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SCHREYER HONORS COLLEGE

SCHOOL OF HUMANITIES AND SOCIAL SCIENCES

THE EVOLUTION OF THE TREATY-MAKING POWERS OF THE  
EUROPEAN UNION

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SPRING 2013

A thesis  
submitted in partial fulfillment  
of the requirements  
for a baccalaureate degree  
in Political Science  
with honors in Political Science

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## ABSTRACT

This paper will focus on the evolution of the European Union's treaty-making powers exploring each step in its decades long development. The paper will begin by looking at the Treaty Establishing the European Coal and Steel Community, next it will focus on the Treaties of Rome, followed by the Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, and finally the Treaty of Lisbon. This paper will look at each treaty and assess its importance in the treaty-making power of the Union. This paper will also explore the theoretical origins of the Union's treaty-making powers.

This paper will analyze two theories behind the origins of treaty-making power. The first is the explicit theory of treaty making-power. Many individuals, especially during the period immediately following the foundation of the Union, believe that the Union was granted its treaty-making powers explicitly within the text of the founding treaties. The second theory is the implicit theory of treaty-making powers. This was the prevailing theory before the Single European Act. Proponents of the implicit theory believe that the text of the Union's founding treaties did not in fact grant the Union the power to conclude treaties but rather to simply negotiate them. The power instead develops from several European Court of Justice cases that grant the Union the power to conclude treaties in areas that the treaties specifically state the Union has power over. This paper will analyze these cases in greater depth. This paper concludes with an assessment of the current status of the EU's treaty-making authority.

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## **ACKNOWLEDGEMENTS**

I would like to acknowledge the incredible advising and assistance that I have received throughout my research. I would especially like to thank Dr. John King Gamble for his invaluable assistance throughout this long and sometimes turbulent journey. His presence kept me motivated and determined to deliver some of my most cherished work to date. This project also could not be completed without the advice of my second reader and academic advisor, Dr. Robert Speel.

## Chapter 1

### Introduction

#### *1.1: Development of the Community*

The European Union began as an agreement among six nation states to “contribute, in harmony with the general economy of the member States, to economic expansion, to the development of employment, and to the improvement of the standard of living, through the establishment of a single market.”<sup>1</sup> The six member economic Community has evolved into a dominating twenty-seven member Union with unprecedented legal powers both within the Union<sup>2</sup> and externally in the international sphere. This paper will examine the transition that the Union experienced as it evolved into a genuine supranational power. This paper will focus principally on the international legal personality of the Union, particularly in its treaty-making powers. However, in order to explore the evolution of the treaty-making powers of the European Union, we first must define two essential terms.

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<sup>1</sup> R.G.H., *The European Coal and Steel Community: Implications of the Schuman Plan*, 7 *Royal Institute of Int'l Affairs*, 197 (1951), <http://www.jstor.org/stable/40392448>.

<sup>2</sup> The terms “the Union” and “the Community” will be used throughout this paper. The Community refers to the European Community (ECSC, EEC, and EAEC) while the Union refers to the European Union after the Maastricht Treaty. The Union will also be used more broadly, encompassing the Community, when explaining the events leading up to its current state.

### *1.2: Explicit vs. Implicit Treaty Making Powers*

This paper will explore two theories behind the origins of treaty-making power. The first is the explicit theory of treaty making-power. Many individuals, especially during the period immediately following the founding of the Union, believe that the community was granted its treaty-making powers explicitly within the text of the founding treaties.<sup>3</sup> Some terminology written into the treaties themselves, particularly in the earlier founding treaties, can be ambiguous and subject to varying interpretations. In each founding treaty, we will examine articles specifically granting the Union international legal powers. Some grant broad international powers and others grant narrow explicit powers. We will therefore define explicit powers as those treaty-making powers granted with narrow and specific language within one of the several founding treaties.

The second theory is the implicit theory of treaty-making powers. This was the prevailing theory until the Single European Act.<sup>4</sup> Proponents of the implicit theory believe that the text of the Union's founding treaties did not in fact grant the Union the power to conclude treaties but rather simply to negotiate them.<sup>5</sup> The power instead develops from several European Court of Justice cases granting the Union the power to conclude treaties in areas that the treaties specifically state the Union has power to carry out the functions of the Union. This implicit power therefore develops from the courts and not from the constitution of the Union. We will define

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<sup>3</sup> Moshe Kaniel, *The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act*, 29 (1996).

<sup>4</sup> *Id.* at 30.

<sup>5</sup> *Id.*

implicit powers as the treaty-making power granted to the Union through court cases and broad, general language within the founding treaties.

The distinction between explicit and implicit powers is by no means clear-cut. In the earlier treaties, many articles granting external power are hotly debated as attempts are made to understand intent. For example, while some may interpret Article 228 of the Treaty of Rome as explicitly granting the European Community treaty-making powers, others argue that the language is too broad and therefore only grants the Community the power to negotiate treaties, not to conclude them.<sup>6</sup> The first line of Article 228 states, “Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission.”<sup>7</sup> According to our definitions, this would not be considered an explicit grant of treaty-making powers, as it does not clearly grant the Community the power to conclude agreements. It simply says that the Community can be party to a treaty with one or more states. The only powers granted to the Community in this instance are the powers to negotiate treaties. We will analyze this specific article, along with several similar provisions.

### *1.3: Founding Treaties*

As has been mentioned earlier, this paper will examine each founding treaty of what is now the European Union and will analyze the role of each in the development of the Union’s treaty-making powers. It is important to understand the context surrounding each individual treaty

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<sup>6</sup> *Id.*

<sup>7</sup> Article 228 of the Treaty of Rome, see

[http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf).

and the relation therein to the Union. Later we will see how each treaty relates directly to the treaty-making power of the Union.

We begin with the Treaty Establishing the European Coal and Steel Community (ECSC). The ECSC laid the groundwork for what would later become the European Economic Community (EEC).<sup>8</sup> This agreement entered into force on July 23, 1952 after six nations agreed to the 1950 “Schuman Plan” which developed a common market of coal and steel. The Community arose in the aftermath of a war that devastated all of Europe. The purpose for the creation of the Community, according to the treaty’s preamble, was not only to create a common market of coal and steel and raise the standard of living but also to lay the foundations for institutions to resolve age-old rivalries and put an end to bloody conflict throughout Europe. Many believe that the Schuman Plan was a political response to World War II in an attempt to end a long and bitter rivalry between France and Germany.<sup>9</sup> The Community was also established to help the desolated economies of the Western European States following the war.<sup>10</sup> This factor allows us to view the Community in an important light. Further, the Community was created with the goal of preserving European States, not creating a supranational organization. This, as we can imagine, is incentive enough for the original member states to allow provisions in its constitution allowing for an international legal personality, and in fact it did. However, with the Community’s influence remaining relatively narrow, we can imagine the founders omitting language granting explicit treaty-making powers to the Community.

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<sup>8</sup> Also referred to as “the Community.”

<sup>9</sup> Dietmar Petzina et al, *The Origin of the European Coal and Steel Community: Economic Forces and Political Interests*, 450 *Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics* 450 (1981).

<sup>10</sup> *Id.* at 457



Five years after the Treaty Establishing the European Coal and Steel Community entered into force, the same six nation states concluded and signed the Treaty of Rome and the Euratom Treaty which created the European Economic Community (EEC) and the European Atomic Energy Community (EAEC). The purpose of the Treaty of Rome was to expand the scope of the ECSC beyond simply a coal and steel common market into a progressive common market approximating the economic policies of the six member states as well as a continuous and balanced expansion, stability, and closer relations between States.<sup>11</sup> It is clear that the EEC sought to build upon the ECSC and broaden its narrow powers. The Euratom treaty was established so the Community could contribute to the development of relations with other countries by creating the conditions necessary for the rapid establishment and growth of nuclear industries.<sup>12</sup> The Euratom Treaty explicitly mentions the Community's relations with third party States. The previous two treaties seemed to focus exclusively on the Community and its common market. However, the Euratom Treaty at its foundation sought to establish external international relations with other States. This attitude is reflected in the language of the treaty in which we will study in subsequent chapters. The Treaty establishing the Coal and Steel Community, the Treaty of Rome, and the Euratom treaty eventually were merged creating the European Community.<sup>13</sup>

By the late 1970s and early 1980s, politicians and academics began losing faith in European institutions.<sup>14</sup> The excitement of a European Community that the Treaty of Rome

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<sup>11</sup> See note 6 at Article 2.

<sup>12</sup> *Id.* Art 1.

<sup>13</sup> Kaniel, *supra* note 2, at 11-12.

<sup>14</sup> Andrew Moravcsik, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community*, 45 *Int'l Organization* 19, 19 (1991), : <http://www.jstor.org/stable/2706695>.

brought seemed to be dissipating. In 1986, the heads of government in the European Community gathered and approved the Single European Act that entered into force less than one year later on July 1, 1987. This treaty both liberalized the European market as well as set procedural reforms streamlining decision making in the governing body of the European Community.<sup>15</sup> The Single European Act greatly expanded the scope and power of the Community by expressly empowering the institutions to take action in the spheres of economic and monetary policy, regional development, worker safety and health, protection and improvement of the environment, and scientific and technological development.<sup>16</sup> This expansion illustrates how the member states voluntarily gave up sovereignty over policy issues. This “power exchange” presages the Community’s development of treaty-making power.

The Treaty on European Union - Maastricht Treaty is another step towards further European integration. The treaty forced a gradual move towards a single monetary policy, culminating in the adoption of a single currency.<sup>17</sup> This movement towards further integration extends to many policy areas including the environment, e.g., pursuant to article 130r, the Community is granted the exclusive power to conclude treaties with third parties in the area of environmental co-operation. I will discuss this explicit mention of exclusivity later in the paper.

The Treaty of Amsterdam is a major revision to the Treaty of Rome. This treaty sought to increase the role of the EU in home affairs; it advanced a model of a supranational European

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<sup>15</sup> *Id.* at 19, 20.

<sup>16</sup> George A. Bermann, *The Single European Act: A New Constitution for the Community*, 27 Colum. J. Transnat’y L. 552 (1988-1989).

<sup>17</sup> Stephen Martin, *The Construction of Europe: Essays in Honour of Emile Noel*, 106 (1994).

Union and de-emphasized intergovernmentalism.<sup>18</sup> One major impact of the treaty, in relation to this paper, is that it expanded the role of the Common Foreign and Security Policy.<sup>19</sup> This was intended to solidify international legal identity that will be explored in later chapters.

The Treaty of Lisbon, which came into force on December 1, 2009, is the most recent step towards a more integrated Europe. The member states pooled their sovereignty in some areas for joint exercise at the European level.<sup>20</sup> The leaders who reached this agreement envisioned the political, economic, and social changes facing the world in the 21<sup>st</sup> Century.<sup>21</sup> This treaty more clearly defines what the EU can and cannot do, and what means it can use.<sup>22</sup> It also strengthened the EU's independence by explicitly giving it a legal personality. The Charter of Fundamental Rights was given full legal status thus developing a stronger concept of a EU citizenship.<sup>23</sup> As we will see, the Lisbon Treaty provides the clearest elaboration of the treaty-making powers of the Community.

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<sup>18</sup> Civitas, Treaty of Amsterdam, (2011) available at <http://www.civitas.org.uk/eufacts/FSTREAT/TR4.htm>.

<sup>19</sup> *Id.*

<sup>20</sup> Michael Waaibel, *A Good Day and Salutary Warning for the European Union*, 69 Cambridge L. J. 38 (2010).

<sup>21</sup> Europa, *Taking Europe into the 21<sup>st</sup> Century*, available at [http://europa.eu/lisbon\\_treaty/take/index\\_en.htm](http://europa.eu/lisbon_treaty/take/index_en.htm).

<sup>22</sup> *Id.*

<sup>23</sup> Pippa Knott, Treaty of Lisbon (2007), Civitas Last update, Lucy Hatton, (2011) available at <http://www.civitas.org.uk/eufacts/download/TR.6.Constitution%20-%20Lisbon%20Treaty.pdf>.

#### *1.4: International Legal Personality*

Now that we have an idea of the foundation and development of the European Union, we must explore a foundational principle of this paper; the principle of legal personality. In a European Court of Justice (ECJ) case known as the European Road Transport Agreement (ERTA) case, the Court briefly dealt with the question of whether the European Community was empowered to conclude a treaty with Switzerland (on road transportation), or whether the power to conclude such agreements remained, in whole or in part, with the member states.<sup>24</sup> In answering this question, the ECJ approached the issues by first determining if the Community had a legal personality, finding that such personality would allow the Community to conclude treaties.<sup>25</sup> It is evident that having a legal personality is foundational to the treaty making process. We must examine whether the EU has an international legal personality. Some controversy remains about the nature and extent of legal personality. Before we examine this issue we must first define the concept.

L. Oppenheim wrote the most authoritative definition of international personality produced in the English language. He states:

The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules that the civilized States consider legally binding in their intercourse, every State that belongs to the civilized

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<sup>24</sup> Jan Klabbbers, *The Concept of Legal Personality* 14, available at [http://people.hofstra.edu/james\\_e\\_hickey/klabbbers-concept-paper.pdf](http://people.hofstra.edu/james_e_hickey/klabbbers-concept-paper.pdf).

<sup>25</sup> *Id.* at 15.

States, and is, therefore, a member of the Family of Nations, is an International Person.<sup>26</sup>

The question now becomes: Can an international organization, such as the European Union possess such a title. The simple answer is yes. In 1949, the International Court of Justice (ICJ) ruled in the *Reparation for Injuries Suffered in the Service of the United Nations* case about the legal personality of international organizations. In answering the question of the legal personality of international organizations, the opinion stated:

The Court goes on to consider what characteristics the Charter was intended to give to the Organizations. In this connection, the Court states that the Charter conferred upon the Organization rights and obligations which are different from those of its members . . . Accordingly the Court concludes that the Organization possessing as it does rights and obligations, has at the same time a large measure of international personality and the capacity to operate upon the international plane.<sup>27</sup>

The ICJ essentially adopted the position that if an international organization has, written within its founding treaty, a clause granting upon the organization a legal status then it should be

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<sup>26</sup> Lassa Oppenheim, *International Law: A Treatise*, 125 (1920).

<sup>27</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, available at <http://www.icj-cij.org/docket/files/4/1837.pdf>.

recognized in the international legal sphere as having a separate legal personality from its constituent member states.

Some debate whether the European Union received this legal personality with the founding European Coal and Steel Community Treaty. Article 6 of the Treaty Establishing the ECSC states that “The Community shall have legal personality.” While some believe that this did not necessarily confer on the Community *international* legal personality others believe that the following lines do in fact clarify the charter’s intentions.<sup>28</sup> Article six states, “In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives.” The intent seems to be a clear expression of international legal personality rather than just domestic legal personality.

To summarize, the European Union, at its very foundation, was granted some international legal personality to allow the organization to function efficiently and effectively, in accordance with its objectives and character.<sup>29</sup> Given this framework of legal personality, we will examine each relevant founding treaty attained in order to understand the evolution and application of these powers.

### *1.5: Exclusive vs. Mixed Agreements*

There are several different types of agreements that the Union (ECSC-EU) can enter into. The Union may enter into a bilateral agreement, between the Union and one other state or organization, or a multilateral agreement, between the Union and two or more states or organizations. In addition to these two types of agreements there are two subsets: exclusive and mixed. For the sake of this paper, an exclusive treaty is one in which the Union enters on behalf

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<sup>28</sup> Klabbers, *supra* note 21, at 14.

<sup>29</sup> Kaniel, *supra* note 2, at 3.

of all member states and no member state is also party to the treaty. In a mixed agreement, neither the Union nor the member states has exclusive competence in a particular area or there may be some other political motivation in which both the Union and one or more member states becomes party to a treaty.<sup>30</sup> In a mixed agreement, both the Union as well as some or all of its member states are party to the agreement.<sup>31</sup> Currently, the number of mixed agreements exceeds 130 from more than 700 total agreements concluded by the Union.<sup>32</sup>

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<sup>30</sup> Jurgo Loo, *Mixed Agreements in the External Relations of the European Community and their Importance for Estonia as a New Member State*, Valisministeerium Estonian Ministry of Foreign Affairs, available at <http://www.vm.ee/?q=en/node/4061>.

<sup>31</sup> Geert De Baere, *Constitutional Principles of EU External Relations*, 232 (2008).

<sup>32</sup> *Id.*

## Chapter 2

### Individual Treaties

#### 2.1: *The European Coal and Steel Community*

The European Coal and Steel Community (ECSC) was the predecessor of the European Economic Community (EEC) and later the European Union (EU). The ECSC was established on April 18<sup>th</sup>, 1951 as a supranational organization in the field of coal and steel.<sup>33</sup> The Treaty establishing the European Coal and Steel Community entered into force one year later on July 23<sup>rd</sup>, 1952. This treaty established that the Community have an executive organ known as The High Authority, a legislative branch consisting of the Consultative Committee, the Common Assembly, and the Council of Ministers, and finally a judicial branch known as the Court of Justice.<sup>34</sup> According to Article six of the treaty, these institutions rather than the individual member states represent the Community.<sup>35</sup>

The ECSC was an unprecedented leap towards a supranational organization with broad powers. The ECSC was originally founded to create and maintain a common market within the

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<sup>33</sup> Jeremy Lever, *International Legal Aspects of the European Coal and Steel Community*, 44 Transactions of the Grotius Society, Problems of Public and Private International Law 205 (1958), available at <http://www.jstor.org/stable/743240>.

<sup>34</sup> Article 7 of the Treaty Establishing the Coal and Steel Community, available at [http://www.ab.gov.tr/files/ardb/evt/1\\_avrupa\\_birligi/1\\_3\\_antlasmalar/1\\_3\\_1\\_kurucu\\_antlasmalar/1951\\_treaty\\_establishing\\_ceca.pdf](http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1951_treaty_establishing_ceca.pdf).

<sup>35</sup> *Id.* at Article 6.



Community.<sup>36</sup> The growth of political and international powers was certainly an aspiration of the founders but was simply not at the heart of the founding of the Community.

However, the founders of the treaty establishing the ECSC granted the Community a legal personality.<sup>37</sup> Article six states that, “In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives.” This terminology is very broad and can be interpreted in many different ways. Some believe that this phrase grants the Community implicit power to conclude treaties with other organizations or states. One example of this in practice is in the Protocol concerning Commercial and Economic Cooperation between the European Coal and Steel Community and Canada, 1976. The treaty begins by citing articles six and eight of the Treaty establishing the ECSC as the legal basis for the Community becoming party to the protocol.<sup>38</sup> This protocol requires that, because the Community has the power to exercise the legal power necessary to carry out its functions, and because, according to article eight, the High Authority is responsible for ensuring that the objectives of the Community are attained, the High Authority has the power to conclude the protocol on behalf of the entire

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<sup>36</sup> Clarence J. Mann, *The Function of Judicial Decision in European Economic Integration*, 6 (1935).

<sup>37</sup> See note 32.

<sup>38</sup> Protocol Concerning Commercial and Economic Cooperation Between the European Coal and Steel Community and Canada, Commission Decision of 17 September 1976, Official Journal of the European Communities, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1976:260:0027:0027:EN:PDF>.

Community. Article six therefore remains, in the eyes of some, the original basis of the power of the Community to conclude international agreements.

As we have seen, Article 6 confers upon the Community an international legal personality. This legal personality is crucial in the Community's ability to conclude treaties. However, there is no explicit provision in the founding treaty granting the Community the right to conclude treaties. Although Article 6 has been cited as the basis for the conclusion of the 1976 agreement with Canada, many scholars believe that the European Economic Community was never granted such authority by its founding members. The European Economic Community expired in 2002 but not before the conclusion of several agreements such as the example provided above. The most recent multilateral treaty signed by the ECSC was a mixed agreement between the ECSC, its twelve member states, and Slovenia in 1993.<sup>39</sup>

The language of the Treaty establishing the ECSC is ambiguous and broad. It never explicitly states that the Community has any legal right to conclude treaties on behalf of the member states. Later analysis of subsequent treaties will show the evolution of this concept.

## *2.2: The European Community*

The European Community is comprised of three entities: the ECSC, the European Economic Community and the European Atomic Energy Agency. Whereas the ECSC included economic unification of only two products, coal and steel, the European Community broadened its economic powers to "make war unthinkable" and "materially impossible."<sup>40</sup> Each individual

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<sup>39</sup> See note 29.

<sup>40</sup> Joaquin Roy, *Reflections on the Treaty of Rome and Today's EU*, Jean Monnet/Robert Schuman Paper Series Special 1 (2007) available at [http://www6.miami.edu/eucenter/Roy\\_ReflectionsTreatyRome\\_spec07\\_edi.pdf](http://www6.miami.edu/eucenter/Roy_ReflectionsTreatyRome_spec07_edi.pdf).

institution within the European Community derives from its own individual constitution, each granting the Community certain forms of treaty-making power.

The EEC was established under the Treaty of Rome in 1957. This treaty contains clearer language regarding the treaty-making powers of the Community. The EEC Treaty contained four areas of external relations. Articles 110-116 relate to commercial and trade relations. Articles 131-136, and 238 relate to association with other States, Articles 228-231 relate to co-operation with international organizations, and Article 237 covers the admission of third State membership to the Community.<sup>41</sup>

Article 114 of the Treaty of Rome expressly grants the EEC treaty-making powers in the field of commercial policy.<sup>42</sup> Article 113 says, “Where agreements with third countries need to be *negotiated*, (emphasis added) the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.”<sup>43</sup> While this provision simply allows the Commission to negotiate treaties, Article 114 grants the Council the power to conclude these treaties. Article 114 states, “The agreements referred to in Article 111(2) and in Article 113 shall be *concluded by the Council on behalf of the Community*, (emphasis added) acting unanimously during the first two stages and by a qualified majority thereafter.”<sup>44</sup> This is an explicit grant of the treaty-making power provided to the Community through its founding treaty. The Commission is given the powers to negotiate treaties with third parties concerning commercial policy while the Council is provided the power to conclude these agreements.

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<sup>41</sup> Patricia Leopold, *External Relations Power of EEC in Theory and in Practice*, 26 *The Int’l and Comp. L. Q.* 56 (1977), available at <http://www.jstor.org/stable/758904>.

<sup>42</sup> Kaniel, *supra* note 2, at 44.

<sup>43</sup> *See* note at Article 113.

<sup>44</sup> *Id.* at Article 114.

One example of the EEC concluding a treaty in the field of commercial policy is in the Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on Trade and Commercial and Economic Cooperation.<sup>45</sup> Both the EEC and the European Atomic Energy Community entered into the agreement separately but within the treaty were jointly called ‘the Community.’ According to the preamble, the Community signed this treaty on behalf of its member states along with the USSR in order to create “favorable conditions for the harmonious development and diversification of trade and the promotion of commercial and economic cooperation in areas of mutual interest on the basis of equality, mutual benefit and reciprocity.”<sup>46</sup> It is only reasonable to deduce that the power to conclude such an agreement derives from article 113-114 of the Treaty of Rome. Again, these articles state that the Community has the powers to negotiate and conclude agreements in the field of commercial policy.

Although the constitution grants the Community treaty-making powers, the member states retain significant power in this area. Article 238 says, “The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.”<sup>47</sup> This explicitly grants the Community the power to conclude agreements with other states or international governmental organizations. However, the article further stipulates, “These

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<sup>45</sup> European Economic Community- European Atomic Energy Community- Union of Soviet Socialist Republics: Agreement on Trade and Commercial and Economic Cooperation Reviewed work(s): Source: International Legal Materials, Vol. 29, No. 4 (JULY 1990), pp. 918-931

<sup>46</sup> *Id.*

<sup>47</sup> *See* note 6 at Article 238.

agreements shall be concluded by the Council, acting unanimously after consulting the Assembly.”<sup>48</sup> This is a very important concept. The Council must act *unanimously*. This means that each member state has an absolute veto power and can prevent an agreement if it so chooses.<sup>49</sup> The immense power to conclude treaties bestowed upon the Community in Article 238 is limited by the member state veto power.

Article 228 of the Treaty of Rome also grants the Community the power to conclude international agreements. Article 228(1) states:

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 Assembly [European Parliament] where required by this Treaty.<sup>50</sup>

Again, this is a clear statement granting the Community the power to conclude international agreements with third party States. This article contains an even broader grant of power. Article 228(2) states that, “Agreements concluded under these conditions shall be binding on the institution of the Community and on Member States.”<sup>51</sup> This power might have been inferred but the founders explicit provision it in the constitution clarifies its intent. This

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<sup>48</sup> *Id.*

<sup>49</sup> Leopold, *supra* note 38, at 57.

<sup>50</sup> *See* note 6.

<sup>51</sup> *Id.*

legitimizes the Communities ability to conclude treaties by binding both the Community and member states.

The third pillar of the European Community is the European Atomic Energy Community. This Community was created under the Treaty Establishing the European Atomic Energy Commission (Euratom Treaty), which entered into force the same time the Treaty of Rome. Similar to the Treaty of Rome, the Euratom Treaty contains explicit provisions granting the Community treaty-making powers. One interesting aspect of the Euratom Treaty is that it gives the community the “exclusive right” to conclude agreements in certain areas. This is the first mention of exclusivity, which prohibits the occurrence of a mixed treaty. Article 52 establishes an agency overseeing the supply of ores, source materials and special fissile materials. Article 52(2b) states that:

An agency is hereby established; it shall have a right of option on ores, source materials and special fissile materials produced in the territories of Member States and an *exclusive right to conclude contracts* relating to the supply of ores, source materials and special fissile materials coming from inside the Community or from outside.<sup>52</sup>

Article 64 elaborates on this power giving by saying:

The Agency, acting where appropriate within the framework of agreements concluded between the Community and a third State or an international

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<sup>52</sup> Article 52 of the EURATOM Treaty, see: [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:084:0001:0112:EN:PDF)

organization, shall, subject to the expectations provided for in this Treaty, have the *exclusive right* to enter into agreements or contracts...<sup>53</sup>

This takes the important step of assuring the Community retains sole responsibility for concluding international agreements that are binding upon member states. This quantum leap in power remains limited to the Agency overseeing the said materials. However, it remains a significant increase in the power of the Community's treaty-making abilities.

Member states must comply with the international agreements concluded by the Community. Article 77 ensures that this remains the case. When addressing this issue, article 77(b) states that, "The provisions relating to supply and any particular safeguarding obligations assumed by the Community under an agreement concluded with a third State or an international organization are complied with."<sup>54</sup> This elaborates on the exclusive treaty-making power bestowed upon the Community.

Chapter ten of the Euratom Treaty relates to external (international) relations. Article 101 is an especially clear expression of treaty-making powers before the Single European Act.<sup>55</sup> Article 101 states, "The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organization or a national of a third State."<sup>56</sup> This unambiguous provision grants the Community the ability to conclude agreements with third party international actors.

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<sup>53</sup> *Id.* at Article 64.

<sup>54</sup> *Id.* at Article 77.

<sup>55</sup> Kaniel, *supra* note 2, at 27.

<sup>56</sup> *See* note 52 at Article 101.

### 2.3: *The Single European Act*

The Single European Act, signed in February of 1986, contains three explicit references of the Community's power to conclude international agreements. The first is found in Article 9, which amends the second paragraph of Article 238 of the EEC Treaty by replacing "These agreements shall be concluded by the Council, acting unanimously after consulting the European Parliament"<sup>57</sup> with, "These agreements shall be concluded by the Council, acting unanimously and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members."<sup>58</sup> We can see that the internal process towards treaty-making powers is evolving becoming more comprehensive, and clearer.

The second mention of treaty-making power is in Article 130n. It states:

In implementing the multi-annual framework programme, the Community may make provision for co-operation in Community research, technological development and demonstration with third countries or international organizations.

The detailed arrangements for such co-operation may be the subject of international agreements between the Community and the third parties concerned which shall be negotiated and concluded in accordance with Article 228.<sup>59</sup>

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<sup>57</sup> See note 8 at Article 9.

<sup>58</sup> Article 238 of the SEA found at:

[http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/singleeuropeanact.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleeuropeanact.pdf).

<sup>59</sup> *Id.* at Article 130n.



This Article grants the Community the express power to conclude international agreements with third party states or IGOs on subjects relating to research, technological development, and demonstration.

The third mention of Community treaty-making powers is in Article 130r, which deals with environmental issues. Paragraph 4 states that, “The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States.”<sup>60</sup> This not only expands the internal role of the Community on environmental issues but paragraph 5 extends this power into the international sphere. With regard to the environment, paragraph 5 reads, “The arrangements for Community co-operation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance to Article 228.”<sup>61</sup> This is further evidence of the growing capacity of the Community to conclude international agreements.

The Single European Act also establishes at least a goal of a common foreign policy.<sup>62</sup> Paragraphs 1 of Article 30 of the Single European Act states, “The High Contracting Parties, being members of the European Communities, shall endeavour jointly to formulate and implement a European foreign policy.”<sup>63</sup> Paragraph 5 goes on to say, “The external policies of the European Community and the policies agreed in European Political Co-operation must be consistent. The Presidency and the Commission, each within its own sphere of competence, shall

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<sup>60</sup> *Id.* at 130r.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 130.

<sup>63</sup> *Id.* at Article 30.

have special responsibility for ensuring that such consistency is sought and maintained.”<sup>64</sup> This cooperation on foreign policy is an example of another important step towards further European integration.

The Single European Act generally is viewed as a subtle yet important increase in Community competence, particularly in the areas of economic and monetary policy, regional development, worker safety and health, protection and improvement of the environment, and scientific and technological development.<sup>65</sup> The Single European Act expands the role of Community exclusivity to a much broader range of issues. This is interesting as we begin to see the treaty-making powers of the Community not only deepen (in its exclusivity) but also broaden (in its range of issues).

#### *2.4: The Maastricht Treaty*

The Maastricht Treaty established the European Union, hereinafter ‘the Union,’ on February 7, 1992. While the Maastricht Treaty does not explicitly expand the treaty-making powers of the Union, it does expand powers in foreign relations. Besides establishing the Union, the Maastricht Treaty’s most important function is the introduction of the common foreign and security policy (CFSP). According to Article 11(1), the CFSP’s objectives are to, “safeguard the common values, fundamental interests, interdependence and integrity of the Union in conformity with the principles of the United Nations Charter.”<sup>66</sup> The CFSP created a far more comprehensive external policy than anything the Union has seen before. However, the EU Treaty does not

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<sup>64</sup> *Id.*

<sup>65</sup> *See* note 13.

<sup>66</sup> De Baere, *supra* note 30, at 101.

provide any explicit competences<sup>67</sup> to achieve these objectives.<sup>68</sup> This more codified common foreign policy is important in the Union's expansion into a more supranational organization.

Article 228a of the EU Treaty gives the Council some limited powers in relation to the CFSP. The Article reads:

Where it is provided in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.<sup>69</sup>

This gives the Union the powers to act as necessary in dealing with issues relating to economic reductions by third countries. This power might include the power to negotiate and conclude international agreements.

The Treaty establishing the EU makes only brief mention of the treaty-making powers of the European Union. In Article 130m, the Treaty expands the Union's competence to conclude

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<sup>67</sup> The term "competence(s)" will be used throughout this paper to refer to the categorized areas of Union exclusivity. For more information on this terminology, see:

Craig Prelims, *Competence* found at:

[http://fds.oup.com/www.oup.com/pdf/13/9780199576999\\_prelim.pdf](http://fds.oup.com/www.oup.com/pdf/13/9780199576999_prelim.pdf).

<sup>68</sup> *Id.*

<sup>69</sup> Article 228 of the Maastricht Treaty found at

<http://www.eurotreaties.com/maastrichtec.pdf>.

international agreements relating to Community research, technological development and demonstration. The Article explicitly states:

In implementing the multi-annual framework programme the Community may make provisions for co-operation in Community research, technological development and demonstration with third countries or international organizations. The detailed arrangements for such co-operation may be subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 228.<sup>70</sup>

The Maastricht Treaty also replaces Article 228 of its founding EC constitution. It now explicitly states that the Council must act by a qualified majority rather than a unanimity when authorizing the Commission to open necessary negotiations on treaties. According to paragraph 2 of Article 228, the Council, acting by a qualified majority, must also conclude all international agreements. Previously, this was all standard practice, but now they are presented to us in legal form, codified in the EU Treaty.<sup>71</sup>

Article 238 of the EC Treaty is replaced by:

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<sup>70</sup> *Id.* at Article 130m.

<sup>71</sup> Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 *The Int'l & Comp L.Q.* 226 (1993).

The Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.<sup>72</sup>

Though these are relatively minor modifications to previous treaties, they are important in the evolution towards a more supranational organization, especially with regard to its treaty-making powers and competences.

### *2.5: The Treaty of Amsterdam*

The Treaty of Amsterdam, signed on October 2, 1997, contains few controversial provisions and was ratified without much public debate. This treaty deals principally with the internal activities of the Union, e.g., parliamentary powers, rather than international activities, such as the exclusive ability to conclude international agreements. The architects of the Treaty of Amsterdam seem to have been unable to design a clear vertical division of competencies between the national and the European level.<sup>73</sup> However, it does expand the Union's powers in the areas of foreign policy, internal security and immigration powers, and parliamentary powers.<sup>74</sup>

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<sup>72</sup> See note 50, at Article 228.

<sup>73</sup> Jorg Monar & Wolfgang Vessels, *The European Union after the Treaty of Amsterdam* 77 (2001).

<sup>74</sup> Andrew Moravcsik & Kalypso Nicolaidis, *Explaining the Treaty of Amsterdam: Interests, Influence, Institutions*, 37 *Journal of Common Market Studies* 60 (1999).

The Treaty of Amsterdam extended the external commercial powers of the Community to international negotiations and agreements on services and intellectual property.<sup>75</sup> Article 113 of the EC Treaty is amended to add that:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.<sup>76</sup>

This explicitly expands the Union's competency into the area of intellectual property, an area of extraordinary importance.

The Treaty of Amsterdam provides that the Council of the European Union may conclude international agreements in implementation of Titles V and VI of the treaty.<sup>77</sup> However, Article J.14 states that, "No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure."<sup>78</sup>

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<sup>75</sup> Eileen Denza & Karl Newman, *External Relations*, 48 *The Int'l & Comp. L.Q.* 718 (1999).

<sup>76</sup> Article 113 of the Treaty of Amsterdam found at:  
<http://www.eurotreaties.com/amsterdamtreaty.pdf>.

<sup>77</sup> Jacques H.J. Bourgeois, *External Relations Powers of the European Community*, 22 *Fordham Int'l L.J.* S150 (1998).

<sup>78</sup> See note 66 at Article J.14.

It continues by saying, “The other members of the Council may agree that the agreement shall apply provisionally to them.”<sup>79</sup>

The Treaty of Amsterdam also enhanced the role of the CFSP, created in the Maastricht Treaty, by setting out a clearer and more coherent framework.<sup>80</sup> Article J.1 under the section entitled “Provisions on a Common Foreign and Security Policy” more clearly sets the objectives of the Union’s common foreign and security policy. Article’s J.2 and J.3 specifically explain a systematic approach to pursuing these objectives. Article J.3 states that the Council shall define the principles of and general guidelines for the CFSP, shall decide on common strategies to be implemented by the Union in areas where the member states have important issues in common, and shall take the decisions necessary for defining and implementing the CFSP on the basis of the general guidelines defined by the Council.<sup>81</sup>

Article 24 of the Amsterdam Treaty on the European Union is also very important in our discussion of treaty making powers, particularly later in our discussion when it deals with the European Security and Defense Policy (ESDP). Article 24 establishes the process that the Union must go through to conclude international agreements. This particular Article is quoted as the source of several agreements relating to the common security and defense of the Union. It states that:

When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this title (the CFSP), the Council may authorize the Presidency, assisted by the Commission as appropriate, to

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<sup>79</sup> *Id.*

<sup>80</sup> Denza & Newman, *supra* note 56, at 716.

<sup>81</sup> *See* note 66 at Article J.3 paras. 1-3.

open negotiations to that effect. Such agreements shall be concluded by the Council in a recommendation from the Presidency.

Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.<sup>82</sup>

The CFSP is important in our discussion of treaty-making powers since it illustrates the expansion of the Union into a more unified, supranational organization rather than an intergovernmental institution. It also represents a shift of the Union from an economic problem-solving arena to an “original polity,” foreshadowing a United States of Europe.<sup>83</sup>

#### 2.6: *The ESDP*

The European Security and Defense Policy (ESDP) was established by the European Council in 1999. The ESDP was a European adaptation of NATO as a framework of security cooperation.<sup>84</sup> While it is a part of the Union’s CFSP, it maintains a distinctive place within the CFSP’s structure, following its own rules and logic.<sup>85</sup> The CFSP and the ESDP are important in our exploration of the treaty-making powers of the Union because they play a critical role in the Union’s foreign policy competence. The majority of developing Union powers and competence lie within the common European security and defense.

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<sup>82</sup> *Id.* at Article 24.

<sup>83</sup> *See* note 58, at 716.

<sup>84</sup> Benjamin Pohl, *Explaining ESDP: A Liberal Approach*, 2.

<http://www.jhubc.it/ecpr-riga/virtualpaperroom/090.pdf>.

<sup>85</sup> De Baere, *supra* note 48, at 150.



As was mentioned in section 2.5 of this paper, Article 24 of the Treaty Establishing the European Union is crucial in examining the treaty-making powers of the Union in its security and defense competency. Between 2002 and 2007, the Council entered into more than 70 international agreements with third parties pursuant to Article 24 of the Treaty Establishing the European Union for the purpose of the ESDP.<sup>86</sup> This would suggest that the EU has an international legal personality<sup>87</sup> however we will see later that this is debatable until the Treaty of Lisbon (2009).

The Council concludes three different types of international agreements under Article 24. These are status of force agreements and status of mission agreements with host states, contributive agreements with third States contributing personnel and assets to operations, and information agreements with third parties to regulate the exchange of classified information between the EU and the third parties.<sup>88</sup> It is important to understand the ESDP and its treaty-making competence because these illustrate the expanding role of the Union in its foreign relations and exclusive treaty-making powers. The fact that the Union entered into more than 70 international agreements, including with NATO and the ICC, demonstrates that the treaty-making power of the Union has been increasing and more generally accepted.<sup>89</sup>

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<sup>86</sup> Aurel Sari, *The Conclusion of International Agreements by the European Union in the Context of the ESDP*, 57 Int'l & Comp. L.Q. 54-55 (2008).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Anne Peters, *Treaty-Making Powers*, Max Planck Encyclopedia of Public Int'l Law 10 (2013).

## 2.7: *The Lisbon Treaty*

The Treaty of Lisbon, which entered into force on December 1, 2009, is the most modern constitution of the European Union. Whereas the previous two treaties were passed without much controversy and without any significant impact on the treaty-making powers of the Union, the Lisbon Treaty reversed this trend. Its ratification was delayed two years due to sweeping revisions of the Union's foreign policy and competency areas. Perhaps the most basic, yet also the most important innovation of the Lisbon Treaty is that it solidified the EU international legal personality.<sup>90</sup> Before the Lisbon Treaty, the legal personality of the Union was uncertain as only the European Community was granted an international legal personality.<sup>91</sup> This treaty also greatly improved the Union's competency in foreign affairs in several different areas. Namely, it drew together two pillars of the Union: the CFSP managed by the Council Secretariat, and the Community pillar of external policies managed by the European Commission.<sup>92</sup> This brought the two pillars closer together making for a more efficient, streamlined, and coherent policies in the foreign relations arena. It is clear that the architects of this treaty aimed to achieve better coherence and consistency in the Union's policies and actions in international affairs while simultaneously increasing its effectiveness and visibility.<sup>93</sup>

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<sup>90</sup> Federiga Bindi & Irina Angelescu, *The Foreign Policy of the European Union: Assessing Europe's Role in the World*, 15 (2010).

<sup>91</sup> *Id.*

<sup>92</sup> Graham Avery, *The New Architecture for EU Foreign Policy*, 17 *European Policy Centre Challenge Europe* 18 (2007). Found at <http://ftp.infoeuropa.euroid.pt/files/database/000040001-000041000/000040206.pdf>.

<sup>93</sup> *Id.* at 25.

One important improvement in external relations is trade policy. The Treaty of Lisbon dispenses with mixed agreements in external trade policy.<sup>94</sup> All trade will be European Union competence and all agreements relating to trade will be ratified by the Union and not by national parliaments.<sup>95</sup> Under Title II, Article 207 clearly defines the Union's competencies on trade:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalism, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.<sup>96</sup>

Article 207 continues in paragraph 3 by stipulating, "Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 shall apply."<sup>97</sup> Paragraph 2 of Article 218 states that, "The Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude

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<sup>94</sup> Stephen Woolcock, *The Potential Impact of the Lisbon Treaty on European Union External Trade Policy*, 8 Swedish Institute for European Policy Studies 1 (2008).

<sup>95</sup> *Id.*

<sup>96</sup> Article 207 of the Treaty of Lisbon found at <http://www.eutruith.org.uk/lisbontreaty.pdf>

<sup>97</sup> *Id.*

them.”<sup>98</sup> Therefore, this gives the Union the exclusive treaty-making powers in the common commercial policy. This is a major step towards European integration as, after all, the very foundation of the Community in 1950 was based on international trade.

The Treaty of Lisbon also attempts to clarify the distinction between implicit and explicit powers of the Union. Article 3b paragraphs 2 and 3 state:

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . . but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>99</sup>

Although the principle of subsidiarity remains a very broad concept, these two principles certainly help to establish the boundaries within which the Union can act, particularly with respect to its treaty-making powers.

In addition to amending the Maastricht Treaty Establishing the European Union, the Lisbon Treaty also amended the Treaty Establishing the European Community. One major amendment was changing the name from the Treaty Establishing the European Community to the Treaty on the Functioning of the European Union. Under Title I of this Treaty the categories and

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<sup>98</sup> *Id.* at Article 218.

<sup>99</sup> *Id.* at Article 3b paras 2-3.

areas of Union competence are explicitly listed in order to avoid confusion. This comprehensive list of competencies helps to remove some of the uncertainty surrounding the Union's competencies. Article 2 of Title I specifically articulates the exclusivity of the treaty-making powers of the Union in regard to its competencies. It states:

When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.<sup>100</sup>

Article 3 continues under paragraph 1 by stating:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.<sup>101</sup>

Some areas of competence bestowed exclusively upon the Union, in which only the Union and not the member states can enter into international agreements, include:

(a) Customs union

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<sup>100</sup> Article 2 of the Treaty on the Functioning of the European Union found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

<sup>101</sup> *Id.* at Article 3.

- (b) The establishing of the competition rules necessary for the functioning of the internal market
- (c) Monetary policy for the Member States whose currency is the euro
- (d) The conservation of marine biological resources under the common fisheries policy
- (e) Common commercial policy<sup>102</sup>

The Treaty on the Functioning of the European Community also specifies the competences that are shared between the Union and the member states and the competences that belong exclusively to the member states.<sup>103</sup> Article 4 lays out the shared competences between the Union and the member states. These are areas in which either the Union, the member states, or both (through mixed agreements) can conclude international treaties. These are as follows:

- (a) Internal markets
- (b) Social policy
- (c) Economic, social and territorial cohesion
- (d) Agricultural and fisheries, excluding the conservation of marine biological resources
- (e) Environment
- (f) Consumer protection
- (g) Transport
- (h) Trans-European Networks
- (i) Energy

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<sup>102</sup> *Id.*

<sup>103</sup> This parallels most modern constitutions of federal countries, including the United States Constitution.

(j) Area of Freedom, security and justice

(k) Common safety concerns in public health matters<sup>104</sup>

Title V of the Treaty focuses entirely on international agreements. This is the first founding treaty to include an article dedicated solely to the conclusion of international agreements. Article 216, paragraph 1 states:

The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding act or is likely to affect common rules or alter their scope.<sup>105</sup>

Paragraph 2 of the same Article continues to say that these agreements are binding upon the institutions of the Union and on its member states. Under Article 218, paragraph 8, the treaty states that the Council shall act by a qualified majority throughout the treaty-making process, eliminating unanimity unless required. One such instance is in determining exchange-rate systems. Specifically, the Council may, in an endeavor to reach a consensus consistent with the objective of price stability, conclude formal agreements on an exchange-rate system for the euro

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<sup>104</sup> *Id.* at Article 4.

<sup>105</sup> *See* note 90 at Article 216.

in relation to the currencies of third States.<sup>106</sup> However, the Council shall act unanimously after consulting the European Parliament.

The Lisbon Treaty moves a considerable distance in implementing a stronger, more unified institution with one coherent international voice. The treaty not only expanded the exclusivity of the Union but, more importantly, outlined exactly what its competencies are and how it can act on those. The Lisbon Treaty is the first of the EU's constitutions to clearly enumerate the powers of the Union to conclude international agreements. This most recent constitution expanded and refined the treaty-making powers of the Union, an unprecedented leap towards IGO supranationalism. It is clear that the architects of the Lisbon Treaty wanted the Union to become more than a European local institution. They wanted the Union to be a major international player with legitimate international influence as an intergovernmental organization. The Lisbon Treaty is just one more unprecedented step towards a United States of Europe.

### *2.8: Implied powers*

So far, the explicit powers granted to the Community have been covered in some detail. However, as has already been mentioned, there is another theory of treaty-making powers; implied power. The European Court of Justice (ECJ) developed the implied power doctrine.<sup>107</sup> In the ERTA case, briefly discussed earlier in section 1.4: International Legal Personality, the ECJ ruled that treaty-making power exists not only when such power is expressly granted but also

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<sup>106</sup> Baudouin Lamine, *Monetary and Exchange-Rate Agreements Between the European Community and Third Countries*, 8 (2006).

<sup>107</sup> Rachel Frid, *The Relations Between the EC and International Organizations: Legal Theory and Practice*, 70 (1995).



from other provisions of the Treaty<sup>108</sup> and from measures adopted by Community institutions. Therefore, the Community's power may be inferred from the general scheme of the treaty, not just explicit provisions therein.<sup>109</sup>

In another case known as the Kramer Case, the Court held that the Community's treaty-making power "arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty."<sup>110</sup> The Court is developing the doctrine that the Community's treaty-making powers do not arise solely from explicit grants of such power, but also through other internal functions related to specific goals and objectives. This ruling was almost identical to that in the ERA case. However, it seems to be more liberal in giving the Community the implicit power to conclude international agreements.<sup>111</sup> The ERTA ruling stated that Community rules must be exercised by the Community at the internal level before the Community will have competence in that field at the external level.<sup>112</sup> The Kramer ruling stated that even if the rules were not actually exercised, the Community will still have external power in that specific field.<sup>113</sup>

The final ECJ case establishing the principle of implicit powers is known as the Rhine Case. This ECJ opinion provides the most liberal grant of treaty-making powers among the three examined here. The Court ruled that when EC law created powers for the Community within its internal system in order to attain a specific objective, the EC has authority to enter into

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<sup>108</sup> *Id.*

<sup>109</sup> Kaniel, *supra* note 2, at 31.

<sup>110</sup> Kramer [1976] ECR 1279, at p. 1308 paras. 19, 20.

<sup>111</sup> *See* note 79, at 36.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

international agreements necessary for the attainment of that objective, even in the absence of any internal measure.<sup>114</sup> The Court determined that internal measures could be adopted on the occasion of the conclusion and implementation of international agreements.<sup>115</sup> This shows a more expansive concept of treaty-making powers than ones seen in the previous two cases.

It is widely held in international law that a test of necessity is sufficient to grant international institutions certain competences in foreign policy.<sup>116</sup> Functional necessity is defined as, “where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties . . . or is likely to affect common rules or alter their scope.”<sup>117</sup> The test of necessity originates from the Rhine Case and the ECJ Opinion 1/94 regarding the Competence of the Community to conclude international agreements concerning service and the protection of intellectual property rights.<sup>118</sup> Again, this states that it must be necessary for the Community to act externally for the achievement of the respective objectives.<sup>119</sup>

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<sup>114</sup> Alina Kaczorowska, *European Union Law* 93 (2008).

<sup>115</sup> *Id.*

<sup>116</sup> De Baere, *supra* note 48, at 16-17.

<sup>117</sup> Peters, *supra* note 67.

<sup>118</sup> Jorg Monar, *The EU as an International Actor in the Domain of Justice and Home Affairs*, 9 *European Foreign Affairs Review* 397 (2004).

<sup>119</sup> *Id.*

## Chapter 3

### Conclusion

The European Union's treaty-making powers developed further than most anyone could have imagined in 1950. The treaty-making powers were briefly established during the Community's inception through the Treaty Establishing the ECSC. Here, the Community was given a legal personality, permitting it to participate in the international legal arena, including but not limited to, concluding international agreements. This important concept is the very foundation of the treaty-making powers of the Community, from which many EU legal authority flows.

After establishing that the Community has an international legal personality, the architects of the treaties began including very broad grants of treaty-making power. Initially, the Community was given only the power to take actions necessary to achieve its objectives. The treaty-making powers of the Community were not moved to a higher plane until the conclusion of the Treaty of Rome in 1957.

The Treaty of Rome is where the founders of the Community first include a more sophisticated elaboration of the Community's treaty-making powers. Articles 113-114, 228, and 238 all bestow upon the Community the power to conclude international agreements. On November 15, 1994, the European Court of Justice ruled in the ECJ Opinion 1/94 that the Community has sole competence, pursuant to Article 113 of the EC Treaty, to conclude the multilateral agreements on trade in goods.<sup>120</sup> This is precisely where the evolution of explicit

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<sup>120</sup> Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?*, 6 EJIL 245 (1995).

Community treaty-making powers originates. The Euratom treaty and the Single European Act expanded these powers to new areas of competence.

The Maastricht Treaty Establishing the European Union seemed to take a step backwards in the treaty-making powers of the newly-established Union. The Treaty devotes little to the international legal capacities of the Union.<sup>121</sup> While it called for a common foreign and security policy, it left the execution almost entirely to the member states with the Council playing a principally procedural role.<sup>122</sup> However, the Amsterdam Treaty on the Establishment of the European Union took a step towards a stronger, more coherent Union by adding Article 24. This significantly increases the role of the Union in its foreign relations area of competence. The CFSP and ESDP hint at a more unified institution, particularly in respect to foreign affairs. Article 24, giving the Union the exclusive competence to conclude treaties represents a new level in treaty-making power.

In many ways, an even higher level in codifying the treaty-making powers of the Union was achieved in the Lisbon Treaty. The Lisbon Treaty clarified the division between member state competences and Union competences. Title V of the Treaty is focused entirely on international agreements as they concern the Union. This recognition shows the growing importance of treaty-making powers.

This paper has investigated the important and complex evolution of treaty-making powers of the European Union, beginning with its precursor in 1950. The powers have developed in remarkable, sometimes chaotic ways, transforming a six member trade-based institution into an expansive twenty-seven member IGO behemoth. The powers to conclude treaties have grown enormously culminating in the Lisbon Treaty. The Union remains active in the international

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<sup>121</sup> Sari, *supra* note 64, at 71.

<sup>122</sup> *Id.*

arena, having concluded 1,032 agreements since 1956.<sup>123</sup> The Union continues to conclude numerous treaties from trade<sup>124</sup> to defense.<sup>125</sup>

As this paper is being written, the Union is in negotiations with the Ukraine over a trade agreement to be signed next year.<sup>126</sup> In order for the negotiations to be concluded, the Ukraine must mend its policies to that of the EU regarding the conviction of a senior opposition leader in the Ukraine.<sup>127</sup> It can clearly be seen that the breadth of the Union's treaty-making powers is growing to global prominence. The Union greatly influences the trade, policy, and security of countries around the globe through entering into numerous international agreements.

If the pattern remains linear, it is possible that we will soon see the Union with complete competence and exclusivity over all matters, leading to the emergence of the most dominant international actor history has ever witnessed.

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<sup>123</sup> EUROPA Treaties Office Database shows 788 bilateral agreements and 244 multilateral agreements with the Union as a party. Both databases are located on the Treaties Office Database website: <http://ec.europa.eu/world/agreements/default.home.do>.

<sup>124</sup> For example, The EU-South Korea Free Trade Agreement 2011.

<sup>125</sup> For example, the Agreement between the Organisation for Joint Armament Cooperation and the European Union on the Protection of Classified Information 2012.

<sup>126</sup> EUObserver, *Another Blow to Prospects of EU-Ukraine Treaty*, found at: <http://euobserver.com/tickers/119710>.

<sup>127</sup> *Id.*

## **Appendix**

### **Acronyms**

CFSP – Common Foreign Security Policy

EC – European Community

ECJ – European Court of Justice

ECSC – European Coal and Steel Community

EEC – European Economic Community

ESDP – European Security and Defense Policy

EU – European Union

EURATOM – European Atomic Energy Community

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# ACADEMIC VITA

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## Education

B.A., Political Science, 2013, Penn State University, Erie, PA

## Honors and Awards

- Academic
  - Dean's List Award recipient. (2009-present)
  - The Pennsylvania State University Evan Pugh Scholar Award. (2012)
  - The Pennsylvania State University President Sparks Award. (2011)
  - The Pennsylvania State University Presidents Freshman Award. (2010)
- Athletic
  - Ranked third on the National Association of Collegiate Water Polo Coaches Men's All Academic Awards list. (2009, 2010)
  - Ranked on the National Collegiate Water Polo Association Scholar-Athlete Team. (2009, 2010)
  - Ranked Second All Time Assists record for Penn State Erie Water Polo program.
  - Record holder for Assists in a single season for Penn State Erie Water Polo program. (2009)
- Scholarship
  - Penn State University Class of 1922 Memorial Scholarship. (2012-2013)
  - Presidential Scholarship of Penn State Erie. (2012-2013)
  - David Gifford Memorial Scholarship. (2011-2012)
  - Behrend Faculty and Staff Scholarship. (2011-2012)
  - Kathryn A. Shustek Scholarship. (2010, 2011)
  - Penn State Alumni Association of Orange County Scholarship. (2010-2011)
  -

## Association Memberships/Activities

- President- College Republicans. (2012-2013)
- Secretary- Pi Sigma Alpha National Political Science Honors Society, Penn State Erie Chapter. (2012-2013)
- Debate Participant alongside PA 49<sup>th</sup> District State Senate Candidates. (October, 2012)

- Debated a range of local and state issues in front of over 100 students, community members, and local media. Debate successfully lasted for two hours.
- Secretary- College Republicans. (2011-2012)
- **Captain**- NCAA Varsity Water Polo. (2010-2011)
- NCAA Varsity Water Polo member. (2009-2011)
- Student Athletic Advisory Committee Representative. (2010-2011)
- Penn State University Explore Law Program member. (Spring 2011)
  - Spent one week taking mock law school classes, learning about the legal profession, and presenting mock cross-examinations. Over 100 candidates, 40 selected.

### **Academic Experience**

- Research establishing a Comprehensive Statistical Database of Multilateral Treaties. (2010-present)
  - Researched over 6,000 multilateral treaties from the last 400 years. Organized treaties into a database spreadsheet based on over twenty variables.
- Honors Thesis- *The Evolving Parenthood of the EEC and Its Member Nations in Treaty Making*. (Spring 2013)
- Credited research assistant on paper, *Choice of Official Text in Multilateral Treaties: The Interplay of Law, Politics, Language, Pragmatism, and (Multi) Nationalism*. (Expected 2013)
  - Used *The Bluebook: A Uniform System of Citation* to footnote over 75 sources.
- Congress to Campus Event. (September, 2012)
  - In charge of hosting two former members of Congress during a three-day event. Event involved creating an intensive itinerary, chauffeuring, and discussing important political issues with the Congressmen, administrators, and faculty.
- University Teacher's Assistant- Comparative Politics. (2011, 2012)
  - Aided over 120 students with a special focus on China and the European Union.

### **Research Interests**

I have broad interests in international law, particularly the role of IGOs in the international legal sphere.