated within the framework of the CFSP.<sup>126</sup> How can we then pretend to avoid third States from raising questions which relate to EC exclusive competence in the framework of this dialogue?

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<sup>124</sup> OJ L 119 07.05.1999.

<sup>125</sup> See IAN BUDGE ET AL., *THE POLITICS OF THE NEW EUROPE* (Roger Jowell ed., Longman 1997).

<sup>126</sup> See *THE ACTORS IN EUROPE'S FOREIGN POLICY* (Christopher Hill ed. 1996).

It should not be necessary to emphasize that the correct approach is precisely the opposite of the one that asks to which pillar a certain issue belongs. The issue must be analyzed from all possible angles in order to obtain the best solution. When various possible angles give rise to different manners of acting, then a difficulty is implied: the result has to guarantee coherence among the various ways of action. However, politicians, senior civil servants, and jurists are paid to resolve these kinds of difficulties while avoiding the intellectually simple but incorrect way of analyzing each issue from only one of the potential angles.

### III. LEGAL PERSONALITY OF THE EUROPEAN COMMUNITY

From what is said above, it can be deduced that both Communities, given the supranational powers conferred on them and their institutions, satisfy the criteria for international legal personality that appears in the *Reparations* case.<sup>127</sup> The precedent of the *Reparations* case could have been limited in the sense that the opinion was related to an organization created by a number of States which comprised the vast majority of members of the international community at that time. Nowadays, there is almost no doubt that international organizations can have objective international personality, even when they have been brought into existence by only a limited number of States.<sup>128</sup> In addition, as we see in Article 281 EC, Article 184 Euratom,<sup>129</sup> and Article 6 (1) of the already expired ECSC,<sup>130</sup> each Community Treaty expressly confers legal personality on the organization it creates.<sup>131</sup> Furthermore, each Treaty confers powers

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<sup>127</sup> For an explanation of the *Reparations* Case, see MCGOLDRICK, *supra* note 24, at 26-28.

<sup>128</sup> *Id.* at 28.

<sup>129</sup> Euratom Treaty art. 184 reads: "The Community shall have legal personality."

<sup>130</sup> ECSC Treaty art. 6(1) reads: "The Community shall have legal personality."

<sup>131</sup> For a study on the ECSC Treaty, see Blumann C., *Communauté Européenne du Charbon et de l'acier*, in *Rép. Communautaire*, Dalloz, Paris, 1992, 1; see also Caia G. and Aicardi N., *Carbone e Siderurgia*, in Chiti M.P. e Greco G., *Trattato di Diritto Amministrativo Europeo*, Giuffrè, Milano, II, 1997, 386; Mathijssen P., *Le Droit de la Communauté Européenne du Charbon et de L'acier. Une étude des Sources*, Nijhoff, La Haye, 1958, 62; Monaco R., *Comunità Economica Europea del Carbone e dell'acciaio (CECA)*, in *Enc. Giur.*, Istituto Poligrafico e Zecca dello Stato, Roma, 1988, 1-7; Panebianco M., Sub art.76 of the ECSC Treaty, in Quadri R., Monaco R. and Trabucchi A., *Trattato Istitutivo della Comunità Europea del Carbone e dell'acciaio* cit., 1105; Pilotti M., *C.E.C.A. (Comunità Europea del Carbone e dell'acciaio)*, in *Novissimo Digesto Italiano*, UTET, 1959, 75-87; Saulle M.R., *Su la Natura Giuridica dei Crediti spettanti alla CECA a Titolo di Prelievo Generale*, in *RDI* 1965, 634; Scovazzi T., *Carbone e Acciaio nel Diritto Comunitario*, in *Digesto delle Discipline Pubblicistiche*, UTET, Torino, 1987, 493-502; Vignes D., *La Communauté Européenne du Charbon et de l'acier: un Exemple d'administration économique Internationale, avec une préface de Paul Guggenheim*, George Thone, Liege, 1956, 51; Zanghì C., *Comunità Europea del Carbone e dell'acciaio*, in *Enc. Dir. Aggiornamento*,

on the Community to act in the international scene by concluding international agreements.<sup>132</sup> Since there is a considerable exercise of these powers, even the exercise of developing the Communities' participation in other international organizations, there is clear evidence of the recognition accorded by the international community to the legal capacity of the Communities under public international law.<sup>133</sup>

The international legal personality of the EC<sup>134</sup> has an objective existence in the international system even as regards states which do not recognize it.<sup>135</sup> We must remember that until 1988, the EC was not recognized<sup>136</sup> as an international organization by the Council for Mutual Economic Assistance (CMEA, or commonly known as COMECON<sup>137</sup>).<sup>138</sup> This position adopted by COMECON was rectified shortly before COMECON was dissolved. In any event, it is pertinent to examine the provisions of the EC Treaty that are relevant to the EC's international relations. In this respect, we refer to Part VI of the Treaty of Rome, Articles 281-312. As explained earlier, positive law is clear and precise. Article 281 EC reads: "The Community shall have legal personality."

This proves the personality of the EC in international law and not just in each of the Member States. Article 282 EC corroborates this state-

V, Giuffrè, Milano, 2001, 238-240; Tesauro G., *Sulla Natura Giuridica del Prelievo C.E.C.A.*, in *Rass.dir.pub.* 1972, 221. [Need an Italian/French speaker to review these citations]

<sup>132</sup> See EC Treaty art. 300.

<sup>133</sup> IAN MACLOEOD, IAN HENDRY & STEPHEN HYETT, *THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES* 31 (Harold Jacobson & Edith Weiss eds., Oxford: Clarendon Press 1997).

<sup>134</sup> See *id.* at XX-XX [insert chpt. 2's page numbers]; RACHEL FRID, *THE RELATIONS BETWEEN THE EC AND INTERNATIONAL ORGANIZATIONS: LEGAL THEORY AND PRACTICE* 21-26 (George M. Von Furstenberg ed., The Hague; Boston: Kluwer Law Int'l 1995).

<sup>135</sup> MCGOLDRICK, *supra* note 24, at 28.

<sup>136</sup> As evidence of this, see, e.g., Council Decision 88/345, 1988 OJ (L 157).

<sup>137</sup> COMECON was an economic organization from 1949 to 1991, linking the USSR with Bulgaria, Czechoslovakia, Hungary, Poland, Romania, East Germany (1950-1990), Mongolia (from 1962), Cuba (from 1972), and Vietnam (from 1978), with Yugoslavia as an associated member. Albania also belonged between 1949 and 1961. Its establishment was prompted by the Marshall Plan. COMECON was formally disbanded in June 1991. It was agreed in 1987 that official relations should be established with the European Community, and a free-market approach to trading was adopted in 1990. In January 1991 it was agreed that COMECON should be effectively disbanded. TISCALI REFERENCE ENCYCLOPAEDIA, available at <http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0006083.html> (last visited Oct. 27, 2006).

<sup>138</sup> See Morawiecki, W., "Actors and Interests in the Process of Negotiations between the CMEA and the EEC," 1989/2, *Legal Issues of European Integration*, pp. 1-38.

ment even more clearly, by saying that the Community shall also “enjoy the most extensive legal capacity accorded to legal persons” in each of the Member States.<sup>139</sup> In such a case, the EC is represented by the Commission. Examples of it are Case T-451/93, *San Marco Impex Italiana SA v Commission*,<sup>140</sup> and Case C-257/90, *Italsolar SpA v Commission*.<sup>141</sup>

The next section addresses the more controversial question of the EU’s legal personality.

#### IV. LEGAL PERSONALITY OF THE EUROPEAN UNION?<sup>142</sup>

Lawyers have long discussed whether the EU can have external relations at all. This is because the Treaties confer legal personality to the two remaining Communities and not to the Union as such. When treaties are concluded in the framework of the CFSP, the EU technically lacks legal personality.<sup>143</sup> However, as analyzed below, the situation with respect to the EU legal personality has fundamentally changed since the enforcement of the Treaty of Amsterdam,<sup>144</sup> although Article 24 TEU<sup>145</sup> refers to the conclusion of CFSP agreements by the Council.<sup>146</sup>

<sup>139</sup> “In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission.” EC Treaty art. 282.

<sup>140</sup> 1994 ECR II-1061.

<sup>141</sup> 1993 ECR I-00009.

<sup>142</sup> Tizzano A., «La personalità internazionale dell’Unione europea», in *Dir. Un. Europea* 1998, 394.

<sup>143</sup> Martin Eaton, *Common Foreign and Security Policy*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* 224 (David O’Keeffe & Patrick Twomey eds., Chichester, Wiley Chancery 1994).

<sup>144</sup> Allan Rosas, *The European Union and Mixed Agreements*, in *THE GENERAL LAW OF EC EXTERNAL RELATIONS* 203 (Allan Dashwood & Christopher Hillion eds., Sweet & Maxwell 2000).

<sup>145</sup> Treaty of Nice art. 24 reads:

1. When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this title, the Council may authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.
2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.
3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2).
4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).

The Maastricht Treaty created a new entity, the European Union, and “fundamentally changed the organizational framework and structure around the EC . . . [i]t introduced two intergovernmental pillars, one on [CFSP] and one on Justice and Home Affairs (JHA).”<sup>147</sup> Although the Maastricht Treaty did not want to give the EU a legal personality in an explicit way, none of its provisions prevents the EU from developing such a personality in a progressive way. In fact, to a non-expert in international affairs, it might appear that the EU has a legal personality. If that is not the case, how could this non-expert interpret the various positions, as well as political and legal engagements, under the EU’s name? If, despite all these legal and political engagements, the Union does not (yet) have a legal personality,<sup>148</sup> then the reason for it must be found inside the EU. It is the composing entities of the EU (not only the Member States, but also the Community and, in particular, two of its institutions – the Commission and the Council) which have refused in the past to accept this personality. When looking at the functional approach of the International Court of Justice (“ICJ”), one can deduce that the EU could have international legal personality. Nevertheless, it has been asserted that the EU does not have international legal personality.<sup>149</sup>

We start with an analysis of the arguments against the existence of an EU legal personality.

#### A. *Arguments against the Existence of an EU Legal Personality*<sup>150</sup>

In evidence to the House of Lords Select Committee on the European Communities, M.R. Eaton stated that “we do not believe that the Union will constitute an international organisation with a separate international legal personality. It would be better characterised as an association of

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5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.

6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.

<sup>146</sup> Esa Paasivirta, *The European Union: From an Aggregate of States to a Legal Person?* 2 HOFSTRA LAW & POL’Y SYMP. 37-59 (1997).

<sup>147</sup> MCGOLDRICK, *supra* note 24, at 4.

<sup>148</sup> This issue would be solved by the EU Constitutional Treaty, which explicitly gives legal personality to the EU.

<sup>149</sup> See MCGOLDRICK, *supra* note 24, at 37.

<sup>150</sup> The arguments here are almost entirely based on the pre-Amsterdam Treaty. The comments are of historical interest and might have been affected by later developments of the post-Amsterdam Treaty.

Member States which, for certain purposes described in the Treaty, act in common.”<sup>151</sup>

Eaton set out the reasoning behind this in the following way:

1. There is no provision in the Treaty on European Union similar to Article 210 (new Article 281) of the Treaty of Rome, which expressly says that the Community shall have legal personality.<sup>152</sup>

However, as Dominic McGoldrick rightly points out, “international personality could be inherent or potential in the EU on a functional basis, applying the approach of the ICJ in the Reparations Case.”<sup>153</sup>

2. Various functions that you would expect the Union to exercise, if it did have such personality, are in fact exercised by the Community, e.g. all the provisions on concluding external Treaties are in the Community Treaty and provide for the Community to conclude such Treaties. There are no such powers given to the Union, in CFSP or else where. Similarly, citizenship is in the Community section.<sup>154</sup>

Here Eaton was right. The Community (and not the Union) concludes international agreements, either alone or together with some or all of the Member States.<sup>155</sup> According to McGoldrick, the Union would be capable of possessing international personality if it were recognized by other international actors when trying to conclude, or be party to, international agreements under any of the three EU pillars.<sup>156</sup>

3. The evidence of the (unpublished) *travaux préparatoires*: there was a clear intention during negotiations *not* to confer legal personality. The question was raised, and the Dutch Presidency said firmly that the Union would not have legal personality. They were supported by the Director General of the Council Legal Service. The Director General of the Commission Legal Service has taken the same view in evidence to the European Parliament.<sup>157</sup>

This view mentioned by Eaton concerning the position of the EU Council legal service in relation to the EU legal personality has radically changed. In fact, in February 2000 at the EU Council, there were interesting legal debates as to whether the EU has, and is capable of having, legal personality. Already in 1992, the UK took the view that the Union will not have international legal personality. However, at the 1996 Inter-

<sup>151</sup> See SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, HUMAN RIGHTS REEXAMINED, 3d REPORT, 1992-93, H.L. 10, at paragraph 129 (declaration of M.R. Eaton).

<sup>152</sup> M. R. Eaton, *Common Foreign and Security Policy*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 213, 224 (David O’Keeffe & Patrick M. Twomey eds. 1994).

<sup>153</sup> See McGoldrick, *supra* note 24, at 37.

<sup>154</sup> Eaton, *supra* note 143, at 224.

<sup>155</sup> If it is in the latter case, then we are dealing with mixed agreements, which are agreements where both the EC and its Member States are contracting parties, on the European side, to an international agreement with a third party.

<sup>156</sup> See McGoldrick, *supra* note 24, at 37.

<sup>157</sup> Eaton, *supra* note 143, at 224.

governmental Conference (“IGC”), the European Parliament (“EP”) called for the Union to be given international personality.<sup>158</sup> This, in principle, proves and demonstrates that the EP accepts the fact that the EU does not have international legal personality for the time being. The Commission also appeared to accept this view.<sup>159</sup> The question of the EU’s international legal personality was also addressed in the Reflection Group for the 1996 IGC. Its final report stated as follows:

A majority of members points [sic] to the advantage of international legal personality for the Union so that it can conclude international agreements on the subject-matter of Titles V and VI concerning the CFSP and the external dimension of justice and home affairs. For them, the fact that the Union does not legally exist is a source of confusion outside and diminishes its external role. Others consider that the creation of international legal personality for the Union could risk confusion with the legal prerogatives of member states.<sup>160</sup>

Along these lines, McGoldrick argues:

[I]f the EU did have international personality then it would be very wide ranging, though still not plenary. Indeed, it would come very close to having all of the international personality of a state. That is no doubt an important factor for those states that oppose international personality for the EU.<sup>161</sup>

Nonetheless, as can be gathered from the Progress Report on IGC, Presidency Conclusions of the European Council in Florence, 21-22 June 1996, it should be possible to have provisions drafted that would enable the EU, instead of the EC, to be party to international agreements without modifying the principles of competence in the EU pillar.<sup>162</sup> For the EU, being a party to international agreements concerning the two inter-governmental pillars could also be useful as long as a clear provision was made to deal with questions of competence, and the relationship with the powers of the Member States.<sup>163</sup>

This state of affairs provokes contradictions, even situations that are difficult to explain. This is mainly the case where the consequence of this refusal to having a legally engaged EU results in the Commission signing memoranda of understanding on behalf of the Union (for example, with the UN and its dependent organisms), although the Commission does not have this competence under the framework of the TEU or the TEC.

<sup>158</sup> European Parliament’s Report to the 1996 IGC, pr. 14 (ii).

<sup>159</sup> See, Commission’s Report to the 1996 IGC, p. 64.

<sup>160</sup> Report of the Reflection Group on the Intergovernmental Conference, December 1995, 2, p. 40.

<sup>161</sup> McGoldrick, *supra* note 24, at 38.

<sup>162</sup> See Progress Report on IGC, Presidency Conclusions, European Council in Florence, 21-22 June 1996, Doc. SN300/96, Annexes, p. 36 at 2 (a).

<sup>163</sup> *Id.* at 2(b).

For the time being, the European Union does not explicitly possess legal personality. In other words, there is no Article in the treaties – unlike the case of the EC – which gives explicit legal personality to the EU. In this respect, I would like to raise a hypothesis: what would happen if one day one of the vehicles with humanitarian aid from the European Union, in the framework of a joint action within the structure of the CFSP, had an accident in a village of former Yugoslavia or in the region of the Great Lakes of Africa?<sup>164</sup> Who would be civilly responsible for this action? If an international judiciary body had to examine such a case, how can we prevent this organization from attributing responsibility to the EU for the accident and damages? From here we can deduce that, if we want to be precise and responsible, we should stop saying “the UNION does . . .” and instead say, who really does what: the Community, the EU Member States, or both together?

As mentioned earlier, during the Amsterdam Treaty negotiations, the issue of the European Union’s legal personality was raised, thanks in particular to the efforts of the legal advisor at the Amsterdam Intergovernmental Conference. The idea of giving legal personality explicitly to the Union in its own right was fought against not only by certain Member States, but also, and mainly, by the Commission, possibly implying at the same time a merger of the then three (currently two) existing legal persons – the European Communities. The Commission foresaw, in recognizing the legal personality of the Union, a kind of competition with the legal personality of the European Community and with the Commission’s role in the exercise of the legal personality of the European Community. When the possibility of a merger of the EU’s legal personality with that of the EC’s legal personality arose, this possibility appeared to the eyes of the Commission as a risk to the Community’s identity. It is interesting to note, though, that this does not prevent the delegations of the European Commission in third States from presenting themselves as delegations of the “European Union.”

In the final text of the Amsterdam Treaty, any kind of explicit recognition of the EU’s legal personality is avoided. However, a specific Article recognizes the possibility that the Council of the European Union sign international agreements under the framework of the CFSP and of JHA. TEU art. 24<sup>165</sup> reads:

1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commis-

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<sup>164</sup> The region of the Great Lakes of Africa refers to the region around the following lakes: Lake Tanganyika, Lake Victoria, Lake Albert, Lake Edward, Lake Kivu, and Lake Malawi. These include the entirety of the nations of Rwanda, Burundi, and Uganda as well as portions of the Democratic Republic of the Congo, Tanzania, and Kenya.

<sup>165</sup> TEU art. 24 (amended by the Treaty of Nice).

sion as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.

2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.
3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2).
4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).
5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.
6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.

This Article creates interpretation problems which are not easy to solve, especially if examined from the perspective of third States or international organizations which are parties to these agreements. With whom will they be internationally engaged: with the Union *as such*? With the entire group of Member States of the Union? Two more points about putting into practice such an Article:

1. This Article will not be applied if there is no need to make use of the possibility described in the last phrase of the fifth paragraph of TEU art. 24;
2. From a political point of view, these agreements will be referred to as "European Union agreements" in the international arena. In any event, all agreements concluded by the European Community are classified by the media and the public opinion as "European Union agreements," and not as "pure Community agreements."<sup>166</sup>

Let us now present a legal analysis of TEU art. 24 and its interpretation to see whether the EU might possess legal personality.

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<sup>166</sup> In areas of non-exclusive EC competence, the EC can, if the EU Council of Ministers so decides, enter into agreements with third countries without formal adherence of EU Member States to these agreements, thereby having a so-called pure Community agreement.

## B. Arguments for the Existence of an EU Legal Personality

### B.1. Analysis of TEU art. 24: Its Interpretation and Application

Despite all the above said, there is an interpretation of TEU art. 24 which gives the capacity of external action to the EU. For that, we shall try to analyze the negotiation and conclusion of EU international agreements with one or more third States in the framework of Titles V<sup>167</sup> and VI<sup>168</sup> of the TEU, and the legal consequences which might derive from there.

To start with, TEU art. 24 is a provision which is part of an agreement in public international law. Secondly, TEU art. 24 provides a certain procedure for the negotiation and conclusion of international agreements on CFSP with various States or international organizations. Thirdly and most importantly, the main question is to know on whose behalf agreements under this provision are concluded. Even if it is not said explicitly in TEU art. 24, those agreements concluded by the Council are agreements which are concluded on behalf of the EU, and not on behalf of Member States. Here are a few points to explain this view:

° Let us interpret TEU art. 24 in the context of other provisions of the TEU, and in particular Title V. We conclude that the EU can be considered as an entity that is different and autonomous from its Member States and which has, in the field of external relations, its own means of action. Among these means of action are, *inter alia*, joint actions and common positions adopted by the EU Council under the terms of Articles 14<sup>169</sup> and 15 TEU.<sup>170</sup> There is no doubt that both joint actions and

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<sup>167</sup> Title V refers to provisions on a common foreign and security policy. TEU title V.

<sup>168</sup> Title VI relates to provisions on police and judicial cooperation in criminal matters. TEU title VI.

<sup>169</sup> TEU art. 14 reads:

1. The Council shall adopt joint actions. Joint actions shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.
2. If there is a change in circumstances having a substantial effect on a question subject to joint action, the Council shall review the principles and objectives of that action and take the necessary decisions. As long as the Council has not acted, the joint action shall stand.
3. Joint actions shall commit the Member States in the positions they adopt and in the conduct of their activity.
4. The Council may request the Commission to submit to it any appropriate proposals relating to the common foreign and security policy to ensure the implementation of a joint action.
5. Whenever there is any plan to adopt a national position or take national action pursuant to a joint action, information shall be provided in time to allow, if necessary, for prior consultations within the Council. The obligation to provide

common positions adopted by the EU Council are acts of the EU, and not of the Member States. It is also clear that when the Council adopts a joint action or a common position, it acts as an institution of the EU. It is in this context that TEU art. 24 should be considered as a means of action of the EU in the international scenario. In other words, TEU art. 24 offers the EU the option to participate in an international agreement.

- When it is on the basis of TEU art. 24, then the Council acts as a common entity of all Member States, whereas on the basis of TEU art. 14 and 15, the EU Council acts as a European institution. In this regard, it is important to note that, according to TEU art. 3.1,<sup>171</sup> the Union has a single institutional framework and that, according to TEU art. 3.2,<sup>172</sup> the Council has the co-responsibility (with the Commission) to ensure the consistency of the EU's external activities. The Council should be considered as the institution acting on behalf of the EU every time the provisions of the TEU give a power of action to the Council and provide a procedure. This can also be valid under TEU art. 24. Had the intention of the TEU drafters been to create the Council as an agency of EU Member States, then the appropriate formula would have been to provide that the decision to conclude such agreements would be adopted by the representatives of Member States in the Council.
- According to TEU art. 24.1, the Presidency (assisted by the Commission, if need be) is authorized by the Council to conduct negotiations

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prior information shall not apply to measures which are merely a national transposition of Council decisions.

6. In cases of imperative need arising from changes in the situation and failing a Council decision, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of the joint action. The Member State concerned shall inform the Council immediately of any such measures.
7. Should there be any major difficulties in implementing a joint action, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the joint action or impair its effectiveness.

<sup>170</sup> TEU art. 15 claims that: "The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions."

<sup>171</sup> TEU art. 3.1 reads:

The Union shall be served by a single institutional framework which shall ensure the consistency and continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.

<sup>172</sup> TEU art. 3.2 disposes:

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

with another party. Pursuant to TEU art. 18.1,<sup>173</sup> the Presidency shall represent the Union, and not the Member States. This corroborates the idea that TEU art. 24 provides a procedure of negotiating and concluding agreements on behalf of the EU.

- Finally, TEU art. 24 is part of Title V of the TEU. That said, according to TEU art. 11.1,<sup>174</sup> it is the EU which defines and implements the CFSP. As a result, an agreement concluded in application of Title V must necessarily be an EU agreement in the framework of the CFSP.

TEU art. 24.5 says that “No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.” We can deduce that, in the absence of such a declaration by a Member State, agreements concluded in the framework of TEU art. 24 are binding on EU Member States. Such a provision would not make any sense if in any case these agreements were to bind Member States and only the Member States. This provision verifies the fact that agreements concluded in the framework of TEU art. 24 are binding on the EU as well as on Member States, except in cases mentioned in TEU art. 24.5. In addition, EC art. 100(7) says that agreements concluded by the EC are binding on Member States.<sup>175</sup> Therefore, Member States must act in conformity with such agreements. TEU art. 24 should be interpreted in those same terms.

With regard to Declaration Number 4,<sup>176</sup> adopted by the Amsterdam Conference and annexed to the final act of the Amsterdam Treaty, con-

<sup>173</sup> TEU art. 18.1 says that the Presidency shall represent the Union in matters coming within the common foreign and security policy.

<sup>174</sup> TEU art. 11.1 reads:

The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;
- to strengthen the security of the Union in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;
- to promote external cooperation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

<sup>175</sup> EC art. 300(7) reads that “Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.”

<sup>176</sup> See Duff, A (ed.) *The Treaty of Amsterdam. Text and Commentary*, Federal Trust for Education and Research, 1997, p. 309

cerning Articles 24 (formerly Article J.14) and 38 (formerly Article K.10)<sup>177</sup> of the TEU, its content does not go against the above interpretation of TEU art. 24.<sup>178</sup> Firstly, the content of this declaration implicitly recognizes the existence of the EU as a separate entity from the Member States, considering it provides a theoretical possibility of a transfer of competences from the Member States to the EU. Secondly, although this declaration does not mention the existence of an EU competence as derived from the existing provisions of the TEU, the EU does have the necessary powers and “competence” to define and implement a common foreign and security policy. From this view, TEU art. 24 does not increase this EU competence, since it provides the conclusion of agreements “in implementation of this title [V on provisions of a common foreign and security policy],”<sup>179</sup> which means that the competence has been attributed to the EU in other Articles of Title V of the TEU. Therefore, agreements concluded under the terms of TEU art. 24 must necessarily respect the framework of EU powers that derive from Title V of the TEU.

From what is said above about Declaration Number 4, we cannot deduce that agreements under TEU art. 24 are concluded on behalf of the Member States. TEU art. 24 only establishes a process for the negotiation and conclusion of agreements, but is neutral concerning the issue of competences for Member States and for the EU.

Lastly, from a more practical viewpoint, it is unthinkable that the EU cannot participate in the international scenario via international agreements. For example, in the progressive framing of a common defense policy concerning relations with the Parliamentary Assembly of Western European Union (“WEU”)<sup>180</sup> and the North Atlantic Treaty Organiza-

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<sup>177</sup> TEU art. 38 reads: Agreements referred to in Article 24 may cover matters falling under this title.

<sup>178</sup> Declaration Number 4 on Articles J.14 and K.10 of the TEU reads: “The provisions of Articles J.14 and K.10 of the Treaty on European Union and any agreements resulting from them shall not imply any transfer of competence from the Member States to the European Union.”

<sup>179</sup> TEU Art. 24.1.

<sup>180</sup> The Western European Union (WEU) is a partially dormant European defense and security organization, established on the basis of the Treaty of Brussels of 1948 with the accession of West Germany and Italy in 1954. The WEU is led by a Council of Ministers, assisted by a Permanent Representatives Council on an ambassadorial level. A Parliamentary Assembly - rather unique for an intergovernmental organization - would oversee the work of the Council. Most of the WEU functions are in the process of being merged into the EU. The Parliamentary Assembly of the Council (composed of the delegations of the member states to the Parliamentary Assembly of the Council of Europe), is fearful for its future existence, and has been lobbying for itself to be recognized as the “European Security and Defence Assembly.” This would allow it to function within the European Security and Defense Policy (ESDP) structures within the EU.

tion (“NATO”),<sup>181</sup> the EU should have the ability to conclude the necessary agreements with such institutions. In fact, as TEU art. 17 indicates, the common defense policy also constitutes a policy of the EU.<sup>182</sup> Therefore, it would seem inconsistent not to admit the capacity to conclude international agreements in order to implement this policy. Most recently, an agreement between the International Criminal Court and the EU on cooperation and assistance, signed on April 10, 2006, and entered

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<sup>181</sup> The North Atlantic Treaty Organization (NATO), also called the North Atlantic Alliance, the Atlantic Alliance or the Western Alliance, is an international organization for collective security established in 1949, in support of the North Atlantic Treaty signed in Washington, D.C., on 4 April 1949.

The Treaty cautiously avoids reference both to the identification of an enemy and to any concrete measures of common defense. Nevertheless, it was intended that if the USSR and its allies launched an attack against any of the NATO members, it would be treated as if it was an attack on all member states. This marked a significant change for the United States, which traditionally harbored strong isolationist groups across parties in Congress. However, the feared invasion of Western Europe never came. Instead, the provision was invoked for the first time in the treaty’s history on September 12, 2001, in response to the September 11 attacks on the U.S. the day before.

<sup>182</sup> TEU art. 17 (amended by the Treaty of Nice) reads:

1. The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.

2. Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.
3. Decisions having defence implications dealt with under this Article shall be taken without prejudice to the policies and obligations referred to in paragraph 1, second subparagraph.
4. The provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such cooperation does not run counter to or impede that provided for in this title.
5. With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article 48.

into force on May 1, 2006, proves that certain members of the international community do recognize the EU legal personality.<sup>183</sup>

## B.2. Interpretations on the EU's Capacity for External Action

There are interpretations on the EU's capacity for external action.<sup>184</sup> This capacity is not supported by the preparatory work of the Maastricht Treaty or subsequent practice. As an example, there is a Memorandum of Understanding of 1994 between the EU and the Western European Union, on the one hand, and between the EU and various ex-Yugoslavia actors on the other, which set up an EU administration for the City of Mostar. This Memorandum was prepared within the context of the second pillar and had to be concluded on behalf of the "Member States of the European Union acting within the framework of the Union in full association with the European Commission."<sup>185</sup> Here one could ask whether the cumbersome title of the Mostar Memorandum of Understanding is conducive to asserting the "identity" of the EU in the international scene, which, according to TEU art. 2, is one of the objectives of the Union.<sup>186</sup>

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<sup>183</sup> OJ (L 115, pp. 50-57), 28 April 2006.

<sup>184</sup> See, Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in *INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION* 231 (Martti Koskeniemi ed. 1998).

<sup>185</sup> See Bury, C & Hetsch, P. "Politique étrangère et de sécurité commune" *Rép. Communautaire Dalloz*, October 1996, pp. 1-11, at p. 8.

<sup>186</sup> TEU art. 2 reads:

The Union shall set itself the following objectives:

- to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty,
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17,
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union,
- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime,
- to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

In the post-Maastricht era, the concept of the *Union* stands out as a signpost. The general public, as well as third States and international organizations, may well be under the impression that the EC no longer exists. It is normally the EU that enters into an engagement when policy documents, which are not going through the formalities of a treaty, are drawn up. As an example, we have the comprehensive political arrangement relating to the EU-U.S. dispute over U.S. unilateral sanctions policy, i.e., the Helms-Burton Act. This arrangement was concluded at the EU-U.S. Summit in London on May 18, 1998, and refers continuously to the EU as one of the parties.<sup>187</sup>

The package adopted at this Summit includes an “Understanding with Respect to Disciplines for the Strengthening of Investment Protection,”<sup>188</sup> the “Transatlantic Partnership on Political Co-operation” and an “Understanding on Conflicting Requirements.” The negotiations leading up to this package were based on an EU-U.S. Understanding of 11 April 1997.<sup>189</sup> This Understanding enabled the EU to suspend a case against the U.S. in the context of the World Trade Organization.<sup>190</sup> Also, a Joint Declaration on EU-Palestinian Security Co-operation, agreed with the Palestinian Authority on April 20, 1998, refers to the EU as the other party.<sup>191</sup> In these two examples there are concrete commitments of a political, rather than a legally binding, nature.

## V. CONCLUDING REMARKS

Although technically speaking the EU does not explicitly have legal personality, the following conclusions can be made:

° Any interpretation of TEU art. 24 to say that agreements concluded in the framework of this provision are binding on Member States, but not

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The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community.

<sup>187</sup> See Delegation of the European Commission to the USA, “Guide to the EU-US Summit,” May 18, 1998, London, available at <http://www.eurunion.org/partner/summit/9805sum.htm> (last visited February 1, 2007).

<sup>188</sup> EurUnion.org, *Understanding with Respect to Disciplines for the Strengthening of Investment Protection*, <http://www.eurunion.org/partner/summit/Summit9805/invest.htm> (last visited June 2, 2006).

<sup>189</sup> See EC.Europa.eu, *Understanding between the European Union and the United States on U.S. Extraterritorial Legislation: 11 April 1997*, available at [http://ec.europa.eu/comm/external\\_relations/us/extraterritoriality/understanding\\_04\\_97.htm](http://ec.europa.eu/comm/external_relations/us/extraterritoriality/understanding_04_97.htm) (last visited June 2, 2006).

<sup>190</sup> For the background to the dispute, see B. Stern, *Vers la Mondialisation Juridique? Les Lois Helms-*

<sup>191</sup> *Burton et D’Amato-Kennedy*, 1996 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 979.

on the EU, would be in contradiction with the other provisions of the TEU, and more precisely with Title V.

- The fact that, at the Intergovernmental Conference of Amsterdam, certain Member States were opposed to giving a legal personality to the EU does not mean that the Conference did not intend to provide the EU with the means to conclude international agreements. Hence, one could argue that there is an implicit EU legal personality through TEU art. 24.
- TEU art. 24 should be interpreted to say that agreements concluded by the Council within the provision are concluded by the Council on behalf of the EU, and they are binding on the EU. This does not mean that Member States cannot take action themselves to implement the CFSP. Certainly they can. Nor does it mean that the Council does not also act on behalf of the Member States. As an example, we have the imposition of immigration restrictions envisaged by a Council common position, covered by Title VI of the TEU (provisions on police and judicial cooperation in criminal matters), where individual Member States are free to take action independently of the rest of EU Member States or the Council. Therefore, these examples prove that the EU already has legal personality.