

## Theories of Supranationalism in the EU

By

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### Abstract

Supranationalism has been a topic of analysis from various points of view when trying to understand the process of European integration. This article aims at presenting the major theories of supranationalism when discussing the ongoing process of European integration. Three main theories are examined: 1) normative *versus* decisional supranationalism; 2) theories of partial integration, and 3) legal theories of economic integration (such as the neo-liberal economic policy, the European Community (EC) as a special-purpose association of functional integration, as well as the theory of the supranational and intergovernmental dual structure of the EC).

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#### I.- Introduction and Preliminary Notes

Most people wrongly believe that the European Community (EC) has been replaced by the European Union (EU). This is inaccurate since both entities co-exist. The main difference between the two is that, technically speaking, only the EC has legal personality<sup>1</sup> and, therefore can conclude international agreements, buy or sell property, sue and be sued in court.<sup>2</sup> All these are competences which the EC has, but the EU does not. The EU comprises the EC and its Member States. The European Union is the political and institutional framework in which the EC's and certain Member States' competences are exercised. In the case of EU Member States, the competences within the institutional framework of the EU are the second and third pillars (Common Foreign and Security Policy, and police and judicial

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<sup>1</sup> This is a very debatable issue among scholars and practitioners. Some authors argue that the EU does have legal personality through Article 24 TEU. Among the many authors who have studied this issue are Tizzano, A. "La Personnalité Internationale de l'Union Européenne," *REVUE DU MARCHE UNIQUE EUROPEEN*, Paris, No. 4, 1998, pp. 11-40; Sommet d'Amsterdam: conclusion de la CIG, *LETTRE MENSUELLE SOCIO-ECONOMIQUE*, Bruxelles, No. 27, September 1997, pp. 16-27; Remiro Brotons, A. "Consideraciones sobre la Conferencia Intergubernamental de 1996," *GACETA JURÍDICA DE LA CE*, Boletín, Madrid, No. 110, February 1996, pp. 7-18; Pechstein, M. "Une personnalité internationale pour l'Union Européenne?," *REVUE DES AFFAIRES EUROPEENNES*, Paris, Année 6, No. 3, December 1996, pp. 229-233; Vilariño Pintos, E. "Representación exterior y cooperación diplomática y consular en el Tratado de la Unión Europea," *REVISTA DE INSTITUCIONES EUROPEAS*, Madrid, Vol. 22, No. 2, Enero-Abril 1995, pp. 417-443; De Gucht, K. "The common foreign and security policy (CFSP): is there room for new perspectives in the aftermath of Maastricht?," *STUDIA DIPLOMATICA*, Bruxelles, Vol. 50, No. 2, 1997, pp. 49-83.

<sup>2</sup> On the implications of international legal personality, see Arangio-Ruiz G., *Diritto internazionale e personalità giuridica*, Clueb, Bologna, 1971, 255; Pescatore P., *Les relations extérieures des Communautés européennes. Contribution à la doctrine de la personnalité des organisations internationales*, in 103 *RC* 1961, II, 137; Rama Montaldo M., *International Legal Personality and Implied Powers of International Organizations*, in *BYIL* 1970, 111; Seyersted F., 'International Personality of Intergovernmental Organizations. Do their Capacity really depend upon their Constitutions?,' in *Indian Journal of International Law* 1964, 39; Seyersted F., *Is the International Personality of Intergovernmental Organizations valid vis-a-vis non members?*, *Indian Journal of International Law* 1964, 260. See also Granvik, L. "Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness" in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 255.

cooperation in criminal matters, respectively) of the EU. The EU, established by the Treaty<sup>3</sup> on European Union (TEU) [also known as the Treaty of Maastricht],<sup>4</sup> now has 25 Member States<sup>5</sup> and a complex structure, including both integrationist and intergovernmental elements, known as “pillars.” According to the TEU, the Union is founded on the European Communities (Article 1<sup>6</sup>) and is served by a single institutional framework (Article 3<sup>7</sup>).

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<sup>3</sup> Treaties are usually composed of articles, Protocols and Declarations. As an example we have the Treaty of Amsterdam, composed of 15 articles, 13 Protocols and 58 Declarations. In the case of the EU, there are currently founding treaties, amending treaties, accession treaties and budgetary treaties. There is also an EU Constitutional Treaty, which seeks to consolidate, simplify and replace the existing set of overlapping treaties. It was signed in Rome on October 29, 2004 and is due to come into force in the near future, conditional on its ratification by all EU Member States. In the meantime, or if the EU Constitutional Treaty fails to be ratified by all EU Member States, the EU will continue to work on the basis of the current treaties. As for the founding treaties, there are four of them: the Treaty of Paris (1952), establishing the European Coal and Steel Community (ECSC), which expired in July 2002; the Treaty establishing the European Atomic Energy Community (Euratom); the Treaty establishing the European Economic Community (EEC); [these last two treaties are known as the Treaties of Rome (1958). However, when the term "Treaty of Rome" or the acronym "TEC" are used, it is to mean only the EEC Treaty]; and the Treaty on European Union (1993) [this Treaty changed the name of the European Economic Community to simply "the European Community" and introduced new intergovernmental structures to deal with the aspects of common foreign and security policy, as well as police and judicial cooperation. The structure formed by these so-called Three Pillars (Community pillar; foreign and security policy; police and judicial cooperation) is the European Union, whose scope then became more overtly political as well as economic]. With respect to the amending treaties, there are also four of them, which are: the Merger Treaty (1967), which provided for a Single Commission and a Single Council of the then three European Communities; the Single European Act (1987), which provided for the adoptions required for the achievement of the Internal Market; the Treaty of Amsterdam (signed in 1997), whose purpose was, *inter alia*, to simplify decision making in addition to further integrating the common foreign and security policy concept. It also amended and renumbered the EU and EC Treaties; and the Treaty of Nice (signed in 2001), where qualified majority voting was again extended to more areas, abolishing the national right to veto in some policy areas. A concept of "enhanced co-operation" was introduced for countries wishing to forge closer links in areas where other EU Member States disagreed. The accession treaties came into being for every enlargement of the EU. As for budgetary treaties, there have been two: the Budgetary Treaty of 1970, which gave the European Parliament the last word on what is known as "non-compulsory expenditure;" and the Budgetary Treaty of 1975, which gave the European Parliament the power to reject the budget as a whole, and created the European Court of Auditors.

<sup>4</sup> OJ C 191, July 29, 1992. The Treaty of Maastricht, establishing the European Union, transformed the European Economic Community into the European Community (Article G), including the European Coal and Steel Community and the European Atomic Energy Community. This required complex planning in order to take into account the specifics of the three founding treaties, and especially to make the EC the first of the three pillars of the EU.

<sup>5</sup> The six founding countries of the EU are France, (West) Germany, Belgium, The Netherlands, Luxembourg and Italy. The UK, Ireland and Denmark joined in 1973. Greece joined in 1981, whereas Spain and Portugal in 1986. East Germany reunited with West Germany in 1990 and consequently became part of the EU. Austria, Sweden and Finland joined in 1995. The last group of countries that joined the EU are Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Malta and Cyprus, which joined in 2004. More countries are expected to join in the near future: Bulgaria and Romania in 2007, and Turkey is an official candidate to join the EU.

<sup>6</sup> Article 1 TEU reads:

However, there are important legal differences between the European Communities and the EU (of which the Communities form a part, called the first pillar).<sup>8</sup>

The competence<sup>9</sup> issue in the European Union (EU)<sup>10</sup>/European Community (EC)<sup>11</sup> is highly related to the notion of supranationalism,<sup>12</sup> (lack of) sovereignty and federal system.<sup>13</sup>

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union".

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

<sup>7</sup> Article 3 TEU reads:

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

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

<sup>8</sup> See Kennedy, T. *Learning European Law. A Primer and Vade-mecum*, Sweet and Maxwell, 1998, pp. 49 et seq.

<sup>9</sup> The term "competence" appears very often throughout this dissertation. This Eurojargon originates from the French term *competence* to refer to the authority, responsibility or power to do or develop something. It is often used in political discussions about what powers and responsibilities should be given to EU institutions and what should be left to national, regional and local authorities. Thus, EC competence, as opposed to national competence, is the authority conferred on the EC, as opposed to a national government, to be in charge of a certain policy or issue.

<sup>10</sup> The European Union or EU is an intergovernmental and supranational union of 25 European countries, known as EU Member States. The European Union was established under that name in 1992 by the Treaty on European Union (the Maastricht Treaty). The European Union's activities cover all areas of public policy, from health and economic policy to foreign policy and defence. However, the extent of its powers differs greatly between areas. Depending on the area in question, the EU may therefore resemble:

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

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

<sup>11</sup> The most important of three European Communities, the European Community was originally founded on March 25, 1957 by the signing of the Treaty of Rome under the name of European Economic Community. The 'Economic' was removed from its name by the Maastricht Treaty in 1992, which at the same time effectively

Therefore, since the EU is a supranational system, I would like to present some theories of supranationalism written by academics in order to analyze the present situation of the EU.<sup>14</sup>

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made the European Community the first of three pillars of the European Union, called the Community (or Communities) pillar.

In the 1950s, six European countries decided to pool their economic resources and set up a system of joint decision-making on economic issues. To do so, they formed three organizations. *European Communities* is the name given collectively to these three organizations, i.e., the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom), when in 1967, they were first merged under a single institutional framework with the Merger Treaty. They formed the basis of what is today the European Union.

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

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

<sup>12</sup> Supranationalism is a method of decision-making in international organizations, where power is held by independent appointed officials or by representatives elected by the legislatures or people of the member states. Member-state governments still have power, but they must share this power with other actors. Furthermore, decisions tend to be made by majority votes, hence it is possible for a member-state to be forced by the other member states to implement a decision against its will; however, unlike a federal state, member states fully retain their sovereignty and participate voluntarily, being subject to the supranational government only so far as they decide to remain members. An alternative method of decision-making in international organizations is intergovernmentalism.

Few international organizations today operate on the basis of supranationalism; the main exceptions are the European Union and the South American Community of Nations – the latter one being a continent-wide free trade zone that will unite two existing free-trade organizations, i.e., Mercosur and the Andean Community, eliminating tariffs for non-sensitive products by 2014 and sensitive products by 2019 – often called supranational unions, as they incorporate both intergovernmental and supranational elements. Some degree of supranationalism may exist in some international organizations. Supporters of a Federal World Government, which refers to the concept of a political body that would make, interpret and enforce international law, wish it to be extended. The UN holds a limited degree of supranational power insofar as governing important matters of global security through the binding decisions of the Security Council.

<sup>13</sup> Broadly speaking, European federalism means any system of government where several states form a unity and yet remain independent in their internal affairs. People who are in favor of this system are often called “federalists.” A number of countries around the world – such as Australia, Canada, Germany, Switzerland, and the United States – have federal models of government, in which some matters (such as foreign policy) are decided at the federal level, while others are decided by the individual states. However, the model differs from one country to another. The European Union is not based on any of these models: it is not a federation but a unique form of union in which the Member States remain independent and sovereign nations while pooling their sovereignty in many areas of common interest. This gives them a collective strength and influence on the world stage that none of them could have on their own. Part of the debate about the future of Europe is the question of whether the EU should or should not become more ‘federal.’

<sup>14</sup> Authors that have previously analyzed the issue of supranationalism are: Lindseth, P. “The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration since the 1950s,” *Loyola of Los Angeles Law Review*, Fall 2003, 363; Lindseth, P. Democratic Legitimacy and the

Let us first give a semantic definition of sovereignty.<sup>15</sup> It is a supreme authority in a state. In any state, sovereignty is vested in the institution, person or body having the ultimate authority to impose law on everyone else in the state and the power to alter any pre-existing law. How and by whom the authority is exercised varies according to the political nature of the state. There is a belief in the concept of sovereignty that it is an absolute power within a community. According to Haas, a federal system must include, *inter alia*, a form of government in which sovereignty or political power is divided between the central and local governments, so that each of them within its own sphere is independent of the other.<sup>16</sup>

## II.- Theories of Supranationalism

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Administrative Character of Supranationalism: The Example of The European Community, April 1999, 99 *Colum. L. Rev.* 628; Feddersen, D. "Papers from the Zavikon VI Conference (1994): Between Supranationalism and Regionalism--Economic and Political Trends of Federal Systems in the East and West," 1995 *St. Louis-Warsaw Transatlantic Law Journal* 103; Esty, D. "Good Governance at the Supranational Scale: Globalizing Administrative Law," 115 *Yale Law Journal* 1490, May 2006; Joseph Weiler, "The Community System: The Dual Character of Supranationalism," 1 *Y.B. European L.* 268 (F.G. Jacobs ed., 1981); Erik Oddvar Eriksen, "Deliberative Supranationalism in the EU," in *Democracy in the European Union: Integration through Deliberation?* (Eric Oddvar Eriksen & John Erik Fossum eds., 2000);

<sup>15</sup> Sovereignty is one of the most used and misused concepts of international affairs and international law. Sometimes, it refers to the role of states in international organizations. Other times, it refers to internal division of power, or the degree of government authority toward its citizens. Richard N. Haas has defined sovereignty in the following manner: "Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components – internal authority, border control, policy autonomy, and non-intervention – is being challenged in unprecedented ways." (See, in this respect, Haass's remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, entitled: "Sovereignty: Existing Rights, Evolving Responsibilities," on January 14, 2003). Most of the time, though, sovereignty actually refers to questions about the allocation of power, i.e., government decision-making power. For an analysis in depth of sovereignty, see Walker, N. (ed.) *Sovereignty in Transition*, Hart Publishing, 2003; Bernier, I. *International Legal Aspects of Federalism*, Longman, 1973; Jackson, J.H. *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge University Press, 2006.

<sup>16</sup> Haas, E.B. *The Uniting of Europe. Political, Social and Economic Forces, 1950-1957*, (1958, Stevens) p. 34.

### A.- Joseph Weiler's Theory

Weiler believes that “to speak of the Community as supranational in the literal meaning of ‘... over and above individual states’ gives too general and antiquated a notion of the system.”<sup>17</sup> Along with this line of thought is that the EU’s present structure and process involve “bits and pieces of national governments...”<sup>18</sup> Following the conception of a federal model in its widest sense of sharing in governance, the EU presents a tension between the whole and the parts, central EU organs and Member States. It is precisely the term supranationalism that makes the difference between the EU and other international organizations.

Weiler divides the process of European integration<sup>19</sup> into phases and periods characterized by different degrees or levels of supranationalization and integration. The period of 1958-1969 is very distinguished in the process of European integration.<sup>20</sup> After analyzing this period, Mr. Greilsammer argues that “through these eleven years during which General de Gaulle - who was allergic to anything supranational - remained in power, no notable progress could be made in integration, either in the political domain, the institutional domain, the monetary domain or in the geographical extension of the Common Market.”<sup>21</sup> From a legal point of view, it was in this period that very revolutionary issues of

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<sup>17</sup> Weiler, J. “The Community System: the Dual Character of Supranationalism” (1981) Y.E.L. pp. 267-280.

<sup>18</sup> Shonfield, A. *Europe: Journey to an Unknown Destination* (Allen Lane, 1972), p. 17.

<sup>19</sup> This term of art is used to refer to the act of building unity between European countries and peoples. Within the European Union, it means that countries pool their resources and take many decisions jointly. This joint decision-making takes place through interaction among the EU institutions.

<sup>20</sup> See Leal-Arcas, R. “Unitary Character of EC External Trade Relations,” *Columbia Journal of European Law*, Vol. 7.3, Fall 2001, pp. 355-383.

<sup>21</sup> Greilsammer, I. 2 *Jerusalem Journal of International Relations* 141 (1976).

supranationalism took place, such as the issues of direct effect and supremacy of European Community Law – which will be discussed later - over national laws.

Following the analysis of Weiler, we are aware of the “diffuse” nature of supranationalism. Let us look at the relationship between supranationalism and sovereignty. According to Hay, “with few exceptions,...the criteria for the loss of sovereignty coincide with those which much of the literature regards as the elements of supranationalism. Thus, the concept of a transfer of sovereignty may be the legal-analytical counterpart of the political-descriptive notion of supranationalism.”<sup>22</sup>

### Two facets of Supranationalism

Weiler makes a distinction between normative and decisional supranationalism. As for normative supranationalism (narrating the story), it has to do with the relationships and hierarchy which exist between EU policies and legal measures on the one hand, and competing policies and legal measures of the Member States on the other. My understanding of his normative supranationalism is that these laws or policies (therefore *normative* supranationalism) have to be interrelated in the binomial EU-Member States. As I pointed out before, whether we like it or not, the present structure of the European Union involves “bits and pieces of the national governments...”<sup>23</sup> In addition, it has also been said before that there is a fundamental principle in the EU by which we count on the supremacy of Community law over national legal systems.<sup>24</sup>

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<sup>22</sup> Hay, P. *Federalism and Supranational Organizations* (University of Illinois Press 1966), p. 69.

<sup>23</sup> Shonfield, A. *Europe: Journey to an Unknown Destination* (Allen Lane, 1972), p. 17.

<sup>24</sup> Kapteyn, P.J.G. & VerLoren van Themaat, P. *Introduction to the Law of the European Communities. From Maastricht to Amsterdam*, Kluwer Law International, 1998.

Concerning decisional supranationalism (explaining and analyzing the story), according to Weiler, it relates to the institutional framework and decision-making processes by which Union policies and measures are, in the first place, initiated, debated and formulated, then promulgated, and finally executed.

This division of treatment of supranationalism covers both ways of approaching this phenomenon, the juridical approach (normative supranationalism) and the political one (decisional supranationalism). The former is in charge of the formal relationships, demarcation of competences,<sup>25</sup> and resolution of conflicts,<sup>26</sup> whereas the latter has to do with the actualities of cooperation and coordination of the various elements in the association of States. Weiler continues his theory by analyzing the evolution of the legal-political framework of the EU.

### A.1.- Normative Supranationalism: Approfondissement

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<sup>25</sup> Delimitation of competences is absolutely necessary in a federal or a quasi federal set-up nature, which I think is the case of the EU, depending on what policy we are analyzing for the simple reason that if there were no such delimitation, there would be chaos within the system, with no clarity among citizens as to who does what. That said, I do not think that the rationale of traditional States can be applied directly to the Union, as the Union is itself a Union of sovereign States. A clear example of this is the fact that defence and foreign policy have not been clearly stated by the EU Constitutional Treaty to be within the Union's exclusive competence, which would be necessary in the traditional federal set-up. The issue of allocation of competences is an internal question for the EU. It is a central concern and enflames high emotion among general public, fearing the encroachment of supranational action into areas of national heritage, power, and tradition. Third States should not mind, but practice demonstrates that they do: it is more difficult to speak with 26 voices (25 EU Member States plus the European Commission) than with one single voice (the EU). Furthermore, being divided but united can give the EU an edge in international bargaining. For a general overview on division of powers, see Simeon, R. *Division of Powers and Public Policy*, University of Toronto Press, 1985.

<sup>26</sup> Interestingly, German constitutional Judge Siegfried Bross has called for a separate court to judge on disputes over competences. In his opinion, the European Court of Justice cannot do this as it may not rule on national constitutional law, and the equivalent national courts may not do it as they cannot rule on interpretation of European law. Cases on economics law, competition law or health law will become more common in the future when the EU will claim more and more competences for itself. The subsidiarity principle – which says that the EU should only act if the goal cannot be better achieved by the EU Member States – offers no relief to the competence confusion, according to Judge Bross. This is so because once the EU Member States transfer powers to the supranational level, they implicitly acknowledge that it is better done at the EU level and cannot

One would have expected to have a centralized decision-making apparatus at a European level in the process of unifying Europe. At least these were the dreams of the past. In the European Union, there is a continuous process of *approfondissement* of normative supranationalism. This connection between the legal order of the Union and that of the Member States resembles a U.S. type of federal system.<sup>27</sup> All along his explanation of a theory on supranationalism, Weiler speaks of three main points: 1) the doctrine of direct effect; 2) the doctrine of supremacy; and 3) the principle of pre-emption.

As for the doctrine of direct effect,<sup>28</sup> it is about vesting power in the EU's main autonomous institution at the time of the European Coal and Steel Community (ECSC), i.e., the High Authority, to adopt self-executing measures which were directly binding on individuals.<sup>29</sup> In this respect, in 1963 there was an important case in Community law, *Van Gend en Loos v Nederlandse Administratie der Belastingen*,<sup>30</sup> where, under certain conditions, provisions of the EC Treaty would have direct effect in the Community bestowing enforceable rights as between individuals and the Member States. This means that Member States, *vis-à-vis* individuals, could no longer break their international treaty obligations<sup>31</sup> by arguing about the weakness of traditional public international law,<sup>32</sup> i.e., a

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invoke the subsidiarity principle at a later stage. For instance, monetary policy in the EU.

<sup>27</sup> Weiler, J.H.H. *The Constitution of Europe. "Do the New Clothes have an Emperor?" and Other Essays on European Integration*, Cambridge University Press, 1999.

<sup>28</sup> To be relied upon in an EU Member State court, an EC law provision must have direct effect; in other words, it must meet the following criteria:

1. It must contain a clear obligation on the Member State;
2. Its content must be applicable by a court;
3. It must be unconditional;
4. The Member State must have no discretion in the implementation of the obligation; and
5. No further act by either the EC or the Member State should be required.

<sup>29</sup> De Witte defines direct effect as "the capacity of a norm of Community law to be applied in domestic court proceedings." See de Witte, B. "Direct Effect, Supremacy, and the Nature of the Legal Order," in Craig, P. & de Burca, G. *The Evolution of EU Law*, Oxford University Press, 1999, p. 177.

<sup>30</sup> Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1.

<sup>31</sup> On the international treaty obligations of the EC, see Leal-Arcas, R. "The European Community and Mixed Agreements," *European Foreign Affairs Review*, Vol. 6, Issue 4, Winter 2001, pp. 483-513.

weakness based on the traditional tardiness of states in bringing international claims on behalf of individuals when their national interest is not involved.<sup>33</sup>

With respect to the doctrine of supremacy, it means that there is a hierarchy of norms by which Community law is superior to Member State law.<sup>34</sup> Both doctrines are highly connected in the sense that supremacy is a consequence of direct effect. The fact that the European Court of Justice (ECJ) introduced the concepts of supremacy and direct effect into the Community legal order in two separate cases indicated a wise attempt to phase in the evolution of normative supranationalism so as to ensure a reception in the national legal and political orders.

The third point, i.e., the principle of pre-emption, means that where the Community has policy-making competence, EU Member States are precluded from enacting legislation contradictory to Community law and they are also pre-empted from taking any action at all.<sup>35</sup> The ECJ is trying to have an equilibrium between the wish to promote Community policy-making and the pragmatic necessity of regulation in fields where the Community has competence but where, for various reasons such as problems in its decision-making process, it has not been able to evolve comprehensive Community policies.<sup>36</sup> The Court has decided

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<sup>32</sup> Both EC and Member States' courts review measures of the EC and its Member States. International law has many consequences on the EC legal system. It cannot be limited to the question of whether international law gives rise to individual rights that may be enforced in national courts. Pescatore argues in this respect that the reality cannot be summarized by the insufficiently qualified questions of whether international agreements are "applicable" within the EC and whether they are "directly enforceable." See Pescatore, P. "Die Rechtsprechung des Europäischen Gerichtshofs zur innergemeinschaftlichen Wirkung Völkerrechtlicher Abkommen" in *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte-Festschrift Mosler* (Springer, Berlin, 1986), p. 663.

<sup>33</sup> Kennedy, T. *Learning European Law. A Primer and Vade-mecum*, Sweet & Maxwell, 1998.

<sup>34</sup> De Witte defines supremacy as "the capacity of that norm of Community law to overrule inconsistent norms of national law in domestic court proceedings." See de Witte, B. "Direct Effect, Supremacy, and the Nature of the Legal Order," in Craig, P. & de Burca, G. *The Evolution of EU Law*, Oxford University Press, 1999, p. 177.

<sup>35</sup> On the principle of pre-emption, see Cremona, M. "External Relations and External Competence: The Emergence of an Integrated Policy," in Craig, P. & de Burca, G. (eds.) *The Evolution of EU Law*, Oxford University Press, 1999, pp. 152 ff.

<sup>36</sup> Louis, J.-V. *L'Ordre Juridique Communautaire*, Office des Publications Officielles des Communautés

that, in such situations, the policy lacunae should be filled by the Member States. In these cases, the Court has followed most federal systems, which do not apply pure pre-emption.

Some decisions by the Court in the field of external trade relations can prove the shift in the formulation of the Court. In the European Road Transport Agreement (ERTA) case,<sup>37</sup> the issue was whether the competence to negotiate and conclude an international agreement in the transport field rested in the Community or the Member State powers.<sup>38</sup> The Court ruled that a matter already regulated by the EU institutions could not be dealt with internationally without Community participation and approval, precisely because it has been regulated by an EU institution. In a judgment, the Court laid down an absolute principle of pre-emption:

Each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying forward common rules, 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 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.<sup>39</sup>

It seems then that there has been a retardation rather than a deepening of the scope of the principle in the Community legal order. There seems to have been a shift by the Court from a conceptualist-federalist approach to a pragmatic approach. Furthermore, to insist on pure pre-emption when the EU institutions are not yet ready for their task could be retrogressive for the general evolution of the EU. There may be two ways of explaining the *approfondissement* of pre-emption: Firstly, by maturing from a dogmatic statement of pure

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Européennes, 1993.

<sup>37</sup> Case 22/70 *Commission v. Council*, (1971) ERC 273.

<sup>38</sup> The ERTA judgment of the European Court of Justice, that is to say, the principle by which the adoption of common rules by the Community *may* create exclusive Community competences, makes clear the relation to the principle of pre-emption.

<sup>39</sup> Recitals 17-18 of judgment.

principle to a doctrine sensitive to EU needs; secondly, pre-emption seems to be going from one substantive field of Community law to another.

With regard to the ERTA Case, I would like to write a few lines. The thesis of parallelism<sup>40</sup> gained approval in the ERTA Case.<sup>41</sup> McGoldrick explains this thesis: “[The doctrine of parallelism] asserts that the competence of the EC to enter into international agreements should run in “parallel” with the development of its internal competence –*in interno in foro externo*.”<sup>42</sup> It was in 1962 when five of the then six Member States of the EEC had signed an agreement known as the first ERTA with certain other European States. Such an agreement was not ratified by enough of the contracting States, which meant that the Member States began negotiations to conclude a second ERTA. Meanwhile, the Council issued a regulation deriving from its internal power covering the same areas. The Commission objected to the Council’s decision to allow negotiations to continue and tried to annul the resolution to that effect in the ECJ. The second ERTA was nevertheless concluded in 1970. According to Kent, “the ECJ held that the EC had the authority to enter into such an agreement. Authority may arise not only out of express provision in the Treaty but also from other Treaty provisions and from secondary legislation. When the EC had adopted common rules to implement a transport policy in 1960, Member States lost their competence to conclude international agreements in this area.”<sup>43</sup>

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<sup>40</sup> For a deeper understanding of the issue, see Groux, J. "Le parallelism des competences internes et externes de la Communaute economique europeenne" (1978), *Cahiers de droit europeenne*, pp. 3-32 and MCGOLDRICK, D., *INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION*, Longman, 1997, pp. 48-50.

<sup>41</sup> For a good explanation of the ERTA Case (1970), Case 22/70, *Commission v Council*, 1971 E.C.R. 263, see MCGOLDRICK, *INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION*, Longman, (1997), at 50-61.

<sup>42</sup> MCGOLDRICK, *INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION*, Longman, (1997), at 48.

<sup>43</sup> KENT, P. *LAW OF THE EUROPEAN UNION*, Financial Times Pitman Publishing, 1996, p. 28.

The European Court of Justice, in its Case C-327/91 *France v Commission*,<sup>44</sup> deals with parallel internal and external powers of the European Community. In the above case, the Court gives the following view: “the ERTA judgment,<sup>45</sup> as we know, is the frame of reference for identifying the external powers of the Community, the Court having stated that the possibility of concluding international agreements exists not only in the situations exhaustively listed in the Treaty but also whenever the Community has internal powers.<sup>46,47</sup> The ECJ goes further by saying in this same judgment [Judgment in Case 22/70 *Commission v Council*]<sup>48</sup> that:

“with regard to the implementation of the provisions of the Treaty the system of internal Community measures may not...be separated from that of external relations. Clearly, if no account were taken to the fact that the point at issue in that case was the division of powers between the Community and the Member States, such a statement could be used for recognising, on the assumption that the conditions are fulfilled, the Commission’s limited power to conclude international agreements, which would thus constitute a corollary, as it were, of its specific internal powers in a given area.”<sup>49</sup>

Under this theory of parallelism (or implied powers), the treaty-making or external competence of the EC should reflect its internal jurisdiction.<sup>50</sup> The reasoning behind this theory is that if the EC has the powers to legislate internally, it should also be competent to enter into international agreements in the same fields. In this line of argument, one should

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<sup>44</sup> 1994 E.C.R. I-3661, paragraph 35.

<sup>45</sup> Judgment in Case 22/70 *Commission v Council*, 1971 E.C.R. 263, paragraphs 12 to 15 and 20 to 22.

<sup>46</sup> For the same view see, most recently, Opinion 1/92 of 10 April 1992 on the draft agreement between the Community and the EFTA countries concerning the creation of a European Economic Area, 1992 E.C.R. I-2821, paragraph 39.

<sup>47</sup> *Id.*

<sup>48</sup> 1971 E.C.R. 263, paragraphs 16 to 19.

<sup>49</sup> Case C-327/91 *France v Commission*, 1994 E.C.R. I-3661, paragraph 35.

<sup>50</sup> Cremona, M. “External Relations and External Competence: The Emergence of an Integrated Policy,” in Craig, P. & de Burca, G. *The Evolution of EU Law*, Oxford University Press, 1999, pp. 137-75.

recall that the EC's treaty-making powers may be divided into two categories: express<sup>51</sup> powers and implied powers.<sup>52</sup> Agreements are negotiated by the Commission and concluded by the Council, normally after consultation with the European Parliament.<sup>53</sup>

However, during the 70s, the Commission and an important part of the doctrine developed the thesis by which the exclusive competence had a larger scope in the external level than in the internal one. In other words, the Community would have an exclusive competence to conclude international agreements on issues that, in the internal sphere, still belong to Member States' competences.<sup>54</sup> This thesis has been invalidated by the Court of Justice in its Opinions 1/94 and 2/94 which, *grosso modo*, follow the thesis of parallelism between external and internal competences.

For Weiler, the Community remains a multi-sectoral condominium (since there is joint control over economic and other sectors of policy). There are still many fields, some of which are crucial such as defense, education, and aspects of fiscal policy *inter alia*, which remain outside the Community sphere. My personal opinion is that there is still a lack of consensus on a broad range of important matters in the Community.

As for the political structure of the EU, it highlights the centrality of the EU Member States. In Europe, unlike the U.S., national governments are responsible for decision-making

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<sup>51</sup> On express powers, see Rhein, "The European Union on its Way to Becoming a World Power," 3 *European Foreign Affairs Review* 325 (1998); Cremona, M. "The European Union as an International Actor: Issues of Flexibility and Linkage," 3 *European Foreign Affairs Review*, 67 (1998); Cremona, M. "The Union as a global Actor: Roles, Models, and Identity," 41 *Common Market Law Review*, 553 (2004).

<sup>52</sup> On the limits of implied powers, see Kingston, "External Relations of the EC – External Capacity versus Internal Competence," *International and Comparative Law Quarterly*, 659 (1995); Arnall, A. "Left to its own Devices? Opinion 2/94 and the Protection of Human Rights in the EU," in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, Sweet & Maxwell, 2000, p. 61; Dashwood, A. "The Limits of European Community Powers," 21 *European Law Review*, 113 (1996); Hyett, S. "The Member States' Competence and Jurisdiction under the EU/EC Treaties," in Capps, Evans & Konstadinidis (eds.) *Asserting Jurisdiction: International and European Legal Perspectives*, Hart, 2003.

<sup>53</sup> KENT, P. LAW OF THE EUROPEAN UNION, Financial Times Pitman Publishing, 1996, p. 28.

<sup>54</sup> On the circumstances in which this may arise, see Temple Lang, "The ERTA Judgment and the Court's Case Law on Competence and Conflict," *Yearbook of European Law*, 183, at 190 ff, 1987.

at national and supranational levels. These principles of normative supranationalism provide a framework into which substantive rules and policies must be fitted. The Treaty of Rome provides a system in which the Member State governments play a key role in filling in the normative framework. This means that the Community did not opt for a classical federal governmental system, where there is a federal legislature directly elected by the people and a federal executive elected in the same way. What the Fathers of the Treaty of Rome thought was that by creating a hybrid structure of decision-making, the interest of the Community would prevail, despite the strong role of the Member States.

#### A.2.- Decisional Supranationalism

There is a process of diminution of decisional supranationalism parallel to normative supranationalism. Having this dual character of supranationalism is what makes the European Union *sui generis* in comparison with other international organizations as a process of integration and as a form of governance.<sup>55</sup>

#### B.- Legal Theories of Economic Integration

According to Christian Joerges, there is not one “grand theory that enables us to fully understand the process of European integration and provides us with a coherent and normatively attractive model of the future shape of a European republic.”<sup>56</sup> Instead, we

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<sup>55</sup> Ludlow, P. Mortensen, J. & Pelkmans, J. (eds.) *The Annual Review of European Community Affairs 1991*, Centre for European Policy Studies, 1992.

<sup>56</sup> Joerges, C. “European Economic Law, the Nation-State and the Maastricht Treaty,” in Dehousse, R. (ed.), *Europe After Maastricht: An Ever Closer Union?* (1994, Law Books in Europe, Munich), pp. 29-60.

should identify problems that need to be taken into account when analyzing the impact of European integration and examine the ability of the various integration strategies to cope with the problems we have identified. For Joerges, the single market has helped to “denationalize” the economy. His theory, an analysis of the process of the Europeanization of economic law, is about examining different legal theories of integration to explain that process. In his opinion, “the core problem of economic law always has been to respect and to guarantee justified demands through economic juridification processes.” Today, theoretical guidance is provided by neo-liberal legal theories (in the case of Germany, *Ordnungstheorie*)<sup>57</sup> and economic analyses of law, followers of system sociologies in legal theory<sup>58</sup> and proceduralized versions of critical theories.<sup>59</sup>

The expansion of European economic law began even prior to the adoption of the Single European Act in 1987.<sup>60</sup> In order to increase Community control over national legislation, the European Court of Justice used Article 30 of the EC Treaty.<sup>61</sup> This penetration of the Community into issues of national competence has been criticized and

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<sup>57</sup> Mestmäcker, “Wirtschaftsrecht”, 54 *RebelsZ* (1990) 409.

<sup>58</sup> See Teubner, “Steuerung durch plurales Recht Oder: Wie die Politik den normativen Mehrwert der Geldzirkulation abschöpft”, in W. Zapf (de.), *Die Modernisierung moderner Gesellschaften. Verhandlungen des 25. Deutschen Soziologentages in Frankfurt am Main 1990* (1991) 528.

<sup>59</sup> J. Habermas, *Faktizität und Geltung, Frankfurt am Main* (1992) 516-537.

<sup>60</sup> The Single European Act (SEA) was signed on February 17, 1986 in Luxembourg by representatives of the then twelve EC Member States. The Danish Parliament had rejected the project of institutional reform, but the Danish people approved it by referendum on February 27, 1986. Apart from minor modifications, this Treaty was the first profound and wide-ranging constitutional reform of the EU since the 1950s. The SEA introduced measures aimed at achieving an internal market (for instance, harmonization) plus institutional changes related to these (such as a generalization of qualified majority voting and a cooperation procedure involving the European Parliament). It also provided legal form for European Political Cooperation.

<sup>61</sup> Article 30 EC reads: The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

praised.<sup>62</sup> With respect to legal integration, it not only undermines the coherence of national legal systems but it also concerns the autonomy of national policy-making. Furthermore, the tension between legal integration and national legal systems implies tension not only between European and national law but also between supranational regimes and national democracies. In this sense, one can argue that the problem of European law is due to an uneven pace of integration, i.e., the economic integration of the European Union goes faster than the institutional proposals for a solid process of integration. However, even the intensity of integration is not homogeneous, depending on the sector.

There are several legal theories of integration which are not based on black-letter EC law. We shall examine the dualism between the supranational regime in the EU and the legitimate national legal orders. In this sense, in the book by Renaud Dehousse (ed.), *Europe After Maastricht. An Ever Closer Union?*, Joerges analyzes three theories of European integration: 1) the neo-liberal economic policy theory; 2) the theory of viewing the EU as special purpose associations of functional integration; and 3) the theory of the supranational and intergovernmental dual structure of the EU.<sup>63</sup> Let us analyze all three theories.

### B.1.- Neo-liberal Economic policy

Even if it has an important role in German economic law theory, the *Ordnungstheorie* is hardly known.<sup>64</sup> This German theory has been useful to find an understanding of European

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<sup>62</sup> Steindorf, "Quo vadis Europa? Freiheiten, Regulierung und soziale Grundrechte nach den erweiteren Zielen der EG-Verfassung," in Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb e.V. (ed.), *Weiterentwicklung der Europäischen Gemeinschaften und der Marktwirtschaft* (1992) 11.

<sup>63</sup> Joerges, C. "European Economic Law, the Nation-State and the Maastricht Treaty," in Dehousse, R. (ed.), *Europe After Maastricht: An Ever Closer Union?* (1994, Law Books in Europe, Munich).

<sup>64</sup> *Wirtschaftsordnungstheorie* or simply *Ordnungstheorie* and the French theory of regulation are two theoretical constructions in which the connection between the historical character of the economy and the

Community law and an overall perspective on the integration process. The fact that Member States give up their national sovereignty for being integrated gives the chance of having a “Law” which will indicate the process of integration. According to Joerges, since the integration should be based on the creation of one common market, the “Law” is economic constitutional law.<sup>65</sup> Back to the origins of the Community, the founder Member States showed very strong anti-interventionist policies, which favored the establishment of a liberal economic regime. In Joerges’s view, the Community, based on economic freedoms, has a legitimacy which protects it against any attacks based upon democracy theory or constitutional policy.<sup>66</sup>

B.2.- The European Community as “Special-Purpose Associations (Zweckverbände) of Functional Integration”

Professor Ipsen is the most relevant person of this theory. In the book edited by Renaud Dehousse, Joerges explains how “Ipsen does not view the law as the centre of a concept that envelops both an economic and a legal order. The term *Zweckverband* defines a commitment to specific functions of “technical realization,”<sup>67</sup> i.e., to administrative tasks that can be and need to be assigned to a supranational bureaucracy. Technical bureaucratic rationality thus

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necessarily theoretical dimension of economics has been and is most investigated. How to articulate these two aspects has been a permanent subject of debate since the nineteenth century. This question was already addressed in the *Methodenstreit* and by Thorstein Veblen. However, both *Ordnungstheorie* and the theory of regulation are uniquely articulated schemes in their attempts at providing theoretical alternatives to what they perceive to be an unsatisfactory state of scientific economics. This basic dissatisfaction arises from the lack of integration of history and theory, for short.

<sup>65</sup> Joerges, C. “European Economic Law, the Nation-State and the Maastricht Treaty,” in Dehousse, R. (ed.), *Europe After Maastricht: An Ever Closer Union?* (1994, Law Books in Europe, Munich), p. 37.

<sup>66</sup> Mestmäcker, “Macht-Recht-Wirtschaftsverfassung” (1973) reprinted in E. -J. Mestmäcker, *Die unsichtbare Hand des Rechts* (1978) 9, 23 et seq.

<sup>67</sup> Joerges, C. “European Economic Law, the Nation-State and the Maastricht Treaty,” in Dehousse, R. (ed.),

replaces the neo-liberal legal order of the market.”<sup>68</sup> As we can see from this theory, Ipsen does not agree with the constitutionalist-federalist approaches of integration, nor does he agree with the idea of limiting the EU to an organizational body in international law. For him, Community law is a *tertium* between the law of federal systems and that of international organizations. In addition, his theory is about being able to make a distinction between technical tasks, which are by definition apolitical, and other tasks.

### B.3.- Theory of the supranational and intergovernmental dual structure of the EU<sup>69</sup>

According to Joerges, there is a paradox in Weiler’s analysis: while Community law was in a process of evolution and built constitutional structures, the European Community went through continuous crises. This divorce between the legal evolution and the political erosion was first acknowledged by Weiler. For him, the influence of the Member States on the process of the Community’s policy-making is legitimate. This influence is necessary in order to have stability in the European system. Finally, for Weiler each EU Member State is interested in defining its own identity and this is the result of legitimate political processes.

### C.- Theory by Wils<sup>70</sup>

Unlike Ipsen, Wils considers that the single market should act as a counterpoint between the desire for government intervention and the desire for integration, and not as a counterpoint

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*Europe After Maastricht: An Ever Closer Union?* (1994, Law Books in Europe, Munich), p. 38.

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

<sup>69</sup> Martin Martinez, M. *National Sovereignty and International Organizations*, Kluwer Law International, 1996.

<sup>70</sup> Wils, W. “The Search for the Rule in Article 30 EEC: much to do about nothing?” (1993) 18 E.L.Rev. p.

between the technical and the political tasks. We are, therefore, facing a system of partial integration. By *desire for integration*, Wils understands the desire to limit the influence of every single national government on the activities of people throughout the EU. As for *desire for government intervention*, he understands the desire for national, and not EU, regulation.

One could have a mental picture of a balance where on one side of it lies the anti-integrationist effect, i.e., an obstructive effect on the integration of national markets. What must be taken into consideration is the level of obstruction, which depends on two elements. On one hand, on the degree to which the national measure influences production activities throughout the European Union. On the other hand, on the weight given to this effect. The more integration there is, the greater the obstructive effect on the integration of national markets. In other words, as integration in Europe grows, the anti-integrationist effect will be more obvious.

On the other side of this hypothetical balance, we find the valued regulatory effect of the national measure. Two factors are taken into consideration in order to weigh the regulatory objective of the national measure. The first one is the value which the European Union gives to the objective pursued. In other words, the idea is to measure the importance of the objective pursued, as an objective of national regulation, to the eyes of the EU. This depends on the level by which the European Union is served by Union action and on the attached value to the objective pursued. As for the second factor to take into consideration in order to weigh the regulatory objective of the national measure, it is about how effective the national measure is in pursuing its objective.<sup>71</sup>

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<sup>71</sup> Nelsen, B & Stubb, A. (eds.) *The European Union. Readings on the Theory and Practice of European*

### III. Conclusion

According to legal scholars, the foundational years of the European Union in the 1950s were years of constitution-building in Europe, preparing the idea of a European supranational federation. In fact, already the EC Treaty's original decision-making process has strong supranational features: the adoption process of laws and policies is supranational since most decisions are by majority voting; and the execution of laws is in the hands of the Commission. By contrast, political scientists have diagnosed this period as the worst moment in the history of European integration. While in the late 1960s the continued existence of supranationalism was a mere speculative issue, in the 1970s the Commission was perceived as an extravagant secretariat of the European Community.

Yet, in the well-known interpretational dilemma of the term supranationalism, i.e., whether to be understood as a Union – a United States of Europe, namely a statal Europe – or as a Community for Europe, historical events from the incipient moments of the process of European integration point to the fact that the latter interpretation of European integration has prevailed, i.e., a Community. To evidence this, let us remember, for example, the rejection of the European Political Community or the European Defense Community in the 1950s, as well as the “enunciation” of supranationalism in the Treaty of Rome, to mention just a few. The above-mentioned bifurcation should not be confused with an international (or intergovernmental) approach to European governance, which is based on international relations, as opposed to a supranational one, typically rooted in comparative constitutionalism. In relation to the modes of governance in the EU, the international mode is

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*Integration*, Lynne Rienner Publishers, 1998.

certainly about negotiation and diplomacy, whereas the supranational one is more structured and legalistic.