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**The European Court of Justice and the Possibility of Bringing About a Review of Decisions of
Domestic Courts Rendered Contrary to Community Law**

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**Thesis submitted to the Faculty of Law in partial fulfilment of the requirements for the LL.M.
degree in Law**

University of Ottawa

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 **Otávio Batista Lomonaco, Ottawa, Canada, 1993**



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UNIVERSITÉ D'OTTAWA
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Summary for Defense Invitation

One of the key features of the European Community is the notion of harmonization of law throughout the Community. Traditionally, only the Executive branches of the Member States have been sanctioned for failing to live up to their responsibilities in this area. This paper will argue that the Treaty of Rome requires that, in addition to harmonization of legislation, there must also be a harmonization of its interpretation by national courts. Consequently, the judiciary of a Member State is also bound by Community law and all its acts must conform with the laws in force at the time. Where national courts neglect or wrongly apply Community law in a particular case, it may be possible to bring the Member State before the European Court of Justice for failing to fulfil its obligations under the Treaty of Rome.

"Au vingtième siècle, il y aura une nation extraordinaire... Elle sera illustre, riche, puissante, pacifique, cordiale au reste de l'humanité. Elle aura la gravité douce d'une amine... elle aura quelque peine à faire la différence entre un général d'armée et un boucher... Elle s'appellera l'Europe..."

Un jour viendra où l'on verra ces deux groupes immenses, les États-Unis d'Amérique et les États-Unis d'Europe, placés en face l'un de l'autre, se tenant les mains par-dessus les mers, échangeant leurs produits, leur commerce, leur industrie, leurs arts, leurs génies... Et ce jour-là, il ne faudra pas quatre cents ans pour l'amener... A l'époque où nous sommes, une année fait parfois l'ouvrage d'un siècle..."

Victor Hugo.

Table of Contents

Table of Contents	ii
Table of Abbreviations	iv
Introduction	1
 Part I	
The European Community and its Institutions	7
Motives that Lead States Towards Integration	12
The Institutions of the Communities	13
The Legal Nature of the European Community	20
The Federalist Elements of the Community	24
 Part II	
Reflections About a Modern State	38
Reflections About the Constituent Elements of a State	38
Montesquieu and the Concept of Separation of Powers	40
A View of Montesquieu's Theory	43
The Sovereignty of a State	45
The Various Levels of the Concept of Sovereignty	47
How Montesquieu's Concepts Interact with the Idea of Sovereignty	48
 The Member State as a Single Entity in the View of the European Court of Justice	 51
 Part III	
A Unique Judicial System - The Cooperation Between Two Legal Systems	60
The Right to Request a Preliminary Ruling	64
The Obligation to Make the Request	66
The Role of the Court During a Preliminary Ruling Procedure	68
The Force of the Preliminary Rulings of the Court	71

Part IV

The Obligations Arising from the Treaty of Rome	72
The Importance of Article 5	72
The Supremacy of Community Law over National Law	74

Part V

Articles 169 and 170	80
The Obligation Imposed by Article 171	84
The Treaty of Maastricht and the Proposed Amendment to Article 171	87

Part VI

How National Judiciaries can Violate the Treaty of Rome	90
The Effects of the Judgement of the Court of Justice on a Member State Level	100
Some Proposals to Implement the Decision from the European Court of Justice	101
The Probabilities of Application of the Theory Proposed	105
Conclusion	108
Appendixes	111
Appendix I	111
Appendix II	118
Appendix III	119
Appendix IV	122
Table of Authorities	124
Bibliography	

Table of Abbreviations

C.E.C.A.	Communauté Européenne du Charbon et Acier
C.F.I.	Court of First Instance
C.M.L.R.	Common Market Law Reports
C.Mkt L.Rev.	Common Market Law Review
E.C.	European Community
E.C.J.	European Court of Justice
E.C.R.	European Court Reports
E.C.S.C.	European Coal and Steel Community
E.E.C.	European Economic Community
J.O.R.F.	Journal Officiel de la République Française
O.J.	Official Journal of the European Communities
O.J.I.R.	Official Journal of the Italian Republic
R.D.H.	Revue de Droit de l'Homme
t.	tome
U.N.T.S.	United Nations Treaty Series
V.A.T.	Value Added Tax

Introduction

After a slow but steady process, twelve democratic European States¹ now form the European Community,² a flexible organization which has gradually enlarged its sphere of influence over time. It began as a simple economic treaty perhaps as a result of the Marshall Plan. Today it is responsible for administering a significant part of the lives of European citizens.

The Treaty of Rome imposes important obligations upon Member States. The Treaty of Rome, its amendments and other primary legislation are the "constitution" of the Community. Among other things, it is important to the Community to ensure that all its Member States, who remain sovereign, to a certain extent, correctly apply the legal statutes duly approved by its legislative bodies: the Council, the Commission, with the participation of the European Parliament.³ The European Court of Justice supervises the correct application of Community law by Member States but it does not have power to overrule a decision from a national court.⁴ Since national courts interact with the Community framework, the drafters of the Treaty of Rome introduced the concept of cooperation

¹. Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, United Kingdom, Portugal, Spain.

². *Treaty Establishing the European Economic Community*, 25/03/1957, 298 U.N.T.S. 11 [hereinafter the "Treaty of Rome" or "Treaty"].

³. See Appendix II, below at 118.

⁴. The Treaty of Rome does not grant the European Court of Justice power to decide matters of domestic law, or to act as an appellate court from national tribunal or courts.

between these two different legal dimensions. Article 177 of the Treaty of Rome⁵ establishes the framework through which Member States' courts request clarification of the interpretation of certain aspects of Community law from the European Court of Justice.⁶

In addition to Article 177, the actions of each Member State are monitored by the Commission under Article 169⁷ to ensure conformity with Community law. When required, the judicial procedure established by this article is put into motion before the European Court of Justice to prevent distortions in the application of Community law by Member States. In this procedure, the European Court of Justice can declare a Member State to be in breach of the Treaty, since Community law, its interpretation and the correct application of it by Member States are within the Court's jurisdiction.

A student of Community law soon notices that Articles 5, 169, 170, 171, 177, and the principle of supremacy of Community law over national law, are discussed throughout textbooks on Community law. Nevertheless, the possibility of national courts being forced to review a decision which is flagrantly contrary to Community law is never raised. The possibility that a Member State's highest court might decide against Community law, and against the principle of supremacy of Community law over national law, raises political as well as legal issues.

⁵. Unless otherwise specified, all references to treaty articles are to the Treaty of Rome. The text of all articles cited in this paper are in Appendix I, below at 111.

⁶. The European Court of Justice will also be referred to as the "Court".

⁷. As it is discussed below, Article 170, which is similar in content to Article 169, has only been used on one occasion by a Member State against another. For details on the functioning of Articles 169 and 170, see "Articles 169 and 170", below at 80 *et seq.*

Within the Member States of the Community, there is a separation of governmental functions. This is part of any modern theory of government. Each branch contributes to the system of checks and balances which promotes the environment for a democratic coexistence among the several branches of the State's government. The branches are independent of each other. It follows that, from a domestic point of view, while acting as a balance to them, one branch must not interfere with the activities of the other two. However, in matters involving external sovereignty the branches represent the will of only one sovereign entity: the State, which is responsible for their acts and their effects vis-à-vis the Community. Consequently, and despite many arguments raised by Member States to evade their responsibilities under the Treaty, the European Court of Justice is capable of finding a State to be in breach of the Treaty because of acts (or omissions) of any one of its governing branches.

The Treaty provides that Member States must take all necessary measures to comply with the objectives of the Community.⁸ The Treaty also provides, through Article 171, that Member States found to be in breach of the Treaty by the European Court of Justice must take appropriate measures to comply with the decision of the Court. Thus, where a national court has incorrectly applied Community law and this is pointed out in a judgment of the European Court of Justice, that State is bound by Article 171 to take measures to comply with the correct interpretation of Community law issued by the Court. As consequence, the European Court of Justice could provide the impetus for a new ground of appeal at the domestic level, even though it has no jurisdiction to interfere in the substance of the matter in domestic affairs.

⁸. Article 5.

This paper aims to provide a description of some of the current obligations of the Member States towards the Treaty of Rome and of the legal steps necessary to find a Member State to be in breach of the Treaty. It will extend the responsibility of correctly applying Community law to the judicial branch of a Member State as well, and then conclude that with the rendering of a decision of the Court in a matter, a Member State will be forced to take measures to comply with the Court's judgement which pointed out the conflict with Community law. In all cases, the defaulting national court will be the one competent to hear, at last instance, a specific case.⁹ Although not within the

⁹. The Treaty refers to "court or tribunal" in Article 177, in general, and specifically to "highest court or tribunal" in Article 177(3). For the purposes of this work a distinction is drawn between a higher court or tribunal that might hear a case on an appeal and the highest court or tribunal of that Member State. That distinction reflects two opposing theories related to Article 177(3): the *concrete* as opposed to the *abstract* theory. This work will apply the concepts of the concrete theory when interpreting Article 177(3), and therefore consider as highest court or tribunal the court or tribunal that might last hear the case on appeal, and not the highest court or tribunal of that Member State. As stated by Kapteyn:

"... the obligation to refer binds the highest court in the case rather than simply the highest court in the hierarchy; whilst this point has been the subject of divergent views (the debate between advocates of the *concrete* theory who favour the standpoint just advanced and the advocates of the *abstract* theory who would restrict the obligation to the highest courts in the hierarchy) it is submitted that the *concrete* theory is to be preferred in the interests of good administration of justice. Indeed the *concrete* theory finds implicit support in the case-law of the Court of Justice (In Case 6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585 [*sic.*] the Milan magistrate had first and last instance jurisdiction (because of the small sum involved in the contested electricity bill) and the Court clearly felt that the magistrate was indeed bound to make the reference)." P.J.G. Kapteyn, P.V. van Themaat, *Introduction to the Law of the European Communities - After Coming into Force of the Single European Act* (Deventer: Kluwer Law and Taxation, 1990) at 325.

For more details on the discussion and application of these two theories, see also Lasok & Bridge, *Law & Institutions of the European Communities* (London, 1987) at 368-371; Brown & Jacobs, *The* (continued...)

immediate objectives of this work, this paper will also make some suggestions as to what a Member State, as well as the Community, could do to solve or prevent future occurrences of similar defaults. Because of the supremacy of Community law over national law, it is the responsibility of the Court of Justice to ensure the correct application of Community law, no matter which of the three branches of a State is responsible for its incorrect application. Such duty will provide that individual rights are at least indirectly protected by the European Court of Justice.¹⁰ Besides the right to seize national judiciaries, there are no other guarantees to individuals that their rights arising from the Treaty of Rome will be protected.¹¹

At the time of writing, the Community was still in the process of adopting revisions to the Treaty of Rome provided for in the European Union Treaty.¹² The analysis proposed in this paper is based on the Treaty as it is currently worded, and where the Treaty of Maastricht proposes modifications to articles of the Treaty relevant to this paper, their effect is considered separately. The interpretation

⁹(...continued)

Court of Justice of the European Communities (London, 1983) at 167-169; Hartley, *The Foundations of European Community Law* (Oxford, 1988) at 261-265.

¹⁰. Indirectly because, according to the Treaty, individuals as such are not entitled to seize the Court of Justice.

¹¹. Except in case of Articles 173 and 175 individuals may not seize the European Court of Justice directly. In these articles, the European Court of Justice verifies the acts (or omissions) of the Council or Commission. In most cases, only Member States, the Commission or the Council have standing to initiate proceedings before the Court. However, in case of Article 173(2), or Article 175(3), and after proving fulfilment of the requirements established, individuals (natural or legal persons) may do so.

¹². *Treaty on European Union*, 07/02/92, [1992] C.Mkt L.Rev. 573 [hereinafter "Treaty of Maastricht" or "European Union Treaty"].

of the Treaty of Rome adopted in this paper is an orthodox one. The result of the analysis expands this interpretation beyond that which has previously been recognized.

This thesis consists of six parts. The first will briefly describe the European Community, its history, its institutions and their role in the legislative process, and its legal nature. Part two discusses some aspects of sovereignty, particularly with respect to the differences between two concepts regarding the representation of a State. It focus on the different effects of the concepts of internal and external sovereignty in the international community. It will also discuss the concept of separation of powers as described by Montesquieu and verify how it affects the concept of external sovereignty. Part three describes the notion of cooperation between national judiciaries and the Community framework and the results of this cooperation. Part four briefly discusses the obligations of Member States towards the Community, including the notion of supremacy of Community law over national law. Part five describes the application of Article 169 and how it contributes to the achievement of the goals of the Community. In this part, the Treaty of Maastricht is also discussed. Finally, part six will describe the mechanism used to identify the failure of Member States judiciaries and offer some possible solutions to the problems this paper addresses.

Part I

The European Community and its Institutions

In the first half of the twentieth century, a number of European individuals favoured a tighter union among their States. Aristide Briand proposed the creation of a European Union;¹³ Konrad Adenauer,¹⁴ Alcide de Gasperi,¹⁵ Earl Richard de Coudenhove-Kalergi the founder of the Pan European Union in 1923,¹⁶ Louis Loucheur who proposed a summit to organize European industries

¹³. "L'apôtre de l'Union fédérale européenne n'appartient pas au passé. Il appartient à l'avenir dont un jour sera fait en présent". F. Siègel, *L'Europe de Maastricht - Pour ceux qui n'y comprennent rien* (Paris: Jean-Claude Lattès, 1992) at 80.

¹⁴. "Sans unification, des différents peuples européens seraient subalternes des super puissances". *idem* at 80.

¹⁵. "La communauté européenne signifie l'assurance de la paix entre la France et l'Allemagne. Elle signifie pour l'Italie une place, modeste mais permanente, dans le concert des nations. Elle signifie l'ouverture d'un marché commun du travail et un accès progressif aux ressources communes. Elle signifie sinon la fin, en tout cas, la réduction des égoïsmes nationaux et la libération des énergies des peuples". A. de Gasperi (Speech at the Vth Congress of the Catholic Democratic Party, Naples, 1954), cited in Siègel, *ibidem* at 80.

¹⁶. Richard Coudenhove-Kalergi (1894-1972): "L'Europe de demain ne ressemblera ni à l'Europe d'hier, ni à celle d'aujourd'hui: une nouvelle conception s'impose dont la réalisation devient la plus grande tâche de notre siècle et de notre génération". Siègel, *ibidem* at 80.

horizontally in 1925; later Paul-Henri Spaak,¹⁷ Robert Schuman,¹⁸ and Jean Monnet¹⁹ also contributed to this effort.

The two World Wars slowed down the evolution of these ideas. After the Second World War, however, discussions about integration became more common.²⁰ As result, a series of events took place.²¹ These events always demonstrated an intention to reduce the existing barriers among European States (in all areas: commercial, economical and military). Most of them failed or were

¹⁷. "Vivant ans la peur des Russes et la charité des Américains, nous voulions rendre à l'Europe, avec sa richesse économique retrouvée, son importance politique. Nous voulions en faire, au sein d'une grande alliance qui en face des communistes aurait défendu les positions du monde démocratique et libre, le partenaire valable des États-Unis". Siègel, *ibidem* at 80.

¹⁸. "Faire l'Europe, c'est précisément coordonner les activités des pays européens, accroître leur efficacité en les libérant des égoïsmes à courte vue, les orienter vers un bien commun supranational..." Siègel, *ibidem* at 80.

¹⁹. "Comme nos provinces hier, aujourd'hui nos peuples doivent apprendre à vivre ensemble, sous des règles et des institutions communes librement consenties, s'ils veulent atteindre les dimensions nécessaires à leur progrès et garder la maîtrise de leur destin". J. Monnet, *Mémoires* (Fayard: Paris, 1976), cited in Siègel, *ibidem* at 80.

²⁰. "Although there had been signs of interest in economic cooperation within Europe prior to World War II, that war gave powerful stimulus to renewed action in this direction". P.J. Reny, *European Economic Integration* (M.A.-S.Sci. Thesis, University of Ottawa, 1961) [unpublished] at 65.

²¹. For an exhaustive list, see France, Secrétariat général du gouvernement, Direction de la documentation (J.-C. Clavel, P. Collet eds.), *L'Europe au fil des jours - les jeunes années de la construction européenne 1948-1978* (Paris: La documentation française, 1979) at 11-39.

ignored. Notwithstanding the uneven results, there was no lack of perseverance, some initiatives prospered, and the Community is now an undeniable reality.

Since World War II, Europe has undergone major political, economic and social changes. In 1951 and 1957 Europe took important steps towards political and economical stabilisation. It was Sir Winston Churchill's speech at Zurich on 19 September 1946 that represented the first contemporary call for an unified Europe. The Treaty of Paris, signed in 1951, created the European Coal and Steel Community.²² The European Economic Community²³ and Euratom²⁴ were created six years later, with the signature of the two Treaties of Rome in 1957. Today, in 1993, the European Community is now facing a critical period in its existence.²⁵ But one must not make any conclusions at this moment. In the 35 years of existence of the Community, in many occasions there have been talks about political integration: in the 1960's, after the come into force of the Single European Act, and

²². *Treaty Establishing the European Coal and Steel Community*, 18/04/51 [hereinafter the "Coal and Steel Treaty"].

²³. Treaty of Rome, *supra* note 2.

²⁴. *Treaty Establishing the European Atomic Energy Community*, 25/03/57 [hereinafter "Euratom Treaty"].

²⁵. Although the official definition is "European Communities", it seems that there is not a consensus, among writers, about this expression. "European Communities" or "European Community" often are used interchangeably to refer to all three communities, sometimes to the European Economic Community. For the purpose of this work, "European Community" refers only to the European Economic Community.

now that the Treaty of Maastricht is about to come into force. However, in all these occasions, the initial enthusiasm was followed by discouragement.²⁶

One of the goals of the Community defined in the Treaty of Rome is the approximation of laws of each of the Member States "to the extent required for the proper functioning of the common market"²⁷ in order to have the same legal principles apply to nationals of the twelve States. This is achieved through the application, at the Member-State level, of Directives, Regulations, Decisions, and other Community acts. Sometimes Member States do not need to introduce the exact words of

²⁶. Nowadays, the initial enthusiasm about Maastricht is waning due to economical recession faced by the twelve Member States. Difficulties faced by the approval of Maastricht at Member State level (*i.e.* United Kingdom, Germany, Denmark) also contribute to this feeling.

²⁷. Article 3(h).

a Community's act into their legal framework.²⁸ In other situations, the Member State is required to pass legislation giving effect to Community acts.

The institutions of the European Community play an important role in the development of a European mentality.²⁹ There are four bodies sharing the duty of governing the Community are the Council, the Commission, the Parliament and the Court of Justice.

²⁸. Such enactments have what is called "direct application". Being directly applicable implies that a piece of legislation at the Community level is "apt to affect the legal rights and duties of private individuals in the Member States without any need for the interposition of a domestic legislative act to give these provisions the force of law". M. van Empel *et al.*, *Leading Cases on the Law of the European Communities* (Deventer: Kluwer Law and Taxation, 1990) at 176.

In Community law, there is a distinction between "direct effect" and "direct application". "Direct application" is defined in Article 189 of the Treaty, whereas "direct effect" has been defined in the case law of the Court of Justice. "Direct effect means that certain provisions of the Treaty and of the acts of the institutions are capable of producing legal effects in the Member States without the need for any implementing measures, in the sense of conferring rights and in some cases imposing obligations upon individuals which are enforceable in the national courts ... [whereas] "direct applicability" concerns the way in which a Community provision (a regulation) comes into operation within the Member States..." In practice, however, these two expressions address the same relationship between individuals and the rights and obligations arising from Community law: "Strictly speaking, therefore, they refer to two different aspects of the relationship between Community law and national law, although they are closely related in that they both deal with the same relationship." A. G. Toth, *The Oxford Encyclopaedia of European Community Law* (Oxford, England: New York: Clarendon Press: Oxford University Press, 1990) at 161.

²⁹. See "The Federalist Elements of the Community" below at 24 *et seq.*

Motives that Lead States Towards Integration

According to Karl Deutsch³⁰ there are two reasons that lead States to integrate.³¹ The first reason is survival based on a stable military situation, by means of a common defense strategy.³² The second is that of economics.³³

³⁰. K. Deutsch, "Conclusion", in G. Ionescu, ed., *Between Sovereignty and Integration* (Toronto: John Wiley & Sons, 1974) 181-187.

³¹. After its integration into the Community, Europe has been seen from a different perspective: "Europe is no longer the internecine battlefield that it was for centuries. The Franco-German border is no longer arrayed with fortresses. Nor is the English Channel still cherished as a barrier to invasion from the continent. Europe has attained internal order and it has prospered..." D.J. Puchala, "Internal Order and Peace: An Integrated Europe in World Affairs" in G. Ionescu, ed., *Between Sovereignty and Integration* (Toronto: John Wiley & Sons, 1974) 164-180 at 164.

³². Inter-State military stability was one of the principle reasons for the creation of the League of Nations and of the United Nations. An old German proverb, loosely translated says: "If you wilt not my brother be, I'll smash thy skull most certainly". Deutsch, *supra* note 30 at 181. Alliances offer means of exercising some control over the other partners, and it was one of the reasons (if not the principal one) for the creation of Coal and Steel Community. The common Franco-German control of the Rhur and of the metal production was itself a way to stop animosity between these two countries and to control the potential revival of diplomatic uncertainty and of military hostilities by rendering unilateral military production impossible. "The EC was founded upon fear - the fear of another war between France and Germany. That fear never amounted to a national ethic encompassing the whole of Europe and, thanks to the happy success of the enterprise..." *The Economist*, "Playing as one?" (29/06/91, v. 320, #7713) at 10, col. 2.

³³. Integrated economies mean prosperity. State economy and producers tend to prosper because of the increased number of potential buyers for a product. On the consumer's side, the rules of a market economy will organize competition and foster the survival of the most efficient organizations, whereas State intervention, to the little extent possible, will try to guarantee fair competition (continued...)

These reasons combine, simultaneously or chronologically, to induce the desire for change. The signature of the Coal and Steel Treaty, and later of the Treaty of Rome and Euratom are the results of such change. With these three treaties in force, Europe has reasonably guaranteed economic and military stability as well as protection against unfair private commercial strategies.

The Institutions of the Communities

Pescatore calls the organizational structure of the Community a "institutional quadripartism" ³⁴ based on, but not equal to the traditional concept of separation of powers³⁵ and containing four elements: the intergovernmental element, represented by the Council, the protection of the common interest entrusted to the Commission, the representation of popular opinion by the European Parliament, and finally, the respect for the law ensured by the Court of Justice.³⁶ A brief outline of these four

³³(...continued)
practices. In the macro-economic environment, integration allows stabilisation of the factors of production - labour, land, and capital.

³⁴. P. Pescatore, "L'Exécutif communautaire: justification du quadripartisme institutionnel institué par les Traités de Paris et de Rome", (1978) 4 Cahiers de droit européen at 387.

³⁵. "... traduit une conception constitutionnelle originale. Loin de constituer une version de la classique séparation des pouvoirs - comme une certaine habitude intellectuelle incline trop souvent à la facilité de le penser ou de le croire..." J. Boulouis, *Droit institutionnel des communautés européennes*, (Paris: Montchrestien, 1991) at 63.

³⁶. "... l'élément intergouvernemental représenté par le Conseil, la sauvegarde de
(à suivre...)

institutions and their roles in the Community legislative process is necessary to understand the interaction between the Community and national governments, and the basis for the development of this thesis.

The Council³⁷ represents the governments of the Member States, it consists of cabinet-level representative of each of the twelve governments. Decisions are often made on a collegial basis, but in case of a lack of consensus, the voting power of the Member State is relative to its importance in the Community.³⁸ It approves the legislative proposals made by the Commission, after the European

³⁶(...suite)

l'intérêt commun confié à la Commission, les forces populaires incarnées par le Parlement, enfin, le respect du droit assuré par la Cour de Justice". P. Pescatore, "Préface" in V. Constantinesco, *Compétences et pouvoirs dans les communautés européennes - contribution à l'étude de la nature juridique des communautés* (Paris: Librairie générale de droit et jurisprudence, 1974) at xii.

³⁷. See Articles 26 to 30, Coal and Steel Treaty; Articles 145 to 154, Treaty of Rome; and Articles 115 to 123, Euratom. The Council of the European Community should not be confused with the Council of Europe, which consists of almost thirty European nations and sits in Strasbourg.

³⁸. Article 148:

2. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as follows:

Belgium	5
Denmark	3
Germany	10
Greece	5
Spain	8
France	10
Ireland	3
Italy	10
Luxembourg	2
Netherlands	5

(continued...)

Parliament has had an opportunity to provide its opinion.³⁹ Under the Treaty, the Council finally approves or refuses almost everything that will affect the functioning of the Community.⁴⁰

Even though the Member States are represented on the Council by members of the Executive branch of their governments, under the Treaty these representatives actually represent the State as a whole, and not only the Executive branch. Consequently the decisions of the Council bind all of the internal branches of the Member States's government.⁴¹

³⁸(...continued)

Portugal	5
United Kingdom	10

For the adoption, acts of the Council shall require at least:

- fifty-four votes in favour where this Treaty requires them to be adopted on a proposal from the Commission,
- fifty-four votes in favour, cast by at least eight members, in other cases.

³⁹. See Appendix II below at 118.

⁴⁰. That legislative prerogative is sometimes given to another body, the Commission, by the letter of the Treaties or by initiative of the Council (delegated competence), but as a general statement, the Council is invested with normative competence: "... le Conseil des Traités (...) est investi (...) de la compétence normative de principe..." Boulouis, *supra* note 35 at 71.

⁴¹. The difference between the notions of internal sovereignty and external sovereignty are explained in "The Various Levels of the Concept of Sovereignty" below at 47.

The Commission⁴² is the day-to-day administrator of the Community. It consists of seventeen members, chosen by Member States. In addition to being responsible for the administration of the European bureaucracy, the Commission is also responsible for proposing legislative initiatives to the Council for approval.

Once appointed, commissioners do not represent the interests of their Member States; they are supposed to act in the best interest of the Community as a whole.⁴³ This independence is so strong that on several occasions, decisions taken by the Commission or the initiatives of its commissioners have faced strong opposition from Member States and have been rejected by the Council.

The European Parliament is not a major legislative body of the Community. This is primarily the role of the Council and of the Commission. The Parliament exists to confer popular legitimacy⁴⁴ on

⁴². For details on the constitution and functioning of the Commission, see Articles 155 to 163, Treaty of Rome; Articles 8 to 19, Coal and Steel Treaty; and Articles 124 to 135, Euratom, and the Rules of the Commission: E.C., *Rules of Procedure of the Commission*, O.J. Legislation (1975) n° L17 at 81 (hereinafter *Rules of the Commission*).

⁴³. "... les membres de la Commission exercent leurs fonctions en pleine indépendance dans l'intérêt général des Communautés. Dans l'accomplissement de leurs devoirs, ils ne sollicitent, ni n'acceptent d'instruction d'aucun gouvernement, ni d'aucun organisme. Ils s'abstiennent de tout acte incompatible avec le caractère de leurs fonctions. Chaque État membre s'engage à respecter ce caractère et à ne pas chercher à influencer les membres de la Commission dans l'exercice de leur tâche." Boulouis, *supra* note 35 at 80.

⁴⁴. Its legitimacy is conferred through direct elections in each of the Member States, a procedure adopted on 20 September 1976. E.C., *Council Decision (E.E.C.) n° 76/87 of 20/09/76*, O.J. Legislation (1976) n° L278 at 1. In 1979 the first popularly elected members took their seats. Prior to that, members had been chosen from among the members of each Member State's legislative house.

the Community, and has the right to render opinions about proposed legislation. Originally created as a consultative body, Parliament responds to the Community's "democratic deficit",⁴⁵ having, in addition to its limited legislature role, only supervisory and advisory powers.⁴⁶

The legislative process of the Community is structured in such a way as to prevent objections about its legitimacy and application to Member States. It was designed to ensure participation of both the Executive branch of the Member States, and of citizens of all Member States directly elected, in order to prevent any objections to the application of Community law in the Member State. The local

⁴⁵. Y. Doutriaux, *Le Traité sur l'union européenne* (Armand Colin: Paris, 1992) at 20-22. The expression "democratic deficit" explains the fact that although called Parliament, the institution only plays a secondary role in the legislative process of the Community. Hence, commentators in several Member States have complained about a transfer of legislative powers from national directly elected legislatures to the appointed Commission and Council.

⁴⁶. "The European Parliament is required to supervise the activities of the Commission... [and] ... in many ... cases the Council is required to consult the Parliament before taking important decisions..." Kapteyn, *supra* note 9 at 140.

Parliament approves the Community budget, and also has three special powers: first, to approve minor amendments to the Coal and Steel Treaty - Article 95, Coal and Steel Treaty; second, to draw up proposals for the uniform electoral system for its own elections - Article 21(3), Coal and Steel Treaty, Article 138(3), Treaty of Rome, and Article 108(3), Euratom; and third, to refer matters to the Court of Justice if the Council or the Commission fails to act in violation of Article 175, Treaty of Rome, and Article 148, Euratom. But its most important prerogative is the possibility of dismissing the entire Commission. According to Article 144, Parliament may vote a "motion of censure" against the Commission and force all its commissioners to resign from their positions. This power, has, nevertheless, never been fully exercised. The procedure has been initiated one, but never to the point where Commissioners would have to resign. The Treaty of Maastricht amended the Treaty of Rome. Article 138b, 138c, 138e address these newly introduced changes.

Executive branch is represented on the Council, and directly elected representatives sit in the European Parliament.⁴⁷

Finally, the Community judicial system is charged with verifying if the actions of Member States conform with Community approved statutes.

The Court of Justice⁴⁸ is a key element for the achievement of the explicit as well as the unadvertised goals of the Community.⁴⁹ As the Community body currently responsible for ensuring the consistent interpretation and correct application of Community law among the Member States, it has changed its image from a passive institution to one of an active and progressive⁵⁰ constitutional court.⁵¹ Like

⁴⁷. See Appendix II below at 118.

⁴⁸. The Court consists of thirteen judges and six Advocates General contribute with their efforts: Article 165, Article 167, and Article 168a, of the Treaty of Rome.

Besides the European Court of Justice created by the Treaty of Rome, Article 168a provides for the creation of a second judicial body if circumstances require. This article was added to the Treaty by the Single European Act [*Single European Act*, 17/02/86, O.J. Legislation (1987) n° L169 at 1 [hereinafter S.E.A.]]. The Court of Justice, applying Article 168a, created the Court of First Instance [hereinafter C.F.I.] -- E.C., *Council Decision (EEC, ECSC, Euratom) n° 88/591 of 24/10/88*, O.J. Legislation (1988) n° L319 at 1. Nowadays, the C.F.I. hears disputes between the Community and its personnel (Article 179) and the procedures initiated by individuals against the Council or Commission according to Articles 173 and 175 of the Treaty of Rome. Its decisions are appealable to the Court of Justice.

⁴⁹. Political union is one of these unadvertised goals. See note 98 below at 35 for references to this hidden agenda of the Community.

⁵⁰. H.G. Schermers, *The Scales in Balance: National Constitutional Court v. Court of Justice*, (1990) 27 C.Mkt L.Rev. 97-105.

the European Parliament, the European Court of Justice was created to fulfil a role; the role of a judicial institution within the Community. Nevertheless, with its practical approach to the text of the treaties and secondary Community legislation, the Court's broad interpretation of Community powers is responsible for the increase of its jurisdiction. The Court is also responsible for the development of so-called principles of community law: jurisprudential constructions, which, even though not expressly written in the text of the treaties, bind Member States and influence the interaction between Member States and the legal framework of the Community in a way that "... its relation to the national judiciaries gradually developed into one of authority".⁵²

The Court of Justice fulfils two different, but not mutually exclusive roles: supervising national courts by means of ascertaining the correct application of Community law, and cooperating with them by answering questions submitted by national courts concerning Community law. In both instances, the Court interprets and applies both primary and secondary Community law.⁵³

⁵¹(...continued)

⁵¹. "... E.C.J. [has exercised the role of] ... a Constitutional court, in proceedings whose object or effect is to define the distribution of powers between the Community and the Member States ... and ... the uniform interpretation of Community law." The C.Mkt L.Rev. Editorial Board (H.G. Schermers *et al.*), "Editorial Comments - The Future Development of the Community's Judicial System" (1991) 28 C.Mkt L.Rev. 5-10 at 6. Emphasis added.

⁵². Schermers, *supra* note 50 at 101.

⁵³. This is the principle of unlimited jurisdiction of the Court of Justice when Community law is involved, and applies to Regulations, Directives, Decisions, and other Community acts, regardless whether they have direct effect or not, treaties concluded between the Community and international organizations or third States (the Court of Justice has no jurisdiction to rule on agreements signed between Member States and third parties in matters outside the scope of the Treaty of Rome: "... to give a ruling on the interpretation of provisions of international law which bind Member States (continued...)

The Legal Nature of the European Community

The debate concerning the legal nature of the Communities has been controversial because the existing methodological background is incomplete and insufficient for the proposed analysis. According to Constantinesco⁵⁴ there are several reasons for this insufficiency. First, because the creators of the Treaty of Rome (and later of the Merger Treaty,⁵⁵ the Single European Act and of the

⁵³(...continued)
outside the framework of Community law..." *Magdalena Vandeweghe et al. v. Berufsgenossenschaft für die Chemische Industrie* (N° 130/73), [1973] E.C.R. 1329 at 1333); acts that affect the relations between the Community and the international community. Even acts which have not yet been classified (therefore *sui generis*) but which generate legal effects, and the interpretation of unwritten legal principles of community law (the identification and definition of which is a duty of the Court of Justice) are within its jurisdiction. Kapteyn, *supra* note 9 at 312.

See *R. and V. Haefeman v. Belgium* (N° 181/73), [1974] E.C.R. 449 at 459-460 regarding the interpretation of acts of the Community with third parties. See *International Fruit Co. NV et al. v. Productschap voor Groenten en Fruit* (N° 21-24/72), [1972] E.C.R. 1219 at 1227-1228; *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) et al.* (N° 267-269/81), [1983] E.C.R. 801 at 861-862 regarding the acts that affect the relations of the Community with the international community. See *Internationale Handelsgesellschaft mbH. v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (N° 11/70), [1970] E.C.R. 1125; *Angelo Tomandini Snc. v. Amministrazione delle Finanze dello Stato* (N° 84/78), [1979] E.C.R. 1801 regarding the interpretation of unwritten principles of Community law.

⁵⁴. V. Constantinesco, *Compétences et pouvoirs dans les communautés européennes - contribution à l'étude de la nature juridique des communautés* (Paris: Librairie générale de droit et jurisprudence, 1974).

⁵⁵. *Treaty Establishing a Single Council and a Single Commission of the European Communities*, 08/04/65, O.J. Legislation (1967) n° L152 [hereinafter "Merger Treaty"].

Treaty of Maastricht) tried to ignore explicit references to preestablished schemes and categories.⁵⁶ Second, because the discussion of its nature has always resulted in a clash of opinions based on political interests.⁵⁷ Third, the premises and current concepts are incomplete and unable to define this new reality. Orthodox methodology lacks initiative to break with accepted canons of knowledge and therefore fails to extend the discussion beyond current definitions of domestic law or of international law.⁵⁸

The Community consists of sovereign Member States.⁵⁹ As sovereign States, having the power to

⁵⁶. "... écarter toute référence explicite à des schémas et des catégories préétablis..." Constantinesco, *supra* note 54 at 2.

⁵⁷. "Or, l'opinion pense mal, elle ne pense pas: ... [E]n désignant les objets par leur utilités, elle s'interdit de les connaître..." Constantinesco, *supra* note 54 at 2 and at 7-8, when commenting Bachelard, *La formation de l'esprit scientifique* (Paris, 1969) at 14.

⁵⁸. Constantinesco, *supra* note 54 at 9 *et seq.*

⁵⁹. Which still remain sovereign for the time being. According to Constantinesco,

"A lire les dispositions des Traités on s'aperçoit que les États membres ont entendu, d'une certaine façon, que les Communautés européennes se substituent à eux dans le domaine international pour ce que est la réalisation de certains de leurs buts. L'article 228 C.E.E. semble être ici la disposition de principe et écarter, pour tous les accords passés entre la C.E.E. et un ou plusieurs États, la présence des États membres en tant que tels: ils ne sont représentés qu'en tant qu'organe de la Communauté, au sein du Conseil. Il semble donc qu'il y ait un certain dessaisissement de la part des États au profit de la C.E.E. Cependant les difficultés posées par l'interprétation des articles 111 et 113 C.E.E. et surtout la pratique des institutions communautaires démontrent la fragilité de cette affirmation. En réalité les États participent bien à la conclusion des accords passés par la C.E.E., non (à suivre...)"

determine their own destinies up to and including self-destruction, the Member States have freely granted part of their sovereign prerogatives to the Community. As such, they have affected both their internal and external sovereignty.⁶⁰ The Community has acquired the power granted by the Member States, and consequently is more than an international organization, but is still less than a unified sovereign State.

There is no universally accepted label applicable to the Community. Expressions such as *sui generis*, supranational, or international organization, are often used to describe it, but these are only used for want of better classifications. Notwithstanding these various classifications, it is important to remember that the Community enjoys a great degree of originality and autonomy.⁶¹

⁵⁹(...suite)

seulement en tant que membres d'un organe de la Communauté, mais en tant qu'États. Témoin la pratique des « accords mixtes », conclus conjointement par la Communauté et les États membres. Ceci témoigne non seulement de l'incertitude qui règne en la matière, mais aussi du fait que les États membres n'ont en rien entendu disparaître face à la personnalité internationale des Communautés européennes." Constantinesco, *supra* note 54 at 44-45.

... by no means submerged the constitutional identity of the member states. And the assertion by inter governmental Council of Ministers of its central role in the Community decision making process suggests that this identity is likely to persist". G.L. Goodwin, "The Erosion of External Sovereignty?" in G. Ionescu, ed., *Between Sovereignty and Integration* (Toronto: John Wiley & Sons, 1974) 100-117 at 116.

⁶⁰. *NV Algemene Transport - en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie des Belastingen* (N° 26/62), [1963] E.C.R. 1 at 20; [1963] 1 C.M.L.R. 105 at 114.

⁶¹. Luxemburgensis, "The Emergence of a European Sovereignty" in G. Ionescu, ed., *Between Sovereignty and Integration* (Toronto: John Wiley & Sons, 1974) 118-134 at 118. "Dès leur apparition, les Communautés ont été considérées comme des institutions de caractère original..." L. Cartou, *Communautés européennes* (Paris: Dalloz, 1986) at 168-169.

The Federalist Elements of the Community

Several elements suggest the constitutional nature of the European Community.⁶² They are: the existence of a sociological variable, that is the development of a European mentality; the constitutional characteristic of the Treaty of Rome; the momentum in the evolution of the Community; its irreversible character; the legal personality of the Community; the exclusive competence of the Community in certain areas; the residual powers granted by Article 235; the existence of joint responsibilities shared between the Community and Member States; the existence of an organized body of European public servants; and finally, the financial independence of the Community.

The sociological aspect of the Community is the appearance and existence of *Homo Europaeus*⁶³ throughout the second half of the twentieth century. This implies the existence of a new type of

⁶². However, the federalist theory meets resistance from other writers who deny such characteristic to the Community. See Cansacchi, "Les éléments fédéraux de la C.E.E.", in *Mélanges en l'honneur de Gilbert Gidel* (Paris: Sirey, 1961); Rosentiel, "Le principe de supranationalité" (1962) *Journal of Common Market Studies* 121.

⁶³. F. Gross, "*Homo Europaeus* - Un loyalisme européen", (1952) 2 *Revue internationale d'histoire politique et constitutionnelle* 68.

citizen, adding a loyalism towards the European Community to the traditional patterns of patriotism.⁶⁴

Gross also foresaw:

"Cette révolution psychologique, tendant à transformer l'*Homo Nationalis* en *Homo Europaeus*, comporterait l'apparition de nouvelles formes de commandement et d'obéissance sur le plan politique. Des problèmes nouveaux se poseraient dans un cadre neuf, formé de territoires hétérogènes au point de vue économique, social et culturel. Les hommes d'État dont les responsabilités se limitaient aux intérêts plus étroits de la nation ne sauraient les résoudre... Strasbourg est devenu la nouvelle capitale européenne. L'assemblée que y siège, ... peut jouer un rôle important dans la formation de l'esprit politique européen." ⁶⁵

Second, there is a "momentum" to the evolution of the Community. Through the efforts of members of the Community bureaucratic machine and of officials from Member States, the Community today is quite different from the institution established in 1958. It would be quite hard to stop its development⁶⁶ except by drastic measures. Failures and delays are not met with pessimism, but rather with renewed effort towards the desired goal: there is always a new attempt to get around the

⁶⁴. "... l'existence d'un nouveau type de citoyen, joignant au patriotisme traditionnel un loyalisme nouveau envers la communauté européenne... Les citoyens de cette Union devraient penser en des termes nouveaux, manifester une compréhension plus large des problèmes de l'Europe. Une telle attitude ne peut être prise que par un Européen (...) différent..." Gross, *idem* at 68.

⁶⁵. Gross, *ibidem* at 69.

⁶⁶. "Comme le remarque Münch 'La fédération est en fait le produit final, le but de fédéralisme, mais elle n'est pas la seule manifestation de ce dernier'. La fédération (c'est-à-dire l'État fédéral) est un moment final, un aboutissement de tout un processus. A ne considérer que le résultat on finit par négliger tout un pan de cette évolution qui serait susceptible de présenter des traits non plus fédéraux, mais fédéralistes. Ainsi compris le fédéralisme serait une tendance dynamique qui menerait à une forme juridique déterminée: la Fédération". Constantinesco, *supra* note 54 at 28.

difficulties, by using a different method or strategy.⁶⁷ As Luxemburgensis notes, "... should crisis or tensions arise around existing Community policies, and should the Community be driven in on itself and fail to take the matter up again in the form of fresh actions and perspectives, then a decisive blow against [it] ... would have been stuck..."⁶⁸

Third, there is the irreversible character of the Community.⁶⁹ In contrast to the Coal and Steel Community, and Euratom, the European Community is not finite.⁷⁰ However, unless the Treaty of

⁶⁷. The Danish 'No' was a good example. After the results of the referendum in Denmark were announced, there was an increase in the amount of communication among Member States as negotiators tried to solve the difficulties raised by several Member States against Maastricht. Nevertheless, even if the Community always tries to minimize such difficulties there are limits to its patience. A few days before the summit in Edinburgh, the Danish foreign minister travelled to some of the Member States trying to reinforce a coalition headed by Denmark:

"... the summiteers confront a well organized Danish coalition which has far more leverage over the shape of the Maastricht treaty than they care to admit... ... On his travels he has met a wary response to Denmark's demands. These were 'not unproblematical', Klaus Kinkel, the German foreign minister said. In private Dr. Kinkel was more direct, telling his Danish counterpart that, if the Danes pushed too far, they would be kicked out of the EC." G. Brock, "Danes Top Hidden Agenda for EC's Toughest Summit", *The [London] Times* (25 November 1992) at 14.

⁶⁸. Luxemburgensis, *supra* note 61 at 120. Emphasis added.

⁶⁹. Article 240.

⁷⁰. Article 97 of the Coal and Steel Treaty provides: "This Treaty is concluded for a period of fifty years from its entry into force". Euratom, on the other hand, is concluded *sine die*. Even though the unlimited life-time for Euratom, this writer believes that the Treaty may not have a long future either. First, there has been a drastic change in the balance of power in the world, as a consequence of the end of the Cold War. Second, because of the increasing interest of the European Community on matters of energy and its conservation (for more details on the issue, refer to Kapteyn, (continued...))

Rome is denounced by one or all of the Member States it remains binding to its full extent over its signatories.

Fourth, the European Community, like the Coal and Steel Community and Euratom, is entitled to speak for itself and on behalf of Member States before international organizations and before other nations in situations related to the Treaty of Rome, the Euratom Treaty, and the Coal and Steel Treaty. The treaties have given their respective Communities legal personality vis-à-vis their signatories⁷¹ and vis-à-vis third parties, so that the Communities have the necessary status to achieve their goals. As Boulouis has commented, they are "... dotées d'une personnalité distincte de celle des États membres qui les constituent..."⁷² This concept has often been reinforced by the European Court of Justice.⁷³

Fifth, there is now a field of exclusive Community competence. The Treaty of Rome initially, and subsequently the Single European Act, listed a series of matters in which competence to legislate

⁷⁰(...continued)
supra note ?, 755-761) all energy-related matters might end up being transferred to the jurisdiction originally given to Euratom.

⁷¹. All three Communities have a legal personality according to their respective treaties (Article 6, Coal and Steel Treaty; Article 210, Treaty of Rome; Article 184, Euratom) and "In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws..." (Article 6(3), Coal and Steel Treaty; Article 211, Treaty of Rome; and Article 185, Euratom).

⁷². Boulouis, *supra* note 35 at 207.

⁷³. See, for example, *Commission v. Council* [E.R.T.A.] (N° 22/70), [1971] E.C.R. 263; [1971] 1 C.M.L.R. 335.

belongs to the Community. Even though such legislation becomes part of their legal framework, Member States no longer have the power to amend or to derogate from the text of their own volition.⁷⁴ Pescatore once said that after the creation of the Community a series of matters of public interest were transferred from a national perspective to a more comprehensive and enlarged area, an area of Community interest.⁷⁵ He also said that Member States went through a process after which they no longer had competence to take actions conflicting with the interests of the Communities.⁷⁶ He concluded by saying that the sovereign prerogatives of the Member States have been affected,⁷⁷ although he did not take any position with regard to the legal nature of the process.

Another powerful indicator of the constitutional nature of the Treaty of Rome are Articles 100, 100a, and 235. The powers granted in these Articles are the Community's residual powers. They make

⁷⁴. "In one sense..., the national governments are made weaker by their membership of the Community..." D. Coombes, "Concertation in the Nation-State and in the European Community" in G. Ionescu, ed., *Between Sovereignty and Integration* (Toronto: John Wiley & Sons, 1974) 86-99 at 99.

⁷⁵. The creation of the Community created a blocking effect vis-à-vis Member States: "... [Ils] on renoncé au droit de régler les problèmes en cause à la manière des États souverains, c'est-à-dire spontanément, unilatéralement et selon des vues de leur intérêt national..." Pescatore, *supra* note 36 at ix.

⁷⁶. Pescatore, *supra* note 36 at x.

⁷⁷. The idea that Member States are no longer sovereign to take unilateral decisions is also emphasized by the European Court of Justice in *Galli*: "... dans les domaines couverts par une organisation commune de marché, ... les États membres ne peuvent plus intervenir, par des dispositions nationales prises unilatéralement, dans le mécanisme ... tel qu'il résulte de l'organisation commune..." *Filippo Galli* (Demande de décision préjudicielle formée par le Pretore de Rome) (N° 31/74), [1975] E.C.R. 47.

it possible for the Community to bring under its jurisdiction even more fields than were originally planned if there is agreement of Council on behalf of Member States. According to the text of Article 235, "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously [emphasis added] on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".⁷⁸ The European Court of Justice has repeatedly upheld the Community's authority under these articles and the Court's decisions give the Community almost unlimited scope, since almost everything could be declared by the European Court of Justice to be comprised in the category of being a Community interest, or capable of affecting the establishment or functioning of the common market.⁷⁹ It should

⁷⁸. Article 100 reads as follows:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

Article 100a reads as follows:

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. [emphasis added]

⁷⁹. See, for example, *Commission v. Council*, *supra* note 73; *Commission v. Italy* (N° 38/69), [1970] 1 E.C.R. 47; [1970] 1 C.M.L.R. 77; *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH* (N° 8/73), [1973] 1 E.C.R. 897.

be remembered, though, that in order for Articles 100 and 235 to be invoked, a unanimous decision of the Council is required, except in case of Article 100a, assuring the agreement of all the Member States,⁸⁰ and then preserving a substantial degree of their sovereignty.⁸¹

Another aspect of the constitutional character of the Treaty of Rome is that "... side by side with these areas of exclusive responsibility, there are a growing number of areas of joint responsibilities, shared between the Community and the Member States. This is particularly noticeable in the realm of regional, social, and industrial policy".⁸² The European Parliament⁸³ declared that "... [w]here powers have not been exclusively or completely assigned to the Community, [a Member State] shall ... take action wherever the achievement of these objectives requires it because, by virtue of their magnitude or effects, they transcend the frontiers of the Member States or because they can be undertaken more effectively by the Community than by the Member States acting separately".

The existence of an organized body of administrative personnel at the Community level is another factor. The "Eurocrats" are the day-to-day working arms of the Community. Although numbering

⁸⁰. The Treaty of Maastricht does not change the requirement of unanimity in Article 235.

⁸¹. Even though Member States may be even more destituted of their sovereign prerogatives if the above mentioned articles are used, they have, at least, exercised their sovereignty in deciding (voting) at Council.

⁸². Luxemburgensis, *supra* note 61 at 121.

⁸³. On 21 November 1990.

only approximately 20,000,⁸⁴ after the implementation of the Treaty of Maastricht this number will likely grow as a result of the newly created institution(s)⁸⁵ and the expansion of existing ones.

The Community is also financially independent from its Member States.⁸⁶ Council Decision 85/257, currently establishes the parameters for the financial autonomy of the Community.⁸⁷ Its resources are classified into four categories: traditional resources, resources related to V.A.T. and G.N.P.,

⁸⁴. Currently, the bureaucratic machine of the Communities has approximately 20,000 servants. Compared to any large city in Europe, this number is way behind the real needs of a "unified" Europe.

⁸⁵. A European Central Bank is one of the new institutions.

⁸⁶. E.C., *Council Decision (E.E.C.) n° 70/243 of 21/04/70*, O.J. Legislation (1970) n° L94 at 19, which was later revised by E.C., *Council Regulation (E.E.C.) n° 1172/76 of 17/05/76*, O.J. Legislation (1976) n° L131 at 1.

⁸⁷. E.C., *Council Decision (E.E.C.) n° 85/257 of 07/05/85*, O.J. Legislation (1985) n° L128 at 15 amending Decision 70/243. According to this Decision Community revenues consist of "a) levies, premiums, additional or compensatory amounts, additional amounts or factors and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries within the framework of the common agricultural policy, and also contributions and other duties provided for within the framework of the common organization of the markets in sugar; b) common customs tariff duties and other duties established or to be established by the institutions of the communities in respect of trade with non-member countries", and revenue accruing, from the application of rates to the assessment basis for value added tax (V.A.T.) collected by Member States (which, however, must not exceed 1,4% of the total collected by them).

Nevertheless, the concept of the Communities being financially independent is not shared by all writers: D. Herperger, *Distribution of Powers and Functions in Federal Systems* (Ottawa: Minister of Supply and Services Canada, 1991) at 10; "... the Community will remain largely dependent for its finances on contributions from the member states (at present about 1 per cent of gross domestic product)." P.M. Leslie, *The European Community - A Political Model for Canada?* (Ottawa: Ministry of Supply and Services Canada, 1991) at viii.

miscellaneous, and credits from previous year. In contrast to the Community's early years, the required contribution from Member States is now only a small fraction of the total revenue of the Community. However, the bulk of the Community's revenue is received by local tax-collectors in the Member States on behalf of the Community.⁸⁸

The combination of these various elements could lead one to the conclusion that there is now a "federal" Europe. This is not totally accurate. It is more accurate to say that there is a quasi federation evolving in Europe, but from this stage to becoming a fully constituted federation would require deeper changes in the relation of powers of the Member States and of the Community than those currently taking place.⁸⁹ Right now, no State is ready to endorse this step, nor is the physical

⁸⁸. "Member States are responsible for all the work of taxation and recovery. The entitlements are established by the national departments, then recovered and, finally, made available to the Community. The Commission is therefore at the end of the line, at the final stage, where the funds are received..." E.C., *Court of Auditors of the European Communities, Annual Report to 1991*, O.J. Communication (1992) n° C330 I-298 at 23 § 1.4. See Appendix III below at 119, for details of the Community's finances. There, in three tables, the reader will notice that contributions from Member States do not represent more than thirteen percent (13%) of the total revenue of the Community. In Table #2, which refers to 1990 it only represents 0,2% of the total revenue.

⁸⁹. Constantinesco, *supra* note 54 at 26-30, discusses the notion of "fédéralisme fonctionnel". His arguments and conclusions about such notion match, in part, the idea of a quasi federalism:

"En effet il est possible que ce processus dynamique se concrétise par des institutions, par des règles juridiques, par autant de caractères qui présentent une nature fédérale même s'ils ne sont pas contenus dans un contexte totalement fédéral. Il y a alors selon Hay, fédéralisme fonctionnel..." at 29.

Another expression often discussed is "fédéralisme limité". It is an expression used by P. Hay, *Federalism and Supranational Organizations - Patterns for New Legal Structures* (Urbana: University of Illinois, 1966) at 89:

(continued...)

framework of the Community capable of handling such a sudden increase in jurisdiction. However the Community is more than a simple international organization because it imposes obligations upon the Member States comparable to the relationship between government and governed. If the Community had to be classified within existing categories, it would best fit in what is called "integrative federalism"⁹⁰ as opposed to "devolutionary federalism".⁹¹

Under traditional notions of federalism, a federal Europe could not be created by an international treaty. However, as Constantinesco points out there is no reason to distinguish between a

⁸⁹(...continued)

"... qui considère que les communautés européennes sont des fédérations limitées jusqu'à ce qu'elles détiennent des pouvoirs souverains (si l'on admet que l'existence des Communautés européennes implique un réajustement du concept de souveraineté). Selon Hay « cette classification est exacte et acceptable spécialement parce que la qualification (limités) enlève l'anomalie causée par l'existence de plusieurs fédérations 'totales' et englobantes »". Constantinesco, *supra* note 54 at 22.

"La Fédération (c'est-à-dire l'État Fédéral) est un moment final, un aboutissement de tout un processus. A ne considérer que le résultat on finit par négliger tout un pan de cette évolution qui serait susceptible de présenter des traits non plus fédéraux, mais fédéralistes". Constantinesco, *supra* note 54 at 28.

⁹⁰. "Integrative federalism refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The goal of establishing an effective central government with direct operation on the people inside its sphere of powers is pursued under respect of the powers of the component entities, at least to the extent that the use by the latter of these powers does not revert into divisiveness. If need be, the system is fully capable of acknowledging the existence of societal pluralism from one component entity to another". K. Lenaerts, "Constitutionalism and the Many Faces of Federalism" (1990) 38 American Journal of Comparative Law 205-263 at 206.

⁹¹. Lenaerts, *idem* at 206-207.

Constitution and a Treaty, provided they achieve the same result: the creation of a State.⁹² This indeed seems to be the goal of the changes approved, but not yet implemented, in the European Union Treaty. Constantinesco, however, warns of the limitations of domestic paradigms.⁹³ Therefore, the Treaty of Rome and other Community documents of significance could be considered to be a constitution in the sense that they organize public institutions⁹⁴ within the Community.

Along this line, one cannot ignore the existence and active role of the bodies in charge of exercising the sovereign prerogatives of the Community. The simple existence of the Commission, of the Council, of the European Court of Justice,⁹⁵ and of the European Parliament as institutions sharing the duties of 'government' would be enough to confer on the Community the attributes of a quasi-

⁹². "... le fait qu'un traité international soit à la base des Communautés européennes ne suffit pas pour leur dénier la qualité d'État fédéral. La doctrine est généralement d'accord pour reconnaître qu'un État (et pas seulement l'État fédéral) peut provenir d'un traité et qu'une constitution n'est pas nécessaire. ... [D]'un point de vue matériel, constitution et Traité international créant une organisation internationale peuvent être identiques (à condition toutefois que le Traité aboutisse à créer un État: or c'est précisément ce qu'il faut démontrer)". Constantinesco, *supra* note 54 at 15 in notes 27 and 29. Emphasis added.

⁹³. "... il ne faut pas pousser trop loin l'analogie avec le droit interne où on entend par constitution l'acte normatif issu de la volonté populaire et ratifié par elle". Constantinesco, *supra* note 54 at 15.

⁹⁴. "... dans le sens où il organise des pouvoirs publics..." Constantinesco, *supra* note 54 at 15.

⁹⁵. "La Cour de Justice des Communautés européennes, et nous l'avons déjà rappelé, constitue sans doute en effet l'organe qui rend le mieux compte d'une tendance institutionnelle vers l'État fédéral". Constantinesco (when discussing Pescatore), *supra* note 54 at 30.

federation. Furthermore, with the creation of a European Central Bank, and the implementation of a common currency system and a common monetary policy, the process of integration will be almost impossible to halt. With the passage of time, Community bodies have developed their own personality and acquired autonomy from the Member States that created them. The Court of Justice is often cited for its role in this regard.⁹⁶ More recently, the 1990 Inter-Governmental Conference on Political Union was presented with a report on the Judicial System of the Communities prepared by the Court of First Instance. One of the comments submitted was that "if the [Conference] culminates in inserting a special subsidiarity clause in the Treaty, and competence to interpret this clause is attributed to the E.C.J., that court will become a genuine *federal constitutional court*..."⁹⁷

The architects of the Community wanted to push Europe into a federal system long before actual talks about political integration started, but they also knew that it could not be accomplished in the late 1950s.⁹⁸ Today, after 35 years of existence of the Treaty of Rome, the Treaty of Maastricht offers

⁹⁶. "... et la Cour de Justice joue déjà, dans une très large mesure, le rôle d'une Cour constitutionnelle..." J. Mischo, "Un rôle nouveau pour la Cour de justice" (1990) 342 *Revue du marche commun* 681-686 at 681.

⁹⁷. The C.Mkt L.Rev. Editorial Board (H.G. Schermers *et al.*), *supra* note 51 at 9.

⁹⁸. "In general, [however], it may be said that while the Treaty creating the European Economic Community was basically similar in terms to the E.C.S.C. treaty, its provisions were drawn more widely, permitting the adequate flexibility which the much wider scope of this new undertaking required. Although the Treaty deals mainly with economic and social integration of its Members, the political objectives of such a union remained in the background." Reny, *supra* note 20 at 70.

"La création du Marché Commun ainsi réalisé était fondée sur des *grandes ambitions*. La première, la plus avouée, visait à la transformation des conditions économiques (à suivre...)"

the first real possibility of taking one more step towards a federalist Europe. What started as a customs union, became a common market, and will perhaps be followed by an economic and monetary union, common military defense strategies, common international representation, and perhaps political union.⁹⁹ It follows that with a closer union between Member States, there is the need for stronger Community institutions, especially a strong constitutional court to ensure a consistent application of Community law.

⁹⁸(...suite)

des échanges et par suite de la production, sur le territoire de la Communauté. Mails l'ambition politique du Traité n'était pas moins évidente. Certes, les déclarations officielles qui accompagnèrent la signature du Traité furent d'une grande prudence. Mais la C.E.E. ne se présentait pas moins, à la suite de la C.E.C.A., comme une contribution à la construction « fonctionnelle » de l'Europe politique, substituée à l'intégration politique directe..." Cartou, *supra* note 61 at 84.

"An examination of its recent history shows that there is a close relationship between the processes of economic and political integration: an integrated economy can *only* be built by creating a capacity for joint decision making. In other words, economic integration cannot proceed far unless member states share quite a broad range of powers by allocating decision-making authority to ... institutions in which they may be outvoted from time to time, or unless - as in a federal system - decision-making power in key economic areas is constitutionally vested in an order of government that encompasses the whole territory..." Leslie, *supra* note 87 at vii.

⁹⁹. "The *European Union Treaty* makes massive amendments to the Treaty of Rome. In addition, it is full of significant constitutional changes: creation of a common foreign policy system; judicial and police co-operation; the statutes of the European System of Central Banks and of the European Monetary Institute; control of state monetary deficits; special social policy system..." N.M. Hunnings, J.M. Hill, *The Treaty of Rome Consolidated and the Treaty of Maastricht* (The European Law Centre at Sweet & Maxwell, 1992).

For a discussion on the Constitutional nature of the Treaty of Rome, see "the Federalist elements of the Community", above at 24.

Regardless of the views one takes of the constitutional and legal nature of the Community, a full understanding of it requires an understanding of its relationship with the Member States. This requires a consideration of the standing of a State vis-à-vis other States and the international community as a whole: the creation of the State, its internal separation of powers and sovereignty. These concepts are discussed in detail in the next part.

Part II

Reflections About a Modern State

Reflections About the Constituent Elements of a State

The concept of State consists of certain basic elements: *people*, *territory*, and *political power*.¹⁰⁰ Its creation is a slow process, and not a sudden one. It is also a voluntary process resulting from the involuntary development of a social consciousness, "... of a long historical evolution".¹⁰¹

People is a group of considerable size, united by common roots such as their past, their wishes, beliefs, and the interests shared by all. The *territory* of a State is a share of the earth's physical surface where the *people* has settled and is under the control of a politically organized power.

¹⁰⁰. Carré de Malberg, *Contribution à la théorie générale de l'État*, t.1 (Paris: Recueil Sirey, 1920) at 2-6; L. Duguit, *Les transformations du droit public* (Paris: Librairie Armand Colin, 1925) at xii: "La nation souveraine et organisée en gouvernement, fixée sur un territoire déterminé, c'est l'État"; G. Burdeau, *Traité de science politique*, t.2 (Paris: Librairie générale de droit et de jurisprudence, 1949) at 68, uses a different nomenclature and approach (less juridical and more sociological). For instance, Burdeau's elements are: territory, nation ("...qui traduit la personnalité du groupe..."), obedience and authority ("...complexe réseau des rapports que s'établissent entre gouvernés et gouvernants et d'où se dégagent ces deux aspects de toute vie politique...").

¹⁰¹. H.E. Cohen, *Recent Theories of Sovereignty* (Chicago: The University of Chicago Libraries, 1937) at 7. It is a succession of facts and circumstances, a sociological fact. And until there is a framework of authority between leadership and the population, with a coercive factor, imposed upon the individuals who must then obey the established parameters of behaviour, there will always be a difference between Constitutional Law and Sociology. Cohen, *idem* at 7-8.

Finally, the *people* settled in a certain *territory* must be under the control of an organized *political force*. It is the *government* that imposes¹⁰² its will¹⁰³ over the *territory*¹⁰⁴ and over the *people* living there.¹⁰⁵ As in the law of physics where only one entity may occupy the same coordinates in space and time, there may be only one sovereign power affecting the *people*.¹⁰⁶

Thus, based on observation of actual situations a State can be defined as a community of individuals, settled in a territory and having an established organizational structure.¹⁰⁷

¹⁰². Therefore, the simple existence of government is not sufficient because "... *de facto* exercise of sovereignty exists only if popular obedience is achieved". Cohen, *idem* at 9.

¹⁰³. In German doctrine, Jellinek and Duguit named it '*Herrschergewalt*' which means an irresistible force, giving an unconditional command.

¹⁰⁴. To the point where its expansion is stopped by another power or national boundaries, thereby creating national borders.

¹⁰⁵. "La puissance, c'est le pouvoir de commander de telle sorte que l'on soit obéi. Ce n'est pas le droit ni la possibilité de commander, c'est simplement le phénomène qui exprime l'exécution de l'ordre donné". Burdeau, *supra* note 100 at 87.

¹⁰⁶. The exception to this rule occurs in special cases such as occupation during war times. "Treaty relations may [also] permit the intrusion of a foreign state". Cohen, *supra* note 101 at 30, but in this case there is no conflict between the intruding and the 'invaded' nations as there is agreement between the sovereign entities.

¹⁰⁷. "... en tenant compte de ces divers éléments fournis par l'observation des faits, on pourrait donc définir chacun des États *in concreto* une communauté d'hommes, fixée sur un territoire propre et possédant une organisation d'où résulte pour le groupe envisagé dans ses rapports avec ses membres une puissance supérieure d'action, de commandement et de coercition". Carré de Malberg, *supra* note 100 at 7.

(continued...)

Montesquieu and the Concept of Separation of Powers

The notion of separation of powers within a State dates at least as far back as Aristotle.¹⁰⁸ However, it was not until 1748 in *The Spirit of the Laws*¹⁰⁹ that Montesquieu¹¹⁰ successfully discussed in depth

¹⁰⁷(...continued)

All these three elements must be present at the same time for the creation of a State: "... cette opération ne se produit pas au hasard. Elle est déterminée par tout un ensemble de circonstances qui concurrent, à un moment donné, à la rendre inévitable". Burdeau, *supra* note 100 at 68, and in our legal culture, in the absence of any of these three elements, State will no longer exist.

¹⁰⁸. P.D. de Gusmão, *Introdução ao Estudo do Direito* (Rio de Janeiro: Forense, 1984) at 426; C. Eisenmann, "La pensée constitutionnelle de Montesquieu" in *Cahiers de philosophie politique* (Grèce: Centre de philosophie politique de l'Université de Reims, 1985) 35-66.

¹⁰⁹. Montesquieu, *The Spirit of the Laws* (A.M. Collier, B.C. Miller, H. Stone, transl.) (Cambridge, N.Y.: Cambridge University Press, 1990); Montesquieu, *L'Esprit des Loix* [sic] (Genève: Barrillot & Fils, 1749).

¹¹⁰. Although Montesquieu is popularly associated with the notion of separation of powers scholars agree that the origins of the theory can be also traced to his predecessors. Althusser, Eisenmann, Seignobos, Carré de Malberg, Troper, and Parodi agree that only part of what has been credited to Montesquieu is the result of his original thoughts. L. Althusser, *Montesquieu - La politique et l'histoire* (Paris: Presses universitaires de France, 1959); C. Eisenmann, "L'Esprit des lois et la séparation des pouvoirs" in *Cahiers de philosophie politique* (Grèce: Centre de philosophie politique de l'Université de Reims, 1985) 35-66; J.-L. Parodi, *La politique* (Paris: Hachette, 1972) at 454; M. Troper, "Montesquieu - l'Esprit des lois" in François Chatelet *et al.*, eds., *Dictionnaire des oeuvres politiques* (Paris: Presses universitaires de France, 1986) 570-582 at 580; Carré de Malberg, *Contribution à la théorie générale de l'État*, t.II (Paris: Sirey, 1962) 1-140. C. Seignobos, *Études de politique et d'histoire* (Paris: Les presses universitaires de France, 1934) 182-208.

(continued...)

the concept of separation of powers among three branches of government: executive, legislative and judicial.¹¹¹ His work developed ideas that are basic to the understanding of the structure of a today's

¹¹⁰(...continued)

A more detailed study of Montesquieu's theory would prove that it is a successful amalgam of previously existing and of his new ideas: "...on doit constater que Montesquieu n'est pas novateur en tout et qu'il l'est sur certaines points bien moins qu'on ne le cru". Troper, above at 574-575. "L'idée n'était pas entièrement neuve". Seignobos, above at 183. Aristotle already acknowledged among the acts of a state (city-state) categories such as 'deliberation', 'commanding', and 'justice'. "Aristote déjà, analysant la souveraineté, le décomposait en trois éléments: 'celui qui délibère, celui qui commande, celui qui juge'". Seignobos, above at 184. Nevertheless, in Aristotle's works there is not a theory being construed. His writings are a mere description of the facts. Besides, Aristotle never raised the concern of having one person exercising two or even all the above mentioned acts, and Locke: "... une théorie inspirée de Locke..." Parodi, above at 454; "... la théorie (...) a été formulée par de nombreux auteurs (...) tels John Locke, et surtout Montesquieu". Miller, above at 706. Emphasis added. Seignobos, above at 183, also mentioned similar concepts. There has also mention to Rousseau. L.-S. Mercier, *De J.-J. Rousseau considéré comme l'un des premiers auteurs de la Révolution* (Paris, 1791) at 48; Swift, and Bolingbroke: "... Swift et Bolingbroke avaient exposé la théorie de la 'balance de pouvoirs' entre le Roi, les Nobles et le Communes..." Seignobos, above at 183.

Montesquieu was the first philosopher to propose a solid and comprehensive theory, developing it in totality beginning by discussing England and ending up "... en un système plus large et plus efficace de pouvoirs compensateurs (pour finalement donner la fameuse séparation des pouvoirs)". D. Miller, *Dictionnaire de la pensée politique - hommes et idées* (Paris: Hâtier, 1989) at 574-575.

¹¹¹. Legal and political doctrine abound with references to Montesquieu and his theory. For a discussion of the different practical results of the various interpretations of Montesquieu's theory, see: S. Cotta, "Montesquieu, la séparation des pouvoirs et la Constitution fédérale des États-unis" (1951) 1 *Revue internationale d'histoire politique et constitutionnelle* 222-247; Sir Harry Gibbs, "The Separation of Powers - A Comparison" (1987) 17 *Federal Law Review* 151-161; B. Neuhorne, "Judicial Review and Separation of Powers in France and the Unites States" (1982) 57 *New York University Law Review* 363-442; T.S. Renoux, "L'apport du Conseil constitutionnel à l'application de la théorie de la séparation des pouvoirs en France" in *Chronique, 25^e cahier* (Paris: Dalloz Sirey, 1991) 169-174; B. Mirkine-Guetzevitch, "De la séparation des pouvoirs" in *La pensée politique et constitutionnelle de Montesquieu - bicentenaire de l'Esprit des lois* (Paris: Recueil Sirey, 1948) 161-181.

State.¹¹² The spirit of the time¹¹³ favoured Montesquieu's use of an empirical method,¹¹⁴ starting from the observation of facts and arriving at the construction of general and abstract principles to explain them and consequently all similar occurrences of the same event.

¹¹². "... il a établi les principes de la nouvelle science". E. Durkheim, "Dans quelle mesure Montesquieu a-t-il contribué à constituer la science des sociétés" (1937) *Revue d'histoire politique et constitutionnelle* 407-463 at 407; "... avoir voulu penser la totalité politique de l'État et non seulement la réalité historique des États existants". M. Le Dantec, "De l'Esprit des lois au droit constitutionnel moderne" in *Montesquieu, de l'Esprit des lois - la nature et la loi* (Paris: Marketing, 1987) 195-203.

¹¹³. Seignobos, *supra* note 110 at 189;

"And this idea did not come to him altogether by chance. We must imagine the double revolution that shook the world at the turn of the [fifteenth] and [sixteenth] centuries. A revolution in its space. A revolution in its structure. ...[O]ther events, too, were shaking the foundations of these convictions. Civil wars, the religious revolution of the Reformation, wars of religion, the transformation of the traditional structure of the State, the rise of the commoners, the humbling of the great". L. Althusser, *Montesquieu, Rousseau, Marx - Politics and History* (London: Verso, 1972) at 18; Mirkine-Guetzevitch, *supra* note 111.

Although the chapter in *The Spirit of the Laws* that presented the theory was entitled 'Of the Constitution in England', the title is not totally justified by its contents, first because there is no written constitution in England. See P.S. James, *Introduction to English Law* (Butterworths, 1989) at 117-118; Second because the picture Montesquieu presented to the reader did not correspond to the reality in England at the time, and thirdly because it is untrue to imagine that the existing English institutions were placed at the same level of hierarchy. In reality, until the 1970's, Parliament enjoyed a superior status in the United Kingdom often expressed as: "Parliament is supreme". After 1972 that supremacy was affected by the accession of the U.K. to the Community. See Royal Commission on the Constitution (1969-1973), Report (London: Her Majesty Stationery Office, 1973), v. 1 and particularly Royal Commission on the Constitution (1969-1973), Memorandum of Dissent (London: Her Majesty Stationery Office, 1973), v. 2.

¹¹⁴. "... raisonne sur des essences et procède par déduction". Troper, *supra* note 110 at 573; "... on doit constater que sa méthode est plus proche du rationalisme cartésien..." *Idem* at 575.

A View of Montesquieu's Theory

Montesquieu's theory of separation of powers¹¹⁵ is divided into two very different principles, one of which precedes the other.¹¹⁶ The first is an organizational one and the second is the functional one.

¹¹⁵. Any reader of Montesquieu's theory must be aware of two important details. First, his theory is applied differently in every State that claims to base its functioning in Montesquieu's separation of powers (the best extremes are France and the United States. Both claim to adopt a system of separation of powers even though in practice the two governments function in very different manners).

Second, the interpretation of his ideas varies drastically from place to place: "... reality does not justify these romantic views: it is not true that the contents of Chapter VI have been always understood the same way, invariable and accepted by all..." Eisenmann, *supra* note 110 at 36. Nevertheless, two major approaches are identifiable. "(...) [A]u cours du temps [il y a eu] deux interprétations différentes, et même opposées, entre lesquelles des esprits semblablement éminents et autorisés se partagent". Eisenmann, *supra* note 108 at 36. These two approaches to the Theory are not mutually exclusive, as usually happens with the interpretation of legal theories. The "political" interpretation, or interpretation of the nineteenth century, appeared right after the publication of the book in 1748 and predominated until our century. It is called the political interpretation because its followers were either politicians or political writers (or both) as opposed to the interpretation of the twentieth century - the "separatist" interpretation. The latter interpretation, defended mainly by scholars with legal background has also been called the "judicial" interpretation. Their conflict rests in the rigidity of their application. Troper, *supra* note 110 at 578; Eisenmann, *supra* note 108 at 37. The confusion about the real meaning of Book XI, Chapter VI and about the real interpretation of *The Spirit of the Laws* is partially Montesquieu's own fault. In his preface, he made it clear that a casual reader would not understand his work. Understanding and acknowledging his plan of work were essential to comprehend his conclusions. Voltaire searched for this plan in vain. The latter found it so confusing that in his critiques of *Spirit of Laws* he complained of not being able to find neither 'order', nor 'plan', nor 'coherence'. He soon was joined by others. Miller, *supra* note 110 at 539-540.

¹¹⁶. "... primordiaux, irréductibles, très différents, dont l'un intervient après l'autre..." Eisenmann, *supra* note 108 at 51.

The organizational element states that one person or body within a State should not exercise more than one function¹¹⁷. According to the first principle, one must avoid a situation in which more than one of the powers, or all of them, are held by the same organ, body, branch, or institution of the State: Everything will be lost if the same person, or the same body, exercise these three powers.¹¹⁸ The aim is to prevent any accumulation of power. This is the 'organic element' of the Theory: one must avoid the concentration of all, or two of the functions of government in one branch.

The second principle, entitled 'functional separation' requires that the sovereignty of a State be divided into three bodies. The functional element states that the powers of the State are divided into three functions: the executive, the legislative and the judicial.¹¹⁹

¹¹⁷. "un même organe, individu ou collège, ne doit pas cumuler l'exercice de deux fonctions juridiques de l'État". Troper, *supra* note 110 at 580.

"Il ne faut pas que le pouvoir de légiférer ou législatif, le pouvoir d'exécuter les lois ou exécutif, le pouvoir de juger, ou en termes de droit public moderne, juridictionnel soient confiés tous trois, ni deux d'entre eux, à un même organe". Eisenmann, *supra* note 108 at 51.

¹¹⁸. "... [T]out sera perdu si le même homme, ou le même corps des principaux ou des nobles, ou du peuple, exerçaient ces trois pouvoirs..." Montesquieu, *supra* note 109 at Chapter VI, Book XI.

¹¹⁹. Even though he identified three, Montesquieu only discussed the legislative and the executive branches in depth. All three are equally important to the proper functioning of a State. The difference arises from Montesquieu's approach in describing them because, according to him, the judiciary does not participate in the intricate game of politics. Judges are to restrain themselves from participating in any activities which could compromise their impartiality. According to Montesquieu (in the words of Eisenmann):

(continued...)

The Sovereignty of a State

Defining sovereignty is not an easy task.¹²⁰ The concept is frequently used, often with different, although not always contradictory, meanings.¹²¹

¹¹⁹(...continued)

"... seuls les Chambres et le Gouvernement sont des organes politiques; à eux seuls ils destinent, ils assignent un rôle proprement politique. Les juges, les tribunaux, ceux qui exercent le pouvoir de juger, au contraire, ne sont pas à ses yeux des forces politiques; la justice n'est pas un pouvoir au sens politique". Eisenmann, *supra* note 108 at 55.

¹²⁰. "Nul concept n'a soulevé plus de conflits idéologiques et n'a plongé les juristes et les théoriciens politiques (...) dans une perplexité plus profonde que le concept de Souveraineté". J. Maritain, "Le concept de souveraineté" (1951) 1 *Revue internationale d'histoire politique et constitutionnelle* 8-22 at 8.

¹²¹. "... [sovereignty] has been of more value for purposes of oratory and persuasion than of science and law... Like liberty, democracy, nationality, and most political terms, sovereignty has continually changed its meaning with changes in the typical political structure and the outstanding political problem of the day in the political objective of the particular writer". Q. Wright, *Mandates Under the League of Nations* (New York: Greenwood Press, 1968) at 277-278;

"Aucune notion correspondante n'avait été utilisée au Moyen Age en relation avec l'autorité politique. Saint Thomas a traité du Prince, non du Souverain. Aux temps féodaux, le roi n'était que le Suzerain de Suzerains, dont chacun possédait ses droits propres et ses pouvoirs propres. C'est depuis le temps de Jean Bodin qu'elle s'est imposée aux juristes de l'âge baroque". Maritain, *supra* note 120 at 13.

K.C. Cole, "The Theory of the State as a Sovereign Juristic Person" in W.J. Stankiewicz, ed., *In Defense of Sovereignty* (New York: Oxford University Press, 1969) 86-103 at 86.

Sovereignty is the expression of the personality of the State. Under this view sovereignty is found in "... the whole State instead of in a single organ of government, [and it is reinforced] by construing the State as an abstract impersonal entity entirely distinct from any ... individuals who might from time to time act for it".¹²² It follows that a sovereign entity does not depend on any of its citizens and since the sovereign entity is the personification of the legal order, the will of the entity prevails over the will of any of its citizens.¹²³

Even though the notion of sovereignty distinguishes between a State and its citizens, a State's powers can only be exercised through its citizens.¹²⁴ When combined with the notion of the separation of power, although the State possesses "... unlimited, supreme, coercive power which has a will..."¹²⁵, no single branch is supreme.¹²⁶

¹²². Cole, *supra* note 121 at 95. Emphasis added. Also Cohen, *supra* note 101 at 15; Duguit, *supra* note 100 at xii.

¹²³. "... elle a une volonté qui est naturellement supérieure aux volontés individuelles, puisque la collectivité est supérieure à l'individu". Duguit, *supra* note 100 at xii.

¹²⁴. "The state, in short, is a purely juristic person capable of acting only through agents or representatives". Cole, *supra* note 121 at 95. In the same sense, Duguit, *supra* note 100 at 73, who recognizes law as being the manifestation of sovereignty.

¹²⁵. W.J. Stankiewicz, "In Defense of Sovereignty: A Critique and an Interpretation" in W.J. Stankiewicz, ed., *In Defense of Sovereignty* (New York: Oxford University Press, 1969) 3-38 at 3-4.

¹²⁶. See H.J. Laski, *Studies in the Problem of Sovereignty* (New York: Howard Fertig, 1968) at 267 commenting on the American structure: "... certainly the President is not absolute. Neither to Congress nor to the Supreme Court is unlimited power decreed..."

The Various Levels of the Concept of Sovereignty

Sovereignty is usually understood as the right of the State: "... to command all the citizens ..., or even all who reside on the national territory..." ¹²⁷ "... [It] is seen as the articulation of the relations of power-obedience, protection-allegiance, between the 'strong central power' and its subjects through the mechanisms of representation, accountability, and coercion." ¹²⁸

This aspect of sovereignty is purely internal to the State. There is also, however, an external aspect of sovereignty.¹²⁹ From the external point of view, sovereignty places all recognized independent States on the same level. In theory, all sovereign States are equal entities according to international law:

"The status of sovereignty implies recognition by other members of society that the sovereign State is not subordinate to any other State, and that in diplomatic and legal convention it should be accorded equality of treatment with other sovereign States, irrespective of its power".¹³⁰

¹²⁷. Cohen, *supra* note 101 at 15.

¹²⁸. G. Ionescu, "Introduction" in G. Ionescu, ed., *Between Sovereignty and Integration* (Toronto: John Wiley & Sons, 1974) 7-24 at 9.

¹²⁹. Wright, *supra* note 121 at 284.

¹³⁰. Goodwin, *supra* note 59 at 101.

External sovereignty also is the right to represent the State and bind it in its relations with other nations.¹³¹

Except when dealing with specific situations involving different sovereign States, the concept of external sovereignty is seldom considered. Wright's analysis of the issue of sovereignty is more comprehensive than most. It pays attention to both concepts of sovereignty. As a dualist, Wright understands sovereignty as a dual-faceted concept with both internal and external attributes:

"... the best method for determining the sovereignty of a thing under international law is to discover the person or group with ultimate powers to change its status, responsible to other sovereigns with respect to it, and competent in fact to change the fundamental municipal law governing it."¹³²

How Montesquieu's Concepts Interact with the Idea of Sovereignty

Montesquieu's theory of separation of powers addresses the internal exercise of sovereignty. Under his conception the sovereignty of the State is fragmented among the various branches of government, although the boundaries are not always easy to identify because they are fluid. In theory, it is easily

¹³¹. "Thus from the standpoint of international law, every entity has some sovereignty if it has capacity to establish legal relations with other sovereigns, and full sovereignty if it has capacity to establish normal relations with all other full sovereigns". Wright, *supra* note 121 at 283. Cohen, *supra* note 101 at 15.

¹³². Wright, *supra* note 121 at 295.

possible to differentiate their functions: *de jure*, the distinction between them is clear; *de facto*, they blend with each other. It becomes hard to identify what is what, by the very simple fact that they are all part of a unity.¹³³

In this day and age, the average citizen probably sees the Executive branch as the embodiment of the State. It is fairly accurate to conclude that the Prime Minister or the President seem to be more active than the members of the other branches. The Legislative and Judicial branches operate within relatively defined parameters. The Executive branch, on the other hand, while exercising authority in those areas not allocated to the other two, ends up with more responsibility than the remaining two branches: if it is not a matter of interpreting the law or of making it through the required legislative process, it is under the umbrella of the Executive branch.

While this may be convenient for some, it is not possible to ignore the fact that the other branches can, and do, exercise authority in their spheres and the legal personality of the State must not be identified only with the Executive branch.

For the purpose of this work, the effects of the acts of any individual exercising a judicial function are also expressions of the sovereign State. After all, the power to interpret the law and to render decisions enforceable by the use of 'state' coercion, if necessary, belongs only to the State. Thus,

¹³³. This difficulty in seeing a sovereign State as a whole has historical roots. "Rousseau's concept ... considered sovereignty as the legislative function alone. Sovereignty was law making, the expressing will. The modern concept, however, conserves the executive function as also a manifestation of sovereignty. Both legislation and execution are its attributes". Cohen, *supra* note 101 at 11.

the internal fragmentation of power among the three branches of government does not affect the indivisibility of a State's sovereignty vis-à-vis its citizens or other States.

The Member State as a Single Entity in the View of the European Court of Justice

When ruling in a matter that involves a Member State, the European Court of Justice deals with representatives of the Executive branch of that Member State. However, even though constitutionally independent from each other from the standpoint of internal sovereignty, the branches of a Member State government are in fact a single entity with regard to external sovereignty. This is particularly important as it constitutes the basis for the Court's ruling that the Member State as a whole is responsible for the acts of any one of its branches, and that the argument of internal constitutional autonomy does not prevent the Court from finding a Member State to be in breach of the treaty. Even if executed under strict internal constitutional separation of powers vis-à-vis the other branches, the acts of these branches can be regarded as acts of the Member State by the international community. Whatever is done by these branches is considered to have been done by the State, for each is part of the single entity. Therefore, from both the international and domestic perspectives, if the Executive branch does something, or if the Legislative branch does it, or if the Judiciary does it, the act is an act of that particular State.

There is no doubt that to the European Community a Member State is one single entity. Regardless how sovereignty is divided among the branches of government, the Member State is accountable for each one of these branches' acts if they generate effects outside the national borders.

Many arguments have been advanced to excuse a Member State from living up to its responsibilities under the Treaty of Rome and to the European Court of Justice. The Court has considered several

possible explanations raised by defaulting Member States; these arguments can be placed into three different categories.

The first category consists of: constitutional independence of the branches of government; force majeure; constitutionally guaranteed dissolution of parliament; Cabinet crisis; delays in the legislative process; etc. The second group is a corollary of the traditional theory of reciprocity in international law. The third and final group of arguments relate to the consequences of the default.

The Court has rejected all of these arguments: it refused to apply the theory of reciprocity in matter involving Community law, even though it is perfectly applicable in 'traditional' international law.¹³⁴ The Court also refused to accept that the breach of the Treaty by a Member State would not bring any harmful consequences to the functioning of the Common Market.¹³⁵

As these arguments are not relevant to the characterization of the Member State as a single entity in international law matters, and therefore in Community matters, only cases dealing with the first group of arguments are discussed in this paper. It will be seen that, in rejecting this group of arguments the Court respected the traditional model of the concept of external sovereignty where a State is a single entity for international law purposes.

¹³⁴. *Commission v. Belgium & Luxembourg* (N° 90-91/63), [1964] E.C.R. 1217; *Commission v. France* (N° 232/78), [1979] E.C.R. 2729.

¹³⁵. *Commission v. The Netherlands* (N° 95/77), [1978] E.C.R. 863; *Commission v. Belgium* (N° 102/79), [1980] E.C.R. 1473.

The first decision which considered the constitutional independence of Member State's institutions vis-à-vis the Community dates from 1968. In *Commission v. Italy* (Case 7/68),¹³⁶ although the question was not the main issue between the Commission and Italy, the Court ruled that despite the fact that a Bill designed to change the disparity between Italian legislation and Community law had died with the dissolution of the Italian Parliament,¹³⁷ Italy, as a single entity, had not fulfilled its obligations under the Treaty of Rome and internal legislative difficulties were no excuse for the breach of its obligation.

Soon after, in *Commission v. Belgium*,¹³⁸ the Belgian government was found to be in breach of Article 95(1) of the Treaty. In that case, the Commission noted that Belgium was imposing a higher tax on timber originating in other Member States than on timber originating in Belgium, in violation

¹³⁶. *Commission v. Italy* (N° 7/68), [1968] E.C.R. 618-629; *Commission v. Italy, Opinion of the Advocate General* (N° 7/68), [1968] E.C.R. 630.

¹³⁷. On 11 March 1968.

¹³⁸. *Commission v. Belgium* (N° 77/69), [1970] E.C.R. 237; *Commission v. Belgium, Opinion of the Advocate General* (N° 77/69), [1970] E.C.R. 245.

"Sommaire:

2. États membres - Obligations - Manquement - Responsabilité - Étendue - Institutions Constitutionnellement indépendantes.

...

2. La responsabilité d'un État membre au regard de l'article 169 est engagée, quel que soit l'organe de l'État dont l'action ou l'inaction est à l'origine du manquement, même s'il s'agit d'une institution constitutionnellement indépendante".

of the Treaty.¹³⁹ A long exchange of letters between the Commission and the representatives of the government of Belgium then took place. Finally, the Commission issued¹⁴⁰ a "reasoned opinion" ¹⁴¹ and referred the matter to the European Court of Justice in December 1969.

In its defense, Belgium pointed out to the Court that in order to rectify the situation it had submitted a Bill proposing amendments to the existing statute to the *Chambre de représentants*. That Bill was clearly designed to harmonise the domestic legal framework with Article 95 of the Treaty.¹⁴² Further in its submissions, Belgium pointed out that it had reminded the President of the Financial Commission of the *Chambre des représentants*, on two occasions, of its interest in the approval of the Bill. With the dissolution of the Belgian Parliament (causing the Bill to die before it was voted),

¹³⁹. "... que l'application de l'article 31-14 du règlement général sur les taxes assimilées au timbre avait pour effet, dans de nombreux cas, de frapper les produits importés des autres États membres en Belgique d'une taxe plus élevée que celle que supportent les produits indigènes similaires..." *Commission v. Belgium*, *supra* note 138 at 239.

The Belgian Executive branch incorrectly applied Article 31-14(3) of "Arrêté royal du 3 mars 1927, modifié par arrêté royal du 27 décembre 1965". By doing so, Belgium taxed imported timber at a higher level than similar domestic products.

¹⁴⁰. On 28 November 1968.

¹⁴¹. The issuing of a "reasoned opinion" is one of the steps the Commission is required to take in order to begin the procedure described in Article 169. More details regarding this procedure can be found in the discussion of Article 169 below at 80 *et seq.*

¹⁴². "... pour remédier à cet état de choses (...) [le gouvernement belge] a, le 27 juin 1967, déposé à la chambre de représentants un projet de loi modifiant le code des droits d'enregistrement, l'hypothèque et de greffe. Son exposé des motifs indiquerait clairement que ce projet a pour objet d'assurer, dans le secteur du bois, le respect de l'article 95 du traité C.E.E." *Commission v. Belgium*, *supra* note 138 at 241.

the Belgian government claimed to have no other alternatives because of the constitutional independence of the Legislative branch.¹⁴³

In its decision, the Court of Justice refused the force majeure theory, stating that:

"... [Translation] the obligations arising from Article 95 of the Treaty devolve upon States as such and the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution;

The objection raised by the defendant cannot therefore be sustained;

In these circumstances, by applying a duty at the same rate, as laid down by Article 31-14 of the Royal Decree of 3 March 1927 as amended, to home-grown wood calculated on its value at the time of the declaration of entry for home use, the Kingdom of Belgium has failed to fulfil its obligations under Article 95 of the Treaty".¹⁴⁴

¹⁴³. "... à deux reprises, rappelé au président de la Commission des finances de la Chambre des Représentants l'intérêt qu'il attache à ce que le projet de loi (rélevé de caducité en 1968) puisse aboutir dans les meilleurs délais. En vertu du principe de la séparation des pouvoirs, le gouvernement Belge ne disposerait pas d'un autre moyen d'action; il se trouverait dans un cas de force majeure". *Commission v. Belgium*, *supra* note 138 at 241.

¹⁴⁴. "... les obligations découlant de l'article 95 du traité incombent aux États en tant que tels et que la responsabilité d'un État membre au regard de l'article 169 est engagée, quel que soit l'organe de l'État dont l'action ou l'inaction est à l'origine du manquement, même s'il s'agit d'une institution constitutionnellement indépendante;

que l'exception soulevée par la partie défenderesse ne saurait donc être retenue;

que, dans ces conditions, (...) le Royaume de Belgique a manqué aux obligations qui lui incombent en vertu de l'article 95 du traité." *Commission v. Belgium*, *supra* note 138 at paragraphs 15-17. Emphasis added. Translation from van Empel, *supra* note 28 at 139.

In *Commission v. Italy* (Case 8/70)¹⁴⁵ the idea of Member State being a single entity regardless of its internal separation of powers was reinforced. Italy was found to be in breach of the Treaty of Rome due to a lack of action by its Parliament. By law,¹⁴⁶ Italy created an administrative service tax of 0.5%, calculated *ad valorem*, applicable to imported goods. The Commission, believing that such a tax had the same effects as an import tax (which should not apply to goods originating from other Member States) started two parallel but separate proceedings under Article 169.¹⁴⁷

The Italian government responded that it was doing everything possible to eliminate this surtax by 1 July 1968 and that it had asked Parliament to approve a new law. One year later,¹⁴⁸ the Italian Government informed the Commission that the difficulties created by Law n° 330 would soon end, as the Italian Council of Ministers had approved a Bill and sent it to Parliament for approval. By April 1970, the Bill had been approved by the Senate, but not by the Chamber of Deputies. The matter was then submitted to the Court of Justice by the Commission. In its defense, the Italian representative insisted that because of a ministerial crisis, the law could not be passed.¹⁴⁹ The

¹⁴⁵. *Commission v. Italy* (N° 8/70), [1970] E.C.R. 961; *Commission v. Italy, Opinion of the Advocate General* (N° 8/70), [1970] E.C.R. 969.

¹⁴⁶. Law n° 330, of 15 June 1910 (O.J.I.R. n° 137 of 17 June 1950).

¹⁴⁷. On 28 December 1967.

¹⁴⁸. On 25 June 1969, by letter n° 3489.

¹⁴⁹. "... le gouvernement a fait tout ce qui était en ses moyens, dans le cadre constitutionnel de l'État, pour supprimer la discrimination litigieuse: un projet de loi a été déposé au Sénat, celui-ci l'a entre temps approuvé et le projet a été transmis à la Chambre des députés. Si l'examen du projet par la chambre des députés a connu
(à suivre...)

European Court of Justice ignored these remarks and held that Italy was not fulfilling its obligations under the Treaty of Rome. In the judgement, the Court stated that a Member State has responsibilities under Article 169 regardless which institution of the Member State is responsible for the action or omission that is the cause of the problem, even if constitutionally independent.¹⁴⁹

The latest ruling of the European Court of Justice declaring an act of an institution other than the Executive branch of a Member State to be in violation of the Treaty is *Commission v. France*.¹⁵¹ Under French legislation,¹⁵² the French government had authority to unilaterally determine retail prices of manufactured tobacco in France. A series of executive acts established the retail prices for several brands on the market. The Commission informally advised the Republic of France that the consequences of its acts could cause it to be in violation of the Treaty. In the Commission's opinion, under the principle of free circulation of goods, the producer of a good has the right to determine the retail price in all Member States. The usual exchange of correspondence between the Commission

¹⁴⁹(...suite)

un temps d'arrêt, ce serait en raison d'une crise ministérielle et de la suspension des travaux parlementaires pendant la période d'été. Il s'agirait donc d'un cas de force majeure inévitable lié au système constitutionnel parlementaire de l'État membre et que empêcherait que l'on puisse affirmer que l'État membre a violé le traité." *Commission v. Italy*, *supra* note 145 at 965.

¹⁵⁰. "La responsabilité d'un État membre au regard de l'article 169 est engagée, quel que soit l'organe de l'État dont l'action ou l'inaction est à l'origine du manquement, même s'il s'agit d'une institution constitutionnellement indépendante." *Commission v. Italy*, *supra* note 145 at 961. Emphasis added.

¹⁵¹. *Commission v. France* (N° 90/82), [1983] E.C.R. 2011-2033; *Commission v. France, Opinion of the Advocate General* (N° 90/82), [1983] E.C.R. 2033-2039.

¹⁵². Law n° 76-448, of 24 May 1976 (J.O.R.F. at 3083).

and the French government took place. The Commission affirmed that France was in breach of the Treaty of Rome for limiting the free circulation of goods in French territory. France denied being in breach of any Community statute. The Commission then issued a reasoned opinion¹⁵³ and initiated proceedings before the European Court of Justice.¹⁵⁴

The Court decided that the French legislation granting the government authority to establish the retail prices for imported tobacco goods prevented the free circulation of goods within the Community.¹⁵⁵ Based on that, the French Republic was found to be in breach of the Treaty of Rome and was ordered to take the appropriate measures to correct the effects of Law n° 76-448.

As can be seen from the cases discussed above, the European Court of Justice, notwithstanding traditional notions of separation of powers and their relationship to internal sovereignty, has chosen to approach the question of a Member State's sovereignty from the external perspective. Consequently, it has consistently held that the expression "Member State" as used in the Treaty of Rome included all the existing branches of government of a Member State, regardless of their autonomy vis-à-vis each other, according to domestic law.

¹⁵³. On 31 October 1980.

¹⁵⁴. On 14 January 1981.

¹⁵⁵. "... la disposition législative française, pour autant qu'elle réserve au gouvernement le pouvoir de fixer d'autorité le prix des tabacs importés, par modification dans certains cas des prix déterminés par les fabricants ou importateurs, (...) empêche la libre circulation de ces produits dans la Communauté". *Commission v. France*, *supra* note 151 at 2026, § 9.

After determining the position of the Court of Justice with regard to separation of powers, the next part will discuss how Member States find themselves interacting with the European Court of Justice. Member States can find themselves before the Court under two defined sets of circumstances. In one, the Commission brings the Member State before the Court for failing to live up to its obligations under the Treaty.¹⁵⁶ The second occasion occurs when the courts of a Member State seek an interpretation of Community law from the European Court of Justice. These two scenarios are considered in detail below.

¹⁵⁶. These obligations are discussed below at 72.

Part III**A Unique Judicial System - The Cooperation Between Two Legal Systems**

The first way in which Member State courts find themselves before the European Court of Justice is through a request from their courts for a preliminary ruling from the Court on a point of Community law, under Article 177.

Article 177 of the Treaty of Rome reads as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of this treaty;
- b) the validity and interpretation of acts of the institutions of the Community;
- c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide...

Where such a question is raised before any court or tribunal of a member State, that court or tribunal may, if it considers that a decision of the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Although national courts are not competent to interpret Community law, for this is a prerogative of the European Court of Justice under the Treaty of Rome, they are still required to apply it to domestic cases. National courts are the only bodies that can solve difficulties arising in the domestic level, and involving private parties, since the Court of Justice deals with Member States' governments, Community institutions, and other Community related matters at Community level. To fill this inconsistency in the jurisdiction of national courts, the Treaty of Rome established a

cooperative scheme between the two judicial systems.¹⁵⁷ During a proceeding before a national court in some legal systems, a judge may refer a matter to a higher court, usually for a ruling on a point of law. These 'interlocutory proceedings'¹⁵⁸ are known to the legal systems¹⁵⁹ of most Member States of the Community, especially Member States with a Civil Law tradition, and they form the basis for the cooperative scheme between Community and national judicial systems.

When in doubt about the interpretation or applicability of Community Law to a case, national judges have the option, and sometimes even the obligation,¹⁶⁰ under Article 177, to adjourn the case and to submit a *preliminary question* to the European Court of Justice.¹⁶¹ When presented with a preliminary question, the European Court of Justice will not decide the merits of the pending case before the national judge, as this remains under the jurisdiction of the national judge who will render the final decision, applying the guidelines provided by the European Court of Justice's preliminary

¹⁵⁷. According to the Court of Justice, Article 177 will lead to a "... real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdictions..." *Bosch v. de Geus* (N° 13/61), [1962] E.C.R. 93 at 104; [1962] 1 C.M.L.R. 1 at 6. This was the first case submitted to the Court under Article 177.

¹⁵⁸. K.P.E. Lasok, *The European Court of Justice - Practice and Procedure* (London: Butterworths, 1984) at 46.

¹⁵⁹. P. Pescatore, *Le recours préjudiciel de l'article 177 du Traité C.E.E. et la coopération de la Cour avec les juridictions nationales* (Luxembourg: Office des publications officiels des communautés, 1986). The Preliminary Ruling proceeding was introduced into the treaties as a result of the influence of the French judicial system.

¹⁶⁰. See "The Obligation to Make the Request" below at 66.

¹⁶¹. *Hauptzollamt Hamburg-Oberelbe v. Bollmann* (N° 40/69), [1970] E.C.R. 70; [1970] 1 C.M.L.R. 141.

ruling.¹⁶² These rulings "... are authentic interpretation of Community law and therefore, ... important for all Member States".¹⁶³ By virtue of the principle of supremacy of Community law over national law, national courts are obliged to apply Community law as interpreted by the European Court of Justice, even if it conflicts with national law.

Article 177 instituted a mechanism "... designed to encourage national courts to apply the law in a manner consistent with the Court of Justice's *interpretation* of the Treaty and secondary legislation...".¹⁶⁴ Therefore, its goal is to guarantee that "... Community law is interpreted and applied in an uniform manner in all Member States..."¹⁶⁵

The drafters of the Treaty of Rome clearly realized that only one body would be capable of ensuring the correct interpretation of Community law.¹⁶⁶ The Treaty conferred on the Court of Justice,¹⁶⁷ and

¹⁶². "... the object of preliminary ruling procedure is to obtain a ruling on a point of Community law before the national court decides the case before it; a ruling requested and delivered after that date is pointless..." Lasok, *supra* note 158 at 49.

¹⁶³. The C.Mkt L.Rev. Editorial Board (H.G. Schermers *et al.*), *Editorial Comments*, (1991) 28 C.Mkt L.Rev. 241-244 at 241.

¹⁶⁴. D. Wyatt, A. Dashwood, *The Substantive Law of the E.E.C.* (London: Sweet & Maxwell, 1980) at 57.

¹⁶⁵. *Hoffmann-La Roche v. Centrafarm* (N° 107/76), [1977] E.C.R. 957; [1977] 2 C.M.L.R. 334. A similar statement can also be found in *Rheinmühlern-Düsseldorf v. EVSt* (N° 166/73), [1974] E.C.R. 33 at 38, § 2.

¹⁶⁶. Lasok, *supra* note 158 at 46. By doing so, the principle of uniform interpretation of Community law is ensured by such judicial body.

only the Court,¹⁶⁸ the exclusive competence to protect the prerogatives of the Community against the acts of Member States; ensure the respect of Member States' prerogatives against the acts of Community institutions and protect the rights of individuals; and solve disputes among Community institutions".¹⁶⁹ However they obviously did not wish the European Court of Justice to rule on substantive national law.¹⁷⁰ If it did, it would effectively become an appellate court over the highest court of each Member State in matters of domestic law. This is not part of its duties. Nevertheless, the Court reviews the entire case-file sent from the national court in order to answer the questions placed by the national judge.

¹⁶⁷(...continued)

¹⁶⁷. Similar articles can be found in the other two treaties. For instance, there is Article 41, Steel and Coal Treaty, and Article 150, Euratom, which also foresee the possibility of submitting questions under a procedure similar to Article 177, Treaty of Rome.

¹⁶⁸. The Court of First Instance is not competent to hear and determine actions brought by Member States or by Community institutions or questions referred for a preliminary ruling under Article 177.

¹⁶⁹. "... défend les prérogatives de la Communauté contre les empiétements des États membres; assure le respect des compétences des États membres contre les empiétements des institutions de la Communauté et protège les droits des particuliers; trancher les conflits entre institutions". Mischo, *supra* note 96 at 681.

¹⁷⁰. "... it does not provide a means of transferring national disputes to a European tribunal..." Wyatt, *supra* note 164 at 57.

The Right to Request a Preliminary Ruling

The second paragraph of Article 177 allows any court or tribunal to place a question before the European Court of Justice, at any time or phase of the proceedings.¹⁷¹ Since it is the Court, and not national courts, which is entitled to interpret the Treaty, only the Court can decide which "courts or tribunals" can place questions before it. It has chosen to adopt a very wide interpretation.

The Court is inclined to grant preliminary ruling requests to any institution of a Member State that has a "... judicial function...",¹⁷² regardless whether it handles civil, criminal or administrative matters. In its rulings the Court of Justice went as far as to allowing other decision-making bodies to request rulings.¹⁷³ The expression "body with judicial function" is understood as an institution

¹⁷¹. *Politi S.A.S. v. Amministrazione delle Finanze dello Stato* (N° 43/71), [1971] E.C.R. 1039 at 1048; [1973] I C.M.L.R. 60 at 69; *Leonesio v. Amministrazione delle Finanze dello Stato* (N° 93/71), [1972] E.C.R. 287; [1973] I C.M.L.R. 343; *Fratelli Variola v. Amministrazione delle Finanze dello Stato* (N° 34/73), [1973] E.C.R. 981.

¹⁷². *Politi S.A.S. v. Amministrazione delle Finanze dello Stato*, *supra* note 171 on C.M.L.R. at 69, on E.C.R. at 1039. Emphasis added. It is the understanding of the Court of Justice that any body which is "... called upon to give judgement in proceedings intended to lead to a decision of a judicial nature..." is competent to make a request. *Re Borker - Demande de décision préjudicielle formée par le Conseil de l'ordre des avocats à la Cour de Paris* (N° 138/80), [1980] E.C.R. 1975.

¹⁷³. "... Even an advisory body may be a 'court or tribunal' within the meaning of the Treaties, if the proceedings leading up to and including the decision given in response to its advice can be considered as constituting a single procedure which is judicial in character". Lasok, *supra* note 158 at 48, when referring to *Nederlandse Spoorwegen NV v. Minister van Verkeer en Waterstaat* (N° 36/73), [1973] E.C.R. 1299.

(continued...)

having independent status, exercising judicial procedure, and proceeding on the basis of the rule of law.¹⁷⁴ Thus, if an institution wishes to propose a preliminary ruling request to the European Court of Justice, the following conditions must be fulfilled:

- i) the composition of the body must be determined by an exercise of or entail a significant degree of involvement on the part of public authority;
- ii) the body must be entrusted by law with the exercise of certain powers or responsibilities of a public law nature, in particular those relating to the implementation of Community law;
- iii) its jurisdiction over the dispute in question must be compulsory and not consensual;¹⁷⁵
- iv) its procedure must be similar to that of ordinary courts;
- v) it must apply rules of law; and
- vi) its decision must bind the parties and therefore be enforceable.¹⁷⁶

¹⁷³(...continued)

There are, however, limitations on this understanding of this expression 'court or tribunal'. For a more complete study of the interpretation of such expression, see *Vaassen-Gobbels v. Beambtenfonds voor net Mijnbedrijf* (N° 61/65), [1966] E.C.R. 377; [1966] 1 C.M.L.R. 508; *Broeckneulen v. Huisarts Registratie Commissie* (N° 246/80), [1981] E.C.R. 2311; [1982] C.M.L.R. 91; And *Nordsee Deutsche Hochseefischerrei GmbH v. Reederei Mond Hochseefischerrei Nordstem AG & Co KG* (N° 102/81), [1982] E.C.R. 1095.

¹⁷⁴. *Vaassen-Göbbels v. Beambtenjonds Mijnbedrijf*, *Opinion of the Advocate General* (N° 61/65), [1966] E.C.R. 402; [1966] 1 C.M.L.R. 508. A similar argument can be found in *Nederlandse Spoorwegen v. Netherlands Minister of Transport*, *Opinion of the Advocate General* (N° 36/73), [1973] E.C.R. 1315; [1974] 3 C.M.L.R. 148.

¹⁷⁵. Therefore, commercial private arbitration is excluded; see *Nordsee Deutsche Hochseefischerrei GmbH v. Reederei Mond Hochseefischerrei Nordtern AG & Co. KG*, *supra* note 173. G. Bebr, "Arbitration Tribunals and Article 177 of the EEC Treaty" (1985) 22 C.Mkt L.Rev. 489-504.

¹⁷⁶. Lasok, *supra* note 158 at 48.

The Obligation to Make the Request

In addition to allowing any court or tribunal to request a preliminary ruling, the Treaty requires certain courts to make such a request. According to the third paragraph of Article 177, where a question concerning the interpretation of the Treaty, acts of the institutions of the Community, and acts of bodies created by the Council is raised in a case pending before a court or tribunal of a Member State, "... against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice." ¹⁷⁷ Unfortunately, the interpretation of the emphasized words have always been troublesome. It is unclear whether the absence of judicial remedy referred to in Article 177(3) includes procedural matters or is limited to matters of substantive law. The current interpretation of the Court of Justice is that only in cases where there is no appeal on matters of substantive law is the national court obliged to make the request for preliminary ruling.¹⁷⁸

¹⁷⁷. Article 177(3). Emphasis added.

¹⁷⁸. "... because the preliminary ruling procedure is ... intimately connected with the resolution of issues of substantive Community law in the national courts..." Wyatt, *supra* note 164 at v.

There have been questions concerning the duty to place a request for preliminary ruling.¹⁷⁹ All matters of Community law that are unclear to a national court should be brought before the European Court of Justice if the former believes the ruling will be important to the resolution of the matter before it. If one allows even minor exceptions to this obligation, national courts could extend the limits of such exceptions, thereby avoiding their obligations under the Treaty. This would jeopardise one of the functions of the European Court of Justice, which is to provide uniform interpretation of the Treaty of Rome and of secondary Community legislation. The Court has clarified that the only situations where the obligation to make a request for a preliminary ruling is not absolute are where the element of Community law is sufficiently clear that the delay in obtaining a preliminary ruling is not warranted, or when the interpretation of Community law is not necessary for the resolution of the matter before the national court.¹⁸⁰

¹⁷⁹. "One may dispute whether a preliminary ruling on any question of Community law is always necessary. Some questions are so unique or so unimportant that one might submit that even a court against whose decisions there is no judicial remedy under national law should not necessarily request a preliminary ruling". The C.Mkt L.Rev. Editorial Board (H.G. Schermers *et al.*), *supra* note 163 at 242.

¹⁸⁰. "[Translation] ... such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling is a similar case... The same effect ... may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions... Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it". *CILFIT et al. v. Italian Ministry of Health* (N° 283/81), [1982] E.C.R. 3415; quoted and translated in van Empel, *supra* note 28 at 125.

The Role of the Court During a Preliminary Ruling Procedure

Regardless whether a national court or tribunal sought a preliminary ruling under the second or third paragraph of Article 177, it is sometimes difficult for the Court to answer the questions submitted to it during preliminary ruling.

It is clear that the Court is competent only to rule on the items described in the first paragraph of Article 177. As already noted, the Court is not competent to decide the merits of the dispute as it has no jurisdiction to interpret national law.¹⁸¹ For that reason, it is accepted that questions placed before the European Court of Justice in preliminary ruling proceedings have to concern only

¹⁸¹. "The Court has emphasized on many occasions that Article 177 authorizes it to rule on the interpretation of the Treaty and the interpretation and validity of secondary legislation. The corollaries are that the Court cannot apply the law to a particular case, and cannot rule on the consistency of national law with Community law". Wyatt, *supra* note 164 at 60.

"Whereas a national court must rule on the facts ..., and interpret national law, the jurisdiction of the Court of Justice is limited to indicating the legal consequences of a hypothesis presented to it... But the Court of Justice will not frame a ruling in such terms that it usurps the jurisdiction of the national court to rule on the facts and on the interpretation of national law". *Idem* at 61.

"The Court is competent only to rule on the question of Community law referred to it; the national court remains competent to decide the dispute between the parties and any other issues of fact or law". Lasok, *supra* note 158 at 46.

Community law, and must be phrased in general terms.¹⁸² The Court of Justice will not accept a preliminary ruling request if the requesting jurisdiction does not fulfil the requirements established by the Court, if the question is of no importance to the development of Community law, or if the Court sees that there will be an unnecessary delay in the proceedings.¹⁸³

As the Court is not entitled to speak on issues of domestic law,¹⁸⁴ its judges will not say whether the national judge should decide for one of the parties. The Community judge's role is to clarify points of Community law and to interpret the grey areas of interaction between Community law and national law. In this cooperative system, the Court of Justice interprets Community law but does not decide

¹⁸². Even when the question is improperly formulated, the Court has found a solution:

"... the Court has power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty".
Costa v. E.N.E.L. (N° 6/64), [1964] E.C.R. 1143, quoted and translated in van Empel, *supra* note 28 at 115.

¹⁸³. Pescatore, *supra* note 159. Only in exceptional cases will the Court of Justice refuse to grant a request from a national court. If the requesting court does not fulfil the conditions established by the European Court of Justice the request will not proceed. A similar result awaits an absurd question placed by a national judge - *Demande de question préjudicielle du Juge chargé du service du tribunal d'instance d'Hayange* (N° 105/79), [1979] E.C.R. 2257. If the questions placed are of no importance to the development of Community law, the European Court of Justice may also deny the request. In other rare situations the Court will deny the request for a preliminary ruling if it is of the opinion that its existing jurisprudence has already clarified the issue, or that the request is an artificial manoeuvre to delay the proceedings, and that the delay is unnecessary. *Foglia v. Novello* (N° 104/79), [1980] E.C.R. 745; *Foglia v. Novello* (N° 244/80), [1981] E.C.R. 3045; *Bertini et al. v. Regione Lazio* (N° 98, 162 and 258/85), [1986] E.C.R. 1885.

¹⁸⁴. *Ministère Public v. Lefèvre* (N° 188/86), [1987] E.C.R. 2963; *Ministère Public v. Gauchard* (N° 20/87), [1987] E.C.R. 4879; [1987] 2 C.M.L.R. 489; *Marcel Demouche et al. v. Fonds de garantie automobile et Bureau central français* (N° 152/83), [1987] E.C.R. 3833.

the merits of any specific case while the national court uses the parameters established by the Court of Justice to decide domestic cases submitted to it.¹⁸⁵ The "indication" given by the Court is necessarily general in nature so as to prevent any connection with specific national statutes.¹⁸⁶ When

¹⁸⁵. "The Court gives binding judgements on the hypothetical application of the law in circumstances specified by referring courts. Whereas a national court must rule on the facts (was this so, or that so), and interpret national law, the jurisdiction of the Court of Justice is limited to indicating the legal consequences of a hypothesis presented to it". Wyatt, *supra* note 164 at 61.

However, as noted above at 45 the Court of Justice receives the complete file from the national court, consequently there are situations where the Court will answer the question raised in such a way as not to give the national judge any other alternative than to rephrase or even copy parts of the decision from the Court in her or his judgement. In *Hauptzollamt Hamburg-Oberelbe v. Bollmann*, *supra* note 161, the German court phrased its question in such a way that the European Court of Justice had no choice but to decide indirectly the merits of the matter. The question concerned classification for tariff purposes of products imported from Turkey. Even though the judges acknowledged the difficulties in answering the preliminary ruling request, the Court felt that the practical benefits of answering the request outweighed the intrusion into the national jurisdiction. The Court took a similar position in *Bestuur v. Mouthaan* (N° 39/76), [1976] E.C.R. 1901 and *Bozzone v. Office de Sécurité Sociale D'Outre Mer* (N° 87/76), [1977] E.C.R. 687; [1977] 2 C.M.L.R. 604.

In other situations, the national judge may improperly phrase the question, so that it loses its general character and the Court faces a situation where it will be forced to discuss the merits of the case. A national judges will also sometimes fail to ask a question at all. Even in these situations, the Court cannot refuse the request on purely procedural grounds, or because questions are improperly formulated. Wyatt, *supra* note 164 at 58. In these cases, the Court will exercise its "... power to extract from a question improperly formulated by the national courts those questions which alone pertain to the interpretation of the Treaty..." *Costa v. E.N.E.L.*, *supra* note 182. A similar argument can be found in *Bosch v. de Geus*, *supra* note 157. It follows that the Court, starting from the poor construction of the question placed by a national court, will rephrase it in such a way that it can be answered without overstepping its jurisdiction. *Marimex v. Italian Tax Administration* (N° 29/72), [1972] E.C.R. 1309; [1973] 1 C.M.L.R. 486.

¹⁸⁶. There are cases, however, that the question is so specific in its nature that the Community law judge will have no alternative other than directly addressing the matter in dispute at national level.

the Court of Justice interprets Community law and resolves a conflict between national law and Community law, it gives an interpretation that may be applied to any other similar conflict, arising from the application of a domestic statute in any of the remaining Member States.

The Force of the Preliminary Rulings of the Court

Regardless whether the question was voluntarily submitted to the Court of Justice under Article 177(2), or whether the national court was required to submit it under Article 177(3), the rulings under Article 177 are binding over the requesting court and binding on all courts that might hear the case on appeal. This is so because the interpretation of the European Court of Justice on points of Community law would have been the same no matter which court had made the request. Besides, the interpretations of the Court aim to clarify a point of law between the parties,¹⁸⁷ and, if the case were to be appealed, the point of law will already have been clarified.¹⁸⁸ Therefore, "... although the decisions of the Court of Justice are not, as a matter of Community law, binding *erga omnes*,¹⁸⁹ ... they are binding^[190] in the cases in which they are sought on referring courts".¹⁹¹

¹⁸⁷. "... ont l'objet de fixer un point de droit entre les parties..." Pescatore, *supra* note 159 at 24.

¹⁸⁸. "Selon l'article 177, la Cour statue sur une question de droit communautaire qui est de sa compétence exclusive: sa décision a donc l'autorité de la chose jugée". Pescatore, *supra* note 159 at 23.

¹⁸⁹. Except in the United Kingdom, where a preliminary ruling response binds all future similar cases by virtue of the *European Communities Act 1972*, 1972, c. 68, s. 2(4).

Part IV

The Obligations Arising from the Treaty of Rome

The Importance of Article 5

The drafters of the Treaty never explicitly provided for the supremacy of Community law over national law. Other than the direct applicability of Regulations, mentioned under Article 189, the Treaty is silent as to any hierarchy of legislation.¹⁹² Only when interpreting the Treaty can one see the real effects of Community law upon national legal systems. However, Article 5 of the Treaty of Rome provides that "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action

¹⁹⁰(...continued)

¹⁹⁰. However, although not binding by virtue of statutes, the interpretation of Community law given by the European Court of Justice is likely to apply to any other preliminary ruling request *in pari materiam*.

¹⁹¹. Wyatt, *supra* note 164 at 71. *Milch, Fett-und Eierkontor GmbH v. Hauptzollamt Saarbrücken* (N° 29/68), [1969] E.C.R. 165; [1969] 1 C.M.L.R. 390; Or see *Benedetti v. Munari* (N° 52/76), [1977] E.C.R. 163: "... an interpretation given by the Court of Justice binds the national court in question..."

¹⁹². According to Boulouis, *supra* note 35 at 229, the Treaty's silence was more an act of prudence than of negligence. He says that the original Member States would have been reluctant to sign the Treaty if federalist principles incorporating the notion upon which 'le droit fédéral brise le droit local' had been proposed.

taken by the institution of the Community"¹⁹³ and consequently, one may deduce that a domestic statute could not be in conflict with Community law.

Article 5 has been interpreted by the European Court of Justice as creating a wide range of obligations for Member States. This interpretation establishes that Member States have the duty to enforce and give full effect to Community law; the duty to comply with fundamental rights' rules and the 'general principles of law' binding on Community institutions; the duty to implement Community objectives; the duty not to interfere with the operation of Community law rules; the duty not to interfere with the operation of a Community institution; the duty not to encourage breaches of Community law or to defeat its purposes; and the duty to clarify national law in relation to Community law, among others.¹⁹⁴ In general, "... article 5 applies to all national authorities, executive, legislative, and judicial, to State enterprises, to regional and local authorities, and to private bodies to which State powers have been delegated..."¹⁹⁵

¹⁹³. Article 5(1). Article 192 Euratom, and Article 86, Coal and Steel Community are to a similar effect.

¹⁹⁴. J.T. Lang, "Community Constitutional Law: Articles 5 E.E.C. Treaty" (1990) 27 C.Mkt L.Rev. 645.

¹⁹⁵. Lang, *supra* note 194 when commenting *International Fruit Co. NV v. Produktschap voor Groenten en Fruit* (N° 51-54/71), [1971] E.C.R. 1107 at 1115-16; *International Fruit Co. NV v. Produktschap voor Groenten en Fruit* Opinion of the Advocate General (N° 51-54/71), [1971] E.C.R. 1119; *Amsterdam Bulb B.V. v. Produktschap voor Siergewassen*, *supra* note 201; *Atalanta Amsterdam B.V. v. Produktschap voor Vee en Vlees* (N° 240/78), [1979] E.C.R. 2137. Emphasis added.

The Supremacy of Community Law over National Law

Community law consists of the contents of the Treaty itself, amending treaties (the Merger Treaty, the Single European Act, and the Treaty of Maastricht when ratified by all Member States), accession treaties and the Protocols instituting some Community bodies (*primary* Community law); as well as any derivative legal act passed by the Commission or Council, and the decisions of the Court of Justice (*secondary* Community law).

As has already been noted, the Treaty does not make explicit provision for the paramountcy of Community law over national law. Initially this notion was developed by the Court of Justice and existed only in its jurisprudence. However, over time this notion has become an increasingly fundamental part of the legal framework of the Community.¹⁹⁶

For example, at the Member-State level the principle of supremacy of Community law over national law exists, and is reinforced by local laws passed to give full effect to the Treaty, and supplemented

¹⁹⁶. See for example: France, *French Constitution*, as amended after the referendum in 1992:

"Art. 88-1. - La République participe aux Communautés européennes et à l'Union européenne, constituées d'États qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences. Sous réserve de réciprocité, et selon les modalités prévues par le Traité sur l'Union européenne signé le 7 février 1992, la France consent aux transferts de compétence nécessaires à l'établissement de l'union économique et monétaire européenne ainsi qu'à la détermination des règles relatives au franchissement des frontières extérieures des États membres de la Communauté européenne".

See also the *European Communities Act 1972*, 1972, c. 68.

by domestic courts. In concluding the necessary Treaty of adhesion, each new Member State accepts the principle even if it requires a constitutional amendment prior to joining the Community. This ensures that there should be no difficulty integrating Community law into the framework of these States.¹⁹⁷ It's legal framework is now part of the Member States' legal system and benefits natural and legal persons by extending the rights and obligations created by the Treaty to them.

In order to attain the objectives of the Treaty of Rome, various changes within the legal systems of its signatories were required not only in areas of governmental administration, but also in legislative and judicial spheres. With accession to the treaties, parts of the rights and obligations of a Member State were transferred to Brussels or to Luxembourg.¹⁹⁸ For instance, the Council and the Commission received part of the jurisdiction that previously belonged to domestic institutions in matters of legislative and executive competence. In signing the Treaty of Rome, Member States also recognized the authority of the European Court of Justice to adjudicate all matters relating to Community law, even those arising in a case before a domestic court. The Court has held the transfer of a legislative prerogative¹⁹⁹ from a Member State to the exclusive competence of the

¹⁹⁷. "... n'en présente pas moins la particularité de s'intégrer aux ordres juridiques de ces états". Boulouis, *supra* note 35 at 207.

¹⁹⁸. Where the European Court of Justice sits.

¹⁹⁹. See for example, Lenaerts, *supra* note 90 at 227:

"Thus, the Community holds exclusive powers with regard to the regime of supply of fissile materials (Chapter VI of the Euratom Treaty), see Case 7/71, *Commission of the E.C. v. French Republic*, judgement of December 14, 1971, E.C.R. 1003, 1018-1019, paragraphs 18-26 (1971). Likewise, the Community powers derived from Article 113 of the E.E.C. Treaty (common commercial policy towards third

(continued...)

Community is irreversible and that the Community does not lose its powers even if it never exercises them.²⁰⁰ However, it may delegate jurisdiction to Member States. The European Court of Justice established jurisprudence stating that "... legislation enacted by the Community pursuant to one of its exclusive powers may contain a 'specific authorization by the Community' in favour of the Member states".²⁰¹

¹⁹⁹(...continued)

States) are normally exclusive, see Case 41/76, *Donckerwolcke v. Procureur de la République*, judgement of December 15, 1976, E.C.R. 1921 (1976); Opinion 1/75 of November 11, 1975, E.C.R. 1355 (1975); Opinion 1/78 of October 4, 1979, E.C.R. 2871 (1979). Finally, the Community's power to take conservation measures in order to prevent the depletion of fish stocks, is exclusive under Article 102 of the Act of Accession of 1972, see Case 804/79, *Commission of the E.C. v. United Kingdom*, judgement of May 5, 1981, E.C.R. 1045 (1981)".

²⁰⁰. "... que les transferts de compétences sont irréversibles et qu'une compétence, même non exercée, ne devient pas caduque (arrêt du 14 décembre 1971, affaire 7/71, *Commission/République française*, Rec. p. 1003) et qu'une carence du Conseil ne peut, en aucun cas, restituer aux états membres la compétence et la liberté d'agir unilatéralement dans le domaine en question) arrêt du 5 mai 1981, affaire 804/79, *Commission/Royaume-Uni*, Rec. p. 1045)". Mischo, *supra* note 96 at 682; Also in Lenaerts, *supra* note 90 at 227.

²⁰¹. Lenaerts, *supra* note 90 at 229. In case of concurrent and residual powers, the European Court of Justice has vacillated in its interpretation of the Treaty. In two instances, the Court rendered conflicting judgements in an interval of three months. In one [*Amsterdam Bulb B.V. v. Produktschap voor Siergewassen* (N° 50/76), [1977] E.C.R. 137] "... the Court in effect decided that, by keeping silent, the Community legislator meant that it was keeping silent, so that the power of the Netherlands to fill the normative gap left by the Community had not been preempted". In another decision [*Officier van Justitie v. Van den Hazel* (N° 111/76), [1977] E.C.R. 901] the Court decided that the silence of the legislator was in itself a measure of economic policy. Lenaerts, *supra* note 90 at 226.

In matters of judicial competence, the Court has emphasized that Community law prevails over national law, and that national judges are entitled and obliged, if necessary, to deny enforcement of national statutes if these conflict with the Community's legal framework. In doing so, national judges can be seen as acting as Community federal judges.²⁰²

The principle of supremacy of Community law over national law was finally articulated in *Simmenthal*.²⁰³ In its decision the European Court of Justice recognized that private parties may obtain a judgement in which a national judge denies enforcement of a domestic statute which does not conform with Community law. Even if the national judge cannot declare a domestic statute to be void because it is in conflict with Community law, the result for private parties is the same: the national law is not applied to the particular case.²⁰⁴

This principle came about in two phases. In the first phase, the European Court of Justice ruled that the contents of the treaties, amending statutes and accessory documents were part of a Member State's legal framework. Community law was therefore binding upon Member States and had the same effect as any ordinary domestic statute. In *Van Gend en Loos* the Court established that Community

²⁰². "On peut donc dire que chaque juge d'un tribunal d'un État membre est, en quelque sorte, un juge fédéral". Mischo, *supra* note 96 at 682.

²⁰³. *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.a.* (N° 106/77), [1978] E.C.R. 629; Also in *Wilhem et al. v. Bundeskartellamt* (N° 14/68), [1969] E.C.R. 1; [1969] I C.M.L.R. 100.

²⁰⁴. "... les particuliers peuvent ainsi obtenir que le juge national laisse inappliquée une disposition de droit national non conforme au droit communautaire, même si le juge national ne peut pas annuler cette disposition. Le résultat pour le particulier est le même..." Mischo, *supra* note 96 at 682.

law was "... clearly intended to be incorporated into national law and to modify or supplement it..." ²⁰⁵

The second phase in the development of the principle of supremacy of Community law over national law was established in *Costa v. E.N.E.L.*²⁰⁶ In this judgement, the European Court of Justice ruled that the supremacy is based on several canons of Community law²⁰⁷ and that Community law prevailed in case of conflict with domestic legislation. In *Commission v. Italy*²⁰⁸ the Court reinforced the principle by using a corollary of *Van Gend en Loos*: the principle of uniform application of Community norms.

Until *Costa v. E.N.E.L.* there had been questions concerning the applicability of domestic statutes enacted after the introduction of Community law into the Member States legal system. When discussing the applicability of domestic law enacted previously to the signature of the Treaty of Rome, and in conflict with it, there is no doubt. Primary and secondary Community law introduced into the domestic framework after the enactment of the conflicting domestic law prevail over it. As

²⁰⁵. *Van Gend en Loos*, *supra* note 60.

²⁰⁶. *Costa v. E.N.E.L.*, *supra* note 182.

²⁰⁷. "... institution d'un ordre juridique propre intégré au système juridique des États membres; création d'une Communauté de durée illimitée dotée de la personnalité, de la capacité juridique, d'une capacité de représentation internationale et de pouvoirs réels issus de transferts de compétence consentis par les États membres; existence, enfin, d'un corps de règles applicables tant à ces États qu'à leurs ressortissants". Boulouis, *supra* note 35 at 230.

²⁰⁸. *Commission v. Italy* (N° 39/72), [1973] E.C.R. 101.

expected, the normal principle that subsequent legislation derogates from earlier enactments to the extent of any inconsistency, applies.²⁰⁹

In *Costa v. E.N.E.L.*, the Court ruled that a domestic statute enacted after the entry into force of Community law cannot derogate from Community law because Member States have no power to make unilateral statutory changes to Community law, or to secondary Community norms,²¹⁰ and that any such attempts are inoperative vis-à-vis the Community.

As stated above, the European Court of Justice has adopted the following position: International agreements (*i.e.* the Treaty of Rome) prevail over all national law, regardless when they were signed. In the case of conflict between national law and Community law, national courts will cease to apply national law only to the extent of the inconsistency and only when the conflict arises. The domestic norm is not, therefore, declared void, but it ceases to be applied in all related cases.²¹¹

²⁰⁹. *Lex posterior derogat legi priori.*

²¹⁰. *Politi S.A.S. v. Amministrazione delle Finanze dello Stato*, *supra* note 171; And *S.p.a. Marimex v. Amministrazione delle Finanze dello Stato* (N° 84/71), [1972] E.C.R. 89.

²¹¹. International agreements signed by the Government prevail over national law. The temporal aspect should not be taken into consideration. In this case the Treaty of Rome is the international statute. Therefore, the judicial courts will only declare the statute inapplicable whenever the matter involves conflicts with Community law. The local statute is still legally valid to regulate other events, although it may not be enforced in some cases. The domestic norm is not, therefore, declared void, but it ceases to be applied: "La norme nationale n'est donc pas abolie, mais elle cesse d'avoir effet à la norme communautaire". *Droit communautaire et Droit français - Étude adoptée par l'Assemblée générale du Conseil d'état le 3 décembre 1981*, Collection notes et études documentaires (Paris: La documentation française, 1982) at 51.

Part V**Articles 169 and 170**

Article 169 reads as follows:

"If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice".

Article 169 plays an important role in the functioning of the judicial system of the Community because it permits the European Court of Justice to ensure the correct interpretation and application of the dispositions of the Treaty, by allowing the Community judge to determine the exact content of the obligations of Member States and to correct divergent interpretations of Community law. To do so, the Community judge uses a procedure which goes beyond the classical rules of international law to ensure the execution of obligations by States even against their will.²¹²

All manifestations of Community law are included within the scope of Article 169, both primary and secondary.²¹³ The breach of the obligations may result from disregard for conventional obligations

²¹². "... une procédure dépassant de loin les règles jusqu'à présent admises en droit international classique pour assurer l'exécution des obligations des États ... [même] contre [leur] résistance". *The Netherlands v. High Authority* (N° 25/59), [1960] E.C.R. 761.

²¹³. *Germany v. High Authority* (N° 3/59), (1960) E.C.R. 121 at 133.

of the Community²¹⁴ as well as general principles of Community law (such as the four pillars of the Community, the principle of supremacy of Community law, and the obligations inferred from the interpretations of articles of the Treaty, *i.e.* Article 5).²¹⁵ It follows that a Member State may violate Community law even though the norm violated does not have direct effect since Community law which does not possess direct effect is equally binding upon Member States.²¹⁶

The procedure under Article 169 takes place in two different phases. The initial administrative phase only involves the Commission and its interaction with the Member State concerned, and the second, the judicial phase, takes place only if the Commission refers the matter to the European Court of Justice.²¹⁷

²¹⁴. *Hauptzollamt Mainz v. Kupferberg & Cie. K.G. a.A.* (N° 104/81), [1983] 1 C.M.L.R. 1; *Commission v. Greece* (N° 194/85 and N° 241/85), [1988] E.C.R. 1037.

²¹⁵. "... il peut s'agir d'une violation du droit originaire, aussi bien que d'une infraction au droit dérivé. ... Le manquement peut également résulter d'une méconnaissance des obligations conventionnelles liant la Communauté ainsi que des principes généraux du droit communautaire". V. Constantinesco, J.-P. Jacqué, R. Kovar, & D. Simon, *Traité instituant la C.E.E. - commentaire article par article* (Paris: Economica, 1992) at 1014.

²¹⁶. "... le droit communautaire non directement applicable est également obligatoire à l'égard des États membres". See conclusions of the Advocate General Roemer, in *Commission v. Italy, Opinion of the Advocate General* (N° 48/71), [1972] E.C.R. 536; *Commission v. France, Opinion of the Advocate General* (N° 167/73), [1974] E.C.R. 375.

²¹⁷. The jurisdiction of the European Court of Justice to hear the case depends on the correct execution of the administrative step. If these rules are not respected by the Commission, the European Court of Justice will refuse, based on procedural imperfections, to hear the case.

The administrative phase begins when the Commission becomes aware that the acts of a Member State appear to be in conflict with Community law. In a first, informal contact, the Commission tries to resolve the difficulties between it and the Member State. In this attempt fails, the Commission then sends the Member State an official letter informing it of the Commission's objections and indicating the points of conflict between the Commission and the Member State. The Member State is invited to submit its comments regarding the observations made by the Commission.

If the Commission agrees with the statements made by the Member State and acknowledges that no conflict exists, the procedure stops there. If not, or if the Member State ignores the invitation to submit its observations, the Commission issues a "reasoned opinion", consisting of both fact and law, explaining why it believes that there has been a breach of the obligations arising from the Treaty and indicating the measures it considers necessary to remedy the breach, as well as the deadline to implement these measures.²¹⁸ This "reasoned opinion" must also present a coherent exposition of the reasons that lead the Commission to the conclusion that the Member State had failed to live up to its obligations under the treaties.²¹⁹ The decision of the Commission to issue a "reasoned opinion" is

²¹⁸. "... exposant les raisons de droit et de fait pour lesquelles elle estime qu'il y a manquement et indiquant les mesures qu'elle juge nécessaires pour y mettre fin, ainsi que le délai accordé à l'État pour se mettre en conformité". Pescatore, *supra* note 36 at 1009.

²¹⁹. *Commission v. Italy* (N° 7/61), [1961] E.C.R. 637, at 654; *Commission v. Germany* (N° 325/82), [1984] E.C.R. 777.

a discretionary one, but it is not absolutely discretionary and the refusal to issue a "reasoned opinion" may be overruled by the European Court of Justice in certain cases.²²⁰

During the judicial phase of the proceedings, the Court first verifies whether the Commission has respected the rights of the Member State involved. It is particularly important that the Court conduct this verification because the Commission is dealing with sovereign States and the political implications of a mistake may cause undesirable repercussions throughout the Community. Then, the Court decides whether the State's action conflicts with Community law.²²¹

Article 170 is similar to Article 169. The only difference is that it is not the Commission which starts the proceedings, but a Member State which alleges that another Member State has failed to fulfil its obligations under the Treaty. Article 170 has only been used once, probably because Member States, fearing retaliation, refuse to openly attack each other before the Court.²²²

²²⁰. *Groupeement des Industries Sidérurgiques Luxembourgeoises* (N° 7 & 9/54), [1955/56] E.C.R. 53; *De Gezamenlijke Steenkolenmijnen* (N° 30/59), [1961] E.C.R. 1; *De Gezamenlijke Steenkolenmijnen* (N° 17/57), [1961] E.C.R. 9; *Société Commerciale Antoine Vloeberghs S.A. v. High Authority E.C.S.C.* (N° 9 & 20/60), [1961] E.C.R. 396.

²²¹. All proceedings involving Member States are heard by all thirteen judges according to Article 165(3).

²²². "... Il est intéressant de constater que, jusqu'ici, l'article 170 n'a été mis en oeuvre qu'une seule fois (arrêt 141/78 du 4 octobre 1979), sans doute parce que les États, par crainte de la réciprocité, répugnent à s'assigner devant la Cour de Justice". *Droit Français*, *supra* note 211 at 24.

The Obligation Imposed by Article 171

Matters brought before the European Court of Justice under Articles 169 and 170 simply result in a declaration that a Member State has or has not failed to live up to its obligations. At this point, Article 171 comes into the scene to impose the duty upon the Member State to take corrective measures at Member State level. It reads as follows:

"If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgement of the Court of Justice."

Although apparently clear, Article 171 has given rise to problems of interpretation regarding its effects and the authority of the judgements rendered by the European Court of Justice finding a Member State to be in breach of its obligations under the Treaty.²²³ It was initially thought that a decision from the European Court of Justice had an exclusively declaratory effect,²²⁴ since its activities end with the publication of its judgement. As Kovar has suggested, once the court has found the Member State to be in breach of the Treaty of Rome, it is *functus officio*. The Community

²²³. "Malgré son apparente clarté, l'article 171 pose de redoutables problèmes d'interprétation, quant aux effets et à l'autorité des arrêts par lesquels la Cour de Justice constate qu'un État membre a manqué à ses obligations". Constantinesco, *supra* note 215 at 1027.

²²⁴. Constantinesco, *supra* note 215 at 1027; See *Humbler v. Belgium* (N^o 6/60), [1960] E.C.R. 1125.

judge can only recognize or not the alleged breach.²²⁵ This statement is partially correct. Notwithstanding, it ignores the force of Article 171 and its interaction with Article 169 (or 170) of the Treaty.

Although the European Court of Justice may not tell the Member State how to rectify its breach of the Treaty, at least in the case of legislation found to be contrary to Community law the Court's ruling has more than a simple declaratory effect. Given the supremacy of Community law over national law and the Court's exclusive right to interpret Community law, its finding that a piece of national legislation violates Community law is binding on the Member State. It follows that:

²²⁵. "La Cour épuise sa compétence dans la constatation du manquement. Le juge communautaire ne peut que dire le droit, accepter ou rejeter le recours de la Commission, constater ou non le manquement allégué". R. Kovar, "L'Autorité des arrêts et des résolutions des organes de protection" (Rapport au colloque de Grenoble), (1973) R.D.H. 699.

Although the Member State has the autonomy to take the necessary measures to comply with the judgement, this is not always the case:

"... Différents indices permettent de penser que le juge communautaire n'exclut pas totalement de préciser à l'État les modalités d'exécution qui lui paraissent s'imposer: c'est ainsi que la Cour a admis que l'obligation incombant à l'État membre concerné puisse être concrétisée par la Commission dans l'avis motivé ou dans la requête introductive d'instance; par ailleurs, le dispositif de certains arrêts de manquement est suffisamment détaillé et contraignant pour que la marge d'autonomie de l'État membre soit pratiquement réduite à néant...; enfin, la cour de justice a accepté, dans le cadre de procédures en référé, d'adresser des injonctions aux États membre en vue de suspendre provisoirement les effets des manquements allégués, et elle n'a pas exclu la possibilité de prescrire, en vertu des articles 186 du Traité C.E.E. et 36 de son Statut, des mesures destinées à mettre fin immédiatement à une infraction constatée dans un arrêt de manquement antérieur". Constantinesco, *supra* note 215 at 1028 referring to *Commission v. Belgium* (N° 102/79), [1980] E.C.R. 1473.

"(...) la constatation juridictionnelle du manquement implique, à tout les moins, l'illégalité en droit interne de la mesure nationale litigieuse et l'obligation pour le juge de tirer les conséquences de cette illégalité. On sait, en effet, que la Cour de Justice ne peut en aucun cas, « de sa propre autorité, annuler ou abroger des lois nationales d'un État membre ou des actes administratifs de ses autorités ». ²²⁶ En revanche, l'autorité de l'arrêt de manquement impose au législateur d'abroger les mesures nationales incompatibles avec le droit communautaire, à l'administration de cesser de les appliquer et aux juridictions de les annuler ou au moins d'en écarter l'application." ²²⁷

A similar argument could be made regarding decisions of national courts which are found to violate Community law. If found to be in breach of the Treaty, the Member State will be required to take appropriate measures to remedy the situation within a reasonable time. The definition of reasonable time takes into consideration the complexity and extent of the changes required. ²²⁸

²²⁶. *Humblet*, *supra* note 224 at 1128.

²²⁷. Constantinesco, *supra* note 215 at 1031.

²²⁸. *Commission v. Italy* (N° 160/85), [1986] E.C.R. 3250; *Commission v. Italy* (N° 69/86), [1987] E.C.R. 778; And *Commission v. Belgium* (N° 227-230/85), [1988] E.C.R. 1.

The Treaty of Maastricht and the Proposed Amendment to Article 171

Currently, no sanctions or constraints apply to a Member State that does not comply with a decision of the European Court of Justice.²²⁹ Based on the premise that Member States voluntarily created or joined the Community, one could assume that Member States would voluntarily comply with the judgments of the Court. This is perhaps the reason why there is not currently any article within the Treaty which foresees the possibility of imposing sanctions upon defaulting Member States, and why the European Court of Justice does not need, in principle, sanctions to execute its decisions. However, if the Treaty of Maastricht is ratified by all twelve Member States, this will change because the following paragraph will be added to Article 171:

If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice. If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 170.

Under the amended Article 171, the decisions of the European Court of Justice will be interpreted in light of a possible pecuniary sanction upon a defaulting Member State. Whereas in the past,

²²⁹. "... de nombreux arrêts de la Cour restent lettre morte". Y. Doutriaux, *Le traité sur l'union européenne*, (Paris: Armand Colin, 1992) at 197.

Member States were slow to remedy defaults and comply with European Court of Justice judgements, under the Maastricht amendments they will have an incentive to act more quickly.

In other traditional legal systems, where one does not comply with the established parameters of conduct (particularly judicial decisions), one suffers the consequences. In the Community, the effects of a decision of the European Court of Justice will be followed by sanctions, this will bring the jurisdiction of the European Court of Justice and the nature of the Community's legal system into line with a traditional legal system.

This system of imposing fines has been extremely successful in another area of Community activity: competition law. If properly applied, a system of sufficiently significant fines could well become an effective tool in hands of the Commission and the Court to enforce the decisions of the Court.

However, the Treaty of Maastricht does not indicate how fines will be imposed against Member States. Repeating the effectiveness achieved in the area of competition law may prove to be a difficult task. In competition related matters, the fines imposed by the Commission are executed through national judiciaries usually against private parties. It might prove to be more difficult enforcing imposing fines upon a Member State, particularly if one tries to execute fines against the judiciary of that Member State.'''

If national judiciaries are reluctant to execute the collection of fines in their own States, the Community could deduct the necessary amount from the contributions it injects into the economy of each Member State (for example, the Common Agricultural Funds, or the funds established by Article 130). In the event, in the future, that a Member State no longer receives financial

contributions from the Community, then the contribution it has to make to the Community's budget could be increased proportionally to the fine owed.

Any such proposal would be effective from both perspectives: the internal and the external. Externally because the Community will be allowed to impose and effectively apply these pecuniary sanctions (against any objections raised by Member States); and internally because considering that no matter how these fines are paid (either from the treasury of a Member State, or in deductions from contributions from the Community) the population of that Member State will indirectly be affected since the money will have to be raised either from taxes or from money initially planned for investments.

Part VI**How National Judiciaries can Violate the Treaty of Rome**

As noted above, some scholars have developed theories to describe and prescribe the limits on the powers of governments and their component parts. One of these is Montesquieu's theory of the separation of powers, according to which, sovereignty is divided among three branches that govern a State. In conducting its activities, each of these three branches aims to contribute to the establishment of a stable, democratic government. The three attributes of a State -- application, interpretation, and creation of laws -- are each conferred on one branch or person, and it is imperative that no person or branch exercise more than one of the functions. In theory, these branches function in harmony, each complementing and supervising the others, within a system of checks and balances.

There are two aspects to a State's sovereignty: the internal and the external one. Although they both centre their attention on the State, the difference between them is in their perspectives. Internal sovereignty looks at the State from within its national borders: therefore under this concept, the State is seen as an entity whose unlimited powers, even to the point of self-dissolution, are divided among branches. External sovereignty looks at the State from outside the national borders. From this perspective, there is only one entity to address, since in international matters, the State is seen as a single entity. It follows that the Executive branch's activities are wide and varied, and it exercises its duties both internally as well as externally. It is clear, however, that even though it represents the State vis-à-vis the international community, the Executive acts representing not only itself, but all the other branches of government. Therefore, in the context of the European Community, the

Member State as a whole is accountable for the acts of its three branches, the Executive, the Legislative, and the Judicial.

As seen above, even though represented by the Executive branch, the entire Member State is the real party in a proceeding before the European Court of Justice, and even though constitutionally independent from each other in matters of internal sovereignty, the acts of any one of the three branches are seen as acts of the Member State by the European Court of Justice.

With the introduction of the Treaty of Rome into the domestic framework of Member States, the relationship among the three branches underwent changes. The activities of Community institutions affected all areas of domestic governmental activities. For instance, Member States' legislative houses may no longer unilaterally derogate from or abrogate domestic statutes enacted in accordance with Community norms, for Community norms can only be altered at the Community level, in accordance with the established Community legislative process. In particular, the Judicial branch's authority, when interpreting the law in a Member State's territory is now shared with the Community Judicial branch, the European Court of Justice. Under this system of cooperation between national courts and the European Court of Justice, national courts apply domestic and Community law to a specific case, whereas the European Court of Justice is in charge of interpreting the Community statute to be applied by the national judge, if necessary.

In exercising its duty to interpret Community law, the European Court of Justice has adopted a progressive approach and enlarged the scope of the Treaty of Rome, its amendments, and accessory statutes. The jurisprudence of the Court has given rise to what is called 'principles of Community law', a crucial one of which is the principle of the supremacy of Community law over domestic law.

This principle applies to domestic legislation enacted before and after the Member State's accession to the Communities.

Bearing in mind the necessity of a uniform application of the dispositions of the Treaty of Rome by all Member States, the Treaty made provision for judicial procedures such as Article 169 and 177. Article 177 established the grounds for a system of cooperation between national courts and the Court of Justice. In it, a national court facing difficulties in understanding the interaction between Community law and national law asks the European Court of Justice to clarify these points. Any court or tribunal of a Member State that fulfils the conditions set forth by the Court can place a request for a ruling under Article 177. In most cases, the national court concerned makes the request voluntarily. However, when a national court hears a case on which there is no appeal under national law, it has the obligation to make such a request to the European Court of Justice. Notwithstanding the option or the duty to make a preliminary ruling request, the judgment of the Court binds the requesting court or tribunal, as well as any of the courts or tribunals that might hear the case on appeal.²³⁰ It follows that all branches of government of a Member State have the duty to apply the point of Community law as interpreted by the European Court of Justice. Consequently, if a governing branch of a Member State does not comply with a judgment of the Court, that Member State is in breach of the Treaty of Rome.

²³⁰. Even though not stated by any author of Community law, by analogy, a ruling of the European Court of Justice may be used by all other courts and tribunals in all the Member States, for the interpretation of the European Court of Justice is on a point of law of Community law which, in principle, applies to all Member States and not only to the requesting jurisdiction. As says Kapteyn, a preliminary ruling judgment "... should be regarded as highly persuasive authority and should be followed (although a new reference can always be made)". Kapteyn, *supra* note 9 at 313.

The Treaty of Rome also imposes upon Member States, through Article 5, the obligation to take all appropriate measures in order to "ensure fulfilment of the obligations arising out of th[e] Treaty or resulting from action taken by the institutions of the Community" and to "abstain from any measure which could jeopardize the attainment" ²³¹ of its goals.

The procedure established by the Treaty of Rome to determine that a Member State has failed to live up to the obligations of the Treaty is found in Article 169. Its provisions are brought into play when the Commission is informed that a Member State might be in breach of the Treaty. The Commission initiates an administrative procedure to verify this possibility and, if necessary, it requests the European Court of Justice to rule on the alleged breach. The judgement of the European Court of Justice binds the Member State and requires it to adjust its activities to conform with the rulings of the Court, although, until recently, there were no enforceable sanctions to apply to a defaulting Member State. The Treaty of Maastricht, however, amended Article 171 to allow the European Court of Justice to impose pecuniary sanctions upon Member States which refuse to comply with one of its judgements. After the ratification of the Treaty of Maastricht by all Member States, the legal framework of the Community will be similar to a classical legal framework: illegal actions will be met with a sanction.

So far, almost all of the matters referred to the European Court of Justice by the Commission under Article 169 have related to the action or inaction of the Executive branch of Member States. However, the Member State's obligations under the Treaty of Rome apply equally to all three

²³¹. Article 5.

branches of the Member State's government and any of them can, through action or inaction, cause the Member State to be in breach of its obligations under the Treaty.

In four instances already referred to in this paper,²³² the Commission sought the Court's opinion whether the actions of the legislative branch of a Member State government constituted a breach of the Treaty of Rome by the Member State. In each case the Member State submitted that its internal constitutional structure granted the Legislative branch autonomy vis-a-vis the other two branches and the Executive branch, which represented the Member State at the Community level, could do no more than ask the Legislative branch to adopt appropriate legislation. The European Court of Justice rejected these submissions, holding that

"[Translation] ...the obligations arising from Article 95 of the Treaty devolve upon States as such and the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution..."²³³

Just as the Legislative branch is autonomous vis-a-vis the other two branches, so is the Judiciary. However it too is part and parcel of the single view of the State from an external perspective. In the European context, the activities of the Judiciary branch can cause the Member State to be in breach of the Treaty of Rome, if it fails to recognize the supremacy of Community law on behalf of the Member State.

²³². *Commission v. Italy*, *supra* note 136; *Commission v. Belgium*, *supra* note 138; *Commission v. Italy*, *supra* note 145; *Commission v. France*, *supra* note 151.

²³³. *Commission v. Belgium*, *ibidem* at paragraphs 15-17. Translation from van Empel, *supra* note 28 at 139.

A breach of the Treaty obligations by the Judiciary may take place in five different circumstances. The first and most obvious would occur if courts or tribunals in a Member State flagrantly disregard Community law, either by rendering a decision contrary to it or by overruling a decision from a lower court or tribunal in such a way that the result is contrary to Community law. Although the national court's decision would be in reference to a particular piece of Community legislation (either primary or secondary), the mistake would also constitute a failure to live up to the general requirements of Article 5 of the Treaty.

The other ways in which a Judicial branch may fail to live up to the Member State's obligations under Treaty of Rome all relate to Article 177. This is not surprising since, as noted above, Article 177 introduced a new procedure into the Member State's legal framework. It is easy to see how national courts would have difficulties coming to terms with this split in their jurisdiction to interpret law directly related to the Community in their day-to-day activities.

Under Article 177(2), a national court or tribunal, at any stage of its procedure, has the right to request a preliminary ruling. When a court or tribunal exercises this right but misapplies or disregards the ruling of the European Court of Justice, that decision is usually entitled to be heard on appeal by another national court or tribunal. If the high court or tribunal entitled to hear the case on appeal refuses to grant the appeal, or grants it and confirms the lower court or tribunal's decision, which is contrary to Community law, that Member State will be in breach of the Treaty.

Another possible breach under Article 177(2), could occur of even if the national court or tribunal correctly applies Community law in the case submitted to it. If the case is appealed and the appellate court or tribunal overrules the lower court and replaces the original decision by another one that is

contrary to the interpretation of Community law given by the European Court in the preliminary ruling judgment.

The application of Article 177(3) is also a possible source of a breach of the Treaty of Rome by national judicial branches. On one hand, a national court or tribunal whose decision is not subject to appeal might ignore the contents of Article 177(3) and not place the preliminary request required by this article. Such negligence on the part of the national court or tribunal also constitutes a breach of the Treaty. Finally, the breach of the Treaty of Rome may occur when a court or tribunal requests a preliminary ruling under paragraph three and misapplies or disregards the ruling of the European Court of Justice when rendering its judgment. In both these situations, by definition, there is no other available remedy under national law.

The Commission has already had an opportunity to consider its reaction to a national court which fails to place a preliminary ruling request when required to do so, and therefore constituting one of the above mentioned situations of breach of the Treaty of Rome. On several occasions the Commission was asked to speak to this matter by members of the European Parliament who asked whether it would initiate proceedings under Article 169 against Member States whose courts of last instance did not submit preliminary ruling requests to the European Court of Justice, and therefore were in violation of Article 177(3). The first of several such questions was placed in 1967.²³⁴ Subsequently, Questions 23/68,²³⁵ 349/69,²³⁶ 608/78,²³⁷ and 526/83²³⁸ were also directed to the Commission. All

²³⁴. E.C., *Question écrite n° 100/67: Application de l'article 177 du traité de la C.E.E.*, O.J. Communication (1967) n° C270 at 2.

²³⁵. E.C., *Question écrite n° 28/68: Importation en France de semoules algériennes*, O.J. Communication (1968) n° C71 at 1.

concerned national courts of last instance which did not place preliminary ruling requests to the European Court of Justice. "So far, the Commission has been reluctant to use Article 169 with respect to decisions of national judiciary"²³⁹ and it is the Commission's view is that even courts of last instance are not obliged to place a request if they feel that the issue under discussion is clear enough not to require a request. The European Court of Justice has supported this view. However, given the Commission's reluctance to refer action of Member State's judiciaries to the European Court of Justice, it has not had an opportunity to consider the effects of a failure to refer a matter that was not clear.²⁴⁰

If a Member State's highest court, fails to observe Community law (*i.e.* ignores the general obligation under Article 5), or the interpretation of Community law given in a preliminary ruling judgment (Article 177) in a case pending before that Court, the defaulting Member State will be failing to fulfil its obligations under the Treaty of Rome and there is not reason why the Member State should not be held accountable for its failure.

²³⁶(...continued)

²³⁶. E.C., *Question écrite n° 349/69: Compatibilité de l'arrêt du Conseil d'État français du 1er mars 1968 avec le droit communautaire*, O.J. Communication (1970) n° C20 at 3.

²³⁷. E.C., *Question écrite n° 608/78: Article 177 du traité C.E.E.*, O.J. Communication (1979) n° C28 at 8.

²³⁸. E.C., *Question écrite n° 526/83: La doctrine de l'acte clair*, O.J. Communication (1983) n° C268 at 25.

²³⁹. The C.Mkt L.Rev. Editorial Board (H.G. Schermers *et al.*), *supra* note 163 at 243.

²⁴⁰. In France, the "Conseil d'État" refused to submit several preliminary ruling requests to the Court based on the argument that the matter was clear enough to them. This gave rise to the "théorie de l'acte clair", and was very useful to excuse the French institution from having to make the request.

As noted above, there are currently two methods by which the Commission or another Member State can ensure the uniform application of Community law. The first involves the Commission and its duty to ensure the uniform interpretation of the Treaty (given by the Court under Article 177) or to ensure that Member States correctly apply Community law (general obligation under Article 5) by bringing them before the Court under Article 169. As explained above,²⁴¹ the amendment proposed by the Treaty of Maastricht to Article 171 will reinforce the obligation of Member States to comply with a decision from the Court that the Member State is in breach of the Treaty of Rome, as a system of fines could be imposed upon the defaulting Member State following the decision of the European Court of Justice that the Member State is in breach of the Treaty.

A second possibility involves seeing Article 170 in a new light. As noted above, Article 170 has only been used once by a Member State against another. It seems that the fear of retaliation prevented Member States from paying too close attention to each other with regard to the correct application of Community law in their territories. A system of fines under Article 171(2), applicable to Member States and executable directly at the Community level (consequently bypassing the difficulty of executing a decision imposing fines in the courts of the defaulting Member State), would create a situation where one Member State that had to pay a fine for incorrectly applying of Community law, or for disregarding a preliminary ruling, would be motivated to make sure that other Member States also lived up to their obligations by more frequent use of Article 171. For example, if the U.K. were to pay a fine imposed on it at the Community level, the U.K. would probably make sure that it is not the only one being punished, if other Member States also ignore the effect of Community law upon their legal systems and get away with it. Consequently, the U.K. would start a proceeding under

²⁴¹. See "The Treaty of Maastricht and the Proposed Amendment to Article 171", above at 87.

Article 170 against France, not only because France is not complying with Community law, but because it is not complying and nothing is being done to punish the French State.

The Effects of the Judgement of the Court of Justice on a Member State Level

Regardless whether a Member State is brought before the European Court of Justice in accordance with Article 169 or Article 170, and regardless whether the alleged breach of the Treaty relates to Article 5 or Article 177, the net result will be the same: a declaration by the Court that the Member State has failed to fulfil the obligations under the Treaty. The Member State will then be required, under Article 171 "to take the necessary measures to comply with the judgment of the Court of Justice",²⁴² failing which a fine could be imposed.

What sort of measures would the Member State be required to take following a finding of the European Court of Justice that the Member State's Judiciary branch had failed to live up to the Member State's obligations under the Treaty, to rectify the situation? There is no obvious answer. Each Member State would have to develop measures compatible with its own legal system to meet this obligation. One may assume that the Commission will not tell a Member State what to do in such a case, because by doing so it would offend the "principle of subsidiarity" which permits each Member State to implement a measure in the manner most compatible with its legal system.²⁴³ By

²⁴². Article 171.

²⁴³. "Le traité d'Union européenne marque, aux termes de son Article A, « une nouvelle étape dans le processus créant une union sans cesse plus étroite entre les peuples de l'Europe ». Il est précisé également dans ce même article que, dans cette Union, « les décisions sont prises le plus près possible des citoyens »: c'est dire que « Bruxelles », « Luxembourg » ou « Strasbourg » ne doivent pas tout régenter dans la Communauté. Il est donc exclu de mettre en place un super-État communautaire. Le traité de Maastricht explicite cette option en prévoyant une définition limitative (à suivre...)

respecting the "principle of subsidiarity", the Community will avoid the risk of requiring a Member State to implement changes in its procedural or substantive laws that are incompatible with its legal system. Each Member State has the duty to pass necessary legislation to achieve the goals established by the Community. Therefore, the judgement of the Court of Justice will be binding on each Member State to which it is addressed, inasmuch as it specifies the result to be achieved, but it will leave the choice of form and methods to the national authorities.

Some Proposals to Implement the Decision from the European Court of Justice

The following suggestions as to how a Member State could provide for a review of a decision found to violate the Treaty of Rome are not exhaustive. The actual solutions chosen will depend on the interaction between Community law and the legal system of every one of the Member States. All things considered, there is always the possibility that the proposed solutions would require too much from the Member State, which could give rise to a political crisis both internal and external. At that point, the Member State would face the dilemma of whether to remain a member of the Community,

²⁴³(...suite)

des domaines d'intervention de la Communauté. On a pu dire dès lors que la Communauté n'avait pas « la compétence de ses compétences »: elle n'agit que dans les domaines que les États membres lui assignent.

De plus, pour les matières que ne relèvent pas de sa compétence exclusive, la règle suivante a été retenue par les partenaires de la négociation: ne pas vouloir régler à l'échelon communautaire ce qui peut être mieux décidé ou mieux géré aux plans national ou régional... C'est le principe de la subsidiarité." J.-C. Zylberstein, ed., *Traité de Maastricht - mode d'emploi* (Paris: U.G.E., 1992) at 58.

thereby contributing to the solidification of a future political union with the other members, or to withdraw from the Community.²⁴⁴

Once it has been decided that a Member State is in violation of the Treaty of Rome because of a judgement of its national court contrary to Community law, there are many possible ways of resolving the situation in order to prevent similar occurrences in the future.

To prevent future occurrences of this type of situation, the Commission might be inclined to propose to Council a Regulation or a Directive obliging all Member States to provide effective judicial remedies in such circumstances. Other States willing to join the Community would have to ensure that their legal system offer similar remedies to those incorporated in current Member States' systems before they could be admitted into the Community.

These guarantees could be provided in at least three ways:

1- Regardless of which court or tribunal's decision had caused the Member State to be found to be in breach of the Treaty of Rome, Member States' legislation would have to establish a procedure under which the matter will be heard again by a competent court or tribunal which will render a

²⁴⁴. Any State participating in an international treaty has the right to denounce its accession instrument if the State no longer wishes to remain under the jurisdiction of the treaty. In case of the Community, that assumption also applies. Although not defined, mentioned, or regulated by the Treaty, withdrawal is possible, simply because a Member State may, at any time, cease to give effect to Community law. Currently, there are no mechanisms to prevent this from taking place. It is the belief of this writer that none of the present Member States is willing to go that far. The economic and social consequences would be too great...

judgment that would not be inconsistent with the interpretation of Community law given by the only body competent to render it: the European Court of Justice.

2- In Member States whose rules of procedure are not established by legislation, the Executive branch would have to ensure that similar provisions were incorporated into the Member State's procedural framework (*e.g.* Rules of the Court). If this does not prove to be possible, because of objections raised by the rule-making body, the Executive, along with the national legislature would have to adopt appropriate legislation.

3- Additionally, Member States could expand the role of their Advocates-General or members of the *Ministère Public*, where they exist. In an expanded role, these individuals would contribute their opinion to every case dealing with Community law, Community-related national statutes or areas of Community interest. They would be completely neutral vis-à-vis the litigants and would submit their statements to the court as to how it should best decide the case.²⁴⁵ In exercising this role, these Advocates-General would have standing to appeal a decision rendered against Community law, even if the parties did not wish to appeal, because the role of this national Advocate-General would be to ensure the correct application of Community law. They would also have standing to refer the matter to the Commission and seek its opinion whether the decision was rendered in accordance with

²⁴⁵. At Community level, Advocates-General's activities are regulated by the Treaty itself. See Article 166(2):

"It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164".

Community law. These national Advocates-General would have similar responsibilities to the Community.²⁴⁶

Member States that do not currently have an Advocate-General, or similar officers, (*e.g.* the United Kingdom) may have no choice but to create such a function in order to achieve the ends required by the Community. In this case, these Member States could probably want to limit this function strictly to matters involving Community law, as it would represent a significant change in their legal system. Matters not related to Community law would preserve their traditional procedural and substantive legal basis. Common Law systems similar to the legal framework in the United Kingdom would be particularly affected by this innovative feature, if introduced by the Member State.²⁴⁷

²⁴⁶. As in many Civil Law systems, these individuals would exercise their function of *custus legis*.

²⁴⁷. It appears that in Common Law, the case, the facts, and the law, their knowledge and application, are strictly the responsibility of the parties. There is not presently anyone exercising the role of Advocate-General in Common Law systems. On the other hand, in Civil Law tradition, the judicial system has an active role in the case. Since the functioning of the Community legal framework is closer to Civil Law principles than it is to Common Law, this option would be quite an innovation to introduce into the judicial system of Member States with Common Law tradition. However, this is not an impossible task to accomplish. One cannot argue that such suggestion could destabilize the judicial system in Member States with Common Law tradition by saying that it would impair its harmonic functioning. These Member States have already undergone drastic changes with their accession to the Community. By signing the Treaty of Rome, Member States accepted to undergo changes in all areas of government: Executive, Legislative and Judiciary branches were equally affected by the Treaty of Rome.

The Probabilities of Application of the Theory Proposed

At the end of every year, in accordance with a Resolution of the European Parliament,²⁴⁸ the Commission publishes an annual report²⁴⁹ which attempts to offer a clear and precise view of the application of Community law in the several sectors of Community jurisdiction.²⁵⁰ This report pays great attention to the conduct of Member States which might lead to an action before the European Court of Justice by the Commission.

Among the several Annexes and Appendixes at the end of the two latest reports,²⁵¹ the Commission discusses the application of Community law by national jurisdictions. According to these reports,

²⁴⁸. E.C., *Resolution of the European Parliament of 9 February 1983*, O.J. Communications (1983) n° C68 at 32.

²⁴⁹. *Rapport annuel au Parlement européen sur le contrôle de l'application du droit communautaire*.

²⁵⁰. E.C., *Commission - Premier Rapport Annuel du 20/4/84*, COM(84) 181 final; E.C., *Commission - Deuxième Rapport Annuel du 23/4/1985*, O.J. Communication (1985) unpublished; E.C., *Commission - Troisième Rapport Annuel du 3/6/1986*, O.J. Communication (1986) n° C220; E.C., *Commission - Quatrième Rapport Annuel du 24/8/87*, O.J. Communication (1987) n° C338; E.C., *Commission - Cinquième Rapport Annuel du 13/9/88*, O.J. Communication (1988) n° C310; E.C., *Commission - Sixième Rapport Annuel du 22/12/1989*, O.J. Communication (1989) n° C330; E.C., *Commission - Septième Rapport Annuel du 22/6/90*, O.J. Communication (1990) n° C232; E.C., *Commission - Huitième Rapport Annuel du 31/12/91*, O.J. Communication (1991) n° C338 [hereinafter *Huitième Rapport*]; E.C., *Commission - Neuvième Rapport Annuel du 28/9/92*, O.J. Communication (1992) n° C250 [hereinafter *Neuvième Rapport*].

²⁵¹. *Huitième Rapport*, *supra* note 250 at 77 *et seq.*; *Neuvième Rapport*, *supra* note 250 at 70 *et seq.*

the Court of Justice was called to rule on a question placed under Article 177, 141 times in 1990, and 153 times in 1991.²⁵² It is highly likely that at least some of the Court's judgments are not fully applied or correctly interpreted at the Member-State level,²⁵³ although there are no published figures to document this speculation. Besides, how can one be sure that among all the judicial bodies of the Member States (courts, tribunals, or any other denomination they are given) correctly apply Community law in all the cases currently being examined, not only Article 177, but the entire set of norms and rules established by the Community. Pescatore alludes to the fact that incomprehension and reticence on the part of some national jurisdictions continues to exist.²⁵⁴ In case these incomprehension and reticence become too serious, the legal framework of the Treaty allows the Commission to start proceedings against a Member State which does not follow Community law.

The Commission is not the only Community body concerned about the correct application of Community law by national jurisdictions. The European Court of Justice is also interested in the correct application of its decisions. The national judge or tribunal who places a preliminary ruling request before the Court is asked to provide the Court a copy of the final judgment as soon as it is

²⁵². There seems to exist some stability in the number of preliminary rulings made to Luxembourg. In the last 3 out of 4 years, the average number of requests was 141. There were 153 requests in 1991, 141 requests in 1990, 139 in 1989, and 139 in 1987. 1988 showed a sudden increase in the number, 179 cases, however it did not affect the amount in subsequent years.

²⁵³. See Appendix IV, below at 122 for details on preliminary ruling requests and procedures under Article 169

²⁵⁴. "... [on a] constaté des incompréhensions ou des réticences auprès de certaines juridictions nationales." Pescatore, *supra* note 159 at 23.

rendered. This judgement is studied attentively by Court officials and a report is circulated to all members of the Court.²⁵⁵

²⁵⁵. "Cette décision fait l'objet d'une étude attentive et les services de la Cour établissent à ce sujet une note d'information qui est diffusée à tous les membres de la Cour." Pescatore, *supra* note 159 at 23. Such a report is confidential to Court officials.

Conclusion

As it can be extrapolated from the above pages, the European Community is the result of the efforts of many state-persons who integrate Europe into a bigger and more powerful structure. The European Community is in constant evolution, and any conclusions regarding its future as well as legal nature are only speculations and projections, and ought not to be considered as absolutes. Nevertheless these discussions are important to situate the reader in the present context of the Community.

The Treaty of Rome directly affected the internal and external concepts of sovereignty of the Member States of the Community. The Member States' governments function according to systems of separation of powers. Although not an absolute model and not equally applied by governments of all twelve Member States, Montesquieu's proposed theory of separation of powers provides enough basis for the understanding of the premise proposed in this Part II, above at 38: to the international community (including the European Community) a Member State is affected by an act of any of its branches of government.

The Treaty of Rome also introduced changes in the legal framework of the Member States. Two among them were discussed here. One, Article 177 allows (and sometimes requires) that a national court or tribunal requests the European Court of Justice to clarify a point of interpretation in Community law that relates to the matter. According to this procedure, the answer of the European Court of Justice binds the national requesting court or tribunal and also all courts or tribunals that

might hear the case on appeal. The national judge extracts from the answer of the European Court of Justice the necessary guidance to decide the case at national level.

The other change, resulting from Articles 169 and 170 allows the Commission or another Member State to bring a Member State before the European Court of Justice on the argument of failure to live up to its obligations. Generally speaking, these obligations are to take all appropriate measures to achieve the goals defined in the Treaty and to restrain from taking any action or omission that might put these goals in jeopardy. If found to be in breach of the Treaty of Rome, the Member State is required to take the appropriate measures to comply with the judgment of the European Court of Justice. Although Article 171 has been frequently disregarded until recently, the new amendments to the Treaty of Rome introduced by the Treaty of Maastricht allow pecuniary sanctions applicable upon Member States refusing to comply with a decision of the European Court of Justice.

Based on what has been explained in the above pages, one may conclude that a decision of a national court or tribunal, even though originating from the judiciary branch of a Member State is considered as an act of the Member State in its totality by the Court, that either disregards or ignores a preliminary ruling from the European Court of Justice or without referring to preliminary proceedings disregards or ignores Community law, constitutes a breach of the Treaty of Rome and subjects the Member State to the jurisdiction of the European Court of Justice under Article 169 (or Article 170).

After a decision of the Court where a Member State was found to be in breach of the obligations arising from the Treaty of Rome, the Member State will have to provide appropriate measures to allow such a decision to be reviewed and the new decision to conform with Community law or with its interpretation by the European Court of Justice, or accept the consequences of its failure. Until

now, even if the Court of Justice ruled that a Member State had failed to live up with the comments of the Court, there would be no other remedy applicable. Today, and as soon as the Treaty of Maastricht comes into force in all Member States, there will exist a real mechanism to guarantee that the decisions of the Court of Justice are met with the celerity and respect they deserve.

Appendixes

Appendix I

Articles of the Treaties cited in this work.

Treaty of Rome

Article 3

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein

- (a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) the establishment of a common customs tariff and of a common commercial policy towards third countries;
- (c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;
- (d) the adoption of a common policy in the sphere of agriculture;
- (e) the adoption of a common policy in the sphere of transport;
- (f) the institution of a system ensuring that competition in the common market is not distorted;
- (g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;
- (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market;
- (i) the creation of a European social Fund in order to improve employment opportunities for workers and to contribute to the raising of the standard of living;
- (j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;
- (k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

Article 5

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

Article 95

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Member States shall, not later than at the beginning of the second State repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules.

Article 138

1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.
2. The number of representatives elected in each Member State is as follows...
3. The European Parliament shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.

The council shall, acting unanimously, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.

Article 144

If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote.

If the motion of censure is carried by a two-third majority of the votes cast, representing a majority of the members of the European Parliament, the members of the Commission shall resign as a body. They shall continue to deal with current business until they are replaced in accordance with Article 158.

Article 148

1. ...
2. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as follows:

Belgium	5
Denmark	3
Germany	10
Greece	5
Spain	8
France	10
Ireland	3
Italy	10
Luxembourg	2
Netherlands	5
Portugal	5
United Kingdom	10

For the adoption, acts of the Council shall require at least:

- fifty-four votes in favour where this Treaty requires them to be adopted on a proposal from the Commission,
- fifty-four votes in favour, cast by at least eight members, in other cases.

3. Abstentions by members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity.

Article 165

The Court of Justice shall consist of thirteen Judges.

The court of Justice shall sit in plenary session. It may, however, form Chambers, each consisting of three or five Judges, either to undertake certain preparatory inquiries or to adjudicate on particular categories of cases in accordance with rules laid down for these purposes.

Whenever the Court of Justice hears cases brought before it by a Member State or by one of the institutions of the Community or, to the extent that the Chambers of the Court do not have the requisite jurisdiction under the Rules of Procedure, has to give preliminary rulings on questions submitted to it pursuant to Article 177, it shall sit in plenary session.

Should the Court of Justice so request, the Council may, acting unanimously, increase the number of Judges and make the necessary adjustment to the second and third paragraphs of this Article and to the second paragraph of Article 167.

Article 166

The Court of Justice shall be assisted by six Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164.

Should the Court of Justice so request, the Council may, acting unanimously, increase the number of Advocates-General and make the necessary adjustments to the third paragraph of Article 167.

Article 168a

1. At the request of the Court of Justice and after consulting the Commission and the European Parliament, the Council may, acting unanimously, attach to the Court of Justice a court with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute, certain classes of action or proceeding brought by natural or legal persons. That court shall not be competent to hear and determine actions brought by Member States or by Community institutions or questions referred for a preliminary ruling under Article 177...

2. ...

Article 169

1. If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

2. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 170

A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

Article 171

If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgement of the Court of Justice.

Article 173

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 175

Should the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

Article 177

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of this treaty;
- b) the validity and interpretation of acts of the institutions of the Community;
- c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide...

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision of the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 186

The Court of Justice may in any cases before it prescribe any necessary interim measures.

Article 189

In order to carry out their task the Council and the Commission shall in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Article 210

The Community shall have legal personality.

Article 211

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.

Article 228

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the European Parliament where required by this Treaty.

The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 236.

2. Agreements concluded under these conditions shall be binding on the institutions of the Community and on Member States.

Article 235

If action by the Communities should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Article 240

This Treaty is concluded for an unlimited period.

Treaty of Maastricht**Article 171**

1. If the Court of Justice finds that a member-State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the member-State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the member-State concerned has not complied with the judgment of the Court of Justice. If the member-State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the member-State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the member-State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 170.

Coal and Steel Treaty**Article 6**

The Community shall have legal personality.

In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives.

In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons constituted in that State; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.

The Community shall be represented by its institutions, each within the limits of its powers.

Article 21

1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.
2. The numbers of representatives elected in each Member State shall be as follows...
3. The European Parliament shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.

The Council shall, acting unanimously, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.

Article 41

The Court shall have sole jurisdictions to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is in issue in proceedings brought before a national court or tribunal.

Article 86

Member States undertake to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community's tasks...

Article 95

In all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the High Authority is necessary to attain, within the common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted.

Any decision so taken or recommendation so made shall determine what penalties, if any, may be imposed...

Article 97

This Treaty is concluded for a period of fifty years from its entry into force.

Euratom Treaty**Article 108**

1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.
2. The number of representatives elected in each Member State is as follows...
3. The European Parliament shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.

The Council shall, acting unanimously, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.

Article 148

Should the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

Article 150

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of this Treaty;
- b) the validity and interpretation of acts of the institutions of the Community;
- c) the interpretation of the statutes of bodies established by an act of the Council, save where those statutes provide otherwise.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 184

The Community shall have legal personality.

Article 185

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.

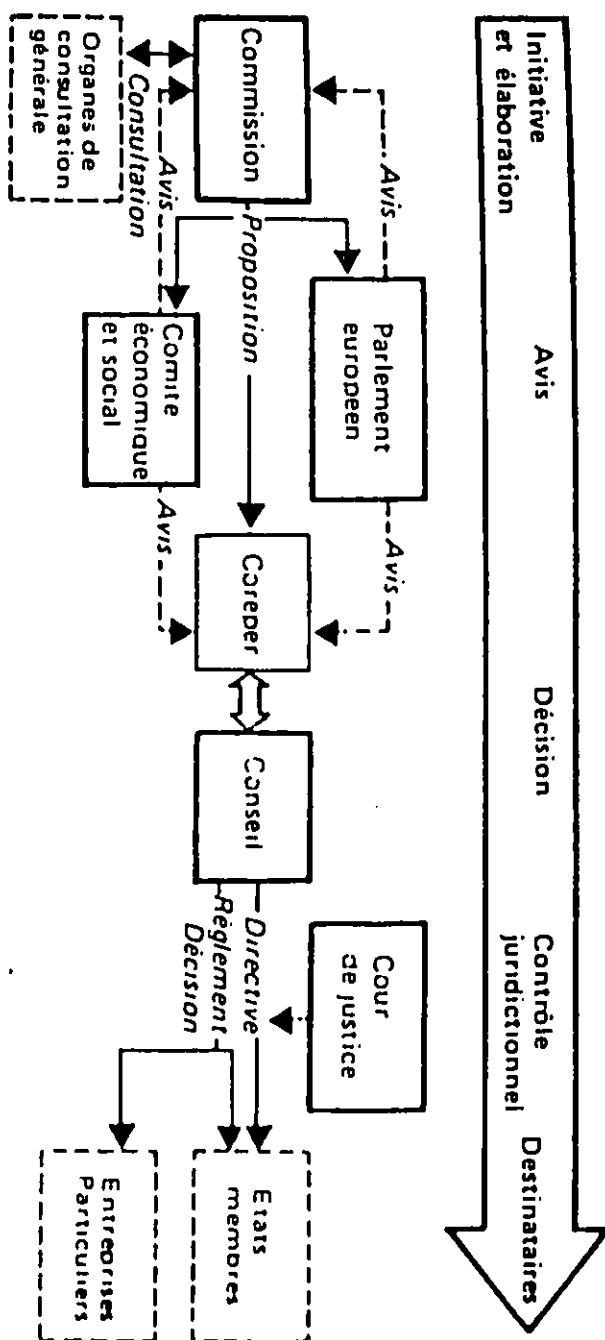
Article 192

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

Appendix II

Scheme of the Legislative process of the Community



Appendix III

Table #1				
Type de recettes entre parenthèses sont indiqués les titres (T) ou les chapitres (Ch) correspondant à la nomenclature budgétaire 1989	Recettes prévisionnelles du budget 1989 (après budget rectificatif et supplémentaire n° 1)		Recettes effectives in 1989 (recouvrement de l'exercice)	
Source: Rapport annuel relatif à l'exercice 1989; J.O. C 12/12/1990, p. 63.	Mio ECU	%	Mio ECU	%
1. Ressources propres:				
- prélèvements agricoles (Ch 10)	1419,2	3,2	1282,7	2,8
- cotisations sucre et isoglucose (Ch 11)	1316,9	2,9	1381,6	3,0
- droits de douane (Ch 12)	11060,0	24,7	11458,8	25,0
- frais de perception des ressources propres (Ch 19) ²⁵⁶	-1379,6	-3,1	-1412,3	-3,1
- ressources propres TVA (Ch 13)	26219,1	58,5	26293,4	57,3
- ressources propres fondées sur le PNB (Ch 14)	3906,1	8,7	2877,1	6,3
- ajustements des contributions financières/TVA (Ch 31)	-	-	634,6	1,4
- excédent ressources PNB de l'exercice précédent (Ch 32)	-	-	171,6	0,4
- recettes destinées à équilibrer le budget général (Ch 21)			1641,8	3,6
Total ressources propres	42541,7	94,9	44329,3	96,6
2. Excédent disponible de l'exercice précédent (Ch 30)	2024,5	4,5	1161,6	2,5
3. Autres recettes (T 4-9)	274,3	0,6	408,8	0,9
Total des recettes	44840,6	100,0	45899,8	100,0

²⁵⁶. Les États membres retiennent, au titre des frais de perception, 10% des montants à verser au titre des chapitres 10, 11 et 12.

Table #2				
Type de recette	Budget Définitif 1990		Recettes effectives 1990	
Source: Rapport Annuel relatif à l'exercice 1990; J.O. C 13/12/1991, p. 31.	Mio ECU	%	Mio ECU	%
1. Ressources traditionnelles				
- Droits de douane	12611,0	26,87	11427,9	24,59
- Prélèvements agricoles	1152,4	2,45	1173,4	2,52
- Sucre, isoglucose	1384,6	2,95	910,7	1,95
- Frais de perception	-1514,8	-3,22	-1351,2	-2,90
Total ressources traditionnelles	13633,2	29,05	12158,7	26,16
2. Ressources TVA et PNB				
- Ressources TVA	27407,9	58,4	27440,1	59,05
- Ressources PNB	94,6	0,20	94,9	0,20
- Recette d'équilibre	-	-	-	-
- Ajustements TVA	p.m.	-	1527,8	3,28
- Ajustements PNB	p.m.	-	189,7	0,40
Total ressources TVA et PNB	27502,5	58,6	29252,4	62,93
3. Recettes 'Réserve monétaire'	1024,0	2,18	0,00	0,00
4. Recettes diverses	304,3	0,64	591,9	1,27
5. Excédent exercice antérieur	4464,2	9,51	4464,2	9,60
Total général	46928,2	99,98	46469,1	99,96

Table #3				
Type de recette	Budget Définitif 1991 (après budgets rectificatifs et supplémentaires)		Recettes effectives 1991 (recouvrement de l'exercice)	
Source: Rapport Annuel relatif à l'exercice 1991; J.O. C 330 15/12/1992, p. 44.	Mio ECU	%	Mio ECU	%
1. Ressources traditionnelles				
- Droits de douane	13277,6	23,7	12751,1	22,7
- Prélèvements agricoles	1262,3	2,3	1621,3	2,9
- Sucre, isoglucose	1288,2	2,3	1141,8	2,0
- Frais de perception	-1584,2	-2,8	-1552,1	-2,8
Total ressources traditionnelles	14243,9	25,4	13962,0	24,8
2. Ressources TVA et PNB				
- Ressources TVA	30255,9	53,9	30269,0	53,8
- Ressources PNB	8408,0	15,0	7445,1	13,2
- (dont réserve monétaire FEOGA, poste 1401)	1004,5	1,8	30,0	0,1
- Ajustements TVA	-	-	1137,2	2,0
- Ajustements PNB	-	-	23,2	-
Total ressources TVA et PNB	38663,9	68,9	38874,5	69,1
4. Recettes diverses				
	336,0	0,6	571,3	1,0
5. Excédent exercice antérieur				
	2841,6	5,1	2841,6	5,1
Total général	56085,4	100,0	56249,4	100,0

Appendix IV

Activities of the Commission:

Table #1 (Article 169 - by individual country)						
	Initial contact		Reasoned opinion		Cases that reached the Court of Justice	
Source: Huitième rapport annuel, <i>supra</i> note 250 at 50; and Neuvième rapport annuel, <i>supra</i> note 250 at 43.						
	1990	1991	1990	1991	1990	1991
Belgium	67	74	29	46	13	7
Germany	61	62	20	13	5	1
Denmark	35	53	5	3	3	1
Greece	121	89	39	48	10	9
Spain	114	81	15	30	3	2
France	76	60	17	15	6	4
Ireland	52	62	17	27	3	3
Italy	110	118	58	76	24	24
Luxembourg	43	64	14	35	4	4
The Netherlands	61	64	20	23	2	7
Portugal	176	86	11	84	2	2
United Kingdom	44	64	6	11	2	-
Total	960	877	251	412	77	64

Table #2 (Article 169 - all Member States combined)			
	Initial contact	Reasoned opinion	Cases that reached the Court of Justice
1985	503	233	113
1986	516	164	71
1987	572	197	61
1988	569	227	73
1989	664	180	96
1990	960	251	77
1991	877	412	64

Table #3 (Article 177 - by individual country)						
Member State	All national jurisdictions			Of which (...) are of last instance		
Source: Huitième rapport annuel, <i>supra</i> note 250 at 77; Neuvième rapport annuel, <i>supra</i> note 250 at 70.						
	1989	1990	1991	1989	1990	1991
Germany	47	34	50	22	12	17 ²⁵⁷
Belgium	13	17	17	-	4	1 ²⁵⁸
Denmark	2	5	2	1	-	-
Spain	2	6	4	-	-	-
France	28	21	24	1	2	3 ²⁵⁹
Greece	2	2	2	-	2 ²⁶⁰	-
Ireland	1	4	1	1	2	1 ²⁶¹
Italy	10	25	18	1	1	3 ²⁶²
Luxembourg	1	4	2	1	2	1 ²⁶³
The Netherlands	18	9	17	15	3	4 ²⁶⁴
Portugal	1	2	3	-	-	2 ²⁶⁵
United Kingdom	16	12	13	2	2	3 ²⁶⁶

²⁵⁷. Origin of the questions placed. 1990: Bundesverwaltungsgericht 1; Bundesfinanzhof 9; Bundessozialgericht 2. 1991: Bundesverwaltungsgericht 2; Bundesfinanzhof 9; Bundessozialgericht 1; Bundesgerichtshof 5.

²⁵⁸. 1990: Cour de Cassation 4. 1991: Cour de Cassation 1.

²⁵⁹. 1990: Cour de Cassation 1; Conseil d'État 1. 1991: Cour de Cassation 2; Conseil d'État 1.

²⁶⁰. Conseil d'État 2.

²⁶¹. 1990: Supreme Court 2. 1991: Supreme Court 1.

²⁶². 1990: Corte Suprema di Cassazione 1. 1991: Corte Suprema di Cassazione 2; Consiglio di Stato 1.

²⁶³. 1990: Conseil d'État 2. 1991: Conseil d'État 1.

²⁶⁴. 1990: Hoge Raad 3. 1991: Hoge Raad 3; Raad van State 1.

²⁶⁵. Supremo Tribunal Administrativo 2.

²⁶⁶. 1990: Court of Appeal 2. 1991: House of Lords 3.

Table of Authorities²⁶⁷
1. Treaties and Conventions

<i>E.C., Rules of Procedure of the Commission</i> , O.J. Legislation (1975) n° L17 at 81	16
<i>Single European Act</i> , 17/02/86, O.J. Legislation (1987) n° L169 at 1	9, 18, 20, 27, 74
<i>Treaty Establishing a Single Council and a Single Commission of the European Communities</i> , 08/04/65, O.J. Legislation (1967) n° L152	20, 74
<i>Treaty Establishing the European Atomic Energy Community</i> , 25/03/57	9, 13, 26, 27
<i>Treaty Establishing the European Coal and Steel Community</i> , 18/04/51	9, 12, 13, 26, 27
<i>Treaty Establishing the European Economic Community</i> , 25/03/1957, 298 U.N.T.S. 11	1, 4, 6, 9, 13, 20, 24, 26, 27, 30, 34, 35, 51, 53, 54, 57, 58, 60, 62, 64, 66, 74, 75, 78, 82, 83, 86, 87, 91-95, 97, 98, 100-102, 106, 108, 109
<i>Treaty on European Union</i> , 07/02/92, [1992] C.Mkt L.Rev. 573	5, 6, 10, 17, 21, 31, 34-36, 74, 93, 98, 109

2. Articles of the Treaty of Rome

Article 3	111
Article 3(h)	10
Article 5	2, 72, 73, 81, 93, 97, 98
Article 5(1)	73
Article 95	55, 94
Article 95(1)	53
Article 100	28

²⁶⁷. The references below are to page number.

Article 100a	28
Article 111	21
Article 113	21
Article 138(3)	17
Article 144	17
Article 148	14
Article 165	18
Article 165(3)	83
Article 166(2)	103
Article 167	18
Article 168a	18
Article 169	2, 6, 53-57, 80, 81, 83, 84, 92-94, 96-98, 106, 109
Article 170	2, 83, 84, 87, 98, 99, 109
Article 171	2, 3, 84, 93, 98, 100
Article 173	5, 18
Article 175	5, 17, 18
Article 177	2, 60-64, 66, 68, 71, 92, 95, 97, 98, 106, 108
Article 177(2)	71, 95
Article 177(3)	66, 71, 96
Article 179	18
Article 186	85
Article 189	11, 72
Article 210	27
Article 211	27

Article 228	21
Article 235	24, 28
Article 240	26
Articles 145 to 154	14
Articles 155 to 163	16

3. Articles of the Coal and Steel Treaty

Article 6	27
Article 6(3)	27
Article 21(3)	17
Article 41	63
Article 86	73
Article 95	17
Article 97	26
Articles 8 to 19	16
Articles 26 to 30	14

4. Articles of the Euratom Treaty

Article 108(3)	17
Article 148	17
Article 150	63
Article 184	27
Article 185	27

Article 192	73
Articles 115 to 123	14
Articles 124 to 135	16

5. Articles of the Treaty of Maastricht

Article 138b	17
Article 138c	17
Article 138e	17
Article 171	87, 98
Article 235.	30

6. Reports from the Court of Auditors and from the Commission

E.C., <i>Commission - Cinquième Rapport Annuel du 13/9/88,</i> O.J. Communication (1988) n° C310	105
E.C., <i>Commission - Deuxième Rapport Annuel du 23/4/1985, COM(85) 149 final</i>	105
E.C., <i>Commission - Huitième Rapport Annuel du 31/12/91,</i> O.J. Communication (1991) n° C338	105
E.C., <i>Commission - Neuvième Rapport Annuel du 28/9/92,</i> O.J. Communication (1992) n° C250	105
E.C., <i>Commission - Premier Rapport Annuel du 20/4/84, COM(81) 181 final</i>	105
E.C., <i>Commission - Quatrième Rapport Annuel du 24/8/87,</i> O.J. Communication (1987) n° C338	105
E.C., <i>Commission - Septième Rapport Annuel du 22/6/90,</i> O.J. Communication (1990) n° C232	105
E.C., <i>Commission - Sixième Rapport Annuel du 22/12/1989,</i> O.J. Communication (1989) n° C330	105

E.C., <i>Commission - Troisième Rapport Annuel du 3/6/1986</i> , O.J. Communication (1986) n° C220	105
---	-----

E.C., <i>Court of Auditors of the European Communities, Annual Report to 1991</i> , O.J. Communication (1992) n° C330	32
--	----

7. European Parliament

E.C., <i>Question écrite n° 28/68: Importation en France de semoules algériennes</i> , O.J. Communication (1968) n° C71 at 1	96
---	----

E.C., <i>Question écrite n° 100/67: Application de l'article 177 du traité de la C.E.E.</i> , O.J. Communication (1967) n° C270 at 2	96
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E.C., <i>Question écrite n° 349/69: Compatibilité de l'arrêt du Conseil d'État français du 1er mars 1968 avec le droit communautaire</i> , O.J. Communication (1970) n° C20 at 3	97
--	----

E.C., <i>Question écrite n° 526/83: La doctrine de l'acte clair</i> , O.J. Communication (1983) n° C268 at 25	97
--	----

E.C., <i>Question écrite n° 608/78: Article 177 du traité C.E.E.</i> , O.J. Communication (1979) n° C28 at 8	97
---	----

E.C., <i>Resolution of the European Parliament of 14 March 1983</i> , O.J. Communications (1983) n° C68 at 32	105
--	-----

8. Regulations

E.C., <i>Council Regulation (E.E.C.) n° 1172/76 of 17/05/76</i> , O.J. Legislation (1976) n° L131 at 1	31
---	----

9. Decisions

E.C., <i>Council Decision (E.E.C.) n° 76/87 of 20/09/76</i> , O.J. Legislation (1976) n° L278 at 1	16
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E.C., <i>Council Decision (E.E.C.) n° 70/243 of 21/04/70</i> ,	
--	--

O.J. Legislation (1970) n° L94 at 19	31
E.C., <i>Council Decision (E.E.C.) n° 85/257 of 07/05/85</i> , O.J. Legislation (1985) n° L128 at 15	31
E.C., <i>Council Decision (EEC, ECSC, Euratom) n° 88/591 of 24/10/88</i> , O.J. Legislation (1988) n° L319 at 1	18

10. Decisions from the European Court of Justice

Advocate General - Opinion (N° 7/68), [1968] E.C.R. 630	53
Advocate General - Opinion (N° 8/70), [1970] E.C.R. 969	56
Advocate General - Opinion (N° 36/73), [1973] E.C.R. 1315; [1974] 3 C.M.L.R. 148	65
Advocate General - Opinion (N° 48/71), [1972] E.C.R. 536	81
Advocate General - Opinion (N° 51-54/71), [1971] E.C.R. 1119	73
Advocate General - Opinion (N° 61/65), [1966] E.C.R. 402; [1966] 1 C.M.L.R. 508	65
Advocate General - Opinion (N° 77/69), [1970] E.C.R. 245	53
Advocate General - Opinion (N° 90/82), [1983] E.C.R. 2033	57
Advocate General - Opinion (N° 167/73), [1974] E.C.R. 375	81
<i>Amministrazione delle Finanze dello Stato v. Simmenthal S.p.a.</i> (N° 106/77), [1978] E.C.R. 629	77
<i>Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) et al.</i> (N° 267-269/81), [1983] E.C.R. 801	20
<i>Amsterdam Bulb B.V. v. Produktschap voor Siergewassen</i> (N° 50/76), [1977] E.C.R. 137	73, 76
<i>Angelo Tomandini Snc. v. Amministrazione delle Finanze dello Stato</i> (N° 84/78), [1979] E.C.R. 1801	20
<i>Atalanta Amsterdam B.V. v. Produktschap voor Vee en Vlees</i> (N° 240/78), [1979] E.C.R. 2137	73

<i>Benedetti v. Munari</i> (N° 52/76), [1977] E.C.R. 163	72
<i>Bertini et al. v. Regione Lazio</i> (N° 98, 162 and 258/85), [1986] E.C.R. 1885	69
<i>Bestuur v. Mouthaan</i> (N° 39/76), [1976] E.C.R. 1901	70
<i>Bosch v. de Geus</i> (N° 13/61), [1962] E.C.R. 93; [1962] I C.M.L.R. 1	61, 70
<i>Bozzone v. Office de Sécurité Sociale D'Outre Mer</i> (N° 87/76), [1977] E.C.R. 687; [1977] 2 C.M.L.R. 604	70
<i>Broeckmeulen v. Huisarts Registratie Commissie</i> (N° 246/80), [1981] E.C.R. 2311; [1982] C.M.L.R. 91	65
<i>CILFIT et al. v. Italian Ministry of Health</i> (Case n° 283/81), [1982] E.C.R. 3415	67
<i>Commission v. Belgium</i> (N° 77/69), [1970] E.C.R. 237	53-55, 94
<i>Commission v. Belgium</i> (N° 102/79), [1980] E.C.R. 1473	52, 85
<i>Commission v. Belgium</i> (N° 227-230/85), [1988] E.C.R. 1	86
<i>Commission v. Belgium & Luxembourg</i> (N° 90-91/63), [1964] E.C.R. 1217	52
<i>Commission v. Council</i> (N° 22/70), [1971] E.C.R. 263; [1971] I C.M.L.R. 335	27, 29
<i>Commission v. France</i> (N° 7/71), [1971] E.C.R. 1003	75, 76
<i>Commission v. France</i> (N° 90/82), [1983] E.C.R. 2011	57, 58, 94
<i>Commission v. France</i> (N° 232/78), [1979] E.C.R. 2729	52
<i>Commission v. Germany</i> (N° 325/82), [1984] E.C.R. 777	82
<i>Commission v. Greece</i> (N° 194/85 and N° 241/85), [1988] E.C.R. 1037	81
<i>Commission v. Italy</i> (N° 7/61), [1961] E.C.R. 637	82
<i>Commission v. Italy</i> (N° 7/68), [1968] E.C.R. 618	53, 94
<i>Commission v. Italy</i> (N° 8/70), [1970] E.C.R. 961	56, 57, 94
<i>Commission v. Italy</i> (N° 38/69), [1970] I E.C.R. 47; [1970] I C.M.L.R. 77	29
<i>Commission v. Italy</i> (N° 39/72), [1973] E.C.R. 101	78

<i>Commission v. Italy</i> (N° 69/86), [1987] E.C.R. 778	86
<i>Commission v. Italy</i> (N° 160/85), [1986] E.C.R. 3250	86
<i>Commission v. The Netherlands</i> (N° 95/77), [1978] E.C.R. 863	52
<i>Commission v. United Kingdom</i> (N° 804/79), [1981] E.C.R. 1045	76
<i>Costa v. E.N.E.L.</i> (N° 6/64), [1964] E.C.R. 1143	4, 69, 70, 78
<i>De Gezamenlijke Steenkolenmijnen</i> (N° 17/57), [1961] E.C.R. 9	83
<i>De Gezamenlijke Steenkolenmijnen</i> (N° 30/59), [1961] E.C.R. 1	83
<i>Demande de question préjudicielle du Juge chargé du service du tribunal d'instance d'Hayange</i> (N° 105/79), [1979] E.C.R. 2257	69
<i>Donckerwolcke v. Procureur de la République</i> (N° 41/76), [1976] E.C.R. 1921	76
<i>Filippo Galli</i> (Demande de décision préjudicielle formée par le Pretore de Rome) (N° 31/74), [1975] E.C.R. 47	28
<i>Foglia v. Novello</i> (N° 104/79), [1980] E.C.R. 745	69
<i>Foglia v. Novello</i> (N° 244/80), [1981] E.C.R. 3045	69
<i>France v. United Kingdom</i> (N° 141/78), [1979] E.C.R. 2923; [1980] 1 C.M.L.R. 6	83
<i>Fratelli Variola v. Amministrazione delle Finanze dello Stato</i> (N° 34/73), [1973] E.C.R. 981	64
<i>Germany v. High Authority</i> (N° 3/59), (1960) E.C.R. 121	80
<i>Groupement des Industries Sidérurgiques Luxembourgeoises</i> (N° 7 & 9/54), [1955-56] E.C.R. 53	83
<i>Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH</i> (N° 8/73), [1973] 1 E.C.R. 897	29
<i>Hauptzollamt Hamburg-Oberelbe v. Bollmann</i> (N° 40/69), [1970] E.C.R. 70; [1970] 1 C.M.L.R. 141	61, 70
<i>Hauptzollamt Mainz v. Kupferberg & Cie. K.G. a.A.</i> (N° 104/81), [1983] 1 C.M.L.R. 1	81
<i>Hoffmann-La Roche v. Centrafarm</i> (N° 107/76), [1977] E.C.R. 957; [1977] 2 C.M.L.R. 334	62
<i>Humblet v. Belgium</i> (N° 6/60), [1960] E.C.R. 1125	84, 86

<i>International Fruit Co. NV et al. v. Productschap voor Groenten en Fruit</i> (N° 21-24/72), [1972] E.C.R. 1219	20
<i>International Fruit Co. NV v. Produktschap voor Groenten en Fruit</i> (N° 51-54/71), [1971] E.C.R. 1107	73
<i>Internationale Handelsgesellschaft mbH. v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel</i> (N° 11/70), [1970] E.C.R. 1125	20
<i>Leonese v. Amministrazione delle Finanze dello Stato</i> (N° 93/71), [1972] E.C.R. 287; [1973] 1 C.M.L.R. 343	64
<i>Magdalena Vandeweghe et al. v. Berufsgenossenschaft für die Chemische Industrie</i> (N° 130/73), [1973] E.C.R. 1329	20
<i>Marcel Demouche et al. v. Fonds de garantie automobile et Bureau central français</i> (N° 152/83), [1987] E.C.R. 3833	69
<i>Marimex v. Italian Tax Administration</i> (N° 29/72), [1972] E.C.R. 1309; [1973] 1 C.M.L.R. 486	70
<i>Milch, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken</i> (N° 29/68), [1969] E.C.R. 165; [1969] 1 C.M.L.R. 390	72
<i>Ministère Public v. Gauchard</i> (N° 20/87), [1987] E.C.R. 4879; [1987] 2 C.M.L.R. 489	69
<i>Ministère Public v. Lefèvre</i> (N° 188/86), [1987] E.C.R. 2963	69
<i>Nederlandse Spoorwegen NV v. Minister van Verkeer en Waterstaat</i> (N° 36/73), [1973] E.C.R. 1299	64
<i>Nordsee Deutsche Hochseefischerrei GmbH v. Reederei Mond Hochseefischerei Nordstem AG & Co KG</i> (N° 102/81), [1982] E.C.R. 1095	65
<i>NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen</i> (N° 26/62), [1963] E.C.R. I; [1963] 1 C.M.L.R. 105	22, 78, 79
<i>Officier van Justitie v. Van den Hazel</i> (N° 111/76), [1977] E.C.R. 901	76
Opinion from the Court (N° 1/75), [1975] E.C.R. 1355	76
Opinion from the Court (N° 1/78), [1979] E.C.R. 2871	76
<i>Politi S.A.S. v. Amministrazione delle Finanze dello Stato</i> (N° 43/71), [1971] E.C.R. 1039; [1973] 1 C.M.L.R. 60	64, 79

<i>R. and V. Haefeman v. Belgium</i> (N° 181/73), [1974] E.C.R. 449	20
<i>Re Borker - Demande de décision préjudicielle formée par le Conseil de l'ordre des avocats à la Cour de Paris</i> (N° 138/80), [1980] E.C.R. 1975	64
<i>Rheinmühlem-Düsseldorf v. EVSt</i> (N° 166/73), [1974] E.C.R. 33	62
<i>S.p.a. Marimex v. Amministrazione delle Finanze dello Stato</i> (N° 84/71), [1972] E.C.R. 89	79
<i>Société Commerciale Antoine Vloeberghs S.A. v. High Authority E.C.S.C.</i> (N° 9 & 20/60), [1961] E.C.R. 396	83
<i>The Netherlands v. High Authority</i> (N° 25/59), [1960] E.C.R. 761	80
<i>Vaassen-Gobbels v. Beambtenfonds voor het Mijnbedrijf</i> (N° 61/65), [1966] E.C.R. 377; [1966] 1 C.M.L.R. 508	65
<i>Wilhem et al. v. Bundeskartellamt</i> (N° 14/68), [1969] E.C.R. 1; [1969] 1 C.M.L.R. 100	77

11. Domestic Legislation

11.1. United Kingdom

<i>European Communities Act 1972</i> , 1972, c. 68	71, 74
--	--------

11.2. France

<i>France, French Constitution</i>	74
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