

FRAGMENTED SOVEREIGNTY? THE EUROPEAN UNION AND ITS MEMBER STATES IN THE INTERNATIONAL ARENA

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I. INTRODUCTORY REMARKS

The conception of the European Union (EU) as a new international law actor which possesses and exercises its own rights and duties autonomously is widely accepted in legal literature.¹ However, the establishment of the EU as an international law actor has certainly not extinguished the legal personality of its Member States (MS). These continue to possess rights and duties individually at the international level, though the scope of their action appears to be significantly curtailed. Thus, in correspondence to the competence assigned to the EU, quite an unusual situation seems to have arisen in the international community: instead of States as fully-fledged legal actors, possessing the panoply of international rights and duties, we have now a plurality of actors sharing competences and powers.

This event, the fragmentation of the overall capacity of the Member States of the European Union, and the distribution of powers and prerogatives among a plurality of subjects, is quite unprecedented in international law. It is an event which profoundly challenges the structure and process of the international legal order and entails an adjustment of its basic legal categories.

A line of research aimed at more precisely identifying how the EU and its MS behave in international legal relations, in themselves and in the relations with each other, appears relevant from both a practical and a theoretical perspective.

Practically, the sharing of competences between the EU and its MS is at the heart of serious legal problems on the international plane. The existence of international activities carried out by a plurality of subjects that share powers and competences produces overlaps and interferences and affects the very idea of unity and coherence in the conduct of foreign relations. An analysis of the interrelations in the behaviour of the EU and its MS is necessary in order to seize the consequences of the co-existence of a plurality of legal persons endowed with partial competence.

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¹ Within the limited scope of the present study, no assumption is made as to the international personality of the EU and to any relations it may have with that of the EC. The acronym EU will be (quite a-technically) used in order to refer to the Union, including the European Community. As the cases examined will concern almost exclusively legal positions possessed by the latter, the vexed issue of the international personality of the EU, as distinguished from that of the EC, can be left unprejudged.

This analysis can reveal how international law is reacting to the sharing of competences, and which changes are occurring to its conceptual structure in order to cope with this unique scenario.

This analysis seems promising also from a theoretical perspective. The fragmentation of the unitary capacity of the State, and the rise, in its place, of a plurality of actors endowed with partial capacity, ostensibly calls into question the notion of sovereignty: a notion that has constituted, and still constitutes today, a fundamental paradigm of international law. Thus, to inquire how the EU and its MS behave in international society may contribute to a closer observation of the evolution of the notion of sovereignty: a notion about which much speculation has been made and yet which remains mysterious in its very content.

2. A NORMATIVE NOTION OF SOVEREIGNTY

In order to introduce the analysis, a short examination of the theoretical foundation of the doctrine of sovereignty seems useful.

According to this model, a sovereign State is an entity possessing plenitude of powers within its territory. It is entitled to establish and maintain its own lines of conduct in international relations and is only limited by obligations arising under international law.²

This conception has reigned almost unchallenged for centuries. True, the notion of sovereignty has undergone a series of vicissitudes in the history of political and legal thought. In particular, in the transition from the absolutist State to the more modern forms of constitutional State, with its corollaries of the distribution of powers and competences among different organs and levels of government, the idea of sovereignty has at times been overtly contested, in favour of the emergence of new notions, allowing a certain pluralism in the exercise of political power.

However, it is worth noting that the doctrinal dispute about the concept of sovereignty in a system of political pluralism has regarded almost exclusively the notion of internal sovereignty.³ In external relations the notion of sovereignty has continued to be regarded as the expression of the unity and full capacity of the State as a politically organised entity. It has been almost univocally held that sovereignty of the State in international relations is necessarily a unitary notion: sovereignty can be acquired, transferred or extinguished in its entirety, but never

² For a complete account of the various meanings of the term sovereignty, see VERDROSS and SIMMA, *Universelles Völkerrecht*, 4th ed., Berlin, 1994, p. 25.

³ See OETER, "Souveränität und Demokratie als Probleme in der 'Verfassungsentwicklung' der Europäischen Union", *ZAÖRV*, 1995, p. 659 ff.; DE WITTE, "Sovereignty and European Integration: The Weight of Legal Tradition", *Maastricht Journal of European and Comparative Law*, 1995, p. 145 ff.

competence to cope with the fragility of international relations and the need to have in mind the interests of the people and the state.

divided.⁴ The distribution of the powers and prerogatives of the State among a plurality of entities endowed with international personality must have appeared, in the minds of political and legal theorists, a heresy.

In international law, the notion of sovereignty seems to express plenitude and comprehensiveness in the exercise of political power. In the classic textbooks of international law, and in some leading cases, sovereignty is defined by reference to intuitive notions, such as independence, plenitude of power and exclusivity in discharging the governmental authority of a territorial community.⁵ In other words, sovereignty has constantly represented an attribute of statehood:⁶ an entity is sovereign when it is empowered to participate on an equal footing with other nations in the course of international affairs.

These, and similar definitions, refer not only to legal, but also to political elements. However, it is worth attempting to extract from them a normative notion of sovereignty. Stripped of its symbolic and political meanings, sovereignty constitutes the potentially unlimited capacity of an entity, which may acquire the whole panoply of rights and duties under international law. In other words, sovereignty is an expression that simply denotes fully-fledged entities, which can use, at their will, all the powers and prerogatives deriving from international law.⁷

⁴ See WILDHABER, "Sovereignty and International Law", in MACDONALD and JOHNSTON (eds.), *The Structure and Process of International Law*, Dordrecht/Boston/Lancaster, 1986, p. 425 ff.; STEINBERGER, "Sovereignty", *Encyclopaedia of Public International Law*, 2000, Vol. IV, p. 500 ff.

⁵ See the famous *dictum* of the sole Arbitrator Huber in the *Island of Palmas* case, *Netherlands v. United States*, 1928, Report of International Arbitral Awards, Vol. 2, p. 829 ff.: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State" (p. 838). In the legal doctrine of the nineteenth century the existence of "half sovereign" entities was generally admitted, intending by that term the existence of entities possessing full sovereignty in their internal relations, but depending on other States for what concerns international relations. See for example DIENA, *Diritto internazionale*, Napoli, 1908, Vol. I, p. 73, who makes a distinction between "Stati sovrani, che possono adempiere liberamente e con massimo d'intensità le funzioni che sono proprie dello Stato ed esercitare integralmente i diritti a questo inerenti, non solo nei rapporti interni, ma anche nei rapporti internazionali", e "Stati semi-sovrani, che, pur avendo in misura più o meno estesa una determinata indipendenza nei rapporti interni, si trovano in condizioni di subordinazione ad un altro Stato per ciò che riguarda le loro relazioni d'ordine esteriore".

⁶ See the celebrated individual opinion of Judge Anzilotti in the *Austria-Germany Customs Regime* case, PCIJ Series A/B, No. 41, p. 57: "Independence [...] is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty". This was synthetically expressed by STEINBERGER, *cit. supra* note 4, p. 507: "The sovereign State thus became the normal subject of international law".

⁷ See the classical definition by OPPENHEIM and LAUTERPACHT, *International Law. A Treatise*, 7th ed., London/New York/Toronto, 1948, p. 113: "Full sovereign States are perfect, not-full sovereign States are imperfect, International Persons, for not-full sovereign States are only in some respects subjects of International Law". According to CRAWFORD, "The Criteria for

This definition is tautological and merely descriptive if applied to a unitary State. It simply denotes as sovereign any entity that possesses all the attributes of sovereignty. Though basic, this definition appears fraught with consequences when applied in a legal environment characterised by the sharing of competences. The transfer of competences to the EU has in fact created a plurality of actors on the international plane, each possessing powers and prerogatives, but none possessing the plenitude of powers traditionally referred to with the notion of sovereignty.

3. THE THEORY OF LEGAL PERSONALITY OF INTERNATIONAL ORGANISATIONS

This situation is quite unprecedented. Little guidance, if any, can be expected from cases regarding the legal personality of international organisations. Although international organisations can be endowed with international powers and prerogatives, and can consequently be considered as endowed with legal personality, their existence has by no means been perceived as a threat to the sovereignty of their MS.⁸

There are at least two reasons for this. First, unlike States, which are fully-fledged actors in international relations, the scope of the legal personality of international organisations is limited. Most international organisations act primarily as a legal framework within which activities of their member States are co-ordinated. Certainly they do not possess the plethora of powers which are put at the disposal of States.

Secondly, and perhaps more importantly, the attribution to international organisations of legal personality is commonly not considered to have curtailed the legal capacity of their member States.⁹ Also in consideration of the powers transferred to them, the capacity of international organisations to interfere with the international position of their MS is quite limited, quantitatively and qualitatively. International organisations are generally regarded as a new category of legal persons, whose establishment leaves untouched the legal capacity of their MS. While most authors are readily willing to admit that the establishment of international organisations has drastically changed the international legal environment, and has established a new

Statehood in International Law", BYIL, 1976-1977, p. 92 ff., p. 108: "In principle States have plenary competence to perform acts, make treaties and so on, in the international sphere: this is one meaning of the term 'sovereign' as applied to States".

⁸ See SCHERMERS and BLOKKER, *International Institutional Law*, The Hague/London/Boston, 1995.

⁹ See CRAWFORD, *cit. supra* note 7, p. 122, who mentions the membership of international organisations among the restrictions which "are not regarded as derogating from formal independence, although if extended far enough, [...] may derogate from actual independence". On the effect of the transfer of powers to supranational organisations on the legal capacity of the MS, see BLECKMANN, "Art. 2(1)", in SIMMA (ed.), *The Charter of the United Nations. A Commentary*, New York, 1995, p. 77 ff.

category of subjects, they are much less disposed to admit that the international capacity of States, full actors in international law, has been curtailed correspondingly.

This conceptual framework emerges from the advisory opinion of the International Court of Justice in the *Reparation for Injuries* case,¹⁰ one of the few instances in which the scope of legal personality of international organisations has been examined, on its own and in its relation with that of States.

In this case the Court was requested to ascertain whether the UN possesses the right to bring an international claim with a view of obtaining reparation in respect of the damage caused to an agent of the organisation in the performance of its duties. The Court made a distinction between the right to claim reparation for damage caused to the organisation as such, and the right to claim reparation for the damage caused to the individual, which involves two different subjects: the UN and the State of the individual's nationality. According to the reasoning of the opinion, the power to bring an international claim, in both situations, was possessed by the organisation "by necessary implication as being essential to the performance of its duties". Furthermore, having noted the existence of potentially conflicting rights, namely the State's right of diplomatic protection, and the organisation's right of functional protection, the Court called upon the parties concerned to find a co-ordinated solution.¹¹ Thus, although embryonic, the Court's line of reasoning acknowledged the fact that the establishment of international institutions endowed with legal personality may entail interference with the international position of States.

The relevance of this opinion for our purposes is perceptibly diminished by the fact that the Court did not go so far as to define the scope of the legal personality of international organisations in its relation with that of their MS. The reason might be that the question of determining which entity has a right to bring a claim for injuries suffered by an individual in the service of an entity other than its national State does not regard specifically the relation between international organisations and member States. This question may arise when an individual in the service of an international organisation has the nationality of a non-member State, or even when an individual in the service of a State has the nationality of another State.

Be that as it may, the opinion has undisputedly contributed to building the conceptual background underlying the doctrine of legal personality of international organisations. In the Court's view, which largely coincides with the view prevail-

¹⁰ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports, 1949, p. 174 ff.

¹¹ It is stated in the Opinion: "Competition between the State's right of diplomatic protection and the Organisation's rights of functional protection might arise. [...] In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organisation to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and, as between the Organisation and its Members, it draws attention to their duty to render 'every assistance' provided by Article 2, paragraph 5, of the Charter", *ibid.*, p. 185.

ing in legal literature, the attribution of legal personality to international organisations has by no means deprived their MS of their powers and prerogatives. States remain the only fully-fledged legal persons, and the establishment of international organisations does nothing more than add a new category of legal persons to the existing ones.

It is worth noting a further point in the Court's line of reasoning, illustrative of its conception of the legal personality of international organisations. Throughout the logical process of deduction of the powers and prerogatives inherently possessed by the United Nations, the Court seems to conceive of the organisation's legal personality as strictly distinct from that of its member States. These powers serve the purposes for which the UN was established and can be used not only independently of the MS, but also, if necessary, against them. The Court thus seems to conceive of the relations between international organisations and member States as analogous to the relationship between corporations and individual shareholders under domestic law: it is one of mutual exclusivity, in regard to the purposes respectively pursued, as well as to the powers available to them.¹²

In summary, two elements emerge as characteristics of the legal personality of international organisations:

i) the first is the fact that international organisations constitute a special category of subjects possessing only limited capacity as necessary for discharging their functions, but whose existence does not affect the sovereignty of States, conceived as fully-fledged legal persons; and

ii) the second is the fact that international organisations, when possessing legal personality, are viewed as distinct legal persons, endowed with the competence necessary for the fulfilment of their own purposes, and exercising them autonomously, distinct from their member States.

It is exactly this conception of legal personality, as having the capacity of a certain entity to exercise its own international rights and duties in full autonomy for the fulfilment of its own purposes, that is at stake in the process of European integration.

4. TRANSFER OF POWERS TO SUPRANATIONAL ORGANISATIONS AND THE MODEL OF DIVIDED SOVEREIGNTY

What changes, and even radically, the terms of the question is the establishment of supranational organisations — like the European Union — entrusted with some powers that are intimately connected with the exercise of governmental authority of their Member States. The fact that these organisations discharge functions gen-

¹² "[The Organisation] occupies a position in certain respects in detachment from its Members, and [...] is under a duty to remind them, if need be, of certain obligations", *ibid.*, p. 179.

erally entrusted to States, on the basis of their own decision-making procedures, makes them State-like entities rather than mere international organisations.

If seen against an historical background, the relevance of this event, the dissolution of the unitary nature of States as international legal persons and the fragmentation of powers in international relations among a plurality of entities endowed only with a partial capacity, can hardly be underestimated. It is likely to cause a profound impact on the evolution of international law and to call for the updating of traditional conceptual categories such as those of legal personality and sovereignty.¹³ It then prompts questions that are of relevance in considering the legal nature of the EU as an actor in international relations. Is it really plausible to think that the transfer of sovereign powers and prerogatives to supranational organisations has left untouched the legal capacity of their Member States? Could we simply think of the EU and its MS as distinct legal persons, exercising their own powers and prerogatives in isolation from each other? Can sovereignty be split among a plurality of entities sharing competences and powers?

¹³ This point assumes that international rules impose obligations and confer rights upon subjects who effectively possess the power to implement them. I can refer to my study, "The Scope of the EU Foreign Power", in CANNIZZARO (ed.), *The European Union as an Actor in International Relations*, Dordrecht/Boston/London, 2002, p. 397 ff. The consequence of this line of reasoning is that, in correspondence to the transfer of normative powers to the EU, a loss of international capacity has occurred, at least in those fields in which the competence of the EU is exercised effectively and overtly. I am well aware that, among international lawyers, a different view is prevailing, according to which the transfer of competence to the EU has not produced a loss of international capacity for the MS. The transfer of normative powers to the EU is seen as an internal event, unsuitable for unfolding consequences on the international status of the MS. This view is based on the traditional conception of sovereignty, construed as the capacity of a certain entity to control ultimately the course of events on a given territory. Within this conceptual perspective, it is assumed that the assignment of normative powers to an entity, such as the EU, which does not dispose of enforcement powers, is not an event capable of exerting influence on the international capacity of the MS. In spite of the transfer of competence, MS have still retained the capacity to keep conduct in compliance with international obligations, eventually at the cost of disregarding EU law inconsistent therewith. In this perspective, the capacity of the MS to control the enforcement of EU law, and, consequently, to comply with, or to breach, international law inconsistent therewith, would constitute the proper test for identifying the sovereign entity. Yet this view does not appear entirely persuasive. It is intimately linked to the doctrine of sovereignty as exclusive territorial control. Whereas this conception can describe satisfactorily the relations between sovereign entities, it appears unsuitable to make sense of the relations, more complex by far, between States and supranational organisations. Certainly the EU does not dispose of exclusive territorial control. However, in a normative perspective, which we are now exploring, it is highly controversial that this is the proper test for identifying sovereign entities. Entities, such as the EU, whose norms are effectively implemented throughout the territory of its MS, and which avails itself of MS' organs in order to secure compliance with its norms, without, or, in certain cases, even against their will, can be reasonably deemed to exercise sovereign powers. Thus, unless a repatriation of powers effectively occurs, and up to that moment, it can be plausibly argued that the MS have lost the capacity to exercise those international rights and duties which require the use of the transferred powers.

A positive answer to the latter question can be framed in the simplest model conceivable in order to describe the relations between the EU and its MS on the international plane: the model of divided sovereignty.

According to this model, each entity possesses on the international plane a share of powers and prerogatives corresponding to its internal competence, and can freely use them for the achievement of its aims. The model has a certain attractiveness in that it basically regards each entity, the EU and its MS, as partial sovereign entities within their sphere of competences, thus preserving the autonomy in the decision-making process of each. Interference by either entity in the conduct of the foreign-relations power of the other is thus precluded.

Theoretically this model represents a coherent development of the notion of international legal personality as the capacity of a certain entity to maintain its own course of action, albeit in limited fields. If an entity has only limited capacity, the sovereign powers with which it is endowed make it only a partially sovereign subject.

The model of divided sovereignty presupposes that international legal positions can be split between individual entities and assigned to them in correspondence to the line separating their competence on the internal plane. However, this conception is very simplistic. It would be an error to expect that the partition of competences on the internal plane has brought about a corresponding partition of powers on the international plane. The case that an entity's capacity possessed under international law corresponds to its internal competence appears, on various grounds, as an exception rather than the rule.

First, the process of competence-sharing on the internal plane is structurally different from the process of attribution of rights and obligations on the international plane. The relationship between internal competence and capacity in international relations is certainly not univocal. In some cases, the relationship is one of correspondence, in the sense that international rules confer rights and impose obligations upon the competent entity, either upon the EU or upon its MS. In other cases, this relationship is more complex, either because the exercise of international rights and duties requires actions which fall, albeit partly, within the competence of both entities, or because international law bestows rights and duties upon an entity which does not have the competence necessary for complying therewith. The richness and variety of the different classes of relationships between internal competences and international position calls for a closer analysis.

Second, and perhaps more interestingly, the possession of a certain share of rights and duties by a certain entity is not in itself an element that univocally determines its capacity to control an entire course of action in international relations. The handling of complex legal situations may require a multiplicity of actions that fall, according to various patterns, within the sphere of the powers of both entities. Whilst the model of divided sovereignty can satisfactorily apply to those situations which can be handled by one entity using its own individual powers, its application to more complex legal situations produces shortcomings that are not easily overcome.

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A third objection derives from observing how international legal situations are frequently interconnected, so that the exercise by one entity of rights and duties falling within its competence can produce legal effects in the sphere of the rights and interests of the other.

All these reasons point to the inadequacy of the approach described above. The idea that each entity individually exercises its share of international rights and duties, according to a model of divided sovereignty, produces shortcomings and inconsistencies. It seems incapable of plainly describing the comprehensive web of relations between the EU and its Member States. The splitting up of sovereign powers among a plurality of entities does not produce a plurality of partially sovereign entities. While each entity, individually considered, certainly possesses a means of action related to its competence, neither can be deemed to possess the capacity to exercise, in isolation, its international legal powers. Some form of co-ordination is required.

5. CO-ORDINATING THE INTERNATIONAL POWERS OF THE EU WITH THOSE OF THE MEMBER STATES: A REAPPRAISAL

The considerations contained in the previous paragraph point to the difficulty of conceiving of a unitary theoretical model in which the multifarious relations between the EU and the MS in the international arena can be conveniently framed. The fact is that there is no unitary model able to capture the variety of relations between internal competences and external legal powers. The interrelations between the EU and the MS depend on a number of factors: on the sharing of competence on the internal plane, but also on the structure of international legal relations. Moreover, as the logic of the internal distribution of competence only approximately matches the legal dynamics on the international plane, these two factors combine in a variety of ways. Co-ordination must therefore be set up on a case-by-case basis, and continuously adjusted in order to cope with the circumstances of the case. Thus, it seems useful at this stage to consider the relations between the EU and the MS in practice on the international plane. A major obstacle in this inquiry comes from the scarcity and inconsistency of trends in practice. By looking at some leading cases, we are merely endeavouring to glean some general guidelines for the study of the interrelation between the international behaviour of the EU and its MS.

5.1. *The Combined Individual Exercise of Parallel Legal Positions*

First, rules of international law which confer rights or impose obligations both on the EU and its MS ought to be considered. Norms of this type can normally be split into a bundle of parallel rights and obligations that are possessed by each entity, in relation to the powers and competences with which each has been respec-

tively endowed. This situation presents an interesting relational scheme, in which each entity's exercise of competence constitutes a part of the more comprehensive process of implementation of the same international norm.

In situations of this type there is generally no reason for deviating from the principle of individual exercise. Each entity is entitled to use its powers for exercising its own international rights and performing its own obligations under international law.

This does not, generally speaking, raise any difficulty in situations in which each entity is individually considered. Thus, for example, both the EU and each of its MS are addressed by international law rules concerning the treatment of aliens and are required to exercise their respective competences in compliance therewith. Both the EU and its MS are entitled to exercise rights and powers individually concerning State succession in relation to agreements respectively concluded. Both are bound by rules on environmental protection, on territorial application of the law, and so on. Certainly, a uniformity of behaviour in the individual action of the EU and its MS would be desirable. One might reasonably presume that the rules of State succession in regard to treaties are uniformly applied by the EU and by its MS.¹⁴ However, one could hardly assert a legal need for uniformity. Their distinct legal personalities prevent third parties, in their relations with one type of entity, from relying on the practice followed by the other.¹⁵

A need for uniformity nevertheless arises when the exercise of rights and performing of duties under international law requires conduct which falls simultaneously within the competence of both entities. In such a case, the necessary conduct on the international plane is simply obtained by adding the exercise of competences respectively possessed by each entity. A good example of this comes from the individual, but co-ordinated, response to the enactment of the Helms-Burton Act by the United States in 1996. The Joint Action 96/668/CE of 22 November 1996¹⁶ expressly qualified the US conduct in question as internationally unlawful and set out the legal framework in which the EC and its MS responded, individually, with measures falling within the competence of each.¹⁷ This pattern has been maintained

¹⁴ See KUYPER, "The Community and State Succession in Respect of Treaties", in CURTIN and HEUKELS (eds.), *Institutional Dynamics of European Integration*, Dordrecht/Boston/London, 1994, p. 619 ff.

¹⁵ See LOWE, "Can the European Community Bind the Member States on Questions of Customary International Law?", in KOSKENNIEMI (ed.), *International Law Aspects of the European Union*, The Hague/Boston/London, 1998, p. 149 ff.

¹⁶ OJ EC No. L 309 of 29 November 1996. The Joint Action was based on Articles J.3, now Article 13, and K.3, now Article 31, of the EU Treaty.

¹⁷ For the response of the EC, see Regulation (EC) 2271/96 of 29 November 1996, OJ EC No. L 309 of 29 November 1996. Interestingly enough, this act replicates the assessment of the unlawfulness of the United States conduct, with strict reference to the field of competence of the EC. Although at first glance this two-step procedure bears traces of resemblance with the procedure established under Article 301 of the EC Treaty, it would be improper to draw an

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along the course of the dispute with the United States, in which each entity has taken part individually, albeit expressing concerted views with the other.

The scheme examined so far presupposes the possibility of splitting rights and duties into a bundle of parallel legal positions respectively possessed by each entity in correspondence to the competences shared on the internal plane.

More complex legal situations require, however, more sophisticated behavioural schemes. In the following subsections attention will be drawn to three different situations. The first regards situations composed of a plurality of individual legal positions dependent on each other, and possessed either by the EU or by its MS (subsection 5.2). The second concerns legal positions collectively possessed, whose exercise implies a joint exercise of competence by both entities (subsection 5.3). The third pertains to international legal positions that intersect the partition of competences between the individual entities (subsection 5.4).

5.2. *Consecutive Exercise of Individual Powers*

This mode of co-ordination applies to complex legal situations, composed of a plurality of rights and obligations, each pertaining individually to either the EU or its MS, but inter-dependent one with another. Thus, each entity, albeit in principle exercising its own rights or obligations individually, is, by virtue of the partition of competences, bound to act in a legal framework entirely set up by the other.

Situations of this type evidence the inadequacy of a system of shared competences that deals with the complexities of international relations. In such a system, powers are shared statically, simply by assigning certain rights to one entity. However, the life of international relations only rarely presents a non-contextualised exercise of powers. Not infrequently must they be exercised in the wider context of situations that consist of a plurality of legal positions that unfold dynamically, so that the exercise of each power finds its legal basis in the preceding one, and sets a legal basis for the subsequent one.

These situations do not generally raise any problem when handled by subjects possessing full capacity. A difficulty arises when competences and powers are shared among a plurality of entities, which fall short, individually, of the powers necessary for dealing with the situation comprehensively. In order to recast a full

analogy between them. In fact, Regulation 2271/96 was based on Articles 73 C, 113 and 235 (now Articles 57, 133 and 308) of the EC Treaty. Albeit mentioning Joint Action 96/668, it expressly attributes to it a co-ordinating role only. This is acknowledged by Joint Action 96/668, which reads in its Preamble: "This Joint Action and the Regulation 2271/96 constitute together an integrated system involving the Community and the Member States each in accordance with its own powers". This can be read as a confirmation that the EC has the power to use its competence not only for the aims specifically assigned to it, but also in order to secure rights that it possesses under international law (see *infra*).

capacity, a co-ordinated exercise of the powers possessed by individual entities is necessary. Single entities are thus required to contribute, according to their respective legal capacities, to the management of the situation.

Situations of this type can be conspicuously found in the law of the sea, where the competences of the EU and of its MS are so entangled that not infrequently each entity exercises its own powers in a legal framework that is set up by the other.¹⁸ For example, the MS have the power to determine the breadth of zones of the sea where the EU is competent to adopt rules for the protection and exploitation of living resources. Thus the scope of EU regulations is defined by the MS, acting under their own international obligations.¹⁹ Although each entity is theoretically under distinct international legal obligations, their legal positions are strictly inter-related, and the lawfulness of the conduct of the one may represent a pre-condition for the lawfulness of the conduct of the other.

This effect can be closely observed in the *Estai* case, concerning the lawfulness of boarding and seizure measures in relation to a Spanish fishing vessel by Canada in the high seas.

The case arose in the context of a more general dispute, between the EU and Canada, with regard to the establishment and enforcement of the regime of fishing quotas under the North Atlantic Fishing Organisation (NAFO). Concerned with what it considered to be overfishing activities by Spanish and Portuguese vessels in the NAFO Area, Canada passed legislation in 1995 providing for a unilateral regime of quotas and for enforcement measures against fishing vessels for straddling stocks in an area beyond its 200-mile jurisdictional zone. Having infringed the Canadian regulatory measures, the Spanish fishing vessel *Estai* was boarded and seized in March 1995. Spain filed an application with the International Court of Justice.²⁰ Following diplomatic exchanges, the dispute between the EU and Canada on the lawfulness of the quota regime was finally settled by a bilateral agreement, concluded on 20 April 1995.

The analysis of the dispute proves that it embodies two distinct issues. The first concerns the lawfulness of the conservation and management measures adopted by Canada. The second concerns the lawfulness of the enforcement measures taken against the fishing vessel *Estai*. Thus, the lawfulness of Canada's conduct depends on two sets of international rules: those concerning the legal regime of the maritime zone in which the conduct was carried out, and those concerning the modalities of the use of force.

¹⁸ See, for example, Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of ships using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and ship-board living and working conditions (port State control), OJ EC No. L 157 of 7 July 1995.

¹⁹ See, for example, the answer of the Commission to the written question P-149/01, OJ EC No. C 235 of 21 August 2001.

²⁰ The claim was subsequently dismissed for lack of jurisdiction. See *Fisheries case (Spain v. Canada)*, Judgment of 4 December 1998, ICJ Reports, 1998, p. 432 ff.

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The response involves several measures. A joint action was undertaken by the EU and its MS, aimed at reaffirming the principle of the freedom of the high seas. Spain responded individually to the boarding and seizure measures taken against its vessel and filed an application with the International Court of Justice.²¹ Finally the EU and Canada, following an intense round of negotiations with a view to resolving their long and complex dispute on fishing quotas, concluded an agreement providing for a new system of conserving and managing fishing stocks under NAFO provisions. Following the conclusion of the agreement, Spain and Portugal were removed from the list of countries whose ships were subject to enforcement measures under the Canadian Coastal Fisheries Protection Act.²²

Be that as it may, it is apparent that the Spanish claim relied entirely on EU legal claims.²³ It is worth recalling that, among the arguments submitted by Canada to the International Court, in support of its request to discontinue proceedings, was the fact that the Spanish claim was superseded by the conclusion of the 1995 agreement. In the view expressed by Canada, the dispute with Spain was dependent on the persistence of a legal dispute with the EU such that the settlement of the latter would have erased the former.²⁴

²¹ The Spanish Memorial contains an interesting statement concerning the respective competences of the EC and its MS on the external plane: "Les compétences externes [...] aux mains des institutions communautaires et (qui) donc ne peuvent plus être exercées par les Etats membres sont essentiellement de deux sortes: la conclusion des traités en matière de pêche en mer et la participation en tant que membre des organisations internationales de pêche. Mais la Communauté Européenne n'exerce pas la protection diplomatique au bénéfice des navires des Etats membres. Cette faculté est rigoureusement réservée aux Etats membres [...] en matière de protection diplomatique, le règles générales du droit international ne son pas affectées par l'impact du droit communautaire [...]" *Memorial*, ICJ Pleadings, 1998, para. 21.

²² The agreement is reproduced as an Annex to the Canadian Counter-Memorial.

²³ Spanish Memorial, *cit. supra* note 21, para. 21.

²⁴ The distinction between the legal positions possessed respectively by Spain and by the EC was carefully pointed out by Remiro Brotons, speaking on behalf of Spain in his pleading before the ICJ, see ICJ Pleadings, *supra* note 21, p. 442. The existence of legal positions which are dependent on each other raises the problem of the attribution of responsibility for unlawful conduct. Assuming that the EU is directly responsible for conduct carried out by MS organs in discharging tasks assigned to them under EU law, a distinction ought to be made between responsibility arising out of a breach of international rules which concern the exercise of competences by the EU, and, respectively, of international rules which concern the enforcing activity of MS organs. It is reasonable to consider that the responsibility must be attributed to the EU in the first case; and to the MS concerned, in the second. In fact, MS organs that enforce EU law are under distinct obligations: an obligation to carry out conduct necessary for securing compliance with EU measures; and an obligation to choose, among the various possible means, those which are in accordance with international law. Thus, a breach of international law flowing from conduct made compulsory under EU law, ought to be attributed to the EU; a breach of international law which derives from conduct which is not imposed on the State's organs under EU law must be attributed to that State; see GAJA, "How Does the European Community's International Responsibility Relate to Its Exclusive Competence?", in *Scritti in onore di Gaetano Arangio-Ruiz*, Napoli, 2004, p. 747 ff.

5.3. *Joint Exercise of Powers on the International Plane*

The legal positions affecting both entities' sphere of competences, which cannot be fragmented into a bundle of rights and obligations individually incumbent on either, are by nature possessed by a composite actor: the EU and its MS. The existence of situations of this type implies a collective exercise of rights and obligations.²⁵

In the field of the law of the sea we can also find examples of this type. As is well known, the EU possesses exclusive competence for protection and exploitation of living resources, while the MS are exclusively competent over other forms of exploitation of the sea. Although each entity is entitled to individually exercise its powers connected with its respective legal position, there is a need for a collective exercise of power in situations where the competences of both the EU and its MS are simultaneously affected. A typical case is the conduct of a third State that has occupied a part of the high seas, thus affecting both the right of the EU to freely regulate fishing activities in this area and the right of the MS to use it for other purposes. If each entity were entitled to individually assert its own rights, the conceptually unitary regime of the zone would be fragmented into a series of sub-regimes, having a distinct discipline, in consequence of a diverging exercise of competences by the EU and by each of its MS.

In the *Estai* case, for example, the EU and the MS collectively claimed that Canada should respect the principle of freedom of the high seas. Canada's conduct, as outlined above, was an attempt to modify the legal regime of the high seas, under which both the EU and its MS exercise their respective competences. Interestingly, a *note verbale*, jointly issued by the EC and its MS, stated in general terms: "the EC and its MS [...] consider, in accordance with Article 189 of the United Nations Convention, that no State may validly purport to subject any part of the high seas to its sovereignty [...]"²⁶

It is thus reasonable to assume that, where the exercise of rights and duties on the international plane intersects the line dividing the competences of the EU and those of the MS, and it is not possible to separate them into parallel, individually

²⁵ The joint possession of rights and obligations does not automatically flow from the fact that an international rule imposes rights and obligations upon both entities. It is necessary that these rights and obligations cannot be individually exercised, either because each entity falls short of the powers necessary or because an individual exercise would produce a side-effect in the legal sphere of the other entity.

²⁶ *Note verbale* of 10 June 1994 (reproduced in an Annex to the Spanish Memorial). See also the *Note verbale* jointly issued on 10 March 1995, which reads: "the arrest of a vessel in international waters by a State other than the State of which the vessel is flying the flag and under whose jurisdiction it falls, is an illegal act under both the NAFO Convention and customary international law [...]" This serious breach of international law goes far beyond the question of fisheries conservation [...]"

possessed legal positions, the legal position is collectively possessed and must therefore be collectively exercised.²⁷

Analogous considerations can lead to the stipulation of mixed agreements. Mixity is mandatory when neither the EU nor its MS, individually considered, have the capacity to acquire all the rights and obligations contained in a certain agreement. It is only the combination of their competences that gives them the international capacity to become a party thereto. However, the conclusion of mixed agreements does not by itself necessarily entail that rights and obligations have to be exercised jointly. The fact that each entity only undertakes obligations falling within its own fields of competence may be made expressly clear to third parties, or be deduced from the competences respectively possessed.²⁸

Irrespective of the legal nature of mixed agreements, their implementation rarely requires action to be taken jointly by the EU and its MS.

An individual exercise of powers, by each entity with respect to its own share of rights and obligations, would, in fact, presuppose a compartmentalisation of the provisions of the agreement and their regrouping in a plurality of self-contained sub-instruments between, on the one hand, the EU or each MS respectively and, on the other, third parties. This would require re-creating, in each sub-instrument, the symmetry of the legal positions between the parties, which was originally established in the mixed agreement.²⁹

This condition is however difficult to be fulfilled, legally and practically. Unless there is clear evidence to the contrary, and beyond the individual commitments of each entity to carry out obligations falling within its sphere of competence, the legal regime of the agreement is a unitary one, and can hardly be split into distinct sub-regimes.

This is quite obvious for the exercise of powers expressly aimed at affecting the legal force of the entire agreement, such as, for example, a declaration to suspend or terminate the agreement as a whole.³⁰ This is equally obvious for powers,

²⁷ It may be worth noting that the EU considers itself addressed by the whole body of international customary rules on the protection of fundamental human rights, irrespective of any reference to the competence possessed on the internal plane. This assumption has been based on the inseparable character of these rules, whose rights and obligations cannot be split according to the field of respective competence.

²⁸ Thus, the legal nature of mixed agreements is not univocal. While some may be viewed as a unitary agreement concluded by the Euro-group, others can be more appropriately decomposed in a bundle of bilateral relations incumbent respectively with the EU or with each of its MS. See on these aspects, ROSAS, "Mixed Union – Mixed Agreements", in KOSKENNIEMI (ed.), *cit. supra* note 15, p. 125 ff.

²⁹ According to GAJA, "The European Community's Rights and Obligations under Mixed Agreements", in O'KEEFE and SCHERMERS (eds.), *Mixed Agreements*, Deventer, 1983, p. 133 ff., p. 138: "The test for deciding whether the Community's participation is independent from that of the Member States appears to be the separability of the part of the agreement which imposes obligations and gives rights to the Community from the other parts of the same agreement".

³⁰ See the Decision 91/586/ECSC, EEC, of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 11 November 1991 suspending

such as the power to invalidate a mixed agreement on the grounds that it allegedly conflicts with *jus cogens*; even if this refers to specific provisions, it invalidates the entire agreement.

A careful inquiry into the rules of the law of treaties results in widening the set of powers which require a joint exercise. Certain powers, although expressly directed to producing effects only with respect to specific provisions falling within the competence of the acting entity may have a spill-over effect and affect provisions falling within the competence of the other.³¹

The rules on reservations and objections thereto constitute an example of this effect. Although they produce effects only in bilateral relations, between the party who makes a reservation and the party who accepts it or who objects to it, the legal regime of reservations does not appear to be easily reconcilable with a shared partnership.³²

the application of the Agreements between the European Community, its Member States and the Socialist Federal Republic of Yugoslavia, OJ EC No. L 315 of 15 November 1991, and the Decision 91/587/ECSC of the Representatives of the Governments of the Member States, meeting within the Council of 11 November 1991 denouncing the Agreement between the Member States of the European Coal and Steel Community and the Socialist Federal Republic of Yugoslavia, *ibid.*, p. 47.

The EU and its MS have assigned to the Council, acting on majority voting, the power to ascertain the breach of essential obligations contained in the partnership agreement concluded between the EU and its MS with the ACP Countries on 23 June 2000, in particular of the obligations to respect fundamental human rights and principles of democracy, and to respond to the breach by suspending or terminating the agreement. See the Internal agreement between the representatives of the Governments of the States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement, OJ No. L 317 of 15 December 2000. This procedure has been applied in a number of occasions. See for example Council Decision 2001/131/EC of 29 January 2001 concluding the consultation procedure with Haiti under Article 96 of the ACP-EC Partnership Agreement, OJ No. L 48 of 17 February 2001; Council Decision 2002/131/EC of 21 January 2002 amending Decision 2001/131/EC concluding the consultation procedure with Haiti under Article 96 of the ACP-EC Partnership Agreement, OJ No. L 47 of 19 February 2002; Council Decision 2002/274/EC of 25 March 2002 concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement, OJ No. L 96 of 13 April 2002; Council Decision 2002/148/EC of 18 February 2002 concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement, OJ No. L 50 of 21 February 2002. An analogous procedure was in force under the IV Lomé Convention; see Council Decision 1999/214/EC of 11 March 1999 on the procedure for implementing Article 366a of the fourth ACP-EC Convention, OJ No. L 75 of 20 March 1999.

³¹ It seems safe to assume that, under the *inadimplenti non est adimplendum* rule, a certain interchangeability of the provisions contained in a mixed agreement is unavoidable. A third State, for example, would be entitled, unless there is a clear indication to the contrary, to suspend a certain provision falling within the competence of one entity in response to the breach of an obligation caused by the other. See GAJA, *cit. supra* note 29, p. 138.

³² See SPILIOPOULOU AKERMARK, "Reservation Issues in the Mixed Agreements of the European Community", Finnish Yearbook of International Law, 1999, p. 351 ff.

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This may be observed in a number of situations. A reservation individually made by one entity, with respect to a provision falling within its own competence, entitles each contracting party to object to it, and thus to preclude the entire agreement from entering into force between the objecting party and the reserving party. However, the combined effect of an EU or a MS reservation and an objection thereto with regard to the legal position of the other entity is unclear. It is certainly unreasonable to consider that such entity's legal position remains unscathed and that it would acquire its own share of rights and obligations under the agreement as if no objection existed. On the other hand, it is equally inappropriate to assume that the objection may also have an effect on the legal position of the entity that has not made the reservation, either by precluding the entry into force of the agreement between it and the objecting party, or by considering it to be saddled with the whole burden of rights and obligations deriving from the agreement. In mixed agreements, the membership of each entity, the EU and the MS, can be viewed as an essential pre-condition for the membership of the other.

Even more complicated situations may occur. Such situations further point to the shortcomings of the unilateral use of the powers to make reservations or to object to reservations with regard to mixed agreements. Diverging reservations, or objections, to the same provision made by the EU and by its MS may bring about the existence of different patterns of obligations that are inconsistent with each other. Reservations, or objections thereto, made individually by one entity to a provision which produces obligations incumbent upon both may make it difficult or impossible for the other entity to comply with it, and so on.³³

The examples briefly outlined above prove that powers concerning reservations and objections to mixed agreements cannot realistically be entrusted to the individual competence of either entity. The fact is that the legal regime of reservations presupposes a conception of international agreements as a unitary body of norms, which is unlikely to be split into a bundle of independent legal relations according to the competences possessed by sub-entities of composite parties. All in all, the whole regime of reservations hardly seems compatible with a partition of competences between sub-entities of a composite actor, unless they act jointly.

Not surprisingly, trends in practice support the view that powers related to reservations and objections thereto are collectively possessed and ought to be collectively handled. In a series of cases, the EU has enacted decisions in order to ensure uniform action on the part of the EU and its MS in the making of reservations or

³³ See, for example, the interpretative Declaration No. 3 made by the EU and by its MS to the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, OJ EC No. L 189 of 3 July 1998: "The European Community and its Member States understand that the term 'States whose nationals fish on the high seas' shall not provide any new grounds for jurisdiction based on the nationality of persons involved in fishing on the high seas other than on the principle of flag State jurisdiction".

interpretative declarations, or in objecting to reservations.³⁴ A need for co-ordinating the use of powers related to the regime of reservations with mixed agreements also emerges from an internal document of the Legal Service of the Commission, even if it does not go so far as to suggest that the structure of international legal relations deriving from the regime of reservations imposes a joint exercise of the powers connected therewith.³⁵

The cases above highlight the asymmetry between internal competence and international capacity of the EU and its MS as individual international actors. Such asymmetry may be remedied, to a certain extent, by considering the EU and its MS as a unitary legal person, acting through the joint action of its sub-entities. This theoretical scheme has a potentially wide field of application, and is likely to apply to a rich variety of cases in which one single entity, individually considered, is not able to handle a certain legal situation, either because its action would produce effects in the sphere of rights and duties possessed by the other, or because its exercise requires a corresponding exercise of competence by the other.

³⁴ See the Proposal for a Council Decision on objection to be made on behalf of the European Atomic Energy Community to a reservation formulated by the Islamic Republic of Pakistan at the time of its accession to the Convention on the Physical Protection of Nuclear Material, COM(2001) 583 final. The reservation would have the effect of sensibly altering the obligation of Pakistan in matters falling within the competence of both the Euratom and the MS. The proposal envisages that "the EU Member States and Euratom, as parties to the Convention, should object to Pakistan's reservation as being incompatible with the object and purpose of the Convention and that each Party would make the objection individually. In this context, in order to give the objections the desired legal effect, it is important that they are submitted by 20 October 2001 at the latest to the States". See also the Council Decision 98/414/EC of 8 June 1998 on the ratification by the European Community of the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks, OJ EC No. L 189 of 3 July 1998. The decision considered that "it is [...] necessary for the Community and its Member States simultaneously to become Contracting Parties in order to carry out together the obligations laid down in the Agreement and exercise together the rights it confers in cases of shared competence in order to guarantee uniform application of the Agreement in the context of the common fisheries policy", and stated that "the instrument of ratification shall be deposited simultaneously with the instruments of ratification of all the Member States. At the same time the Member States shall confirm the declarations made by the Community on ratification of the Agreement". The declarations are reproduced in an Annex to the decision. It is worth noting that among the declarations, some concern obligations that neatly fall within the sphere of exclusive competence of the MS. For an example of individual reservations to mixed agreements see the Council Decision 1999/575/EC of 23 March 1998 concerning the conclusion by the Community of the European Convention for the protection of vertebrate animals used for experimental and other scientific purposes, OJ EC No. L 222 of 10 August 1998.

³⁵ Reservations and objections to reservations with regard to mixed agreements, SEC(1998) 2249 of 23 December 1998. The document focuses on the difficulties arising from the individual handling of the powers concerning the making of reservations and objections thereto, and calls on the EU and the MS to keep a strict co-ordination.

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5.4. *Individual Exercise of International Powers Intersecting the Internal Partition of Competence*

Finally, one has to consider the case of the exercise of powers intersecting the respective fields of internal competences. The intersection between international powers and internal competences may give rise to two types of effects. It may happen that a certain entity possesses individually the internal competence but not the international capacity to adopt a certain measure, or, conversely, that it possesses individually the international capacity but does not have the internal competence to act internally. In both cases, an exercise of power on the international plane across the line dividing the internal competence is necessary.

This is a result of the different dynamics between the process of competence sharing on the internal and the international planes. While the partition of competences between the MS and the EU is mainly based on subject-matters, powers in international relations depend on their quality as international law subjects. The scope of the international personality tends to correspond with the scope of the internal competence, but the coincidence is not complete. In consequence thereof, a certain asymmetry in the legal position of the EU and its MS is to be observed. Without exhaustively dealing with this still relatively unexplored topic, for the purposes of the present work it is useful to give some examples in which, in order to overcome this asymmetry, powers of either entity are used across the fields of their respectively possessed competences.

Intersections between internal competence and international power may frequently occur in the field of instrumental powers conferred by international law on its subjects for securing the respect of their rights. Among these, the use of trade measures as countermeasures has widely attracted the attention of legal literature.

By virtue of its quality as an international law subject, each entity, the EU and the MS, is entitled to adopt individual measures of self-protection against the unlawful conduct of third States. However, the partition of competences has curtailed the means of protection of either entity, and each is deprived of the possibility of adopting measures which fall within the competence of the other. Thus, neither entity, individually considered, has at its disposal the whole set of means normally used as a means of self-protection. This result is particularly disappointing for the MS. Having transferred commercial policy to the exclusive competence of the EU, they would be prevented from adopting commercial sanctions, which constitute a powerful means of pressure widely used in international relations. A cross-cutting use of competences on the international plane, that allows either entity to use its competences for protecting the international position of the other, is the only way for recasting the plenitude of powers which the other international law subjects possess.

This emerges from the practice of economic countermeasures. The EU has adopted response measures towards the unlawful conduct of third States even in

cases in which it could not be properly considered as injured under international law.³⁶

As further examples of intersection between international capacity and internal competence, the cases of representation on the international scene ought to be considered. Sometimes the capacity of one entity, mainly the MS, has been used on the international plane in order to overcome the lack of capacity of the other. Thus, the MS have been authorised by the EU to become parties to treaties on behalf of the EU in fields falling within EU competence when the EU could not become a party to the treaty.³⁷ In order to avoid misconceptions as to their respectively possessed competences, the EU requested that the MS, when acting on behalf of the EU, declare their status as agents of the Union. Whereas the legal effect of such declarations is not entirely clear, they seem at least to have created third-party awareness as to the incompetence of the MS to act on their own.³⁸

³⁶ This conclusion seems to have been recognised also within the internal legal order of the EU. Article 301 of the EC Treaty establishes a two-step procedure for using Community competence for sanctioning purposes. Ambiguous as the wording of the provision undoubtedly is, it can reasonably be assumed that it refers to the possibility of using Community competence as a means of protection of the international legal position of the MS. As the EC already possesses the capacity to use its competence for protecting its own rights under international law, a different interpretation would lead to the conclusion that Article 301 would curtail the scope of EC foreign power, by interposing the necessity of a CFSP measure to a lawful exercise of Community competence. I have dealt with this issue more extensively in my essay "The Scope of the EU Foreign Power", *cit. supra* note 13.

³⁷ This procedure has been upheld by the Court of Justice in Opinion 2/91, ECR, 1993, p. I-1061 ff. Thereafter it has been used on a number of occasions. See among the most recent, the proposal for a Council Decision authorizing the Member States to sign in the interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention, COM(2001) 680 final); the proposal for a Council Decision authorizing the Member States to sign and ratify in the interest of the European Community the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunker Convention, COM(2001) 675 final); the proposal for a Council Decision authorizing the Member States to ratify in the interest of the European Community the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention, COM(2001) 674 final). In the same vein, when the competence has been transferred to the EU by its MS after the conclusion of agreements to which these are parties, and the EU itself has not the capacity to become a party, it can exercise its competence by means of its MS, acting on its behalf. The question arises, for example, in regard to the participation of the EU to the IMF, to which now twelve MS are parties although they, having transferred their competence to the EU, do not fill the substantive conditions. See LOUIS, "Les relations extérieures de l'Union économique et monétaire", in CANNIZZARO (ed.), *cit. supra* note 13, p. 77 ff.

³⁸ See for example, Article 2 of the Proposal for a Council Decision authorizing the Member States to sign in the interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention), COM(2001) 680 final.

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The cases mentioned above are testimony to the existence of a practice allowing the EU and its MS to act internationally, outside the scope of their respective competences, on behalf of the other entity. These situations have been considered as exceptional cases of dissociation between international capacity and internal competence.³⁹ Consequently, the exercise of powers on the international plane has by no means necessitated a realignment of the entities' respective, internally possessed competences.

6. CONCLUDING REMARKS: TOWARDS A SYSTEM OF MIXED SOVEREIGNTY?

It is certainly not easy to compose the cases examined in the previous paragraphs into a coherent and comprehensive legal theory. Trends are not well settled, and the borderline between the different situations is uncertain and fuzzy. Nevertheless, an attempt may be made to draw from the above analysis some general guidelines as to the relationship between the EU and the MS as actors on the international plane.

Certainly, the existence of composite entities, such as the EU and the MS, each possessing distinct legal personality but sharing powers and competences, challenges the Hobbesian conception of the State as a personified entity, unitarily possessing and exercising its legal powers and prerogatives, a model on which international law has for centuries relied.⁴⁰

On the other hand, at the end of the analysis, one must frankly admit that there is no alternative conceptual model capable of capturing the richness and variety of the ways in which the EU and the MS co-ordinate their legal position in international relations. They act as distinct and independent legal persons, as distinct but interrelated legal persons, or as one composite actor, according to the different situations in which their competences are respectively affected.

The various situations can be regrouped within three basic behavioural models. The EU and the MS act as distinct and independent actors, according to a model of divided sovereignty, in situations which fall plainly within the subjective sphere of each entity. They act as distinct but complementary legal actors when the individu-

³⁹ Among the cases of passive representation, the collective responsibility attributed to the MS under the European Convention on Human Rights for activities undertaken by the EU cannot be grouped. See European Court of Human Rights, *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004. This situation would be better framed in the case-law of the organs of control of the Convention, that have ruled out the possibility that MS decline their responsibility under the Convention in consequence of the transfer of powers to the EU.

⁴⁰ See WEILER, "The External Legal Relations of a Non-Unitary Actor: Mixity and the Federal Principle", in O'KEEFE and SCHERMERS (eds.), *cit. supra* note 29, p. 35 ff.

al exercise of rights and obligations is conceived as a means to overcome functional deficiencies deriving from the partition of competences. They act as sub-entities of a composite actor in order to handle legal positions that are possessed collectively.

The lesson that can be drawn from this analysis is twofold. At first glance, one is tempted to conclude that the partition of competences has completely fragmented the comprehensiveness of powers traditionally associated with sovereignty. Thus, instead of States possessing the full plethora of international prerogatives, we have a plurality of actors sharing competences and powers; correspondingly, instead of using legal concepts evoking comprehensiveness and plenitude of powers, such as the concept of sovereignty, we should use concepts that are more appropriate to a pluralistic legal environment, such as the concept of competence.

In the field of external relations this process seems to replicate the process of distribution of powers that took place within the legal order of States once the idea of sovereignty as a concentration of powers in the hands of the sovereign had ceased to exist. This line of reasoning appears to challenge the conception of sovereignty as implying unity and comprehensiveness in the conduct of foreign-relations power. Not unlike what happened with the power of internal representation, the power of external representation seems to have split into a polyarchy of decision-making powers.

Certainly, the experience of the European integration shows that the conduct of foreign affairs does not necessarily require a system of unitary representation. Rather, the idea is gradually gaining ground that the external relations power, no less than other governmental powers, can be split among a plurality of independent actors, and can be based on institutional pluralism and on the partition of competences.

This remark, however, only partially tallies with the results of our analysis. We have seen that the idea of sovereignty as a legal category, conceived as the possession of the full panoply of rights and duties put at the disposal of States, has not completely disappeared. The fragmentation of powers has not brought about a corresponding disappearance of sovereignty. This concept is still revealing its usefulness. However, it cannot be referred to the State, conceived in its personified unity, as the monopolistic bearer of sovereign powers. Rather, it must be referred to a composite international actor, composed of a plurality of sub-units, each endowed with international personality, and individually possessing certain powers and prerogatives, which can be interchangeably used in a functionally co-ordinated framework, on behalf of, and for the benefit of, the entire unit. The combined use of individual powers distributed to the single sub-units can thus replace the completeness and comprehensiveness of sovereignty.

It is useful to dwell briefly on this concept. The study of international practice has proved that each sub-unit, the MS and the EU, can be satisfactorily described as a sovereign entity when acting in situations that are fully dealt with by the powers and competence individually possessed by them.

On the other hand, they must co-ordinate their actions, according to different schemes of behaviour, when dealing with situations that cannot be fully handled

functional entities of respectively. Hence, one might argue that the EU is not a single entity. Thus, we have instead of such as state to a process since the sign had of sovereign relations on, the mission-duct of rather, than s, and ysis. is the has about g its fied rred en-ers ated e of de-ice as ers ent ed

within their respective powers; situations that, in other words, affect the sphere of competence of both, the MS and the EU.

Moreover, in the international arena the interconnection in the external conduct taken by the EU and by its MS has met no objections, and seems to have been largely accepted as an inevitable complication in the relations between these entities. It does not seem unreasonable to assume that the EU and its MS, although in principle acting as distinct legal persons within their respective fields of competence, tend to act as organs of a more comprehensive entity in situations in which the rights and obligations respectively possessed by each entity on the international plane are interconnected. This conclusion has the effect of qualifying the assumption that the concept of sovereignty has ceased its function. Whilst the use of this concept must probably be stripped of many theoretical features that have marked its existence from the beginning, its usefulness in legal discourse has not disappeared.

Thus, not only may sovereign powers be distributed among a plurality of organs and levels of government without touching upon the very concept of sovereignty; sovereign powers may also be distributed among a plurality of units possessing their own legal personality. Co-ordination in the international conduct of these entities, in the forms seen above, or in other forms that will develop in future practice, recasts the comprehensiveness of sovereignty and thus prevents the process of partition of competences from bringing about a corresponding process of fragmentation of sovereignty. The plenitude and comprehensiveness formerly secured by the unitary nature of a State as a legal person is now recast in the co-ordinated action of a plurality of legal persons sharing powers and competences. It appears appropriate to speak of mixed sovereignty, intending by this the circumstance where there is no unitary manifestation of sovereignty; rather sovereignty consists of a plethora of powers that are possessed and exercised individually, jointly or co-ordinately, according to the structure of the legal relations at stake.