

EU Regulation 44/2001 and its Implications for the International Maritime Liability Conventions

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I INTRODUCTION

EU Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was adopted on 22 December 2000.¹ It is probably fair to assume that few at that time realized the full extent of the effects that this instrument would come to have in fields outside the framework of judicial cooperation. By incorporating the 1968 Brussels Convention² into European Community law, subject matters regulated therein triggered what is known as “exclusive Community competence,” not only internally within the EU, but also externally in relation to other States, in line with the so-called AETR doctrine established by the European Court of Justice.³

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¹2001 O.J. (L 12) 1, reprinted in 6B Benedict on Admiralty as Doc. No. 8-9.1 (F. Wiswall, ed., 7th ed. rev. 2003).

²The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968), reprinted in 6B Benedict supra, as Docs. No. 8-9A-F. Since its adoption, the convention has been amended several times. A consolidated version was published in 1998 O.J. (C 27).

³In *Commission v. Council* (the AETR judgment), the Court held that:

each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules . . . As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the community legal system. . . . It follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the treaty, the Member States cannot, outside the framework of the community institutions, assume obligations which might affect those rules or alter their scope.

Since matters relating to the jurisdiction, recognition, and enforcement of judgments are frequently regulated in international conventions, in particular those relating to liability and compensation, a number of conventions that had previously belonged to the domain of Member State competence in this way became “mixed,” that is, where the competence is shared by the Member States and the Community. Member States’ liberty to act freely with regard to a number of conventions was hereby considerably limited under Community law. The maritime liability conventions have been among the first in the line to be affected by this new shared competence and therefore provide an interesting case for studying the effects of this new situation and for analyzing the different solutions proposed to address it at EU and international levels.

An analysis of the impact of Regulation 44/2001 on the maritime liability conventions is interesting, too, in that the international agreements concerned have different relationships to Regulation 44/2001. The earliest of the conventions considered in this article is the HNS Convention, which was adopted already in 1996, well before Community competence on judicial cooperation had been established, but has not yet been ratified by the EU Member States.⁴ The Bunkers Convention was adopted in April 2001,⁵ that is, shortly after the adoption of Regulation 44/2001, but before its consequences were fully understood.⁶ These two conventions have recently been at the center of a discussion relating to the management of the new situation within the EU, which will be dealt with in sections three and four below. Since the adoption of Regulation 44/2001, new maritime liability agreements have been, or are being, negotiated with the new shared competence in mind.

Case 22/70, [1971] E.C.R. 263, ¶¶ 17-22. This position has since been confirmed in a number of judgments, most recently in the “Open Skies” judgments of 5 November 2002, Cases C-466—469/98, C-471/98, C-472/98, C-475/98 and C-476/98, [2002] E.C.R. I-9427 et seq. See also Art. I-12.2 of the draft Treaty establishing a Constitution for Europe, Doc. CONV 850/03, providing that: “The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal Union act.”

⁴International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, reprinted at 35 I.L.M. 1415 (1966).

⁵International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, reprinted at 40 I.L.M. 1493 (2001).

⁶It seems that the new situation caught by surprise the representatives of EU Member States at the Diplomatic Conference adopting the Bunkers Convention in London in March 2001. The altered legal circumstances following the adoption of Regulation 44/2001, as regards both the Community competence and the incompatibility between the two instruments in substance, were apparently made known to them only at the Diplomatic Conference itself. Last-minute efforts by the EU to arrive at a coordinated position during the conference, aiming at providing a possibility for the Community to conclude the Convention and at allowing Member States to continue to apply Regulation 44/2001 in their mutual relations, proved unsuccessful. See COM 2001(675) final, quoting a declaration made by the EU Member States attending the Diplomatic Conference, noting that:

Those agreements and the solutions envisaged for them are dealt with in section five. Some concluding remarks relating to potential short-term and longer-term implications of Regulation 44/2001 for the Community's international activities in maritime affairs appear in section six.

II REGULATION 44/2001

The Treaty of Amsterdam included a new Title IV into the EC Treaty containing specific provisions on judicial cooperation in civil matters. Following from this new competence, the European Council in October 1999 established that enhanced mutual recognition of judicial decisions and judgments would facilitate cooperation between authorities and the judicial protection of individual rights, and agreed that the principle of mutual recognition should become "the cornerstone of judicial cooperation in both civil and criminal matters within the Union."⁷ One of the first EU regulatory measures to result from this effort is Regulation 44/2001 (also known as the Brussels 1 Regulation), which covers all areas of civil and commercial law except for those that are expressly excluded from its scope.⁸ It lays down the rules on jurisdiction for a variety of different matters, and is largely based on the principle that jurisdiction is appropriate in the State of the defendant's domicile. In matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in the Member State where the harmful event occurred or may occur. The regulation further contains specific jurisdiction rules relating to insurance, consumer contracts and employment, where the weaker party needs particular protection. Recognition of a judgment given in one court of an EU Member State is automatic in another Member State unless contested. Similarly, a declaration that a judgment is enforceable is virtually automatic after purely formal checks of the documents. Enforcement can be refused only on one of the grounds exhaustive-

certain issues regarding the relationship between the Convention and recent EU legislation on jurisdiction and the recognition and enforcement of judgments will have to be addressed at EU level. Furthermore, they recognize the desirability of this Convention entering into force rapidly and the need for a continued effort within the European Union to achieve that result.

See also IMO Doc. LEG/CONF.12/CW/WP.3

⁷Paragraph 33 of the Presidency Conclusions of the Tampere European Council, 16 October 1999 (Press: Nr: 200/1/99).

⁸In accordance with the Protocol on the position of Denmark annexed to the Treaty on the European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of Council Regulation 44/2001 and is not bound by it nor subject to its application. The 1968 Brussels Convention remains in force in the relations between Denmark and the other EU Member States.

ly listed. This procedure is therefore less complex than would generally result from the application of national law.

When it comes to the relationship between these provisions and international agreements which govern the same subject for particular matters, Regulation 44/2001 represents a small but significant change to the regime that applied under the 1968 Convention. While such international conventions were given a general precedence in the 1968 Convention, Regulation 44/2001 limits this exception only to conventions to which the Member States are parties (at the time of the adoption of the Regulation).⁹ In brief, therefore, the adoption of Regulation 44/2001 resulted in a significant set of new rules being brought into the realm of Community law. For the purpose of this article, the most important consequence of this is the resulting exclusive Community competence, which implied significant limitations on the possibility for EU Member States to enter into international obligations on issues that could “affect” the rules laid down in Regulation 44/2001.¹⁰

⁹Paragraph 57(1) of the 1968 Convention reads: “This Convention shall not affect any conventions to which the Contracting States are *or will be* Parties and which in relation to particular matters govern jurisdiction or the recognition or enforcement of judgments.” (Emphasis added). In article 71(1) of Regulation 44/2001, the emphasized words have been left out.

The wording of Regulation 44/2001 thus reflects the AETR doctrine, which would presumably have applied even in the absence of any provisions to this effect. It is possible that an express provision giving precedence to international conventions, such as the one in the 1968 Convention, would have overruled this doctrine in this specific area, but such a solution was apparently not a choice preferred by the drafters of Regulation 44/2001. The Commission originally even aimed at compiling an exhaustive listing of the conventions exempted for this purpose. See Commission document COM (1999) 348 final.

¹⁰The exclusive nature of the Community’s external competence in this area will not be further analyzed here. While the Court in its case law has laid down a number of criteria to be met for the competence to be of an exclusive nature, the present case is relatively straightforward and uncontested, given that it is based on adoption of Regulation 44/2001, which regulates exhaustively the matters in question (i.e., not in the form of minimum standards only) and given that the maritime liability conventions are law harmonizing instruments that involve limitations on their parties’ applying more far reaching national or regional rules in matters regulated therein. In addition, there are considerable differences in substance between the rules on jurisdiction and the recognition and enforcement of judgments of Regulation 44/2001 and the maritime liability conventions. Generally on the jurisprudence of exclusive external competence, see David O’Keeffe, *Community and Member State Competence in External Relations Agreements of the EU*, 1999 4 *Eur. Foreign Aff. Rev.* 7-36; I. MacLeod, I. D. Hendry & Stephen Hyett: *The External Relations of the European Communities* 56-74 (1996); *The General Law of EC External Relations* (Alan Dashwood & Christophe Hillion eds., 2000); André Nollkaemper, *The External Competence of the Community with Regard to the Law of Marine Environmental Protection: The Frail Legal Support for Grand Ambitions, in Competing Norms in the Law of Marine Environmental Protection - Focus on Ship Safety and Pollution Prevention* 165-86 (Henrik Ringbom ed., 1997); *International Law Aspects of the European Union* (Marti Koskenniemi ed., 1998); and Rachel Frid, *The Relations Between the EC and International Organizations: Legal Theory and Practice* 57-118 (1995).

III IMPLICATIONS IN THE MARITIME FIELD

A. General

The international maritime community is probably among the most sensitive towards regional or other “unilateral” initiatives in regulatory and political debates. The argument, vigorously maintained by both the maritime industry and a considerable number of Governments, is that a global business, where the players so easily can choose the jurisdiction of their operations, needs to be regulated at global level in order to avoid a patchwork of standards in various geographical areas, which would result in distortion of competition and a series of legal and practical difficulties. Partly for such reasons, frequently strongly defended also in the Council, the European Community has not been in a position to exercise the full potential of the competence acquired by an ever-widening set of measures regulating maritime safety and pollution control.¹¹ It is only in the last five or so years that the practice of EU coordination of Member States’ positions ahead of international meetings has become generally established in the maritime field. And even then, the Community has generally satisfied itself with a less formal, and less committing, form of coordination of positions than a strict reading of the EC Treaty would suggest. Perhaps symptomatically, it took a regulation in a completely different field to trigger a more formalistic way of handling maritime issues falling within the exclusive Community competence at the international level. The implications are considerable, as tens of international conventions or protocols in the maritime field alone may be implicated by this new “mixity.”¹²

Most, if not all, maritime liability conventions include provisions on the competent jurisdiction and on the recognition and enforcement of judgments. In contrast to the multiple grounds for jurisdiction available under Regulation 44/2001, the pollution liability conventions, as a rule, make jurisdiction exclusive to the State Party where pollution damage occurred. The

¹¹See Jaques de Dieu, EU Policies Concerning Ship Safety and Pollution Prevention Versus International Rule-Making, in Ringbom supra note 10, at 141-63, and Henrik Ringbom: The *Erika* Accident and its effects on EU Maritime Regulation, in Current Marine Environmental Issues and the International Tribunal for the Law of the Sea, 265-90 (Myron H. Nordquist & John Norton Moore eds., 2001).

¹²Apart from the conventions considered in this article, the 1999 Arrest Convention (Article 7) and the 1993 International Convention on Maritime Liens and Mortgages (Article 1) also contain provisions relating to the jurisdiction or recognition and enforcement of judgments and may thus be presumed to be conventions in which the competences are now shared between the Member States and the European Community. This may well have similar implications for EU Member States as those discussed in this article.

conventions further provide that the courts of the State where the shipowner, or the insurer, has constituted a fund in order to benefit from the right to limit the liability shall have exclusive jurisdiction to determine all matters relating to the apportionment and distribution of the fund. The underlying reasons for limiting the number of jurisdictions include fostering equal treatment of claimants, ensuring a link between the court involved and the action, limiting forum shopping, and avoiding a situation where the same incident is litigated in a variety of courts and jurisdictions at the same time. The maritime conventions seek to avoid complex procedures relating to the recognition of cross-border judgments by requiring the recognition of a judgment that is no longer subject to ordinary forms of review, except where the judgment was obtained by fraud, or where the defendant was not given reasonable notice and a fair opportunity to present his case. Judgments shall be enforceable in each State Party as soon as the formalities required in the State where the judgment was given have been satisfied.

It should perhaps be noted, though, that the provisions on jurisdiction and the recognition and enforcement of judgments have largely been standard clauses, in particular in the marine pollution liability conventions. The relevant articles have generally been adopted without much debate, on the basis of precedents dating back to the late 1960's. The newly acquired Community competence is therefore somewhat outside the "core" of the conventions, and the articles concerned are often perceived as being of a purely "technical" nature by the conventions' draftsmen. Conversely, the more substantive parts of the conventions have so far been assumed to lie outside the sphere of exclusive Community competence, in the absence of Community rules relating to shipowners' liabilities or insurance obligations.¹³ Yet, despite this seemingly wide psychological difference between the parts of the conventions that constitute exclusive Community competence and the (majority of) provisions which do not, the two types of rules are closely interrelated when it comes to the practical application of the conventions, as the articles on jurisdiction, recognition and enforcement of judgments provide the procedural underpinning for implementing the substantive rules of the conventions.

¹³There are indications that the absence of Community legislation in the field of maritime liability may soon be a thing of the past. In particular, recent maritime accidents in EU waters have considerably strengthened the call for Community legislation in this area. For more details, see e.g. the Commission's Communications relating to oil pollution liability and compensation COM(2000) 802 final, COM (2002) 681 final and COM(2003) 105 final and, on carriers' liability for death and injury of passengers carried by sea, COM(2002) 158 final, and the Council's Conclusions relating thereto.

B. The search for a solution

Two rather different approaches to the issues at hand are easily discerned. On the one hand, there is the “maritime approach” stressing the importance of achieving widespread ratification of the maritime liability conventions as soon as possible. In this view, the principal aim of the HNS and Bunkers Conventions is to address the void in international regulation of liability and compensation regimes for a number of hazardous substances transported by sea. Their purpose is to provide for improved compensation of victims of pollution incidents, by providing for a strict but limited liability of the shipowner, coupled with compulsory insurance and, in the case of the HNS Convention, the establishment of a supplementary compensation fund. In light of this objective, any limitation on Member States’ possibilities to ratify the agreements is inadmissible, all the more so in the present case, given that the Community competence concerns only a very limited part of the conventions. Any denial or delay in ratification, goes the argument, would result in disproportional consequences for matters which remain the competence of Member States. A more legalistic strand of the same argument plays down the legal consequences of individual Member State ratification by invoking the rule of treaty law that internal reasons cannot be taken as grounds for invalidating its conclusion of a treaty.¹⁴

On the other hand, the arguments of Community law are straightforward enough for the proponents of the “Community approach.” The European Court of Justice has left Member States in no uncertainty about the difficulties they face in concluding international conventions that might affect Community rules or alter their scope. As it seems reasonably straightforward in the present case to establish the exclusive nature of the Community competence for parts of the conventions, the repeatedly held view of the Court applies, that Member States are prevented from assuming obligations in those areas outside the Community institutions.¹⁵ In addition, the Court, referring to the requirement of unity in the international representation of the Community, has held that, as regards mixed agreements in general, “it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into,” and that

¹⁴Article 46(1) of the 1969 Vienna Convention on the Law of Treaties provides that:

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

1155 U.N.T.S. 331, reprinted at 8 I.L.M. 679 (1969).

¹⁵See *supra* notes 3 and 10.

“the Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard.” In case of agreements that do not permit the Community as such to conclude the convention, such cooperation is, in the words of the Court, “all the more necessary.”¹⁶

The issue goes beyond one of competence and procedures, however. Since the relevant convention articles are different in substance from the regime laid down in Regulation 44/2001, a concern from an EU perspective is that a lack of vigilance here may lead to a gradual break-up of the newly adopted common rules. The individual ratification by Member States of the maritime conventions would compromise the uniform application of the rules of Regulation 44/2001 within the Community and the development would be completely outside the Community’s control. Admitting exceptions to the AETR doctrine here would provide an almost unlimited possibility for Member States to circumvent the Community rules through the conclusion of particular conventions. In addition, any solution adopted in this framework is likely to serve as a precedent when similar questions relating to potentially more controversial subjects appear on the EU agenda.¹⁷ Finally, the questions involve highly concrete legal issues relating to the competent jurisdiction and to how judgments relating to ship-source pollution are to be recognized and enforced as between Member States and beyond.

The Commission’s proposal for a solution with respect to the HNS and Bunkers Conventions was presented in November 2001. The envisaged solution consisted of two Council Decisions authorizing the Member States to ratify the conventions, subject to making a specific reservation to allow for a continued application of Regulation 44/2001 as between Member States with regard to the recognition and enforcement of judgments.¹⁸ The proposed decisions were intended as temporary measures until a time when the two conventions were amended in order to allow for Community participa-

¹⁶Opinion 2/91, [1993] E.C.R. I-1061, ¶¶ 36-38. See also Ruling 1/78, [1978] E.C.R. 2151, ¶¶ 34-36; Opinion 1/94, [1994] E.C.R. I-5267, ¶¶ 107-09; and Case C-25/94, [1996] E.C.R. I-1469, ¶¶ 48-50.

¹⁷In this respect it is to be noted that, among others, the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, for which amendment is currently being discussed, contains similar provisions with respect to jurisdiction and the recognition and enforcement of judgments. The Commission’s proposal with respect to the conclusion of the new Protocol to this Convention has partly been inspired by the HNS and Bunkers decisions. See COM (2003) 409 final.

¹⁸The Commission originally proposed different solutions for the two conventions, in that the reservation made for the Bunkers Convention foresaw a continued application of the jurisdiction rules of Regulation 44/2001 as well, “insofar as the pollution damage is caused in a . . . Member State of the European Community and the defendant is domiciled in a Member State of the European Community.” Since this additional reservation does not form part of the final decision, it will not be further analyzed here.

tion. The Commission also stressed their exceptional nature and that the decisions were not to be construed as precedents for future cases.¹⁹

The solution proposed by the Commission, which was largely supported by the European Parliament,²⁰ initiated an extensive debate in the Council. Underlying these discussions were the highly diverging interests of EU Member States in the pollution liability conventions, ranging from those of coastal States wishing to improve the protection of potential victims of marine pollution as quickly as possible to those of landlocked States with few incentives to be involved in this type of coastal protection convention at all. The decisions were adopted by the Council around a year later.²¹ They follow the main thrust of the Commission's proposal and thus resolve the most immediate concern of many Member States, that is, the deadlock relating to the conclusion of conventions. However, the decisions raise a number of questions, many of which lack conclusive answers in Community law. While occasions to specify the principles for the division of external competence between the Community and its Member States have been afforded the European Court of Justice in several cases, there have been few judgments clarifying the specific legal and practical implications of mixed agreements.

IV

ISSUES RAISED BY THE HNS AND BUNKERS CONVENTIONS

A. The Absence of an EC Accession Clause

The absence of clauses in the HNS and Bunkers Conventions allowing the Community to conclude them poses a difficulty under Community law. The exclusive Community competence over some areas regulated in the conven-

¹⁹COM(2001) 674 final (on the HNS Convention) and COM(2001) 675 final (on the Bunkers Convention), both dated 19 November 2001.

²⁰See the opinions of the European Parliament, PE T5-0287/2002 and PE T5-0288/2002 of 11 June 2002.

²¹Council Decision 2002/762/EC of 19 September 2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention), 2002 O.J. (L 256) 7, and Council Decision 2002/971/EC of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to 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), 2002 O.J. (L 337) 55.

tions presumes that the Community itself shall conclude the agreement to that extent, and that Member States each have a duty to contribute to this.²² In situations where the agreement does not allow for conclusion by the Community, the Court has held that the Community competence “may, if necessary, be exercised through the medium of the Member States acting jointly in the Community’s interest.”²³ The more precise features of this “medium” are uncertain. There seems to be no general understanding as to what joint action by Member States is required in situations of this type, apart from the obvious prerequisite that the solution should be agreed by and within the Community, rather than by Member States individually. In practice, agreements involving a shared competence but not allowing for Community ratification have rarely been addressed at Community level.

Regarding the HNS and Bunkers Conventions, the solution is to authorize Member States to ratify or accede to them “in the interest of the Community,” subject to certain conditions. The first question that arises is whether this, as far as Community law is concerned, amounts to conclusion of the conventions by the Community. Are these decisions, in other words, to be understood as mere authorizations for Member States to deviate, if they wish, from the Community rules laid down in Regulation 44/2001 by becoming parties to the conventions, or do they imply a decision by the Community as a whole to adhere to the relevant rules of the conventions, thus integrating them into the Community legal order?²⁴

The terminology generally used to indicate the conclusion of an international agreement by the Community is “on behalf of” the Community. This is the case, too, in one of the rare precedents dealing with the conclusion by all Member States of an agreement that does not contain a clause allowing the Community to do so, the AETR Agreement.²⁵ The wording of the HNS

²²In the joint Cases 3, 4 and 6/76, [1976] E.C.R. 1029, ¶ 45, the Court held that the Community institutions and Member States are “under a duty to use all the political and legal means at their disposal in order to ensure the participation of the Community in the Convention and in other similar agreements.”

²³Opinion 2/91, [1993] E.C.R. I-1061, ¶ 5 (re ILO Convention 130).

²⁴In Case 181/73, R. & V. Haegeman v Belgian State, [1974] E.C.R. 449, at ¶¶ 3-5, the Court held that an agreement concluded under articles 300 and 310 of the Treaty was “an act of the institutions of the Community” and its provisions “from the coming into force thereof, form an integral part of the Community law.” The same applies, following Case 12/86, Demirel v. Stadt Schwäbisch Gmünd, [1987] E.C.R. 3719, ¶¶ 7-12, to mixed agreements, at least as far as the provisions of the agreement relate to a field of exclusive Community competence. In Case C-439/01, Libor Cipra v. Bezirkshauptmannschaft Mistelbach, [2003] E.C.R. I-745, at ¶ 24, the Court recently confirmed that international agreements concluded through joint Member State action also form part of Community law. This case related to the AETR Agreement ratified on the basis of Regulation 2829/77 referred to *infra*.

²⁵Article 2(1) of Regulation 2829/77 provides: “In ratifying or acceding to the AETR the Member States . . . shall act on behalf of the Community.” A recital of the same Regulation specifies that: “Whereas, since the subject matter of the AETR Agreement falls within the scope of Regulation (EEC) No 543/69, from the date of entry into force of that Regulation the power to negotiate and conclude the

and Bunkers Decisions could thus be taken as an indication of the former of the above interpretations, i.e., that the decisions represent authorizations only and do not imply the acceptance by the Community of the relevant convention rules. Thus, the precise legal status of the HNS and Bunkers Decisions within the Community legal order would appear somewhat uncertain.²⁶ Such authorizations are not without precedent in Community law, but it seems that in most cases the addressee of such a decision to authorize the ratification of a convention has been a single Member State, rather than all of them collectively.²⁷

The significance of the choice of terminology should not be overstated, however. To the extent there is any reason for leaving out of the HNS and Bunkers Decisions the term “on behalf of the Community,” it may as well relate to uncertainties as to the scope and timing of the conclusion by the Community of these conventions. In fact, there are good reasons to believe that the decisions in question are intended to represent a more formal conclusion of the conventions on behalf of the Community, thus incorporating the relevant convention rules into the Community legal order. The main indication is the use of Article 300(2) as the procedural legal basis for the decisions.²⁸ The reference to the article of the Treaty dealing with the conclusion by the Community of international agreements implies that the Community in this way, through the joint action by its Member States, would become an “invisible” party to the conventions and that the Council Decisions authorizing the Member States to conclude the conventions on behalf of the Community in legal terms would equal other Council acts giving effect to international agreements within the Community. The view that the HNS and

Agreement has lain with the Community; whereas, however, the particular circumstances in which the AETR negotiations took place warrant, by way of exception, a procedure whereby the Member States of the Community individually deposit their instruments of ratification or accession in a concerted action but nonetheless act in the interest and on behalf of the Community.” 1977 O.J. (L 334) at 11.

²⁶It is not clear, for example, to what extent these Community decisions, in the absence of an integration of the relevant provisions of the HNS and Bunkers Conventions into the Community legal order, would qualify the general rule that Community secondary legislation (such as Regulation 44/2001) prevails over international agreements entered into by Member States after the date of their accession to the EU, as derived from Article 307 of the EC Treaty.

²⁷See e.g. Council Decision 1999/405/EC, concerning the accession of Spain to the Convention on the Inter-American Tropical Tuna Commission. In this case, too, it was impossible for the Community to adhere to the Convention, due to the lack of a clause permitting regional organizations to conclude it. It appears from the recitals, that the decision is intended to be a temporary one, until such a possibility has been catered for, “as an exceptional measure, to meet unique circumstances, and should not set a precedent in the sphere of Community representation in international organisations” It further appears that the only EU vessels operating in the geographical area covered by the Convention are Spanish fishing vessels. Article 2 of the Decision imposes an obligation on Spain to discharge its function as a Contracting Party “in line with the Community position and in close cooperation with the Commission.”

²⁸On the significance of this, see Case 181/73, *R. & V. Haegeman v. Belgian State*, [1974] E.C.R. 449.

Bunkers Conventions, once ratified by Member States, are to be considered as being concluded by the Community is also supported by the inclusion of the full convention text into the annexes of the decisions, which is the common practice when the Community decides to conclude an international agreement, and by outlining a time-frame for this purpose. Furthermore, it seems that during the negotiations of the decisions, this starting point was more or less taken for granted.²⁹

It has to be acknowledged, though, that the absence of formal conclusion of the conventions by the Community puts limits on how far the parallel to the procedure foreseen in Article 300(2) can be drawn. Firstly, it appears that the effects of “concluding” (parts of) an international agreement through Member State action alone are limited to the internal legal order of the Community. Externally, that is, in relation to non-EU State Parties to the conventions, Member States would remain the sole Contracting Parties, on the basis of international law. Secondly, in the absence of formal international law obligations by the Community towards third States, it is unclear to what extent the arguments for the primacy of international agreements concluded by the Community over secondary legislation would apply.³⁰ In the present case, however, it would seem that the relevant provisions of the HNS and Bunkers Conventions would prevail over Regulation 44/2001 in any event, on the basis of the *lex specialis* and *lex posterior* maxims, as applied to the decisions accepting the incorporation of parts of the two conventions into the Community legal order.

The assumption for the remainder of this section is thus that, through the ratification/accession by EU Member States in the interest of the Community, the HNS and Bunkers Conventions will in part be integrated into the Community legal order. The relevant provisions of the conventions will hence be subject to the jurisdiction of the European Court of Justice and will, subject to the declarations to be made by the Member States, take precedence over secondary Community legislation. In reality, Regulation 44/2001 is hereby modified, albeit in a rather obscure fashion. The incorpo-

²⁹During the elaboration of these decisions, the Community institutions involved largely took the view that the matter is one of judicial co-operation rather than maritime policy, which is also reflected in the legal bases of the decisions. This view will presumably have contributed to some reluctance by the drafters of the decisions to accept deviations from Regulation 44/2001, unless such deviations had a very solid foundation in Community law. See also Opinion 2/91 ¶ 37, where the Court emphasized the importance of cooperation, as the Community could not, “as international law stands at present, itself conclude an ILO convention *and must do so through the medium of the Member States.*” (Emphasis added.)

³⁰In Case C-61/94, *Commission v. Federal Republic of Germany*, [1996] E.C.R. I-3989, at ¶ 52, the Court held that “the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.”

ration of the relevant rules of the conventions into Community law in this way raises a number of uncertainties as to the scope of application of the conventions' provisions on jurisdiction, recognition and enforcement of judgments within the EU. These uncertainties are potentially substantial, but their magnitude is linked to the questions addressed in the remainder of this section.

B. Limiting the Territorial Scope of EC Conclusion

The diverging interests of Member States in the HNS and Bunkers Conventions prompt the question as to whether a decision to conclude the conventions in the interest of the Community could be narrowed down in geographical terms. Could, in other words, the effects of the Community's acceptance of the conventions be geographically limited only to those Member States that are parties to the conventions? If they could, the situation would not be very different from that which applied under the 1968 Brussels Convention, which admitted exceptions to the common regime for States that were also parties to a special convention. The difference is that under the 1968 regime such inconsistencies related to the relationship between two agreements of international law. In the new situation the relationship is between an agreement of international law and an act of Community law.³¹

While these issues have not been dealt with in detail by the European Court of Justice, an express limitation of the territorial application of the conventions concluded by the Community in this way is unlikely to find support in Community law. Such a solution would not easily be justified in light of the law, jurisprudence, practice and overall rationale of the regime relating to the conclusion of international agreements by the Community. Article 300(7) of the Treaty prescribes that international agreements concluded by the Community shall be binding on the Community's institutions and on Member States, and does not seem to offer any scope for the application of territorial exceptions in this regard. This is a logical extension of one of the most dearly regarded principles of Community law, the uniformity of application of the common rules within the Community territory. In line with what was held in the previous section, it should not alter the legal argument in this regard whether the Community itself concludes the agreement or Member States do so on its behalf. In addition, there seems to be a total absence of precedents in this area. This author is not aware of any instance where the conclusion of an international agreement by the Community

³¹See *supra* note 9.

(whether as a Contracting Party itself or by its Member States acting on its behalf) has been coupled with a specific geographical limitation of the Community's participation.

In light of this, it seems reasonable to assume that any limitation of the geographical scope of the Community's participation in the maritime liability conventions would have to be very forcefully justified. Since it would have direct consequences on the equal application of Community law within the Community territory, the threshold for such a limitation would presumably have to be the same as that justifying differentiation of treatment of EU Member States more generally in Community law. In view of the Court's traditionally restrictive policy on different treatment of Member States, it is difficult to see how the present case could provide for such justifications. Not even the very coastal focus of the concerns addressed in the conventions in combination with the fact that two of the Member States are land-locked would presumably suffice as justification for excluding them from the scope of the decisions, as this fact alone does not render the conventions meaningless in the land-locked Member States, in particular not when it comes to the parts of the conventions for which the Community competence is exclusive.³²

This relatively strict view seems to be accepted by the Council. The decisions do not, apart from the particular Danish exception that has its foundation in the Treaty, allow for any territorial limitation of the Community's ratification. Given that this question was paid considerable consideration within the Community's institutions, it can probably be concluded that the mere fact that the Community competence is restricted to a limited number of provisions of the agreement, arguably even "ancillary" to the core substance of the agreement, cannot be taken as a justification for side-stepping basic principles of Community law relating to the territorial scope of international agreements concluded by the Community. Similarly, the fact that some States, due to geographical attributes are not concerned with the main part of the conventions, but nevertheless may be concerned with those provisions of the conventions that belong to the exclusive competence of the Community, seems to be a good enough reason for rejecting a limitation of the application of the agree-

³²The geographical scope of the Bunkers and HNS Conventions is limited to the coastal waters of a State Party. However, their provisions relating to jurisdiction, recognition and enforcement of judgments concern actions for compensation against the shipowner, insurer or other person providing financial security for the shipowner's liability. As the shipowner, insurer and victim of a pollution incident may be of any nationality, including natural and legal persons residing in a land-locked Member State, it is by no means excluded that cases based on the conventions will have a bearing on persons and judicial authorities in land-locked States.

ment to some Member States only.³³ As a result, therefore, once the HNS and Bunkers Conventions have been concluded in the interest of the Community, their provisions on jurisdiction and the recognition and enforcement of judgments are presumed to apply throughout the Community territory.

C. Obligations of Member States to Ratify the Conventions

Rejecting the possibility of qualifying the Community's participation in the conventions in geographical terms, or of addressing the decisions to some Member States only, leads to a related—and considerably more delicate—question: must *all* Member States become parties to the maritime liability conventions and, if so, must they do so simultaneously? Affirmative responses to these questions would effectively turn the authorization to ratify the conventions into an obligation to do so. While such solidarity among Member States may be customary, or at least not without precedent, in matters of exclusive Community competence, in this case the main parts of the conventions concerned relate to areas where there is no such exclusivity.

1. Mixed agreements in general

Taking existing mixed agreements as a starting point, it is clear that practice has allowed for a certain margin of flexibility in this respect. There are a number of examples of so-called “incomplete” mixed agreements, which have been concluded by the Community and only some of its Member States. This is particularly the case if the objective and the scope of application of a mixed agreement are limited to a specific geographic area, as in agreements relating

³³In one of the more curious twists in the relationship between Regulation 44/2001 and the maritime liability conventions, a recent Commission proposal confirms this view. In COM(2003) 534 final, the two land-locked EU Member States, Austria and Luxembourg, are specifically authorized to accede to, in the interest of the Community, the 1969 International Convention on Civil Liability for Oil Pollution and the 1971 International Convention setting up the Oil Pollution Compensation Fund, as amended by the 1992 Protocols thereto. Apart from the harmonization of the EU-wide rules on jurisdiction and recognition and enforcement of judgments relating to oil pollution incidents, the eventual accession of Austria and Luxembourg to these instruments, to which all other Member States are already parties, would seem to be of little practical significance. This proposal contrasts with the proposal for the Protocol to the Paris Convention (*supra* note 17) where the authorization to sign and ratify the new Protocol is limited to the Member States that are parties to the underlying nuclear liability regime. Recital 8 of the proposed decision provides:

Given that the Protocol amends the Paris Convention, that Council Regulation (EC) No 44/2001 authorises the Member States bound by that Convention to continue to apply the rules on jurisdiction provided for in it and that the Protocol does not substantially amend the rules on jurisdiction of the Convention, it has been deemed objectively justified, on an exceptional basis, to allow these three Member States not to become Parties to the Protocol.

to environmental protection of specific sea areas.³⁴ For such agreements, the diverging political interests of different Member States are easily understood and an “asymmetric” participation by Member States has been accepted.³⁵

Other mixed agreements in which incomplete participation by Member States has been accepted are those in which the matters of Community competence can clearly be distinguished and separated from the matters falling under the competence of Member States.³⁶ In this case, the separation of competences between the Community and its Member States is of a “horizontal” (sectorial) nature and it is, in theory at least, possible to consider the agreement as two separate and independent agreements in one, where the Community is a party to the parts for which it is competent and Member States are parties to the provisions belonging to national competence.³⁷

In the case of the HNS and Bunkers Conventions, however, neither of these seems applicable. The scope of the conventions is not limited to a particular geographical area, nor does it seem feasible to draw a straightforward line between the matters of Community competence and those of Member State competence. It is difficult to conceive how a State could become a party to these liability conventions without applying their provisions on jurisdiction, recognition and enforcement of judgments relating to those very liabilities. This view is reinforced by the law-harmonizing nature of the maritime liability conventions and the absence therein of any provision which would allow for a State to be bound only by some, but not all of their provisions.³⁸ Similarly, it would make little sense for the Community to con-

³⁴Examples include the 1996 Convention on the International Commission for the Protection of the Oder; the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area and the 1995 Convention for the Protection of the Mediterranean Sea against Pollution. See Lena Granvik: *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness*, in Koskenniemi, *supra* note 10, at 255-72.

³⁵Note however that this argument, generally speaking, has its limits when it comes to maritime transport. While the sea area may be limited in geographical terms, ships by their nature move from one area to another. It could therefore be argued that even (ships flying the flag of) EU Member States that are not parties to the marine environment protection conventions quoted in the previous footnote are bound by their provisions through the Community conclusion, at least to the extent that the matters regulated therein are subject to exclusive Community competence.

³⁶One example is the 1982 United Nations Convention on the Law of the Sea, which covers subject matters for which the Community has acquired exclusive competence (such as fishing) as well as matters of Member State competence (such as the delimitation of maritime boundaries). The Community concluded this convention in 1998, but there are still Member States that have not done so.

³⁷See Allan Rosas, *Mixed Union—Mixed Agreements*, in Koskenniemi, *supra* note 10, at 128-33.

³⁸Some other transport liability conventions, however, seem to accept a potential disconnection between the “substantive” and “procedural” rules. See, e.g., Article 21 of the 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), which provides that “[w]henver two or more States are bound by an international Convention establishing rules of jurisdiction or providing for recognition and execution of judgments given by a court of another State, the provisions of those instruments replace the corresponding provisions of . . . this Convention.”

clude the parts of the convention for which it is exclusively competent without applying the conventions' substantive provisions. The close link between the two types of rules is explicitly acknowledged by the Council in the sixth recital of the respective decisions.³⁹

It therefore appears difficult to find support for incomplete participation by Member States in the maritime liability conventions on the basis of a strictly theoretical approach to the law of mixed agreements. However, the jurisprudence of the Court on mixed agreements does not seem developed enough to deduce a legal obligation for all Member States to conclude the convention on behalf of the Community, even in the absence of any of the two conditions referred to above. In practice there may well be numerous precedents of incomplete mixed agreements where neither of the conditions applies.⁴⁰ Other relevant criteria in determining the obligations in this regard could well be established in the future, such as whether implementation of the relevant provisions actually requires a joint action by all Member States, or, on the other hand, if the ratification by some Member States could lead to complications with respect to non-EU State Parties to the agreement in question or even would defeat its object and purpose. While it is clear that all Member States are subject to the cooperation duty referred to above, it is submitted that this duty falls short of amounting to an obligation for all Member States to become a party to a mixed agreement, even in the absence of any of the two exceptions outlined above. That said, it seems increasingly clear that practice relating to the conclusion of mixed agreements, including multilateral ones, tends towards a co-ordinated and joint conclusion by the Community and all of its Member States.⁴¹

2. *Agreements without a Community accession clause*

The reasoning above supposes that there is a possibility for the Community to conclude the agreement. In the case of the HNS and Bunkers Conventions, however, there is no such option. This presents an additional and highly practical problem. Even if it were possible to separate the areas of Member State and Community competence, or otherwise justify "incom-

³⁹The recitals affirm that "acceptance of the provisions . . . which come under Community competence cannot be dissociated from the provisions which come under the competence of Member States."

⁴⁰Recent examples of multilateral agreements where the Community is a Contracting Party together with only some of its Member States include the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity. For more examples, see Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* 128-29 (2001).

⁴¹One recent example where the Community and all its Member States have jointly deposited their instruments of ratification is the conclusion on 31 May 2002 of the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change.

plete” mixed participation, there is no mechanism for the Community to conclude its part of the agreement in a transparent way, neither for the needs within the Community legal order nor for those of the outside world. Furthermore, in the absence of a formal conclusion by the Community, there is no evident way to establish the timing of the incorporation of the relevant convention rules into the Community’s legal order. Would it be when the first Member States ratifies, when the last one does, or somewhere in between? This question becomes particularly relevant here, as the relevant parts of the conventions differ from Community law in substance, but are still presumed to apply in the whole Community.

It seems evident, therefore, that the lack of a clause allowing the Community to be a contracting party in combination with the absence of some Member States from the convention regime would cause considerable uncertainties in determining the rules that apply within the Community as a whole, most notably with respect to Member States that have not ratified the conventions. For this reason, the absence of a Community accession clause in and of itself represents a considerable stumbling block for leaving it up to each Member State individually to decide whether or not to ratify the HNS and Bunkers Conventions.

3. Simultaneous ratification

From the above, it is a short step to conclude that all Member States following the decisions should ratify/accede to the HNS and Bunkers Conventions at the same time or, rather, that the ratification/accession instruments should be deposited jointly and then only once all Member States have finalized their national ratification procedures. In this way, the modification of Regulation 44/2001 would take place simultaneously throughout the Community and there would be no ambiguity as to the timing or scope of this modification.

However, the political implications of such a conclusion are considerable. In order for some Member States to ratify the conventions, all would have to do so. Member States who feel an urgent need for concluding the conventions would presumably be significantly delayed in doing so while awaiting the formalities to be met by all Member States, including those with few political incentives for hastening the process. Member States who are less concerned would, on the other hand, no doubt be subject to pressure by their fellow EU partners to become parties to conventions in which they have little interest and for which, at least in this case, the exclusive Community competence is very limited. But even looking at the matter from a purely Community point of view, it seems clear that the generalization of a requirement of simultaneous ratification for this type of mixed agreements easily

could backfire on the interests of the Community. A requirement for simultaneous ratification would amount to a veto for any one Member State, enabling it to decide alone whether the Community should conclude the agreement or not. In mixed agreements where the Community's competence is extensive this may run counter to the general interests of the Community and would undermine the voting rules of the Council.⁴²

Therefore, and in the absence of a clear jurisprudence or other authoritative guidance on this matter, it would seem that in determining these questions, there will always have to be some degree of flexibility and, consequently, an argument for approaching the issue of simultaneous ratification on a case-by-case basis, in light of the various interests and competences at stake.⁴³ The Council Decisions on the conclusion of the HNS and Bunkers Conventions seem to confirm such flexibility. Far from requiring a concerted ratification by all Member States, they explicitly accept a margin of discretion for Member States in this regard, by providing in Article 3.1 that Member States shall take the necessary steps to become Contracting Parties to the conventions "within a reasonable time . . . and, if possible, before 30 June 2006."⁴⁴

While the inclusion of a target date for the finalization of the national procedures to adhere to the conventions presumably is an effort to mitigate the legal problems arising from the absence of a requirement of simultaneous ratification, it does at the same time represent an interesting application of the cooperation duty as laid down by the Court in its Opinion 2/91.⁴⁵ Its acceptance in the present case indicates that the Council recognizes that the principle of loyal cooperation between the Member States and the Community institutions, as derived from Article 10 of the Treaty, may extend to Member States being led to conclude mixed agreements, even if, quantitatively, a very limited part of the agreement belongs to the exclusive

⁴²See Rosas, *supra* note 37, at 134, referring to the delay experienced in the ratification by all Member States of the (mixed) agreement on customs union and co-operation with San Marino as an example to prove that a requirement of simultaneous ratification hardly serves the interests of the Community in all cases.

⁴³It is notable in this respect that the Court in Opinion 2/91, which concerned a convention where the Community competence extended to the 'core' areas of the Convention, fell short of requiring simultaneous ratification by all Member States. In fact, the disputed ILO Convention No. 170 has not been concurrently ratified, but so far only by Sweden in 1992 (before Sweden joined the EU) and by Italy in 2002. The original Commission proposals for the HNS and Bunkers Conventions were also silent on this point.

⁴⁴The Decision on the Bunkers Convention also contained a target date for Member States to sign the Convention, which ran out only eleven days after the adoption of the Decision. Nevertheless, during this time, six EU Member States signed the Convention, one of which (Spain) has already formally become a party to it.

⁴⁵See note 16 above.

Community competence, and despite a considerable reluctance of some Member States to be parties to the agreement in the first place.

D. Assessment

It is easy to conclude that there is no perfect solution to the problems in the case of the HNS and Bunkers Conventions raised by the shared competence that followed the adoption of Regulation 44/2001. Not surprisingly, therefore, the decisions adopted in September and November 2002 do not clarify all issues relating to the application of the two conventions within the Community. Through the elaboration of these decisions, EU Member States have no doubt exercised their obligation to address the matter within the Community institutions, rather than individually. The decisions also resolve the main dilemma for most Member States, that is, the "ban" imposed on them by Community law from ratifying the two conventions as they wish. However, at the same time the decisions expose a number of issues related to the law of mixed agreements, which lack conclusive answers in Community law. In elaborating the HNS and Bunkers Decisions, EU decision-makers had to undertake a balancing act between legal purism and political pragmatism, which resulted in imperfections on both fronts. As far as law is concerned, the drawback of the decisions is that they leave certain questions of significant legal importance unanswered.

Firstly, the precise legal status of the two conventions in EU law, once they have been concluded on the basis of these authorizations, is not clear. It has been assumed above that the relevant parts of the conventions would become part of EU legal order, as far as the situation within the Community is concerned, and that the decisions henceforth would have similar effects as a conclusion by the Community of the HNS and Bunkers Conventions. However, as the relationship with non-Community State Parties to the conventions would continue to be governed by international law, i.e., bilaterally between the individual Member State Party and the third State, this analogy is not complete, which may have implications on the internal Community order, notably as to the hierarchical relationship between Regulation 44/2001 and the conventions.

Secondly, even if the decisions are intended to equal the conclusion of the conventions by the Community, the absence of a simultaneous ratification requirement casts doubts as to the timing by which this is deemed to take place. Will only some Member States, or even a single one, be able to trigger the incorporation of the relevant parts of the HNS and Bunkers Conventions into the Community legal order with the ensuing implications throughout the Community territory, or will it take place only once all

Member States have completed the ratification? In approaching this question a starting point is that nothing in the decisions suggests an obligation for Member States that have not ratified the conventions to give up the regime of Regulation 44/2001 in case of marine pollution incidents. It would therefore seem difficult to infer obligations deriving from the HNS or Bunkers Conventions on those Member States.⁴⁶ Rather, it is evident from the context in which the decisions were developed, as described in the recitals and in the Commission's original proposals, that the motive for the decisions was a perceived need to allow individual Member States, exceptionally, to ratify the maritime conventions. For this reason, it seems that the effects of the two decisions on the regime set out in Regulation 44/2001 should be limited to what is necessary to ensure the effective application of the HNS and Bunkers Conventions in the Member States parties to them.

To this author, it therefore seems that the inclusion of the relevant parts of the conventions into Community law becomes fully effective only once all Member States have become parties to the conventions.⁴⁷ In this way, the legal uncertainties related to the invisibility of the Community as a Contracting Party would be minimized and there would be no question as to the applicability of the rules once this is achieved. In the interim period, the rules would differ between Member States depending on whether they are parties to the conventions or not. Regulation 44/2001 would continue to apply in Member States that have not ratified the conventions, while the Member States that have ratified the conventions would give precedence to the international rules, subject to the declaration made at the time of ratification. Apart from appearing to be the only alternative which is manageable in practical terms, it is the only solution which is consistent with the obligations of Member States under international law. Such deviations from Community law would in this case be endorsed by an express authorization by the Community, which serves to ensure that the accession/ratification by Member States is not unilateral or taken outside the framework of the Community institutions. The acceptance of such a (transitory) asymmetric regime for the jurisdiction, recognition and enforcement of marine pollution judgments also seems to be supported in principle by the setting of a target date for Member States to ratify the con-

⁴⁶From the perspective of international law it is equally problematic to maintain that EU Member States that are not parties to the conventions could be legally implicated by some of their provisions in the absence of a formal commitment to this end, either by those States or by the Community.

⁴⁷See also the Euratom Treaty which, contrary to the EC Treaty, specifically foresees mixed agreements. Article 102 provides that: "Agreements or contracts concluded with a third State, an international organization. . . to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements . . . have become applicable in accordance with the provisions of their respective national laws."

ventions.⁴⁸ It should be noted, however, that while EU Member States not yet parties to the conventions may not be bound by the conventions' rules on jurisdiction or recognition and enforcement of judgments, the decisions discussed in this chapter may nevertheless involve legal effects across the EU as from the first ratification of a Member State.⁴⁹

A third question left unanswered is the legal significance of the "declaration" to be attached to these decisions. The choice of terminology here suggests that the statement in question is not a reservation but merely constitutes a declaratory statement on one particular aspect of the conventions in question and therefore does not have the force of law.⁵⁰ Yet, the actual text of the declaration suggests otherwise. By making explicit that judgments given by a court of an EU Member State shall be recognized and enforced in another Member State according to Community rules on the subject, the declaration's wording suggests a complete disconnection between the EU rules and those of the conventions. In light of the substantive differences between the two types of rules on recognition and enforcement of judgments,⁵¹ this could create legal uncertainty.

Support for the continued application of the EU rules could be sought in Article 41.1.b of the Vienna Convention, which allows two or more of the parties to a multilateral treaty to agree to modify the treaty as between themselves, on the condition that the modification in question is not prohibited by the treaty (which it is not in the present case) and i) and neither affects the

⁴⁸Interestingly, Regulation 2829/77 provided for a very short deadline, less than three weeks, for the completion of Member States' ratification of the AETR Agreement on behalf of the Community. See *supra* note 25. This suggests that by the time the regulation was adopted, Member States had already completed their ratification of the Agreement.

⁴⁹Such effects could, for example, be triggered where a Member State that would be the competent jurisdiction under Regulation 44/2001 is a party to a convention that attributes the exclusive jurisdiction to a State outside the EU. In that case, claimants from all EU States would have to accept a certain loss of jurisdiction by having to make their claims outside the Community.

⁵⁰The Commission originally proposed to use a reservation for this purpose, which seems to have foundation in past practice: Council Regulation 2829/77, see *supra* note 25, required Member States to enter a reservation which was explained in a recital as being necessary "in order to ensure the supremacy of Community law in intra-Community transport." However, Article 2(d) of the Vienna Convention on the Law of Treaties reduces the significance of choice of terminology, by defining reservations as 'a unilateral statement, however phrased or named, made by a State . . . whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State.'

⁵¹While the regime set out in Regulation 44/2001 addresses this matter in considerable detail, the HNS and Bunkers Conventions merely refer to the general recognition of judgments "no longer subject to ordinary forms of review," save for the cases where the judgment was obtained by fraud or where the defendant was not given reasonable notice and fair opportunity to present the case. The procedural differences include the EU regime's absence of the general requirement of "completion of the formalities" and "no longer subject to ordinary forms of review." In addition, the grounds for refusing the recognition of judgments are different. Regulation 44/2001 does not, like the conventions, allow the possibility to refuse the recognition of an EU judgment for reasons of fraud. On the other hand, Article 34 of Regulation 44/2001 contains some grounds for refusal that are not mentioned in the maritime conventions, e.g., that recognition would be "manifestly contrary to public policy."

rights or obligations of other parties nor relates to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

It is not self-evident that a continued application of Regulation 44/2001 as between EU Member States would meet those criteria. Firstly, while it is true that the declaration only covers the recognition and enforcement of judgments as between courts in Member States, it is by no means excluded that nationals of non-EU State Parties are implicated in those judgments. Secondly, while the harmonization of the recognition and enforcement of judgments may not be the principal object and purpose of the HNS and Bunkers Conventions, it is difficult to maintain that it is not among their objectives. The bottom line seems to depend on whether the continued application of Regulation 44/2001 would be incompatible with the effective execution of the objectives and purposes of the conventions. It is submitted that this is not the case. The main objective of the relevant provisions in the maritime liability conventions is to ensure the smooth recognition and enforcement of judgments in cases relating to the conventions that involve several jurisdictions. The purpose underlying the recognition and enforcement rules of Regulation 44/2001 is no different. In light of this convergence of objective, the substantive difference between the two sets of rules would seem to be one of detail, rather than amounting to incompatibility. This view is reinforced by the fact that a continued application within the EU of the recognition and enforcement regime established by Regulation 44/2001 would generally result in future-going possibilities to recognize and enforce judgments based on the conventions. From the point of Community law, however, it is not excluded that the principle of primacy of international agreements concluded by the Community over secondary legislation would necessitate a strict adherence to the rules laid down in the conventions.⁵²

V

FURTHER DEVELOPMENTS

A. The Athens Protocol

It follows from the foregoing section that an important mechanism for avoiding a set of complex legal issues relating to the application of agreements where the competence is shared between the Community and Member States is to allow the Community as such to conclude the agree-

⁵²See note 29 above.

ment. Through the Community's conclusion, the relevant parts of the agreement can be incorporated into the Community legal order in a transparent way and a number of uncertainties as to the scope and timing of EC participation can be avoided, both within the EU and with respect to the outside world. In light of this, it is not surprising that a growing number of multi-lateral international agreements provide for a clause allowing "Regional Economic Integration Organizations" to conclude the agreement. In the maritime field, this has not been the case, however. Prior to the adoption of Regulation 44/2001, not a single IMO convention allowed for the Community to become a Contracting Party, nor had any IMO convention been accepted on behalf of or in the interest of the Community by its Member States.

The test case as to whether the adoption of Regulation 44/2001 would provoke a change in this regard was the revision of the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, which was already reaching its final negotiation phase when Regulation 44/2001 came into being. For the negotiation of the parts of the Athens Protocol which related to jurisdiction and the recognition and enforcement of judgments, the Council mandated the Commission, in accordance with Article 300 of the Treaty, to negotiate the relevant parts of the Protocol on behalf of the Community.⁵³ The mandate specifically focused on the need for the new Protocol to include a possibility for the Community to become a Contracting Party to it. However, the Council also expressed its wish to remove a proposed paragraph granting jurisdiction to the court of the State of the claimant's own domicile or permanent residence on the basis of the defendant's providing services to or from that State and being subject to jurisdiction in that State (the so-called "fifth" jurisdiction), which was deemed to be the most problematic of the proposed jurisdictions when compared to the regime laid down in Regulation 44/2001.⁵⁴ Thirdly, the Council mandated the Commission to negotiate a possibility for continued applica-

⁵³See COM(2003) 375 final.

⁵⁴Given the focus of the Athens Protocol on incidents relating to death and injury of passengers, its jurisdiction regime is considerably different, and more complex, than that of the pollution liability conventions. Article 17 of the 1974 Athens Convention included the following four options:

- (a) the court of the State of permanent residence or principal place of business of the defendant, or
- (b) the court of the State of departure or that of the destination according to the contract of carriage, or
- (c) the court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or
- (d) the court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

tion of the Community rules on recognition and enforcement of judgments as between EU Member States.

The negotiations took place in a number of meetings of the IMO's Legal Committee, in less formal information meetings organized by the Commission, and at the diplomatic conference itself.⁵⁵ Judging from the outcome, the effort made by the Commission to explain the new situation to IMO Member States largely paid off. The final Protocol, which was adopted on 1 November 2002, includes a possibility for Regional Economic Integration Organizations to become Contracting Parties (Article 19, which is largely based on similar provisions from other recent conventions developed under the aegis of the United Nations) and foresees a declaration to be made by the Community specifying and updating the distribution of competences between the Community and its Member States.⁵⁶ The fifth jurisdiction clause is gone from Article 10 of the Protocol. As for the recognition and enforcement of judgments, the Commission failed to achieve a full disconnection between the EU rules and those of the Protocol. However, an innovative Article 11(3) of the Protocol includes a new provision according to which Contracting Parties to the Protocol may apply, as between themselves, other rules for the recognition and enforcement of judgments, provided that their effect is that judgments are recognized and enforced "at least to the same extent" as under the rules of the Protocol. In most circumstances, this clause thus appears to permit a continued application of the regime set out in Regulation 44/2001 as between EU Member States.⁵⁷

Such accomplishments in the international negotiations will no doubt have contributed to the decision by the Commission to propose to regulate matters relating to passenger liability through the revised Athens Convention rather than through a separate regional liability regime.⁵⁸ In June 2003, the

⁵⁵See IMO Doc. LEG CONF.13/7.

⁵⁶IMO Doc. LEG/CONF.13/20. On the rationale behind some of the key features of the accession clause, see J. Temple Lang, *The Ozone Layer Convention: A New Solution to the Question of Community Participation in "Mixed" International Agreements*, [1986] *Common Mkt. L. Rev.* 157-76.

⁵⁷In IMO Doc. LEG/CONF.13/17, the Commission, on behalf of the Community explained that this approach represented:

[a] compromise between the wish of prospective Parties to ensure a continued application of existing rules that may not be identical to the Athens Protocol and the need for clarity among all Parties to the Athens Protocol on the common rules for recognition and enforcement of judgments relating to passenger claims.

⁵⁸The option of addressing the liability rules for the carriage of passengers by sea outside the IMO framework, in the form of an EU Regulation, was elaborated in a Commission Communication of 25 March 2002, COM(2002)158 final, at 14-5:

The Commission in this case considers that a satisfactory regional solution is to be preferred to an unsatisfactory international one. ... Considering the importance of the matter under regulation, the adequate compensation of death and personal injury of passengers, the Commission believes that a Community-wide regime in this area is a well-justified and necessary measure, should the international agreement fail to provide the necessary guarantees.

Commission proposed that the Community ratify the Athens Protocol and that all Member States do likewise "as soon as possible and in any case before the end of 2005." The proposed decision also includes a declaration of competences to be made by the Community in accordance with Article 19 of the Protocol. The declaration proposed by the Commission is exclusively focused on matters relating to Regulation 44/2001.⁵⁹ The approach proposed for the Athens Protocol is, legally speaking, considerably clearer than the solutions adopted for the Bunkers and HNS Conventions. In this case, the Community's ratification will be limited in substance to the (specifically declared) areas of exclusive Community competence, which will be incorporated into EC law at the time of the Community's conclusion of the Protocol and would take precedence over Regulation 44/2001 throughout the Community territory as from its entry into force.

Yet, the Commission's proposal leaves one notable question unanswered. If the final decision allows the Community to conclude the Athens Protocol before all Member States have done so, which is not an unlikely outcome given the urgency that some Member States attach to the implementation of the Protocol, the legal situation during the interim period will still involve uncertainties. In theory, the Protocol's provisions on jurisdiction and recognition and enforcement of judgments would apply throughout the EU territory, whereas its substantive provisions would only apply in the Member States Parties to it.⁶⁰ However, the close inter-relatedness between the two types of provisions in the present case considerably complicates the translation of this theory into clear-cut solutions in practice.

As regards jurisdiction, for example, Article 17 of the 2002 Athens Convention provides a list of competent courts, "provided that the court is located in a State Party to this Convention." Treating the Community as a whole as a Party for this purpose would not seem possible until all Member States have ratified the Protocol, as the Member States not parties to the Protocol may have completely different substantive rules. Consequently, this provision, if considered binding throughout the Community, would in effect

⁵⁹COM(2003) 375 final. In the explanatory part of this proposal, the Commission announces a future proposal for an EU regulation incorporating the substantive parts of the Athens Protocol into Community law. If or when such a regulation is approved, it presumably means that the Community acquires exclusive competence over the entire Athens Protocol and will update the declaration of competences accordingly.

⁶⁰The question as to whether the Community's obligations under a mixed international agreement extend beyond the areas of its exclusive competence has been subject to varying interpretations in academic literature. See notably the various views expressed by the contributors in *Mixed Agreements* (David O'Keeffe & Henry G. Schermers eds. 1983). The arguments in favor of a more extensive interpretation have partially relied on considerations of treaty law, which does not distinguish between different parts of an agreement on the basis of the competence of the contracting party. A growing tendency in practice to make use of specific declarations of competence in international treaties, such as the one in the Athens Protocol, seems to have clarified the extent of the Community's responsibilities in this regard to some extent. See Heliskoski, *supra* note 40, at 141-55.

serve to divert jurisdiction from Member States that are not parties to the Athens Protocol to States that are, whether EU Member States or not. If the Community as a whole were bound by this provision, it would therefore amount to a de facto adherence to the substantive rules of the Athens Protocol by the whole Community, but exercised only by the State Parties to it.

When it comes to recognition and enforcement of judgments, it appears easy enough to justify that judgments given by any State Party to the Athens Protocol shall be recognized and enforced according to the rules of the Protocol by all EU Member States, whether Parties to the Athens Protocol or not. The matter gets more complex, however, if one considers the possibility that there are two competing judgments, one on the basis of a Party to the Athens Protocol and one given by an EU Member State outside the Athens framework on the basis of its national liability laws. In such a case, it is unclear whether the priority for agreements concluded by the Community would amount to a prohibition for Member States to recognize and enforce the latter judgment under the rules of Regulation 44/2001.⁶¹

In the end, it would seem that a choice has to be made between two rather different legal approaches. The expansive approach implies obligations for all EU Member States which extend to the substantive parts of the Athens Protocol and in reality may come close to equalling full participation in the Athens Protocol by the Community and all its Member States. The more restrictive interpretation, on the other hand, is a “piece-meal” approach that mainly limits the implications of the Athens Protocol to those Member States that are parties to the Athens Protocol.⁶²

The inclination of this author is towards the latter approach. From an international law point of view, there is nothing in the wording of Article 19 of the Athens Protocol or the proposed declaration of competence suggesting a limitation on the rights of Member States that are not parties to the Athens Protocol from settling a case on carriers’ liability on the basis of their national laws on liability and compensation.⁶³ This in itself diminishes the

⁶¹The Athens Protocol is silent on this question. It contains no provision on priority in competing recognition requirements. Similarly, it does not establish that its jurisdiction rules shall apply irrespective of questions related to *lis pendens* and *res judicata*.

⁶²This interpretation is similar to that advocated for the HNS and Bunkers Conventions in the text *supra*, at notes 47-49.

⁶³The rights and obligations of a Regional Economic Integration Organization apply only “to the extent that the . . . Organization has competence over matters governed by this Protocol” which is to be specified by the (exhaustive) declaration of competences which is to be made at the time of conclusion. See also paragraph 5 of Article 19 stating that Member States “shall be presumed to have competence over all matters governed by this Protocol in respect of which transfers of competence to the Organization have not been specifically declared.” In IMO Document LEG/CONF.13/7, Annex 1, p. 3, the Commission, on behalf of the Community, confirms that the legal effects of the Community’s conclusion of the Protocol would be limited to the areas of (exclusive) Community competence.

arguments for construing the obligations of non-party Member States extensively under Community law. In addition, it would seem that the effects of the Community's conclusion of the agreement have to be in proportion to the extent of its exclusive competence in matters regulated therein. The exclusive Community competence in the Athens Protocol is, so far, limited in scope, which weakens the case for requiring Community-wide performance of all obligations therein.⁶⁴ Finally, the suggestion that the obligation of non-party Member States may depend on the character of the agreement in question would also seem to favor a less strict approach in this particular case.⁶⁵

That said, however, it is clear that Member States under Community law are under a duty to co-operate with the Community in this area and that this duty, which is based on Article 10 of the Treaty, extends to matters which fall outside the exclusive Community competence.⁶⁶ It is by no means excluded therefore that the Community's conclusion of the Athens Protocol could lead to obligations for Member States that have not ratified the Protocol. This would seem justified, for example, where the performance of such obligations is necessary for the effective application of the Protocol by the Member States that have ratified it, or in situations where failure to apply the international rules would defeat the object and purpose of the Athens Protocol.⁶⁷

The practical significance of this admittedly rather ambiguous legal situation will largely depend on the deadline allowed for national ratification. The legal uncertainties could be removed altogether if the Council opted for a requirement of joint and simultaneous ratification by all Member States and the Community.

⁶⁴In a recent case relating to the obligation of Ireland to adhere to the 1971 Berne Convention for the Protection of Literary and Artistic Works, the Court confirmed this obligation, referring *inter alia* to the circumstance that the convention "covered an area which comes *in large measure* within the scope of Community competence" and is governed by Community legislation." Case C-13/00, *Commission v. Ireland*, ECR 2002 I-2943, ¶¶ 15 and 16. (Emphasis added.)

⁶⁵MacLeod et al., *supra* note 10, at 150, suggest that the requirement of unity might be stronger in mixed agreements which are in substance bilateral than in multilateral agreements or where the participation by all Member States is necessary to enable to Community to participate effectively (in terms of voting rights or financial contributions, for example).

⁶⁶See Case C-25/94, *Commission v. Council* [1996] E.C.R. I-1469, at ¶ 48 (UN fishery conservation agreement), and *supra* at note 16. The precise legal implications of this duty remain elusive. See Nollkaemper, *supra* note 10, at 182-85; Frid, *supra* note 10, at 147-53; Heliskoski, *supra* note 40, at 61-69; MacLeod, *supra* note 10, at 145-50; and Stephen Hyett, *The Duty of Co-operation: A Flexible Concept*, in Dashwood & Hillion, *supra* note 10, at 248-53.

⁶⁷See Granvik, *supra* note 34, at 270, concluding that the Community's conclusion of an incomplete mixed agreements implies a negative obligation for all Member States, who "are not free to violate any agreement concluded by the EC since they are under a Community law obligation towards the EC to comply with its international agreements."

B. The Supplementary Fund Protocol

The most recent IMO instrument to involve Community competence is the Protocol to Supplement the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the “Supplementary Fund Protocol”), which was adopted on 16 May 2003. Despite being negotiated after the adoption of the Athens Protocol, the Supplementary Fund Protocol does not contain a clause permitting the Community to become a Contracting Party.⁶⁸ While this could be taken as a shift in the Community’s policy from that developed for the Athens Protocol, it seems more probable that the absence of this clause has more to do with the particular nature of the Supplementary Fund Protocol. The Protocol establishes a fund, the sole purpose of which is to financially top-up an existing fund (the 1992 International Oil Pollution Compensation Fund, or the IOPC Fund), for the Contracting Parties of the IOPC Fund who wish to ensure a higher level of maximum compensation for accidents taking place in their coastal waters. The Supplementary Fund is therefore only accessible to the parties to the IOPC Fund, which does not include the Community. Similarly, as the Supplementary Fund only compensates damage caused by incidents which are already covered and compensated by the IOPC Fund, different standards in the two funds on the competent jurisdiction would risk adding considerable perplexity for the courts dealing with the cases.

Such reasons probably underlie the seemingly subordinate ambitions of the Community to arrive at modifications such as those achieved in the context of the Athens Protocol. As regards the provisions on recognition and enforcement of judgments, however, the Commission did negotiate on behalf of the Community. This led to the insertion of a new paragraph into Article 8 of the Supplementary Fund Protocol, which is the same as that in the Athens Protocol, described above. Apart from this, the Commission has for a number of years already campaigned for a complete revision of the international oil pollution compensation system for reasons of substance. It now seems possible that such a revision will take place⁶⁹ and if so, it is very likely that the Community will try to address matters relating to the jurisdiction and the recognition and enforcement of judgments more fundamentally during that process.

The proposed decision to authorize Member States to ratify the Supplementary Fund Protocol also includes a deadline for this purpose. In

⁶⁸IMO Doc. LEG/CONF.14/20, Art. 19. The Commission originally proposed to negotiate this type of clause into the Supplementary Fund Protocol, but this part of the negotiating mandate was not accepted by the Council. See COM(2003) 534 final.

⁶⁹See IOPC Fund Document: 92 Fund WG.3/15 of 25 March 2003, ¶¶ 6.20, 6.27 and 6.35.

the proposed wording, the deadline is definite and very short, expiring by the end of 2003. While EU Member States are likely to raise objections to this part of the Commission's proposal for reasons of principle, their argument is weakened by various precedents in Community law that couple a decision to conclude an international agreement by or on behalf of the Community with obligations for all Member States to do likewise within a specific deadline⁷⁰ and by strong political commitments by EU leaders to bring the Supplementary Fund in force before the end of 2003.⁷¹

VI Conclusion

In his analysis of the Community's external competence in light of existing secondary legislation in the maritime field, Professor André Nollkaemper in 1997 indicated considerable scepticism as to the Community's competence by including the following words in the title of his study: "the frail legal support for grand ambitions."⁷² Much has happened since then and the epithet "frail" no longer accurately describes the legal case for exclusive Community competence relating to the international maritime conventions. In the past five years, the Community has adopted a number of new legal instruments with very direct links to the main conventions developed by IMO. Some of the Community measures in question cover basically the essence of the relevant IMO conventions,⁷³ while others trans-

⁷⁰One example is Council Decision 88/540/EEC concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer, which in its article 3 contains an unqualified obligation for Member States to ratify the instruments before a specific date "as far as possible simultaneously."

⁷¹See paragraph 12 of the Transport Council Conclusions of 6 December 2002, where the Council supported the establishment of the new fund "foreseeing a rapid mechanism for payments and being operational by the end of 2003, and the intention of those Member States, which are parties to the existing global compensation regimes, to ratify the new supplementary fund." The Council further agreed that "in the event that the supplementary compensation fund is not established, [the Council will] examine immediately a regulation on the establishment of a fund for the compensation of oil pollution damage in European waters, with the aim of establishing this fund before the end of 2003." 2472nd Council meeting—Transport, Telecommunications and Energy - Brussels, 5-6 December 2002, Press Release: Brussels (10/12/2002)—Press:380 Nr: 15121/02. These conclusions were subsequently endorsed by the EU Heads of State at the Copenhagen Summit on 12 and 13 December 2002 (Press Release: Copenhagen (13/12/2002) Nr: 400/02, at para. 33.

⁷²See supra note 10.

⁷³This is the case as regards Directive 2001/25/EC of 4 April 2001 on the minimum level of training of seafarers, 2001 O.J. (L 136) 17, in relation to the 1995 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).

pose, elaborate or even strengthen significant parts thereof by means of Community legislation.⁷⁴ In light of this development and in light of Community law on mixed agreements, there can be no doubt that an increased role of the Community on the international maritime scene would have taken place gradually in any event.

The new competences resulting from the adoption of Regulation 44/2001 have no doubt accelerated this development. Until recently, formal mandates for the Commission to negotiate in the IMO arena had been very rare indeed and the submission of documents by the Commission “on behalf of the Community and its Member States” was unheard of in this organization. By entering the scene from the “outside,” and by bringing along a number of individuals who may not have been so acquainted with the subtleties of the maritime world, Regulation 44/2001 has no doubt assisted the Community’s ambitions to take a more prominent role at the international scene on the basis of the doctrine of mixed agreements.

Since the adoption of Regulation 44/2001 the Community has shown a considerable level of activity in ensuring that maritime liability conventions are negotiated and concluded in accordance with Community rules and procedures, not always without internal tension or difficulties for third States to understand the significance of these activities.⁷⁵ Liability conventions that do not allow the Community to conclude them have posed a particular dilemma, as they raise problematic questions relating to the modalities of the exercise by the Community of its exclusive competence. Rather than just blocking the conclusion by Member States of the conventions, the Community has sought to find a solution, at least as a temporary measure. The outcome finally arrived at is an authorization allowing Member States to ratify the agreements on certain conditions. While this solution may be commended for being both practical and creative, it entails considerable imperfections as

⁷⁴Examples include Regulation (EC) No. 1726/2003 of 22 July 2003 amending Regulation 417/2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers, 2003 O.J. (L 249) 1, and Directive 2000/59 of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues, 2000 O.J. (L 332) 81, as regards the International Convention on the Prevention of Marine Pollution from Ships (MARPOL). In the field of the safety of navigation, Directive 2002/59/EC of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, 2002 O.J. (L 208) 10, covers a variety of matters regulated in the International Convention for the Safety of Life at Sea (SOLAS).

⁷⁵During and after the negotiation of the possibility for the Community to conclude the Athens Protocol, some non-European countries, in particular Brazil, voiced concerns about the clause allowing regional organizations to conclude the agreement and expressed fears that participation by such organizations “will give way to positions in block.” In a submission to the Legal Committee of the IMO in April 2003, Brazil proposed a complete revision of this clause in the future. See IMO Docs. LEG 86/14/1 and LEG 86/15, ¶¶ 94-98.

regards legal clarity. A number of uncertainties as to the scope and extent of the decisions on the HNS and Bunkers Conventions have been pointed out above. Yet, it should be borne in mind that the many questions raised by the two decisions relate to a problem of transitional nature and are therefore unlikely to keep decision-makers within the Community and beyond preoccupied forever. Presumably, these and other maritime liability conventions will be revised in the future to take the new situation into account by clarifying the role of the Community in the conventions.

When it comes to negotiation of new maritime liability instruments that touch upon the competence acquired through Regulation 44/2001, practice has already indicated that the Community negotiators at IMO meetings have been very conscious of this competence and have tried to address the issues in accordance with Community rules on mixed agreements. The first instrument to permit a regional organization to conclude an IMO instrument was the Athens Protocol in 2002, and it seems likely that future instruments containing clauses on jurisdiction, recognition and enforcement of judgments will follow suit. The extent to which the Community will make an effort to change the substantive rules on jurisdiction and recognition and enforcement of judgments remains to be seen, but, judging from the experience so far, it seems that the justification for a departure from the Community rules will be determined separately in the case of each agreement. However, as the example of the Athens Protocol shows, not even the conclusion by the Community itself of the maritime liability conventions would necessarily resolve all practical difficulties involved in their implementation. Due to the close inter-relatedness of the rules under exclusive Community competence and the other parts of the conventions, significant legal uncertainties will remain, as long as the Community's conclusion is not joined with ratification by all of its Member States.

The impact of the new exclusive Community competence goes beyond matters related to jurisdiction and the recognition and enforcement of judgments. All EU decisions relating to maritime liability conventions discussed in this article have included some form of EU-wide target date, or even deadline, for Member States to ratify the conventions. The most recent proposals by the Commission go a step further by insisting on absolute and rather short deadlines for this purpose. While it is easy to justify this approach on the basis of the existing Community law on mixed agreements and on legal clarity considerations related to the exclusive Community competence, it has probably not escaped the Community institutions that this approach would at the same time result in the development of a *de facto* common approach within the Community, even in fields which are outside the sphere of the

exclusive Community competence.⁷⁶ On the other hand, the increased participation of the Community and its Member States in the international maritime liability conventions may also, perhaps paradoxically, limit the Community's current regulatory flexibility in this field by gradually strengthening its legal ties to the IMO regulatory instruments.

Now that Regulation 44/2001 has paved the way for the Community's participation in the maritime liability conventions, it does not seem implausible that a similar exercise of competence will spread into other fields of the activities of IMO, based on exclusive Community competences that already exist but have not been fully exercised. In parallel, the Commission, encouraged by the prospect of an enlarged EU almost doubling the EU fleet's commercial tonnage, has recently taken the first steps in the process of making the Community a full member of the IMO, rather than only an observer.⁷⁷ It seems that Professor Nollkaemper's reference to the "grand ambitions" of the Community in the maritime field remains as valid as ever.

⁷⁶The HNS Convention provides an illustrative example. In December 2000 the Commission expressed its dissatisfaction about the absence of a liability and compensation regime for chemical pollution by ships in EU waters and noted the lack of progress by Member States to ratify the HNS Convention. See COM(2000)802 final, at 61. At that point, however, the Commission had few legal mechanisms at its disposal to insist on progress. The target-date since included in the decisions to authorise the ratification of the HNS Convention significantly increases the role of the Commission in the implementation of the HNS Convention and in particular enhances its authority to act in case of non-ratification. Target dates in the form of absolute deadlines would obviously further expand the Commission's powers to take action, including legal action, against Member States who fail to meet the commitments.

⁷⁷Commission Press Release IP/02/525 of 9 April 2002. See also the Commission's White Paper entitled "European transport policy for 2010: time to decide," COM (2001) 370 final, where it is held that "the European Union, which is the world's leading commercial power and conducts a large part of its trade outside its own borders, has . . . little say in the adoption of the international rules which govern much of transport. This is because the Union as such is excluded from most intergovernmental organizations, where it has no more than observer status."

