

**WAYS TO ENSURE THE UNITARY CHARACTER IN THE  
EXTERNAL TRADE RELATIONS OF THE EUROPEAN  
COMMUNITY ON ISSUES OF MIXED COMPETENCE  
BETWEEN THE EUROPEAN COMMUNITY AND ITS  
MEMBER STATES**

By

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The London School of Economics and Political Science

Dissertation for the Degree MPhil in European Studies

July 2001

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## **NOTE FOR RE-SUBMISSION OF THE MPhil THESIS**

In December 2000, the candidate was given the opportunity by his MPhil examiners to update the material of his Thesis, whose date of submission was May 2000, to cover developments up to the date of re-submission (July 2001).

The candidate, however, has decided **not** to update the Thesis to the latest developments of European integration.

Murcia, July 2001

**RAFAEL LEAL-ARCAS**

**WAYS TO ENSURE THE UNITARY CHARACTER IN THE EXTERNAL  
TRADE RELATIONS OF THE EUROPEAN COMMUNITY ON ISSUES OF  
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ITS MEMBER STATES**

**ABSTRACT**

Both the European Community (EC) and its Member States agree that it is in their best interest to coordinate their action *vis-à-vis* the rest of the world in international agreements. This dissertation examines the law and practice of the EC external trade relations. The major point of analysis is to find ways to ensure the unitary character of the EC external trade relations in areas of mixed competence between EC Member States and EC Institutions as well as understand the management of the EC external trade relations. It begins with an analysis of the evolution of the EC common commercial policy, through which the author examines the checks and balances at the micro, meso and macro levels. The major EC Institutions are examined: the Commission as the negotiator of international agreements, the EU Council as the consultator and concluser of agreements, the European Parliament in its role of consultator and the role of the European Court of Justice in relation to shared competence between the EC and its Member States in the framework of international trade. The decision making process of the EU and its relation with national institutions are analyzed as an important part of this dissertation. The legal complexity of mixity is then analyzed. This unique legal phenomenon (mixed agreements) is tackled from an intra-EC perspective as well as from its external dimension, where its various implications for third parties are taken into account. This dissertation concludes that although the European Union is composed of 15 sovereign Member States with unique needs and circumstances, in most cases it is in their national interest to give up their national sovereignty to the European level to have a stronger negotiating position in international negotiations. This would only be legally possible by amending the Treaties.

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## INTRODUCTION

- I. Introduction**
- II. Objectives and Central Argument**
- III. An Overview of the Thesis**
- IV. Methodology and Sources**
- V. Approach**

### **I. Introduction**

The intention of this dissertation is to study how the External Trade Relations of the European Community (EC) are managed. In the framework of the European Union, there is Community competence, national competence and mixed competence. Through Article 133 of the EC Treaty, the European Community has been given exclusive competence<sup>1</sup> to create common commercial policy in the field of the external trade relations.<sup>2</sup> However, this competence is not exclusive to the EC in such areas as services, investment and intellectual property rights, where Member States share competence with the EC. These cases involve so-called “mixed competence”, where competence is shared between the European Community and its Member States. That said, the scope of this dissertation is to focus on specific aspects of EC’s external trade policy, i.e., services, intellectual property rights and investment.

Competencies are joint because Member States prefer not to allow Community

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<sup>1</sup> For a definition of the locution “exclusive EC competence,” see *infra* chapter 3.

<sup>2</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

competence and, instead, preserve their national competence.<sup>3</sup> This approach, which became apparent in the Court's Opinion 2/91 on the ILO, weakens the constitutional position of the Community in the field of external relations.<sup>4</sup> As long as the external competence has not become exclusively EC competence, Member States, even acting collectively, remain free to enter into multilateral treaty relations. The tensions created by the mixture of competencies between the EC and its Member States are seen as an obstacle to the achievement of Community interests as a whole, and are a problem for Europe's trade partners.

Shared competence<sup>5</sup> between the EC and its Member States implies the fragmentation of unity in the international representation of the Community and translates into less power for the EC in the international arena. On the other hand, EC exclusive competence facilitates international negotiations, since the Commission is the only competent actor in a given matter. In light of this discussion, Allan Rosas argues that only when the fifteen Member States "speak with one voice" can they aspire to be a powerful voice, and thus collaborate with the United States on equal terms.<sup>6</sup>

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<sup>3</sup> See Editorial Comments, "The Aftermath of Opinion 1/94 or how to ensure unity of representation for joint competencies", (1995) 32 *CMLRev*, p. 386.

<sup>4</sup> Opinion 2/91, [1993] ECR I-1061.

<sup>5</sup> For a definition of the locution "shared competence," see *infra* chapter 3.

<sup>6</sup> Rosas, A. "The External Relations of the European Union: Problems and Challenges" in *The Forum for US-EU Legal-Economic Affairs*, The Mentor Group, 1998, pp.59-71, at p. 59.



## II. Objectives and Central Argument

### A.- Objectives

The objectives of this dissertation are to examine the circumstances under which Member States, regarding the negotiation of international agreements, confer the exercise of their national competencies on the European Commission in order to allow the EC to act with a single voice in its external trade relations in those areas where, according to the Treaties of the European Communities, there is shared competence between the Member States and the EC. This means, in technical terms, the fields of services, intellectual property rights and investment. We will analyze situations where the aim is to ensure single representation of the EC and its Member States in international trade negotiations in which their scope touches EC competence and Member States' competence (shared competence). The necessary circumstance is an agreement which is a Community and a national agreement at the same time.<sup>7</sup> This, inevitably, provokes a *de facto* confusing situation which I shall try to clarify throughout this dissertation.

Having said that, I would like to emphasize that the decision of Member States to allow the Commission to negotiate on their behalf does not imply any legal transfer of competencies from Member States to the Commission. It is done for mere practical purposes to obtain greater bargaining power in international trade negotiations. In other

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<sup>7</sup> Information gathered from an interview on February 1999 with Ramón Torrent, Professor of Political Economy at the University of Barcelona and Former Director responsible for the External Economic Relations of the European Community in the Legal Service of the Council of the European Union until May 1998.

words, the only transfer from Member States to the Commission is the right to negotiate mixed agreements.<sup>8</sup> In fact, the locution “shared competence” is perfectly compatible with that of “speaking with one voice.” The relation between the two is that precisely because of the existence of shared competence –which is a legal fact in EC law–, there is a procedural tendency in international trade negotiations toward speaking with one voice in order to obtain a stronger position.

Weiler commented in 1992 that “the EC may not speak with one voice but increasingly speaks like a choir.”<sup>9</sup> As there is no article in the Treaties of the European Community that provides a straightforward answer to this question, there is a significant legal vacuum on issues of mixed competencies in the European Union (EU).<sup>10</sup> Member States cede their negotiating role to the European Community negotiator, and in practice, it is the European Commission who negotiates. The Commission, therefore, attends negotiations on behalf of the EC and its Member States *vis-à-vis* a third party<sup>11</sup> without prejudice to legal competence.

### B.- Argument

The hypothesis, therefore, is that Member States confer specific negotiating powers on

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<sup>8</sup> For a thorough definition of mixed agreements, see *infra* the chapter on The European Community and Mixed Agreements.

<sup>9</sup> Weiler, J. H. H., “The Evolution of Mechanisms and Institutions for a European Foreign Policy. Reflections on the Interaction of Law and Politics”, European University Institute Research Paper No. 85/202, 1992.

<sup>10</sup> For further reading on this matter, see Heliskoski, J. “Should there be a New Article on External Relations? Opinion 1/94, Duty of Co-operation in the Light of the Constitutive Treaties” in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, pp. 273-87.

<sup>11</sup> This third party has to be a non-Member State of the EU.

the EC when it is in their own national interest to have a common European position in international trade negotiations. By "EC level"<sup>12</sup> or common European position we mean "supranational level", and the EC is a supranational organization, or one to which the Member States have transferred specific legislative and executive powers and whose decisions are binding on them and their citizens. Member States may confer negotiating powers on the European Commission in international agreements where there is shared competence, but co-ordination is requested of Member States during all negotiations.

The national interest of Member States is, in a strict sense, the will of the national governments. However, in a larger sense, it is the position adopted by the civil society. For example, a Greek citizen may not agree with the idea of a free airspace in Europe because he thinks that this might endanger his country's security *vis-à-vis* one of its neighbors, i.e. Turkey. In a broader sense, national interest implies a fight for the long-term well-being of a community within a society, or a fight for the maintenance and improvement of the wealth of that community. In the case of mixed agreements, national interest and EC interest coincide, so the EC and its Member States both sign the agreements in question.

For the EU, national interests vary very much depending on the historical situation of the country in question. The Schengen Agreement was only partially accepted by the United Kingdom (UK) in May 2000 for geographic and historical reasons. The UK's reluctance to accept the Euro is another example of a conflict between national interests and European interests. The notion of national interest can also depend on governing political party. A right-wing British Government, for example, might be less amenable to Social Rights

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<sup>12</sup> For further details, see Drost, H. *What's what and Who's who in Europe*, Cassell, 1995, p. 207.

and Benefits in the EU than a left-wing political party.

Regarding a common European interest and position, Sophie Meunier demonstrates<sup>13</sup> how to Karl Deutsch and his "communitarian" followers, successive stages of integration could be expected to gradually build a sense of community in the region, at the expense of outsiders.<sup>14</sup> By becoming socialized as "Europeans", EC policy-makers, negotiators and technical experts would develop ways of working that would increasingly isolate those who do not belong to the network. Therefore, the stronger the sense of European solidarity, the harder the EC would defend its position externally. Giving the EC and its Member States a single voice in international trade negotiations would, therefore, contribute to strengthening its bargaining position.<sup>15</sup>

Institutional steps have been taken recently towards greater coherence and common action. For example, the fact that the EC can conclude legally binding agreements with third parties, whether it be a State or an international organization, in its own name, including trade agreements, is an achievement of the 1950s that has become particularly significant in the last two decades.<sup>16</sup> Many of these agreements have been concluded on legal grounds of a common commercial policy, Article 133 EC.<sup>17</sup> International Agreements today may also involve a number of other legal bases, for example, the procedures for conclusion of

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<sup>13</sup> See Meunier, S. "Talking with a Single Voice: European Integration and EC-US Trade Negotiations", p. 3; paper prepared for delivery at the 1997 Annual Meeting of the American Political Science Association, The Sheraton Washington Hotel, August, 28-31, 1997.

<sup>14</sup> Deutsch, K. *et al. Political Community and the North Atlantic Area*, Princeton University Press, 1957.

<sup>15</sup> See Meunier, S. "Talking with a Single Voice: European Integration and EC-US Trade Negotiations", p. 3; paper prepared for delivery at the 1997 Annual Meeting of the American Political Science Association, The Sheraton Washington Hotel, August, 28-31, 1997.

<sup>16</sup> Wellenstein, E. "Twenty-Five Years of European Community External Relations", *Common Market Law Review* 16, 1979, pp. 407-423.

<sup>17</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992,

agreements and the role of the Commission, Council and Parliament that appear in Article 300 EC.<sup>18</sup>

An important example of the EC's potential as an international actor was the Uruguay Round. The EC's credibility as a meaningful player in the post-Uruguay Round system will depend on its ability to overcome the threat of fragmentation.<sup>19</sup> The EC gained strength during the GATT talks because it was obliged to speak with one voice. If Member States present themselves in a non-unified way within a multilateral framework, their influence on world trade politics is likely to decrease. This is a concern as some of the international agreements concluded by the EC are also concluded by the Member States (the so-called "mixed agreements"), which complicates both their conclusion and administration.

### III. An Overview of the Thesis

This dissertation is divided into two main parts, being the first one the EC External Trade Relations in its context. The aim of the first part is to show the legal problems raised by issues of shared competence and mixity throughout the history of the EC external trade relations. It also intends to show what implications the so-called legal phenomenon of "mixed agreements" has for third parties. The second part deals with the EC institutions with regard to EC External Trade Relations. It intends to analyze the role that the major

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OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>18</sup> *Ibid.*

<sup>19</sup> See Meunier, S. "Talking with a Single Voice: European Integration and EC-US Trade Negotiations", Abstract; paper prepared for delivery at the 1997 Annual Meeting of the American Political Science

EC institutions play in the proposed field of study. Of particular interest is the role of the European Court of Justice (ECJ) in relation to EC exclusive and shared competence. Issues such as the EC in the World Trade Organization (WTO), the jurisdiction of the ECJ in international trade and how international agreements in general, and the WTO Agreement in particular, affect EC law will be analyzed in Part II of this dissertation. In the last section of Part II, there is an analysis of the famous *Hermès International* case, which intends to explain the interpretation by the ECJ of a particular mixed agreement.

In the field of External Trade Relations of the European Community there are many examples where the Community's and the Member States' competence is shared, for example, the Food and Agriculture Organization, where Case 25/94,<sup>20</sup> *Commission v Council*, can be used as evidence. Our interest is to analyze the ways and means that would ensure the unitary character of the international representation of the EC in situations where the competence is shared, namely in its external trade relations.

The problem arises because we are dealing with situations where the European Community and its Member States have international legal personality to sign international treaties. The question is to see when Member States of the European Union authorize the European Commission, the executive power of the European Union, to act on behalf of Member States and the Community in bilateral/multilateral mixed agreements. The Commission's powers are to negotiate agreements, even if these are not exclusively *communautaire*. These agreements are eventually concluded by the EU Council.

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Association, The Sheraton Washington Hotel, August, 28-31, 1997.

The duty of co-operation suggested by the European Court of Justice seems to be a rather broad formula for the achievement of a unitary character for the EC, for example, the Community's post-Opinion 1/94 external relations regime. Opinion 1/94 does not give any guidelines as to the more specific implementation of the "duty of cooperation".<sup>21</sup> Co-operation has taken place until now either *ad hoc* or under an informal "code of conduct" agreed in May 1994 between the Council, the Commission and the Member States at the "post-Uruguay Round" negotiations on services.<sup>22</sup> However, the Member States, the Council and the Commission have been unable to reach an agreement –in spite of numerous attempts– upon a permanent and more comprehensive code that would cover the Community and Member States' participation in the WTO as a whole.

Nor does Opinion 1/94 indicate any provisions of either the EC Treaty or the Treaty on European Union in which the duty of co-operation can be found.<sup>23</sup> To justify its position, the Court simply referred to its previous case-law (Ruling 1/78 on the Draft Convention of the International Atomic Energy Agency on Physical Protection of Nuclear Materials, Facilities and Transport, paras. 34-36<sup>24</sup> and Opinion 2/91 on ILO Convention 170 on Chemicals at Work, para. 36<sup>25</sup>).<sup>26</sup>

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<sup>20</sup> [1996] ECR I-1469, para. 48.

<sup>21</sup> [1994] ECR I-5267.

<sup>22</sup> See European Commission, *General Report on the Activities of the European Union 1994*, pt. 990. The code has never been officially published but the text is cited in Part XVII of the "Description of the Request" ("Questions put by the Court to the Commission, the Council and the Member States and the answers given to those questions"), Opinion 1/94, at pp. 5365-5366.

<sup>23</sup> [1994] ECR I-5267.

<sup>24</sup> Ruling 1/78 of 14 November 1978, [1978] ECR 2151.

<sup>25</sup> Opinion 2/91 of 19 March 1993, (1993) *CMLRev* 800.

<sup>26</sup> Professor Jacques H.J. Bourgeois has been very critical in this respect: see Bourgeois, J. H. J. "The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession", (1995) 32 *CMLRev*, 763 at p. 785;

Where competence is shared between the EC and its Member States, both Member States and the EC are **obliged** to seek a common position. Coordination of their positions is indispensable to prevent inconsistencies or even mutual blockage within the framework of an international organization.<sup>27</sup> According to the ECJ, this requirement of unity in the international representation of the three Communities shows the importance of co-operation or close association between the Member States and the EC institutions in the negotiation or conclusion of agreements and in the fulfillment of commitments at the international level.<sup>28</sup> Community and Member States, since they have an obligation to co-operate, must attempt to organize harmoniously their coexistence in international organizations in which they share membership and competence, such as the WTO,<sup>29</sup> as stated in Opinion 2/91.<sup>30</sup>

As for the fulfillment of commitments at the international level, Opinion 1/94 (Re WTO Agreement)<sup>31</sup> describes how Community and Member States are each other's prisoners. The one cannot act without the other. Achieving a common position of Member States is a *sine qua non* for Community action.

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Bourgeois, J. H. J. "The Uruguay Round Results from a European Lawyers' Perspective: an Introduction" in Bourgeois, J. H. J. *et al.* (eds.) *The Uruguay Round Results. A European Lawyers' Perspective*, European University Press, 1995, p. 19. See also Kuijper, P. J. "The Conclusion and Implementation of the Uruguay Round Results by the European Community" (1995) 6 *EJIL* 222 at pp. 242-243; Hilf, M. "The ECJ's Opinion on the WTO –No Surprise, but Wise?", (1995) 6 *EJIL* 245 at p. 258; Dutheil de la Rochère, J. "L'ère des compétences partagées. À propos de l'étendue des compétences extérieures de la Communauté européenne", (1995) 390 *RMUE* 461 at p. 470; Maunu, A. "The Implied External Competence of the European Community After the ECJ Opinion 1/94 –Towards Coherence or Diversity?" (1995) 2 *LIEI* 115 at p. 126; Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 145.

<sup>27</sup> See Editorial Comments, "The Aftermath of Opinion 1/94 or how to ensure unity of representation for joint competencies", (1995) 32 *CMLRev*, p. 386.

<sup>28</sup> [1994] ECR I-5267.

<sup>29</sup> See Editorial Comments, "The Aftermath of Opinion 1/94 or how to ensure unity of representation for joint competencies", (1995) 32 *CMLRev*, p. 385.

<sup>30</sup> [1993] ECR I-1061, at para. 36.



This “duty to co-operate” is an obligation imposed on Member States and Community institutions under Community Law. Formerly, the repealed Article 116 EEC<sup>32</sup> was available for that purpose.<sup>33</sup> It obliged Member States to proceed within the framework of international organizations of an economic character on matters of particular interest to the common market only by common action. However, Article 116 EEC Treaty has been regrettably deleted at Maastricht. It had proven to be a useful legal basis for coordination of actions of Member States and the Community in the no-man’s-land of dubious demarcation between Community and national competencies, or where the exercise of these competencies was inextricably linked (for instance, the international commodities agreements in application of the so-called Proba 20).<sup>34</sup>

However, Article 116 EEC Treaty was not one of the most transparent provisions of the Treaty. Where the Community was not able to act because it was not a member of the relevant organization, Member States would have to act on its behalf, and the necessary Community action was decided on the basis of Article 133 TEC, not Article 116 EEC Treaty. There is a similar issue in Article 12 TEU in relation to matters falling within the scope of the Common Foreign and Security Policy and Article 33 TEU in relation to *common positions* in international organizations and at international conferences in various fields covered by Title VI of the TEU.<sup>35</sup>

With regard to Part II of this dissertation, an important issue to mention, in order

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<sup>31</sup> [1995] 1 CMLR 205 at para. 108.

<sup>32</sup> Hereinafter the repealed Article 116 EEC will be addressed as “Article 116 EEC.”

<sup>33</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719. The Treaty on European Union amended the EEC Treaty.

<sup>34</sup> *Ibid.*

to better understand the complexity of European integration, is the veto power assigned to EC Member States. It is worth mentioning the French policy of *chaise vide*, which was eventually reflected institutionally in the *Compromis de Luxembourg*. France, by refusing to participate in the EC decision-making process, effectively blocked a series of decisions.<sup>36</sup> The Single European Act of 1987, the Council practice of 1985 and *Maastricht* represent a reduction of Member State participation, by moving from unanimity to a qualified majority requirement. Weiler points out in his book *The Constitution of Europe* that EC Member States are less willing today to accept ERTA-type decisions by the ECJ.<sup>37</sup> In these decisions, EC Member States, by transferring sovereignty over a given issue to the EC, implicitly acknowledged that the EC can exercise sovereignty over the issue at an international level.<sup>38</sup>

Authors such as Weiler argue against the popular belief that the 1970s were nothing much to the history of European integration and everything started after *Cassis de Dijon*.<sup>39</sup> During that time, the ECJ was the most influential international/supranational court, the Commission was assuming its role of the engine of the integration process and the European Parliament was requesting more institutional powers. The Council found itself more and more restrained in the Community game, probably against the original design of some Member States who regarded the EU Council as an *ultima ratio*, a refuge

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<sup>35</sup> Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>36</sup> Mavroidis, P. "Lexcalibur: The House that Joe Built", *Columbia Journal of Transnational Law*, Vol. 38, 2000, Number 3, pp. 670-671.

<sup>37</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>38</sup> Mavroidis, P. "Lexcalibur: The House that Joe Built", *Columbia Journal of Transnational Law*, Vol. 38, 2000, Number 3, p. 671.

<sup>39</sup> Case 120/78 *REWE Central v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

of nationalism. However, the EC was established originally on an unquestionable transfer of sovereignty from Member States to the EC,<sup>40</sup> with only the doctrine of implied powers as a caveat. Provisions that do not specify exactly what has been transferred to the EC, such as Article 308 EC, nevertheless constitute an explicit limitation of national sovereignty.<sup>41</sup>

According to Weiler, Member States are not prepared to live in a world in which the Community assumes that it is competent. Proof competence is necessary from now on. Opinion 1/94 is a good example.<sup>42</sup> The EU Council challenged the Commission and requested that the Court establish a clear dividing line between the Community's and the Member States' competence with respect to trade liberalization for purposes of ratification and future negotiations. The outcome was a shock to many: the Commission's powers in the field of services and intellectual property rights were severely curtailed. Had the ECJ's interpretation of the ERTA doctrine been more expansive, it would have supported a more pro-Community view. In the post-Opinion 1/94 period, Member States have worked more closely together in international trade issues. There are signs that the Commission is more cautious now. A new code of conduct has evolved in this field, regulating the interaction between the Commission and EC Member States.<sup>43</sup>

The Community as a whole is greater than the sum of its parts. According to

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<sup>40</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585 is a clear example of transfer of sovereignty to the EC, although limited.

<sup>41</sup> Mavroidis, P. "Lexcalibur: The House that Joe Built", *Columbia Journal of Transnational Law*, Vol. 38, 2000, Number 3, p. 673.

<sup>42</sup> [1994] ECR I-5267.

Mavroidis, even Germany has much more weight as the EC's leading economy than it would by itself in international economic relations.<sup>44</sup> Even when EC Member States are loyal to the European integration process, they will continue to call into question the precise limits of Community competence in a world of qualified majorities. In this sense, the ECJ has an important role to play.<sup>45</sup>

#### IV. Methodology and Sources

For the conduction of this research, I shall make an analysis of the Treaties of the European Communities and the case-law of the European Court of Justice (mainly the analysis of Opinion 1/94 and Case C-53/96 *Hermès International v FHT Marketing*). Later on the dissertation we shall see how much power was given by the ECJ to the Member States in mixed agreements. We shall see how this was a surprise mainly to national Administrations, who were not aware of the degree of their competencies on these issues. The main articles, in the case of the Treaty of Rome, dealing with the External Relations of the Union are Article 111 (repealed), Article 133, Article 300 and Article 310. As for the legal personality of the EU, we shall examine Article 24 TEU. In any case, political aspects (which will also be taken into consideration) have a vital importance

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<sup>43</sup> Mavroidis, P. "Lexcalibur: The House that Joe Built", *Columbia Journal of Transnational Law*, Vol. 38, 2000, Number 3, pp. 673-74.

<sup>44</sup> *Ibid.* at p. 674.

<sup>45</sup> A good example is the experience in banning cigarette advertising. See 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, pp. 286-323.

in this issue.<sup>46</sup>

Primary sources such as *The Annotated Summary of Agreements linking the Communities with Non-Member countries*, together with *The Participation of the European Communities in Multilateral Agreements*, published by the European Commission, Directorate General for External Relations, DG 1A, Brussels, in June 1997, will enable me to have a compendium of the bilateral and multilateral mixed agreements signed within the framework of the European Union. Case-law of the European Court of Justice (ECJ), privileged material of legal analysis, was at first unusual and, now that it exists, it has become controversial. Opinions from the European Court of Justice will be of great value for the interpretation of the Treaties. Interviews with desk officials (negotiators) from national delegations (COREPER and working groups) and from the European Commission (Directorate General for External Relations) as well as from the Council will also be part of primary sources.

The consultation of official and working documents from EU national parliaments and EC institutions, such as the Council's General Secretariat, together with conclusions of the European Council, speeches and statements from EU commissioners and national politicians will also be taken into consideration. As for other sources, secondary source literature specialised in the External Relations of the Union as well as articles from newspapers such as *Financial Times*, *The Times* and *International Herald Tribune* will also be a support for this dissertation.

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<sup>46</sup> See Louis, J.-V., "Preface" in Flaesch-Mougin, C. *Les Accords Externes de la CEE. Essai d'une*

## V. The Approach

There are various ways of looking at the issue of mixed agreements.<sup>47</sup> There is the perspective of third countries. Here, analyses such as the fact that third countries have entered into an increasing number of agreements with the European Community without the participation of its Member States will be a centre of attraction. According to Article 300 (2) EC, European Community agreements with third countries are binding on the European Community institutions as well as on Member States. As for implementation, measures are to be adopted either by the European Community institutions or by Member States. I shall see to what extent third countries are less likely to insist on mixed agreements when they see that the European Community has the means to ensure compliance with European Community commitments in issues that are to be taken by the Member States.

A second perspective is the political science one. This would be the approach of a federal system, proposed by Joseph Weiler.<sup>48</sup>

The third perspective is a politico-institutional one. The mixed agreements preserve the power and legal capacity of the Member States in order to protect their own

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*Typologie*, Editions de l'Universite de Bruxelles, 1980, p. 11.

<sup>47</sup> See Bourgeois, J.H.J. "Mixed Agreements: A New Approach?" in Bourgeois, J.H.J., Dewost, J. & Gaiffe, M. *La Communauté européenne et les accords mixtes, Quelles perspectives?*, Presses Interuniversitaires Européennes, 1997, pp. 83-91.

<sup>48</sup> See Weiler, J. H. H. "The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle", in O'Keeffe, D & Schermers, M., *Mixed Agreements*, Deventer, Leiden, 1983, p. 35-83 at 80.

interests against qualified majority decisions by the Council of Ministers. Mixed agreements also allow Member States to better control the Commission in its negotiating role.

A fourth perspective is based on positive law. Therefore, it allows a discussion from a common basis about the law as it stands. Florence Zampini gives a clear analysis of it.

The fifth perspective is the efficiency perspective, which advocates extending the concept to other external policy areas and leaving on one side the mixed agreements formula.

It should also be useful to see every single approach and study their strengths and weaknesses. Main actors such as interest groups and their influence on the European Community international relations will be an important part of this research. To study the European Union actors' interests at 3 levels (international, Community and national level), the national bureaucratic interest in Article 133 Committee, Comitology, how control can be exercised, theories on supranationalism, issues of competence, i.e. who sits on the negotiations are things at which I will be looking. As for Comitology, it is a method of implementing legislation in the European Union. It describes the practice of delegating the implementation of decisions reached by the European Commission to committees composed of officials from the Member States. The Commission is responsible for carrying out decisions adopted by the Council of Ministers, the European Union's main legislative body, and has some legislative powers of its own.<sup>49</sup>

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<sup>49</sup> Drost, H. *What's what and who's who in Europe*, Cassell, 1995.





## **CHAPTER I: THE EUROPEAN COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM**

- I. Introduction**
- II. The European Community in the World Trade Organization**
- III. The Problem of the EC in its External Trade Relations**
  - A.- The “Duty of close Co-operation” in the External Relations of the Communities**
    - A.1.- Community Co-ordination**
    - A.2.- Close Co-operation and Unity**
  - B.- Doctrine of the French Conseil Constitutionnel**
- IV. Allocation of Competencies between the EC and its Member States in EC Trade Policy**

### **I. Introduction**

This chapter aims at giving an insight to the EC’s position within GATT and the WTO generally. In section II, we will see the general view that the EC’s specific problems and challenges for the ECJ are related on the one hand to the EC’s position in the WTO. In this sense, the opinion of Advocate General Tesauro with regard to Case *Hermès International v FHT Marketing Choice* is helpful for understanding the unitary character of the EC external trade relations: “The Community legal system is characterized by the simultaneous application of provisions of various origins, international, Community and

national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system.”<sup>1</sup>

Section III shows more specifically the problem that the EC faces in its external trade relations. The so-called “duty of close cooperation” and unity in the Communities’ external relations will be analyzed.

## II. The European Community in the World Trade Organization

When looking at the history of the EC External Trade relations, one sees that the EC was not a contracting party to the General Agreement on Tariffs and Trade 1947 (GATT). However, the EC Member States were full members of such institution. Over the years, the EC has become full member and a contracting party to the GATT/WTO. Accession protocols and trade agreements negotiated in the GATT framework provided in their final provisions that the agreements were open for acceptance by contracting parties to the GATT and by the EC. In addition, the substantive and procedural provisions of these Agreements treat the EC like a GATT contracting party.”<sup>2</sup>

Furthermore, since 1970, most agreements negotiated in the framework of GATT were accepted by the EC alone, without acceptance by EC Member States. The only exception is two agreements at the end of the Tokyo Round of multilateral trade

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<sup>1</sup> Tesaro AG in Case C-53/96 *Hermès International v FHT Marketing Choice BV*, [1998] ECR I-3603, para. 21.

<sup>2</sup> See Bourgeois, J.H.J. “The European Court of Justice and the WTO: Problems and Challenges” in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 72.

negotiations and the part of the Tariff Protocol relating to ECSC products.<sup>3</sup> The EC exercised all rights and fulfilled almost all obligations under GATT law in its own name like a GATT contracting party.<sup>4</sup> Since the 1960s all GATT contracting parties had accepted such exercise of rights and fulfillment of obligations by the EC and had asserted their own GATT rights, even in dispute settlement proceedings relating to measures of individual EC Member States, almost always against the EC.<sup>5</sup> The EC has replaced, with the consent of other GATT contracting parties, its Member States as bearers of rights and obligations under the GATT.

During the Uruguay Round of Multilateral Trade negotiations, the EC was faced with the issue of the scope of its authority under the EC Treaty in the field of international economic relations, particularly with respect to trade in services and intellectual property rights. Negotiations were conducted according to the normal procedures for GATT negotiations, albeit that the European Commission negotiated on behalf of both the EC and its Member States.<sup>6</sup> By creating the WTO as an international organization, formal international consequences emerged in several respects: first of all, the fact that the EC would become a member of the WTO; second of all, the EC would replace the EC Member States.

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<sup>3</sup> See Bourgeois, J.H.J. "The Tokyo Round Agreements on Technical Barriers and on Government Procurement", 19 CML Rev.(1982) 5 at 22.

<sup>4</sup> See Bourgeois, J.H.J. "The European Court of Justice and the WTO: Problems and Challenges" in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 72.

<sup>5</sup> See Petersmann, E.U. "The EEC as a GATT Member –Legal Conflicts between GATT law and European Community Law" in Hilf, M., Jacobs, F.G. & Petersmann, E.U. *The European Community and GATT*, (Kluwer, Deventer, 1986), 23 at 37-8.

<sup>6</sup> See van den Bossche, P. "The European Community and the Uruguay Round Agreements" in Jackson, J.H. & Sykes, A. (eds.) *Implementing the Uruguay Round*, Clarendon Press, Oxford, 1997, 23 at 56-7.

With regard to the latter point, two constraints of political nature led the European Commission not to stand up. The first constraint was the fact that the matter was discussed in a meeting of the EU Council in November 1993, “after the Maastricht Treaty had entered into effect with some difficulty and it was thought wise not to push this issue at that stage.”<sup>7</sup> The second political constraint was that around this time, the Council had not yet approved the Uruguay Round and Sir Leon Brittan thought it was preferable not to put on the table another contentious issue. As a result was the creation of Article XI of the Marrakesh Agreement establishing the WTO, which states that the contracting parties to GATT 1947 and the European Communities shall become original Members of the WTO.<sup>8</sup>

This dual membership by the EC and its Member States of the WTO may be an open door for abuse by other WTO members and a handicap for both the EC and its Member States. The fact that the EC Member States are WTO Members together with the EC poses questions in relation to the position of the ECJ to the WTO law. As far as GATT 1947 was concerned, and as a result of the substitution of the EC for the Member States in relation to commitments under GATT, the ECJ would have the final word on the interpretation of the GATT provisions, even in relation to the compatibility of Member States legislation with GATT.<sup>9</sup> However, this argument is no longer possible. In accordance with Article XI of the Agreement establishing the WTO, both the EC and its Member States signed the Final Act.

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<sup>7</sup> See Bourgeois, J.H.J. “The European Court of Justice and the WTO: Problems and Challenges” in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 72.

<sup>8</sup> WTO, *The Uruguay Round Results. The Legal Texts*. (Geneva, 1995), 6.

<sup>9</sup> See *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana (SPI) and SpA Michelin*

The ECJ has stated that the division of powers between the EC and its Member States is a domestic question in which third parties have no need to intervene.<sup>10</sup> In the minutes of the Council meeting 7/8 March 1994, the Commission relied on this argument by saying that:

The Final Act...and the Agreements thereto fall exclusively within the competence of the European Community.”<sup>11</sup>

This argument does not allow the *a sensu contrario* inference that because the Member States and the EC are formally WTO Members, it is irrelevant for the division of powers within the EC legal system. On the contrary, the Agreement establishing the WTO and the agreements that form part of it were approved by the Council on behalf of the EC expressly “as regards matters within its competence.”<sup>12</sup> Therefore, the need to have a useful *raison d’être* to the joint WTO membership of the EC and the Member States is inevitable. It must have something to do with the division of powers within the EC.

### III. The Problem of the EC in its External Trade Relations

In this subtitle we shall see the view of the European Court of Justice with regard to agreements where some of their provisions are EC competence, while others remain as competence of the Member States. Unfortunately, although the Court deals with the

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*Italiana SAMI*) [1983] ECR 801, paras 15 and 17.

<sup>10</sup> Ruling 1/78 [1978] ECR 2151, para. 35.

<sup>11</sup> Cited in the ECJ Opinion 1/94 [1994] ECR I-5267, para. 5.

issue throughout its case law, it does not say how to solve the problem. The view of a national Court (the French Conseil Constitutionnel) on this matter shall be analyzed and will help us understand the practice of this issue.

#### A.- The “Duty of close Co-operation” in the External Relations of the Communities

As mentioned earlier, the notion of European identity has not yet coalesced to the point that it is possible to speak of a common good for the entire EU. For this reason, the European Court of Justice, in its Opinion 1/94 upon the WTO,<sup>13</sup> emphasizes the duty of co-operation between the Member States and the Community institutions. The European Court of Justice stated that:

“...it is essential to ensure close co-operation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation to co-operate flows from requirement of unity in the international representation of the Community...”<sup>14</sup>

Since the essence of mixed agreements<sup>15</sup> is that some of their provisions fall within the competence of the Community, while others fall within the competence of the Member States, it is hard to precisely divide powers between the Member States and the Communities within an agreement. The European Court of Justice has discouraged

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<sup>12</sup> Council Decision of 22 December 1998 (OJ 1994 L 336/1).

<sup>13</sup> Opinion 1/94, competence of the Community to conclude international agreements concerning services and intellectual property (15 November 1994), [1994] ECR I-5267.

<sup>14</sup> Opinion 1/94, para. 108.

<sup>15</sup> Let us remember that a mixed agreement is an agreement signed by one, more than one or all the 15 Member States of the EU and the European Community, on the European side, with a third party. For a more detailed definition, see *infra* chapter 3.

attempts to allocate competence between the Member States and the Community, Ruling 1/78.<sup>16</sup> Instead, when considering issues dealing with mixed agreements, the Court has emphasized the need for common action, or close co-operation, between the Community and its Member States “in close association” with each other in the negotiation and implementation of mixed agreements.<sup>17</sup> The duty of co-operation, which follows from what the Court calls the “requirement of unity in the international representation of the Community,”<sup>18</sup> is one of the fundamental principles of the external relations of the Communities.

As for the origins of the duty of close co-operation, they may be tracked back to the Treaties themselves, particularly to the duty of loyal co-operation derived by the Court from Articles 86 ECSC, 192 Euratom and 10 EC.<sup>19</sup> A similar duty is contained in Article 3 TEU, where the Council and the Commission are responsible for ensuring the consistency of the external activities of the Union as a whole in the context of its external relations, security, economic and development policies. This duty applies as much to mixed agreements as to any other area of the Union’s activity.

With regard to mixed agreements, the duty of close co-operation first emerged in Ruling 1/78. The Court had to adjudicate on the division of powers between Euratom and the Member States with regard to a draft Convention on the Physical Protection of Nuclear Materials.<sup>20</sup> The Court said that “the draft convention...can be implemented as regards the Community only by means of a close association between the institutions of

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<sup>16</sup> Re Draft Convention on the Physical Protection of Nuclear Materials) at paragraph 35 (in relation to third parties, [1978] ECR 2151.

<sup>17</sup> O’Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983.

<sup>18</sup> Ruling 1/78, paragraphs 34-36 as well as Opinion 2/91, [1993] ECR I-1061, at para. 5.

<sup>19</sup> For further discussion on the duty of loyal co-operation, see Kapteyn, P. J. G. & VerLoren van Themaat, P. *Introduction to the Law of the European Communities*, Kluwer, 1982, chapter III, 5.2.

the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into”.<sup>21</sup> Regarding the implementation of the convention, the Court said that the Community would implement measures falling within its competence, the Member States would implement measures falling within their competence, and the Council would arrange for coordination of the actions of each.<sup>22</sup>

The Court had to face an agreement which covered matters falling within the exclusive competence of the Community, matters where both the Community and its Member States shared competence, and matters within the competence of the Member States in Opinion 2/91 (Re ILO Convention 170).<sup>23</sup> The Court said as follows:

At paragraphs 34 to 36 in Ruling 1/78, the Court pointed out that when it appears that the subject matter of an agreement falls in part within the competence of the Community and in part within the competence of the Member States, 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 fulfillment of the obligations entered into. This duty of co-operation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community.

(37) In this case, cooperation between the Community and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO Convention and must do so through the medium of the Member States.

(38) It is therefore for the Community institutions and the Member States to take all the measures necessary so as best to ensure such co-operation both in the procedure of submission to the competent authority<sup>24</sup> and ratification of Convention 170 and in the implementation of commitments resulting from that Convention.<sup>25</sup>

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<sup>20</sup> Ruling 1/78, [1978] ECR 2151.

<sup>21</sup> *Ibid.*, at para. 34.

<sup>22</sup> *Ibid.*, at para. 36.

<sup>23</sup> [1993] ECR I-1061.

<sup>24</sup> i.e. in the ILO.

<sup>25</sup> Opinion 2/91, paragraphs 36 ff, [1993] ECR I-1061.



The agreement under consideration in Opinion 2/91 was not a mixed agreement *stricto sensu*. The Community could not formally become a party to it.<sup>26</sup> This limitation may stem from ILO provisions restricting membership and participation only to States. However, the agreement did involve matters within the competence of the Community and of the Member States.

The issue of co-operation between the Member States and the Community institutions was raised even more acutely in Opinion 1/94. The Commission raised the issue of potential problems regarding the administration of the various agreements that were part of the WTO package, if the Community and the Member States were to share competence to participate in the conclusion of the GATS and TRIPS agreements. According to the Commission, the Community's unity of action *vis-à-vis* the rest of the world would be undermined and its negotiating power greatly weakened if the Member States were allowed to express their own views in the WTO, or if the Community position had to always be adopted by consensus.<sup>27</sup> According to the Commission, the Community should have sole responsibility for conclusion of the agreement.

The Court responded to the Commission's concern by saying:

first, that any problems which may arise in implementation of the WTO Agreement and its annexes as regards the co-ordination necessary to ensure unity of action where the Community and the Member States participate jointly cannot modify the answer to the question of competence, that being a prior issue...

(108) Next, where it is apparent that the subject matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to

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<sup>26</sup> Opinion 2/91, paragraph 1, [1993] ECR I-1061.

<sup>27</sup> Bourgeois, J. H. J. "The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession", *Common Market Law Review* 32, 1995, pp. 763-787.

ensure close co-operation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation flows from the requirement of unity in the international representation of the Community...

(109) The duty to co-operate is all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which are inextricably interlinked, and in view of the cross retaliation measures established by the Dispute Settlement Understanding.<sup>28</sup>

Therefore, the basic principle is that in all aspects of the negotiation, conclusion and implementation of a mixed agreement, the Member States and the Community are required to co-operate closely and act in close association. This duty of co-operation applies to agreements involving any of the Communities, and is binding on the institutions of the Community as well as the Member States.

#### A.1.- Community Co-ordination

Both Member States and the EC institutions are obliged to inform each other of their positions, to seek to reach a common view on matters that fall within the scope of a mixed agreement, and to proceed by common action within the framework of international bodies.<sup>29</sup> This involves meetings between the representatives of the Member States and the institutions (usually the Commission) to seek a common position. These meetings are called Community co-ordination and take place within the framework of the Council, either in Brussels or an international forum in which the Community and the Member States are participants. The latter is known as *sur place*

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<sup>28</sup> One of the Agreements that make up the WTO package.

<sup>29</sup> O'Keeffe, D. "Community and Member State Competence in External Relations Agreements of the EU", *European Foreign Affairs Review* 4, 1999, pp. 7-36.

coordination. Community co-ordination in the negotiation of international agreements is well established in practice. There are informal understandings between the Commission and the Council. For example, there are co-ordination arrangements in international commodity agreements and in international organizations, particularly in the FAO and the UN.

#### A.2.- Close Co-operation and Unity

Trying to reach an agreement on a common position will inevitably lead to difficulties and disagreements. For example, a Member State may wish to take a position different from that of the Community and its partners during the negotiation of an agreement. An agreement also may not be of equal relevance among all the Member States. Therefore, the question arises whether the duty of cooperation requires all the Member States to reach a common position or just to use their best effort to reach such a position. In the end, each Member State will have to defend its own interests. It is important to distinguish between failure to agree on a position on matters falling within the exclusive competence of the EC, and failure to agree on a common position on matters where the Community and Member States share competencies. With regard to matters exclusively within the Member State competence, the EC Treaties have in principle nothing to say (although the provisions of Titles V and VI TEU may be relevant).<sup>30</sup>

In those cases where a common position between the Community and the Member States is not possible, Member States will be able to express their own national

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<sup>30</sup> Pescatore, P. "Opinion 1/94 on "Conclusion" of the WTO Agreement: is there an Escape from a

views on matters within national competence and exercise their national powers. Support for this proposition may be derived from the practice of the EU Council. In any case, there is always a duty to search for a common position. However, if a common position cannot be reached, Member States have the residual right to express national positions, as can be seen from the informal co-ordination arrangements agreed on for Community and Member State participation in organizations such as the FAO. In addition, there could be cases in which a Member State might claim that its participation in an agreement was contrary to its national interests or for some other reason undesirable or even impossible.

#### B.- Doctrine of the French Conseil Constitutionnel

Ruling Number 37-394 DC, of December 31, 1997, of the French Conseil Constitutionnel, on the required Constitutional revisions for ratification of the Treaty of Amsterdam,<sup>31</sup> illustrates some of the problems mentioned above. On one hand, the ruling corrects Article 88-1 of the French Constitution from the constitutional Act of June 25, 1992, on the division of competencies between the Community and the Member States. By that provision, the Community will only be a simple mechanism to “exercise in common” certain Member States’ competencies, and the French Conseil Constitutionnel refers consistently to the “transfer of competencies” from the French State to the Community.<sup>32</sup> On the other hand, the Conseil Constitutionnel continues to

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programmed Disaster?”, *Common Market Law Review* 36, 1999, pp. 387-405.

<sup>31</sup> Official Journal of the French Republic of 3 January 1998, p. 165.

<sup>32</sup> See “Appendice III: Deux Commentaires a la Doctrine du Conseil Constitutionnel Francais” in Torrent,

develop the thesis by which “the necessary conditions to exercise national sovereignty” are not affected by the transfer of competencies itself but by the types of exercise of these competencies. This would be affected if the Council adopted decisions by qualified majority but not if unanimity was used. This thesis had already been introduced by the Conseil Constitutionnel in its previous Ruling on the Treaty of Maastricht.

There are three problems with this thesis. First of all, Ruling Number 37-394 DC of December 31, 1997 of the French Conseil Constitutionnel is relevant to the external economic relations of the EC because it tries to show that the Community will be a mechanism used to obtain a common position between the EC and its Member States in certain domains. The ruling states that there will be a transfer of competencies from the national to the Community level. Secondly, had the European Court of Justice, in its Opinion 1/94 on the division of competencies between the Community and the Member States regarding the agreements from the negotiations in the Uruguay Round, taken a position stating that the exclusive EC competence covered the integrity of the agreements, the consequence for the French State would have been that it would not have had competencies. Therefore, it would not have been able to become a member of the World Trade Organization.

Finally, the “constitutional” problem is that of the existence, the nature (whether exclusive or non-exclusive) and the limits of EC competencies and not of the exercise of EC competencies. The exercise of EC competencies is primarily a political problem, in which the juridical-constitutional apriorisms are often bad advisors. As Professor

Torrent points out, the requirement of unanimity in the Council is seen by some as a guarantee of the ability to block the action of a majority that is against the interest of the French Government.<sup>33</sup> However, the example could be reversed: unanimity allows the representative of a Government of any other Member State to block the action of a majority where the French Government participates.

In the case of EC exclusive competencies, blocking Community action cannot be compensated for by an action at the national level. In such a case, preference for unanimity or qualified majority depends on seeing if in the near future it will be more beneficial to “block others” (by choosing inaction) or to run the risk of “being blocked by others” (and being condemned to inaction).<sup>34</sup> This is a question of a political nature and not a juridical-constitutional question.

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<<<http://www.ub.es/dpecp/ep/livreTorrent.html>>>, 1998, chapter 1.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

## **CHAPTER II: HISTORY AND EVOLUTION OF EUROPEAN COMMUNITY EXTERNAL TRADE RELATIONS**

- I. Introduction**
- II. 1952-1958: The ECSC as a Pioneer**
- III. 1958-1967: The Three Communities Working in Parallel**
  - A.- Euratom in the External Policies of the Communities**
  - B.- The Emergence of the EEC as a Major Negotiating Partner in World Affairs**
- IV. 1967-1977: The Period of the “Merger”, the End of the Transitional Period of the EEC and the Transitional Period after the First Enlargement**
  - A.- A Note on Commercial Policy**
  - B.- External Political Power**
- V. Recent Developments of the EU in International Affairs**

### **I. Introduction**

In this chapter, the evolution of the external trade relations of the EC shall be analyzed from its starting days. The EC has become an important actor on the international scene, and since the 1970s, its external relations have been growing both in number of agreements signed and domains of participation. The European Communities have participated in an important number of multilateral conventions within the framework of the international or regional organizations, and are increasingly present in world affairs. In the context of multilateral relations, they have a growing role.<sup>1</sup>

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<sup>1</sup> European Commission, *Participation des Communautés Européennes aux Accords Multilareaux*, Direction General I A, 1997, Introduction.

An important part of this chapter is devoted to a historic analysis of Article 133 EC.<sup>2</sup> We will divide this chapter into different periods of the history of the European Community. We begin with the period when the new entities called the *European Community* started to find their way in the complex world of international relations, with a starting date of 1952 (section II). The next period (1958-1967) is the time in which the three Communities worked in parallel (section III) and the EEC was seen as a major negotiating power in world affairs. 1967-1977 is the period of the merger of the Communities (section IV). Next, there is a quick overview of the evolution of the external relations, and finally, we will analyze the most recent developments of the EU in the international scenario (section V).

## II. 1952-1958: The ECSC as a Pioneer

The powers attributed to the European Coal and Steel Community (ECSC), specifically to its High Authority in the field of the external relations, were limited to the economic sectors covered by the Treaty of Paris. These powers were also limited in nature. Articles 71-75 ECSC<sup>3</sup> merely grant the institutions to have recourse to specific interventions to avoid undesirable situations. The founders of the ECSC paid attention to its relations with the rest of the world, the Western world in particular. Jean Monnet, the first president of the ECSC High Authority, never considered the refusal of the UK to join the ECSC as a final “no” to the concept of European integration. On the contrary, he set out to establish a close working relationship with

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<sup>2</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7,



the UK Government and rejected any kind of distinction between members and non-members, who were called “third countries.”<sup>4</sup>

During this period, there were questions as to the right of the High Authority to receive foreign envoys.<sup>5</sup> Days after the High Authority started its work, UK and US diplomatic missions were accredited to the ECSC, and these were later followed by others, including Austrian, Swiss, Swedish, and Danish missions. However, by the autumn of 1952, a problem confronted the ECSC, the UK Government was tabling the so-called “Edenplan”, by which the Council of Ministers and the Common Assembly of the ECSC would function as a kind of inner circle of the Committee of Ministers and the Consultative Assembly of the Council of Europe. It had to be decided which institution would be entitled to deal with the UK Government and with the Council of Europe on these issues.<sup>6</sup> Since the Treaty did not deal with this problem, it was necessary to obtain advice from three prominent international lawyers, Maître Reuter, Professor Ophüls and Professor Rossi. They concluded that the High Authority would conduct the negotiations on these matters when referring to the institutional organization of the ECSC.

The US Government’s invitation to the High Authority to visit Washington in the summer of 1953 was another event that contributed to the establishment of the ECSC’s international position. The then-President of the High Authority and two of his advisers met with President Eisenhower and members of his cabinet, as well as

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1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>3</sup> The ECSC was created by the Treaty of Paris, 1952.

<sup>4</sup> Wellenstein, E. “Twenty-Five Years of European Community External Relations,” CMLRev 16 (1979), p. 408.

<sup>5</sup> Castanos de Medicis, S. *Principes et Problèmes de Relations Internationales Européennes*, Editions A. Pedone, 1965.

with influential members of Congress. The US administration was already supporting European efforts towards integrated policies, of which the ECSC was the first example.<sup>7</sup> During this period, the High Authority also negotiated the Association Agreement of 1954 with the UK, and other important arrangements with Austria, Switzerland<sup>8</sup> and Sweden on various issues relating to coal and steel markets.

From there, the EC continued to increase its political efforts. With regard to external representation, the High Authority opened a delegation at the ambassadorial level in London, when the “Association Agreement” was concluded with the UK, set up an Information Office in Washington, and established a liaison office for Latin America in Santiago, Chile.

### **III. 1958-1967: The Three Communities Working in Parallel**

#### **A.- Euratom in the External Policies of the Communities**

The second of the Treaties of Rome of 1957, which established the European Atomic Energy Community (Euratom), played a vital role in the development of the Communities’ external relations. The Euratom Treaty contains the most comprehensive provisions for foreign relations of the three treaties setting up the

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<sup>6</sup> Feld, W. *The European Community in World Affairs. Economic Power and Political Influence*, Alfred Publishing Co., Inc., 1976.

<sup>7</sup> Weidenfeld, W. *America and Europe: Is the Break Inevitable?* Bertelsmann Foundation Publishers, 1996.

<sup>8</sup> Agreement on the introduction of international railway tariffs for the carriage of coal through Swiss territory, OJ ESCS 17/57, p. 223.

European Communities, including the EEC Treaty.<sup>9</sup> The Euratom Treaty reads as follows:

The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State.<sup>10</sup>

Following the Directives given by the Council, it is the Commission which negotiates and concludes such agreements today, except those which can be implemented without the Council in the framework of the existing budget. However, under the EEC Treaty, it is the Council that concludes such agreements. Additional provisions address mixed agreements and limitations on the treaty-making power of the Member States.

In the early years of Euratom, a number of important agreements were signed concerning the supply of enriched uranium, with the U.S. in 1959 and with Canada.<sup>11</sup> For example, the Agreement between Canada and the European Atomic Energy Community (EAEC) was signed for co-operation in the peaceful uses of atomic energy.<sup>12</sup> In the implementation of these agreements, security plays an important role. It was the preservation of the control system at the Community level that necessitated successful negotiations during the late 1960s and early 1970s with the International Atomic Energy Agency (IAEA) in Vienna and Brussels.

An example is the Agreement between Belgium, Denmark, the Federal Republic of Germany, Ireland, the Italian Republic, Luxembourg, the Netherlands,

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<sup>9</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>10</sup> See Chapter X on External Relations, Article 101, para. 1 of the Euratom Treaty.

<sup>11</sup> Henig, S. *External Relations of the European Community. Associations and Trade Agreements*, Chatham House: PEP, 1971.

the European Community for Atomic Energy and the IAEA in application of paragraphs 1 and 4 of Article III of the Treaty on Non-Proliferation of Nuclear Weapons.<sup>13</sup> The implementation of the Treaty on the Non-Proliferation of Nuclear Weapons required control arrangements which came into existence in the so-called “Verification Agreement” between Euratom, some of its Member States and the IAEA. It was a mixed agreement based on Art. 102 of the Treaty establishing the European Atomic Energy Community.<sup>14</sup> The provisions of the Euratom Treaty as well as the main agreements concluded in the late 1950s on that basis still had importance in the late 1970s for the external policy of the Community.<sup>15</sup>

#### B.- The Emergence of the EEC as a Major Negotiating Partner in World Affairs<sup>16</sup>

In the ECSC Treaty, the idea of a common market is based on “harmonized” tariffs, where the tariffs of Member States may not differ more than the cost of transport between their territories.<sup>17</sup> However, the EEC, as a customs union, has a full-fledged *common tariff*<sup>18</sup> and a *common commercial policy*,<sup>19</sup> as well as provisions concerning negotiations of the common tariff and common commercial policy with third countries. After the transitional period, decisions on these matters are taken by the

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<sup>12</sup> OJ L 60/59, p. 1165.

<sup>13</sup> OJ L 51 of 22/2/78, p. 1, (78/164/EURATOM).

<sup>14</sup> Smith, M. & Woolcock, S. *The United States and the European Community in a Transformed World*, The Royal Institute of International Affairs, 1993.

<sup>15</sup> Ibid.

<sup>16</sup> Piening, C. *Global Europe. The European Union in World Affairs*, Lynne Rienner Publishers, 1997.

<sup>17</sup> Völker, E. L. M. *Barriers to External and Internal Community Trade*, Kluwer, 1993.

<sup>18</sup> Article 131, ex 19 & 111 of the Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

Council and proposed by the Commission by qualified majority, though in the beginning they had to be unanimous. Another important provision of the EEC Treaty is ex-Article 116, which reads as follows:

From the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organisations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action.

During the transitional period, Member States shall consult each other for the purpose of concerting the action they take and adopting as far as possible a uniform attitude.<sup>20</sup>

Ex-Article 116<sup>21</sup> obliges Member States to act in concert when matters of particular interest to the common market (after the transitional period) arise in international economic organizations.<sup>22</sup> Article 300 EC is a general provision concerning the procedures for negotiation and conclusion of agreements with third-countries or with international organizations, where the Commission acts as the negotiator and the Council as the “concluder”.<sup>23</sup> It opens up the possibility of asking for a preliminary opinion from the ECJ. Ex-article 237 EC<sup>24</sup> concerning enlargement

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<sup>19</sup> Articles 131 & 133 of the Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>20</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>21</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>22</sup> Cerexhe, E. *Le Droit Euopeen: Les Objectifs et les Institutions*, Nauwelaerts, 1989.

<sup>23</sup> Craig, P. & Harlow, C. (eds.) *Lawmaking in the European Union*, Kluwer Law International, 1998.

<sup>24</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

of the Community, and Article 310 EC,<sup>25</sup> concerning “associations”, are both characterized by mutual rights and duties, common actions and special procedures.<sup>26</sup>

What characterizes the EEC Treaty is its wide coverage of both the range of products and various policies. Under the EEC Treaty, the institutions can create new policies. Even before the merger of the Councils and Commissions of the three Communities in 1967, the world viewed the EEC as a general integrative undertaking, able to use political weight to solve problems.<sup>27</sup> Euratom alone would not have had the strength to convey the same political message. However, the EEC, with Euratom as a component, had a considerable impact on world affairs.<sup>28</sup> During this period, third countries gained interest in joining the EEC. Greece was the first to ask for an association agreement, with an intention of membership. Then came Turkey,<sup>29</sup> and Israel also applied.

There were also those who tried to neutralize what they saw as the potential negative effects of these new Communities on their own position. The UK and other European States worked together for the creation of a free trade area within the framework of OEEC. This failed, and so the creation of a smaller free trade area (European Free Trade Association [EFTA]) came into existence. There were also those countries that supported the process of Community construction from without.<sup>30</sup> In this respect, the United States considered the process a major

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<sup>25</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>26</sup> Craig, P. & de Burca, G. (eds.) *The Evolution of EU Law*, Oxford University Press, 1999.

<sup>27</sup> Hilf, M., Jacobs, F. G. & Petersmann, E. (eds.) *The European Community and GATT* Kluwer Law and Taxation Publishers, 1986.

<sup>28</sup> Piening, C. *Global Europe. The European Union in World Affairs*, Lynne Rienner Publishers, 1997.

<sup>29</sup> Agreement establishing an Association between the European Economic Community and Turkey, OJ No 217 of 29 December 1964, pp. 3685 and 3705.

<sup>30</sup> Stingelin, P. *The European Community and the Outsiders*, Longman Canada Limited, 1973.

contribution to the stability and prosperity of the world. Finally, there were those like the former USSR who condemned this revival of European dynamism as detrimental to the peaceful coexistence of sovereign nations.<sup>31</sup>

Before the Treaties of Rome were ratified, the then six Member States had to prepare for negotiations within the GATT framework.<sup>32</sup> The EEC was quickly engaged in various negotiations, and the implementation of the transitional provisions of the Treaty required enormous efforts from the Institutions, which also had to deal with proposals from outside the EEC. A few years later, among these proposals were four applications for membership, three from the group that had previously formed the European Free Trade Association, and Ireland. This intense international activity during the first years of the EEC was focused on the common external tariff, which became gradually applicable over the twelve years of the transitional period. Ex-Article 111 of the Treaty<sup>33</sup> gave the Community the express task of negotiating this common tariff. Concessions on future common customs duties of the single market also provoked important offers from the US.<sup>34</sup> The replacement of the Member States by the European Economic Community facilitated reductions of trade barriers.

From the perspective of international economic relations, perhaps the most interesting arrangements made by the High Authority during its period of independent activity were the successful consultations with Japan about the situation

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<sup>31</sup> *Ibid.*

<sup>32</sup> 61 Stat. A3, TIAS No. 1700, 55 UNTS 187.

<sup>33</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>34</sup> Wellenstein, E. "Twenty-Five Years of European Community External Relations," CMLRev 16 (1979), p. 413.

in the world steel market in the early 1960s. This was before the merger of the EEC and Euratom Commissions in 1967. Around 1964, the steel market was already going through a difficult period, with risks of dangerous protectionist reactions coming from the US.<sup>35</sup> During the late 1950s and early 1960s, the specific powers of the High Authority in the field of commercial policy were first used in practice.<sup>36</sup>

#### **IV. 1967-1977: The Period of the “Merger”, the End of the Transitional Period of the EEC and the Transitional Period After the First Enlargement**

The successful participation of the EEC in the greatest multilateral trade negotiations of the time, the Kennedy Round of trade negotiations from 1963-1967, gave the EEC a very strong position in the international fora. The EC was the first major trading entity in the Western world to implement the proposals for the introduction of generalized preferences adopted in 1968 at UNCTAD II<sup>37</sup> in New Delhi. This was also the period in which the executive institutions of the three Communities were merged into a single Commission and a single Council (1967). With the end of the transitional period in 1970, these merged institutions would become responsible for the common commercial policy.

Before the merger of the executives mentioned above, the EC was involved in a series of individual and collective negotiations.<sup>38</sup> For example, the Association

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<sup>35</sup> Woolcock, S. *Market Access Issues in EC-US Relations. Trading Partners or Trading Blows?*, Royal Institute of International Affairs, 1991.

<sup>36</sup> Feld, W. *The European Common Market and the World*, Prentice-Hall, Inc., 1967.

<sup>37</sup> UNCTAD stands for United Nations Conference on Trade and Development.

<sup>38</sup> Allen, J. J., *The European Common Market and the GATT*, The University Press of Washington, D. C., 1960.



Agreements with Greece for future membership were concluded in 1961<sup>39</sup> and with Turkey in 1963.<sup>40</sup> Negotiations with the UK and other Western European countries during the 1960s for membership and special relations with the EC did not end in agreements.

Negotiations with Austria continued during this period and talks with Israel<sup>41</sup> and Spain were taken up, leading the latter country to agreements before the end of the 1960s. When the UK, Ireland and Denmark joined the EC in 1973, the enlarged Community entered into free trade agreements with the remaining members of EFTA, i.e. Austria, Switzerland,<sup>42</sup> Sweden, Iceland<sup>43</sup> and Portugal. Finland and Norway<sup>44</sup> followed sometime later.

Another reason for international negotiations was the historical link between the different Member States of the EC and overseas territories or dependencies. Shortly after the establishment of the EEC, there was an important transformation in the links between these countries and the Common Market, which, according to Part IV of the EEC Treaty, consisted of a two-way free access for each other's products and a special Community aid program.

As a consequence, the conclusion of the Yaoundé Convention took place with eighteen African States and Madagascar. An Agreement between the European

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<sup>39</sup> Agreement establishing an association between the European Economic Community and Greece, OJ 26, of 18 December 1963, p. 294.

<sup>40</sup> Agreement establishing an association between the European Economic Community and Turkey, OJ No 217 of 29 December 1964, pp. 3685 and 3705.

<sup>41</sup> An early Agreement with Israel was signed on May 11, 1975. It was a free trade and co-operation agreement, OJ L 136/75, p.1.

<sup>42</sup> Agreement between the European Economic Community and the Swiss Confederation on the application of the rules of Community transit OJ L 294/72, p. 1.

<sup>43</sup> Agreement establishing a free trade area between the European Economic Community and the Republic of Iceland, OJ L 301/72, p. 1.

<sup>44</sup> Agreement between the European Economic Community and the Kingdom of Norway and provisions for its implementation, OJ L 171/73, p. 2.

Economic Community and the Government of the Democratic Republic of Madagascar regarding fishing off the coast of Madagascar was signed some years later.<sup>45</sup> After the first enlargement of the Community, the whole system was renegotiated (1973/1974) with nearly 50 countries (all the former dependencies of the UK in Africa, the Pacific and the Caribbean). In 1975 the Lomé Convention, between the Community and this group of countries, introduced new ideas such as the organisation of commercial and industrial co-operation and the stabilization of export earnings.

The Yaoundé Conventions linked the European Community to African States, providing, *inter alia*, financial and technical assistance for economic development. An example is the Convention of Association between the European Economic Community and Associated African States, of July 20, 1963<sup>46</sup> as well as the Convention of Association between the European Economic Community and Associated African States, of July 29, 1969.<sup>47</sup> In reference to the Lomé Conventions, there have been four additional agreements, the European Economic Community-African, Caribbean and Pacific Countries Convention (ACP-EEC Convention), of February 28, 1975,<sup>48</sup> the second ACP-EEC Convention, of October 31, 1979,<sup>49</sup> the third ACP-EEC Convention, of December 8, 1984,<sup>50</sup> and the fourth ACP-EEC Convention, of December 1, 1989.<sup>51</sup> Thanks to these Conventions, over 99% of their imports enjoy free access to the EU.

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<sup>45</sup> OJ L 73/86, p. 25.

<sup>46</sup> 2 ILM, 971 (1970).

<sup>47</sup> 9 ILM, 484 (1970).

<sup>48</sup> 14 ILM, 596 (1985).

<sup>49</sup> 19 ILM, 327 (1985).

<sup>50</sup> 24 ILM 571 (1985).

<sup>51</sup> OJ L 229/91, p. 3.

The Community also signed agreements with a number of Mediterranean countries. Some of these countries received special treatment from the Community because of their historic link with European countries.<sup>52</sup> For example, see *inter alia* the Co-operation Agreement between the European Economic Community and the People's Democratic Republic of Algeria,<sup>53</sup> the Co-operation Agreement between the European Economic Community and the Hashemite Kingdom of Jordan,<sup>54</sup> the Co-operation Agreement between the European Economic Community and the Lebanese Republic,<sup>55</sup> the Co-operation Agreement between the European Economic Community and the Kingdom of Morocco,<sup>56</sup> the Co-operation Agreement between the European Economic Community and the Syrian Arab Republic<sup>57</sup> and the Co-operation Agreement between the European Economic Community and the Republic of Tunisia.<sup>58</sup> During this period, the creation of "The global Mediterranean policy" took place. This nomenclature was not very precise since it suggested the idea of similar agreements with all partners. However, the agreements were very different from those completed between 1973 and 1975.

Agreements were also designed to help some Asian countries meet the problems that arose from the loss of certain preferences from the Commonwealth.<sup>59</sup> This was the case with India,<sup>60</sup> Pakistan,<sup>61</sup> Sri Lanka<sup>62</sup> and Bangladesh.<sup>63</sup> In Latin

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<sup>52</sup> Wellenstein, E. "Twenty-Five Years of European Community External Relations," CMLRev 16 (1979), p. 413.

<sup>53</sup> OJ L 263/78, p. 1.

<sup>54</sup> OJ L 268/78, p. 1.

<sup>55</sup> OJ L 267/78, p. 1.

<sup>56</sup> OJ 264/78, p. 1.

<sup>57</sup> OJ L 269/78, p. 1.

<sup>58</sup> OJ L 265/78, p. 1.

<sup>59</sup> The implementation of the "declaration of intent" does not require the conclusion of any agreement.

<sup>60</sup> Agreement between the European Economic Community and the Republic of India on cane sugar, OJ L 292/84, pp. 1 & 5.

America, agreements were concluded with Argentina,<sup>64</sup> Uruguay,<sup>65</sup> Brazil<sup>66</sup> and Mexico.<sup>67</sup> We also have, *inter alia*, the Interregional framework Co-operation agreement between the European Community and its Member States, of the one part, and the Southern Cone Common Market (Mercosur), of the other part<sup>68</sup> as well as the Framework Agreement for Co-operation between the European Economic Community and the Federative Republic of Brazil.<sup>69</sup> Regarding preferential access to the Community's markets, it must be said that Iran requested such a negotiation, but the response was less than positive.

In 1976, the Community signed with Canada the first bilateral agreement with an industrialized nation outside Europe. It was simply a co-operation agreement,<sup>70</sup> because trade policy between developed countries is covered by GATT. Co-operation agreements<sup>71</sup> were also signed with the Andean group<sup>72</sup> as well as with ASEAN (Association of South-East Asian Nations)<sup>73</sup> in 1980. There is an Agreement between the European Economic Community and Malaysia on trade in

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<sup>61</sup> Agreement for commercial, economic and development co-operation between the European Economic Community and the Islamic Republic of Pakistan, OJ L 108/86, p. 1.

<sup>62</sup> Agreement between the European Economic Community and the Republic of Sri Lanka on trade in textile products, OJ L 301/90, p. 1.

<sup>63</sup> One early agreement with Bangladesh was on commercial co-operation, OJ L 319/76, p. 1.

<sup>64</sup> Framework Agreement of Commercial and economic Co-operation between the European Economic Community and the Republic of Argentina, OJ L 295/90, p. 66.

<sup>65</sup> Agreement in the form of an exchange of letters between the European Community and the Eastern Republic of Uruguay on trade of sheep and lamb meat, OJ L 275/80, p. 37.

<sup>66</sup> Agreement between the European Economic Community and the Federal Republic of Brazil on trade of textile products, OJ L 40/91, p. 1.

<sup>67</sup> Agreement in the form of an exchange of letters between the European Economic Community and the United States of Mexico on trade of textile products, OJ L 292/87, p. 73.

<sup>68</sup> OJ C 14/96, p. 3 and OJ L 69/96, p. 1.

<sup>69</sup> OJ L 262, p. 53.

<sup>70</sup> Framework Agreement for commercial and economic co-operation between the European Communities and Canada, OJ L 260/76, p. 1.

<sup>71</sup> Framework Agreement for co-operation between the European Economic Community and the Cartagena Agreement and its member countries Bolivia, Colombia, Ecuador, Peru and Venezuela, OJ C 25/93, p. 32.

<sup>72</sup> The Andean Pact is composed of Venezuela, Colombia, Ecuador, Peru and Bolivia.

textile products<sup>74</sup> and a Co-operation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand, all member countries of the Association of South East Asian Nations.<sup>75</sup>

The Community's role in the UNCTAD negotiations was less satisfactory than its fully integrated stand in GATT.<sup>76</sup> This is due to the application of Article 116,<sup>77</sup> which is far more complicated than that of Article 133EC.<sup>78</sup> There was also a general problem of the position of the EC (Commission) representatives in international organizations, especially those of the UN family. Since at that time only States could be members of these organizations, the Commission's representatives had many difficulties. Whatever their constitutional powers may have been under EC Law (for example, the exclusive right to negotiate), the Commission's representatives were at best "observers."<sup>79</sup>

There were also problems with the European Conference on Security and Co-operation. The Commission representative had to find his place within the delegation of the Member State exercising the Presidency of the EU Council. The conference began with a Dane exercising the presidency and finished with an Italian. The primary goal for the Security Conference was to make clear in all statements and documents that certain matters simply could not be addressed unless the Community

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<sup>73</sup> The six Founding Countries of ASEAN are Malaysia, Indonesia, The Philippines, Singapore, Thailand and Brunei.

<sup>74</sup> OJ L 339/90, p. 42.

<sup>75</sup> OJ L 144/80, p. 1.

<sup>76</sup> Petersmann, E.-U. "Application of GATT by the Court of Justice of the European Communities", *Common Market Law Review* 20, 1983, pp. 397-437, at 420.

<sup>77</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>78</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

through its competent institutions agreed to it. Already in 1967, this point made the USSR give up its resistance to Community participation in the international wheat agreement.

### A.- A Note on Commercial Policy

A brief note can be written on the evolution of the concept of “commercial policy” as used in Article 133 of the EC Treaty. The Article lists several examples, such as tariff changes and liberalization.<sup>80</sup> There has been a tendency on the part of national administrations to limit the application of the Article to the examples given above. However, this is not a logical interpretation. First of all, from Article 133 EC we can deduce that the enumeration is not meant to be exhaustive; secondly, among the examples listed, there is one with the general wording “export policy”;<sup>81</sup> thirdly, there are many examples of commercial policy outside of those listed in Article 133EC. A Community that would deprive itself of those possibilities would weaken itself in relation to other entities, whereas the rationale of the common commercial policy is to strengthen the EC.

The scope of “commercial policy” became relevant on different occasions during the 1970s.<sup>82</sup> An important case arose when a number of Western countries tried to introduce more discipline onto export credit policies with state backing.

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<sup>79</sup> McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, p. 41.

<sup>80</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719.

<sup>81</sup> Völker, E. L. M., (ed.) *Protectionism and the European Community*, Kluwer Law and Taxation Publishers, 1987.

These policies indeed risked degenerating into a competition between the treasuries of different Western countries, with the effect of providing highly industrialized States in Eastern Europe, for example, with credits below the market rate. Was this, then, a matter for the Community or for Member States individually? The European Commission seized the occasion of a rather minor arrangement in this field within the framework of the OECD to ask for an opinion from the Court under Article 300 EC. The advisory Opinion<sup>83</sup> left no doubt as to the “commercial policy nature” of such export credit arrangements with state backing.

The status of so-called “cooperation” activities *vis-à-vis* Article 133 EC is another issue of considerable importance. Member States can still sign individual co-operation agreements (especially with East European countries), but since 1975, there is an obligation of full consultation on the practical application and the terms. The EC can also conclude agreements when co-operation is the primary concern. Commodity agreements are covered by this policy. History and evolving jurisprudence have gradually provided a much clearer and more convincing outline of the concept of common commercial policy.<sup>84</sup>

## B.- External Political Power

EC external relations are in no way limited to the field of trade policy. Unfortunately the Treaty is not very explicit about other dimensions, but the European Court of

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<sup>82</sup> Demaret, P. *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels*, Story-Scientia, 1988.

<sup>83</sup> Opinion 1/75, given in November 1975, [1975] ECR 1355.

<sup>84</sup> Hartley, T. C. *The Foundations of European Community Law. An Introduction to the Constitutional and Administrative Law of the European Community*, Oxford University Press, 1998.

Justice has attempted to clarify them. In the famous ERTA case on road transportation (Case 22/70 *Commission v Council*),<sup>85</sup> the Court ruled that a matter already regulated by the EC institutions could not be dealt with internationally without Community participation and approval, precisely because it has been regulated by an EC institution. External activity can take three main forms: 1) autonomous legislation, to set out rules for relations for the outside world; 2) negotiation, to arrive at agreements with third parties; and 3) dialogue, to gain a better understanding of other parties in order to better determine one's own attitudes.<sup>86</sup> It was the dialogue that gained importance in the late 1970s.<sup>87</sup>

In this context, we see that the EC now has diplomatic delegations in many capitals as well as in the UN headquarters (where it obtained official observer status in 1975). Since 1973, the EC has conducted a systematic dialogue with the U.S., Japan, Canada, Australia and New Zealand, apart from the periodic discussions that take place regularly within the OECD. Since 1977, the EC has also been involved in the economic world summits of the seven major industrialized nations, the so-called G 7.

Already in the late 1970s, the Community had become an important interlocutor in most of the areas concerned, not only in trade but also energy, fisheries and development policies, *inter alia*. The Community was already a major actor in most world fora, often speaking with one voice, even if some aspects of the debate were not under its direct competence. An example of this was the Conference

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<sup>85</sup> [1971] ECR 263.

<sup>86</sup> Bourgeois, J. H. J. "External Relations Powers of the European Community", *Fordham International Law Journal*, Vol 22, 1999, pp. 149-73.

<sup>87</sup> Dashwood, A. "External Relations Provisions of the Amsterdam Treaty", *Common Market Law Review* 35, 1998, pp. 1019-1045.



on International Economic Co-operation (the so-called “North-South Dialogue”) in Paris in 1976-1977, when the Community had one single delegation to cover all points of the agenda. Another example was the Euro-Arab dialogue. However, the same cannot be said about UNCTAD negotiations.

In early 1978 a trade agreement was concluded with China and in 1985, a Trade and Economic Co-operation Agreement between the European Economic Community and the People’s Republic of China<sup>88</sup> replaced the previous commercial Agreement of April 3, 1975.

All of the Eastern European countries now have arrangements on agricultural, steel and textile products, *inter alia*. Romania was the first country to approach the EC and was granted special treatment for some of its exports under the generalized scheme of preferences in 1974. A more recent agreement with Romania is the Additional Protocol to the Europe Agreement on Trade in textile products between the European Economic Community and Romania.<sup>89</sup>

The Community was founded to create a framework within which the economies of the Member States could develop beyond their national borders. It was also founded to promote stability in the world. The preambles of the treaties of Paris and Rome give an idea of the very wide objectives which the founders of the EEC had in mind. The place their creation now occupies in the world lays enormous responsibilities on the institutions. Without the constructive contributions of the EC, many world problems can simply not find an appropriate solution.

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<sup>88</sup> OJ L 250/85, p. 1.

<sup>89</sup> OJ L 123/94, p. 476.

## V. Recent Developments of the EU in International Affairs<sup>90</sup>

There were a few important examples of EU action in the international arena in 1997. In the trade sector, the EU played an important role in two significant WTO agreements: the first agreement being the Telecommunications Service Agreement,<sup>91</sup> which covers about 90% of world revenues in the telecommunications sector; and the second was the Agreement on Financial Services,<sup>92</sup> which covers about 95% of trade in the banking, insurance and security sectors. In this same year, the EU donated ECU 438,000,000 in humanitarian aid. An EU special envoy was sent to support the Middle East Peace process. The EU has adopted a strong position with regard to problematic states such as Cuba and Burma. The EU also led the industrialized nations in their decision to reduce greenhouse emissions by the year 2010 at the Kyoto Summit on Climate Change in the Conference of the Parties to the Framework Convention on Climate Change, Kyoto Protocol, in December 1997.<sup>93</sup> All this shows that the EU has developed into a significant actor in many international spheres.

Having said that, it is important to note that more than just traditional external policies will define the EU's external role. We can perceive that as the EC has integrated to create a single European Market with a single currency, its domestic policies are increasingly influencing its role in the international arena.<sup>94</sup>

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<sup>90</sup> Whitman, R. *From Civilian Power to Superpower? The International Identity of the European Union*, MacMillan Press Ltd, 1998.

<sup>91</sup> WTO: Agreement on Telecommunications Services, February 15, 1997, 36 ILM, p. 354.

<sup>92</sup> There is no publication available.

<sup>93</sup> December 10, 1997, 37, ILM p. 22 (1998).

<sup>94</sup> O'Keeffe, D. "Community and Member State Competence in External Relations Agreements of the EU", *European Foreign Affairs Review* 4, 1999, pp. 7-36.

Since 1958, the vision of the EEC Founders has expanded geographically as the EU has grown from six members to the current 15. With the Single European Act,<sup>95</sup> together with the completion of the single market, economic integration has created a cohesive entity. In 1973, with the first enlargement of the EC to nine Member States, the EC became the world's largest trading bloc.

The original Treaty of Rome<sup>96</sup> contained three major provisions for external relations. First of all, the treaty established a special regime for development aid and co-operation, which initially aided developing countries that had a long-standing relationship (mostly former colonies) with founding Member States. The regime was further developed through the Yaoundé and Lomé Conventions, which linked 70 developing countries to the EU.<sup>97</sup>

Secondly, the Treaty of Rome provided for the conclusion of association agreements in Article 310 EC. Agreements with various degrees of commitment and different economic and political purposes have been concluded with almost every country, except for some of the most developed countries such as the U.S., Japan and Australia. These association agreements represent the closest relationship with the EU and usually involve some kind of reciprocal obligation. Agreements with countries of the European Economic Area,<sup>98</sup> the Mediterranean Agreements,<sup>99</sup> the Europe Agreements with Central and Eastern European countries and the Euro-Mediterranean Association Agreements fall within this category.

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<sup>95</sup> Single European Act, OJ L 169/1 (1987), (1987) 2 CMLRev, p. 741.

<sup>96</sup> Treaty establishing the European Economic Community, March 25, 1957, 298 UNTS, 11.

<sup>97</sup> See earlier comments *supra* on the Yaounde and Lome Conventions.

<sup>98</sup> Agreement on the European Economic Area, OJ L 1/1 (1994).

<sup>99</sup> Co-operation Agreement between the European Economic Community and the Arab Republic of Egypt, OJ L 266/78, p. 1. Agreement in the form of an exchange of letters relating to Article 9 of

The Europe Agreements are a series of association agreements into which the European Community entered with various Central European countries pursuant to the authority granted in Article 310 EC.<sup>100</sup> As examples of Europe Agreements we have, in the case of Central Europe, *inter alia*, the Europe (association) Agreement between the European Communities and the Republic of Bulgaria,<sup>101</sup> the Europe (association) Agreement between the European Communities and their Member States and the Czech Republic,<sup>102</sup> and the Europe (association) Agreement between the European Communities and their Member States and the Republic of Hungary.<sup>103</sup>

In contrast to the association agreements, the “non-preferential trade and co-operation agreements” provide closer relationships between the EU and many countries of Southeast Asia and Latin America. These agreements are usually aimed at lesser-developed countries. In addition to these two types of agreements,<sup>104</sup> the EU has developed a hybrid of “partnership agreements”, which share features of co-operation accords and Europe agreements to manage its relations with the successor States of the former USSR. One example is the Partnership and Co-operation Agreement between the European Communities and their Member States and the Russian Federation.<sup>105</sup>

Finally, since the Founding Fathers chose a customs union as the way to proceed towards a unified Europe, a common trade policy *vis-à-vis* the rest of the

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Protocol 1 to the EEC-Israel Agreement and concerning the Community of tomato paste originating in Israel, OJ L 23/77, p. 13.

<sup>100</sup> See Goebel, R. “The European Community and Eastern Europe: Deepening and Widening the Community Brand of Economic Federalism”, 1 New Eur. L.Rev. 163, 1993, pp. 218-23.

<sup>101</sup> OJ L 358/94, p. 1.

<sup>102</sup> OJ L 360/94, p. 1.

<sup>103</sup> OJ L 347/93, p. 1.

<sup>104</sup> The Association Agreements and the Non-Preferential Trade and Co-operation Agreements.

<sup>105</sup> OJ 1997 L 327/1.

world was inevitable.<sup>106</sup> The Community has retained exclusive competence in this field, and the European Commission acts on behalf of the European Community with a qualified majority vote from the Council. However, there are trade issues where Member States have competence (despite the EC “exclusive” competence in commercial policy).<sup>107</sup>

It was at that moment that an internal debate arose between the EU Member States and the European Commission about the coverage of the existing commercial policy provisions (the famous Article 133 of the EC Treaty)<sup>108</sup> in the areas of intellectual property and services. The Commission negotiated agreements covering both of these areas, using standard European Economic Community commercial policy procedures. When the European Court of Justice was consulted, it stated in Opinion 1/94 that only certain aspects of the two sectors could be considered as falling under Article 133 EC, and thereby under the European Community’s exclusive competence.<sup>109</sup> During the Intergovernmental Conference that produced the Treaty of Amsterdam, the Commission, reacting against Opinion 1/94, made a proposal to enlarge the scope of the relevant treaty provisions to explicitly include

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<sup>106</sup> MacCormick, N. “Beyond the Sovereign State”, *The Modern Law Review*, Vol. 56, No. 1, January 1993, pp. 1-18.

<sup>107</sup> Rosas, A. “The External Relations of the European Union: Problems and Challenges” in *The Forum for US-EU Legal-Economic Affairs*, The Mentor Group, 1998, pp.59-71.

<sup>108</sup> Treaty establishing the European Community, February 7, 1992, OJ C 224/1, at p. 44 (1992), (1992) 1 CMLRev, pp. 573-656, incorporating changes made by the Treaty on European Union, February 7, 1992, OJ C 224/1 (1992), (1992) 1 CMLRev, p. 719. The Treaty on European Union amended the EEC Treaty.

<sup>109</sup> Opinion 1/94, (1994) ECR I-5267, I-5401, (1995) 1 CMLRev 205, p. 316.

services and intellectual property.<sup>110</sup> The Member States obviously refused because they still wanted their participation in international trade agreements.<sup>111</sup>

The EC, however, continues to face some difficulties in creating a coherent commercial policy. Although the Treaty of Amsterdam included some amendments stating that Article 133 procedures can extend over intellectual property and services, it still represents a hurdle because most decisions relating to these sectors must be unanimous,<sup>112</sup> in reference to the use of Article 133 (5). However, not *all* agreements on intellectual property and services would have to be concluded by unanimous vote, since there are aspects of services and intellectual property which already fall within the scope of the EC common commercial policy. In addition, if Member States are forced to reach a consensus, it will be more difficult to reach a Community position, even though the Commission has the power to act as a spokesperson in such negotiations according to the Amsterdam Treaty, provided the Council agrees to that application by unanimity.<sup>113</sup>

Some WTO members have introduced cases related to these sectors against individual Member States instead of against the EC as a whole. For instance, the United States has brought various TRIPS<sup>114</sup> cases against Denmark, Sweden and Ireland. In this last case, the USA brought a case against Ireland regarding measures

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<sup>110</sup> Dashwood, A. "External Relations Provisions of the Amsterdam Treaty", *Common Market Law Review* 35, 1998, pp. 1019-1045.

<sup>111</sup> For a general discussion on this issue, see Jacques H.J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echtermach Procession*, 32 COMMON MKT. L. REV. (1995).

<sup>112</sup> See the consolidated version of the Treaty establishing the European Community, article 133 (5), 1997 O.J. (C 340) 173, 238; 37 I.L.M. 79, 108.

<sup>113</sup> Article 2 (20) Treaty of Amsterdam, inserting Art. 113(5) into EC Treaty, OJ C 340/1, at p. 35 (1997).

<sup>114</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *Legal Instruments: Results of the Uruguay Round*, Vol 31, 33 ILM 81 (1994).

affecting the grant of copyrights and neighboring rights.<sup>115</sup> The main argument of the Commission in the discussion for expanding EC competence over intellectual property and services was based on the need for the EC to be effective in international negotiations. However, Member States were not readily convinced, perhaps because the success of the Uruguay Round (General Agreement on Tariffs and Trade, of October 30, 1947),<sup>116</sup> revealed concerns about the balance between the respective roles of the EC and its Member States in international affairs.<sup>117</sup>

As mentioned earlier, there are areas where internal policies are likely to spill over and impact the international arena. One example is that of competition policy, an area in which the Commission has been active since the early 1960s. With increasing worldwide economic interdependency and the emergence of global markets for a large number of products, more competition cases involve actions that take place outside of the EU,<sup>118</sup> like the Boeing and McDonnell Douglas merger. In this respect, the EC-U.S. Co-operation Agreement (which provides the background to the McDonnell Douglas case) is worth mentioning. Competition authorities on both sides of the Atlantic examined the issue and came to different conclusions. This case shows that even in carrying out policies that have traditionally been domestic, the European Union is increasingly influencing economic matters in other parts of the world.

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<sup>115</sup> Bourgeois, J. H. J. "The EC in the WTO and Advisory Opinion 1/94: an Echterbach Procession", *Common Market Law Review* 32, 1995, pp. 763-787.

<sup>116</sup> 61 Stat. A3, TIAS No. 1700, 55 UNTS 187.

<sup>117</sup> Brittan, L. "Europe must grow to Change", *The World in 1996*, 1996, p. 48.

<sup>118</sup> Eeckhout, P. *The European Internal Market and International Trade: a Legal Analysis*, Clarendon Press Oxford, 1994.

Despite this, nowhere is the effect of domestic policies likely to be as relevant as with EMU.<sup>119</sup> EMU is essentially a domestic issue. However, it is hoped that the Euro will benefit *international* trade. EMU is likely to have a major impact not only on international markets, but also on the weight attributed to the European Union as an international actor. That said, the variable geometry of the EMU with its ins and outs also poses a challenge for the unity of external representation in the economic sphere.<sup>120</sup>

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<sup>119</sup> Breton, P., Scott, H. & Sinclair, P. *International Trade. A European Text*, Oxford University Press, 1997.

<sup>120</sup> Emiliou, N. & O'Keefe, D. *The European Union and World Trade Law. After the GATT Uruguay Round*, Wiley, 1996.



## **CHAPTER III: THE EUROPEAN COMMUNITY AND MIXED AGREEMENTS**

- I. Introduction**
- II. Definition of Mixed Agreements**
- III. Typology of Mixed Agreements**
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- VI. Conclusion**

## I. Introduction

In this first section of the current chapter we shall firstly explain what is meant by a Mixed Agreement (section II) and then see the various types of Mixed Agreements<sup>1</sup> that exist in the field of the External Relations of the European Community (section III). In order to have a definition of Mixed Agreements we shall see what Dominic McGoldrick has said in this respect.<sup>2</sup> We shall see that the European Community appears to be a unique creation from the perspective of international law.<sup>3</sup> We shall then look into the effects of the EC's international agreements *vis-à-vis* third parties (section IV). Attention shall be paid to the fact that problems raised by Mixed Agreements do not exist within the context of exclusive European Community competence (section V). Some of these problems have to do with the functioning of the European Community. We shall see how the Member States have delegated their authority to negotiate international trade agreements to the supranational level.<sup>4</sup>

We shall also see that within the European Community treaty-making, there is a tendency to sign Mixed Agreements rather than agreements of European Community exclusive competence in areas dealing with the External Relations of the EU. This

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<sup>1</sup> For types of mixed agreements, see Rosas, A. "Mixed Union-Mixed Agreements" in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, pp. 128-33 and Schermers, H. G. "A Typology of Mixed Agreements" in O'Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, pp. 23-33.

<sup>2</sup> See McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997.

<sup>3</sup> McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, p. 1.

<sup>4</sup> See Meunier, S. "Talking with a Single Voice: European Integration and EC-US Trade Negotiations", Abstract; paper prepared for delivery at the 1997 Annual Meeting of the American Political Science Association, The Sheraton Washington Hotel, August, 28-31, 1997.

shows their importance for the European Community and for its position in the world.<sup>5</sup> Although the EC increasingly wants to become an international actor and somehow assert its international personality and identity, it also has to accept that Member States and third parties have legitimate interests.<sup>6</sup> EC Treaty practice has become increasingly dominated by mixed agreements<sup>7</sup> for they reflect the legal and political reality that the EC is not a single State for the purposes of international law.<sup>8</sup> We shall see how the EC's membership of and participation in international organisations<sup>9</sup> is highly variable for an organisation which pretends to act as a single actor.<sup>10</sup>

This chapter does not deal with treaties that are entered into by the Member States alone (if that were the case, they would not be mixed agreements *stricto sensu*), but treaties which in substance cover matters of exclusive EC competence. If it is not possible to have Community adherence to such treaties (because the treaty is only open to States), the EC competence may be exercised "through the medium of the Member States acting jointly in the Community's interest."<sup>11</sup> Nor does this chapter deal with treaties concluded in the framework of the Common Foreign and Security Policy

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<sup>5</sup> See Ehlermann, C. D. "Mixed Agreements: A List of Problems" in O'Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, p. 3.

<sup>6</sup> The relationship between the EC and third States is a unique experience in international law and international relations.

<sup>7</sup> See McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, chapter 5.

<sup>8</sup> This is also the case for the EU, "it is difficult to see anything short of a major war provoking a transition to a statehood", Hill, C., "The Capability-Expectations Gap, or Conceptualising Europe's International Role" (1993) 31 *JCMS*, 305-28, p. 325.

<sup>9</sup> For the participation of the EC in International Organisations, see Frid, R. *The Relations between the EC and International Organizations. Legal Theory and Practice*, Kluwer Law International, 1995.

<sup>10</sup> See McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, chapters 2 & 10.

<sup>11</sup> Opinion 2/91, *ILO Convention No. 170* [1993] ECR I-1061, para. 5. See also McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, pp. 82-83.

(CFSP), where the EU technically has not yet legal personality.<sup>12</sup> However, the situation with respect to the EU legal personality has fundamentally changed since the entry into force of the Treaty of Amsterdam,<sup>13</sup> and Article 24 TEU refers to the conclusion of CFSP agreements by the Council.<sup>14</sup> The final subtitle will be devoted to concluding remarks on the issue of mixity in the EC external relations.

## II. Definition of Mixed Agreements

Dominic McGoldrick holds that “an agreement can be regarded as mixed if the European Community and one or more of the Member States are parties to it...An agreement can also be regarded as mixed if the European Community and the Member States share competence in relation to it, even if only Member States can be parties. Finally, an agreement can be in a mixed form because of requirements relating to its financing or relating to its provisions on voting.”<sup>15</sup> His explanation continues by saying that “if competence in the subject matter of a Treaty lies partly with the European Community and partly with the Member States, then the agreement is described as a mixed one.”<sup>16</sup> Furthermore, he gives a more precise description of mixed agreements by

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<sup>12</sup> Eaton, M. R. “Common Foreign and Security Policy” in O’Keeffe, D. & Twomey, P. (eds.) *Legal Issues of the Maastricht Treaty*, Chichester, Wiley Chancery, 1994, p. 224.

<sup>13</sup> See Rosas, A. “The European Union and mixed agreements” in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, 2000, p. 203.

<sup>14</sup> See Paasivirta, “The European Union: From an Aggregate of States to a Legal Person?,” 2 *Hofstra Law & Policy Symposium*, 1997, pp. 37-59.

<sup>15</sup> See McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, p 78.

<sup>16</sup> *Ibid.*, p. 79.

saying that “the expression *mixed agreement* more accurately describes agreements where the European Community and the Member States genuinely share competence”.<sup>17</sup>

While it may be largely unknown to the general public, mixity (or mixed agreements) has become part of the daily life of the EC external relations. Mixity has also been a very complex topic of scholar debate.<sup>18</sup>

Interestingly enough, mixed agreements were not foreseen in the Treaty of Rome. However, the concept does appear in the Treaty establishing the European Atomic Energy Community.<sup>19</sup> As Granvik correctly points out, “the very same article [Article 102 of the Treaty establishing the European Atomic Energy Community] has

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<sup>17</sup> Ibid., p.79.

<sup>18</sup> Most of the relevant literature is in the more general context of the EC external relations; see, Timmermans, C. & Völker, E. (eds.) *Division of Powers between the European Communities and their Member States in the Field of External Relations*, Kluwer, 1981; O’Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983; Dolmans, M.J.F.M. *Problems of Mixed Agreements: Division of Powers Within the EEC and the Right of Third States*, Asser Instituut, 1985; Groux & Manin, *The European Communities in the International Order*, Commission of the European Communities, 1995, pp. 57-88; Conze, A. *Die voelkerrechtliche Haftung der Europaeischen Gemeinschaft*, Nomos, 1987, pp. 73-87; Neuwahl, “Joint Participation in International Treaties and the Exercise of Powers by the EEC and its Member States: Mixed Agreements”, *Common Market Law Review*, 28, 1991, pp. 717-740; *idem*, “Shared Powers or Combined Incompetence? More on Mixity”, *Common Market Law Review*, 33, 1996, pp. 667-687; Frid, R. *The Relations between the EC and International Organizations. Legal Theory and Practice*, Kluwer Law International, 1995, pp. 111-116; Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, pp. 142-164; Kaniel, M. *The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act*, Kluwer, 1996, pp. 145-174; McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, pp. 78-88; Bourgeois, J., Dewost, J. & Gaiffe, M. *La Communauté européenne et les accords mixtes, Quelles perspectives?*, Presses Interuniversitaires Européennes, 1997; Koskeniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, notably articles written by Dashwood (pp. 113-123), Rosas (pp. 125-148) and Granvik (pp. 255-272).

<sup>19</sup> It is precisely in Article 102, which reads as follows: “Agreements or contracts concluded with a third State...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 or contracts have become applicable in accordance with the provisions of their respective national laws”.

later been accepted [by EC law-makers] as a suitable model for the EC.”<sup>20</sup> In this same line of thought, Macleod *et al.* point out that there is no doubt about the existence and legal validity of the concept of "mixed agreement". Proof of it is Article 102 of the Euratom Treaty, where “a form of mixed agreement is recognised and which [Art 102] makes explicit provisions for treaties which are to be concluded by the Community and one or more Member States.”<sup>21</sup>

In addition to what has been said above, there are various important clarifications to be mentioned in this subtitle in order to facilitate the understanding of the issue. Here are some of them:

1. The European Court of Justice has recognised in its Ruling 1/78, Opinion 1/78, Opinion 2/91 and Opinion 1/94 (*Re WTO Agreement*) *inter alia* that some agreements require the participation of both the Community and the Member States.<sup>22</sup> From here one can deduce that not all Community competence is exclusive. Furthermore, in the everyday practice of the Community institutions we see that the concept of mixed agreement is a well-established part of EC Law.<sup>23</sup> An example of this is Case 12/86,

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<sup>20</sup> See 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. 256.

<sup>21</sup> Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, pp. 143-4.

<sup>22</sup> Ruling 1/78 [1978] ECR 2151; Opinion 1/78 [1979] ECR 2871; Opinion 2/91, [1993] ECR I-1061 at para. 5; and Opinion 1/94 [1995] 1 CMLR 205.

<sup>23</sup> Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 144.

*Demirel v. Stadt Schwabisch Gmünd*,<sup>24</sup> in which the European Court of Justice used the term "mixed agreement" to describe the Association Agreement between the Community and the Member States on the one hand and Turkey on the other.

2. It is a fact of life that mixed agreements raise difficult and interesting legal and political issues about the role of the Communities and the Member States in the international arena. Despite the legal uncertainties, in practice the Community and the Member States participate together effectively in various international agreements.<sup>25</sup> It is precisely in the field of international treaty law that mixed agreements show the changes that international law has undergone through the establishment of entities such as the EC.<sup>26</sup>
3. In this same line of thought, Allan Rosas<sup>27</sup> argues that "the European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organisation, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements<sup>28</sup> [...] offers a telling illustration of the

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<sup>24</sup> [1987] ECR 3719 at 3751, paragraph 8.

<sup>25</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 144.

<sup>26</sup> Tomuschat, C. "Liability for Mixed Agreements" in O'Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, pp. 125-32.

<sup>27</sup> Allan Rosas is Principal Legal Adviser of the Legal Service in the European Commission.

<sup>28</sup> The possibility of mixed agreements is expressly recognised in Article 102 of the Treaty establishing the European Atomic Energy Community (EURATOM). The expression "mixed agreements" has been used by the Court of Justice, e.g., in Case 12/86 *Demirel* [1987] ECJ 3719 at 3751 (paragraph 8). See also O'Keeffe, D. & Schermers, H. (eds.) *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983; Dolmans, M. J. F. M. *Problems of Mixed Agreements: Division of Powers within the EEC and the Right of Third States*, Asser Instituut, The Hague, 1985; Neuwahl, N. "Joint Participation in International

complex nature of the EU and the Communities as an international actor”.<sup>29</sup>

We speak of complex nature since the circumstance which has to occur is to have an agreement which is a Community and a national agreement at the same time. This means that Europe has 15 voices (one for each Member State) plus one more voice coming from any of the European Communities.

4. The phenomenon of mixed agreements is, therefore, not only deeply interrelated to EC Law and its division of powers doctrine but it is also interrelated to public international law. As for the division of powers, McGoldrick points out that “each international agreement will require consideration of its subject matter to determine the allocation of competence between the EC and the Member States, and the nature of that competence.”<sup>30</sup> This allocation of competence can evolve over the lifetime of an agreement [this is so even during the drafting of an agreement, being an example of it Case C-25/94, *Commission v Council* (FAO Fisheries Agreement)]<sup>31</sup> or series of agreements. This has been the case with the GATT.<sup>32</sup> According to public international law, the rights and obligations which derive from an agreement form an undivided entity. This, however,

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Treaties and the Exercise of Powers by the EEC and Its Member States: Mixed Agreements”, (1991) 28 CMLRev, pp. 717-740; Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, pp. 142-164.

<sup>29</sup> See Rosas, A. “Mixed Union-Mixed Agreements” in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 125.

<sup>30</sup> McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, pp 78-9.

<sup>31</sup> [1996] ECR I-1469.

<sup>32</sup> For further detail, see Petersmann, E.-U. “Participation of the European Communities in the GATT: International Law and Community Law Aspects”, in O’Keeffe, D. & Schermers, H. *Mixed Agreements*,



does not necessarily mean that the EC and its Member States cannot respect the internal division of competence according to EC Law.<sup>33</sup>

### III. Typology of Mixed Agreements<sup>34</sup>

Since there are many different types of mixed agreements, depending on how they are categorised, the answer to the question they raise may vary very much. Let us, then, see some ways of classification. Allan Rosas makes a basic distinction between parallel and shared competencies:<sup>35</sup>

#### A.- Type of Competence

The terminology used in the doctrine is very unclear: non-exclusive, shared, parallel, joint, concurrent and divided competence of the EC. These terms are used here to describe the same phenomenon, i.e. the potential powers which the EC may exercise if

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Kluwer Law and Taxation Publishers, 1983, pp 167-98. See also McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, chapter 7, pp. 118 and 121.

<sup>33</sup> See Gaja, G. "The European Community's Rights and Obligations under Mixed Agreements" in O'Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, pp 133-140.

<sup>34</sup> See Schermers, H. "A Typology of Mixed Agreements," in O'Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, pp. 22-33; Dolmans, M. J. F. M. *Problems of Mixed Agreements: Division of Powers within the EEC and the Right of Third States*, Asser Instituut, The Hague, 1985, p. 25, 39-42; Rosas, A. "Mixed Union-Mixed Agreements" in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 125-148 at 128-133; Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 143.

<sup>35</sup> See Rosas, A. "Mixed Union-Mixed Agreements" in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, pp. 128-33.

the Council so decides and which, when exercised, may turn into exclusive EC competence.

### A.1.- Parallel Competencies

*Parallel competencies* “implies that the Community may adhere to a treaty, with full rights and obligations as any other Contracting Party, this having no direct effect on the rights and obligations of Member States being parties to the same treaty.”<sup>36</sup> However, this situation might have indirect effect on the rights and obligations of the Member States. As an example, we have the Agreement establishing the European Bank for Reconstruction and Development (EBRD),<sup>37</sup> which is open to States and the EC alike,<sup>38</sup> and obliges “each Contracting Party to provide financial resources as a loan or grant to a third State or international fund (assuming that the participation of the EC would be covered by the Community budget).”<sup>39</sup> The given situation can be more complex if financial assistance does not come from the Community budget but from a separate fund, consisting of Member States’ contributions and based on a separate internal agreement between the Member States. An example of it could be Case C-316/91

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<sup>36</sup> As far as parallel competence is concerned, Schermers, H. G. notes in “A Typology of Mixed Agreements” in O’Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, that such treaties, which are covered by a formal (as distinct from a substantial) definition of mixed agreements, are “inherently...not of a mixed nature”.

<sup>37</sup> For more information on EBRD, see Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, pp. 187-89.

<sup>38</sup> [1990] OJ L372/1.

<sup>39</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 129.

*Parliament v Council*<sup>40</sup> as well as Opinion 1/78 (*Re Draft International Agreement on Natural Rubber*).<sup>41</sup>

Another example could well be the adherence to the 1989 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, prompted by the need to protect the Community trade mark.<sup>42</sup> According to Article 10 of the Madrid Protocol, each Contracting Party, including the EC, has one vote. This implies that the EC and its Member States may have altogether 16 votes, a principle contested by the United States, which have so far refused to adhere to the Protocol.<sup>43</sup>

#### A.2.- Shared Competencies

As for *shared competencies*, they imply some division of the rights and obligations in the agreement between the Community and the Member States. According to Dolmans, one can distinguish between mixed agreements with coexistent competence and mixed agreements with concurrent competence.<sup>44</sup> Let us start with the latter case.

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<sup>40</sup> [1994] ECR I-625.

<sup>41</sup> [1979] ECR 2871.

<sup>42</sup> Commission Proposal for a Council decision approving the accession of the EC to the Protocol, COM (96) 367 final of July 22, 1996.

<sup>43</sup> See Rosas, A. "The European Union and Mixed Agreements," in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, 2000, p. 203.

*A.2.a.- Concurrent Competencies*

Mixed agreements with concurrent competencies implies that the agreement in question forms a certain whole or totality which is indivisible or cannot be separated into two parts. P. Allot, when referring to concurrent competence, speaks of mixed agreements “in the strong sense”, meaning that the Community and Member States participation is “inextricably confused”.<sup>45</sup> Such a truly shared-competencies situation may arise principally if there is a non-exclusive Community competence covering the whole and entire agreement. Articles 111, paragraph 5 (agreements relating to economic and monetary policy), 174, paragraph 4 (environmental agreements) and 181 (agreements relating to development co-operation) of the EC Treaty provide that not only the Community, but also the Member States, may negotiate in international bodies and conclude international agreements. Nevertheless, according to a Declaration on Articles 111, 174 and 181 EC contained in the Final Act of the TEU, this (non-exclusive) competence is subject to the ERTA judgement of the Court of Justice, that is to say, the principle by which the adoption of common rules by the Community *may* create exclusive Community competencies also on the fields covered by the said Articles.

There are also other areas where the Community may have a non-exclusive competence to conclude agreements if it has a corresponding competence to establish internal rules and this specific competence has not yet been used. In this respect, we

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<sup>44</sup> Dolmans, M. J. F. M. *Problems of Mixed Agreements: Division of Powers within the EEC and the Right of Third States*, Asser Instituut, The Hague, 1985, p. 25, 39-42, 97.

have as examples the joined Cases 3, 4 and 6/76 Kramer,<sup>46</sup> as well as Opinion 2/91 (ILO Convention No. 170)<sup>47</sup> and Opinion 2/92 (OECD National Treatment Instrument).<sup>48</sup> According to A. Rosas, even if this specific competence has been used, "the external competence may rest at least partly non-exclusive if the common internal rules are considered as minimum rules only"<sup>49</sup> ...[as an example we have Opinion 2/91 (ILO Convention No. 170)<sup>50</sup>]... or [if the common internal rules] do not cover the whole area regulated in the international agreement."<sup>51</sup> An example of the latter case is Opinion 1/94 (WTO Agreement).

#### *A.2.b.- Coexistent Competencies*

As for mixed agreements with coexistent competence, since the agreement contains provisions which fall under the exclusive competence of the Community and/or the Member States, respectively, it is "in principle possible to divide it into two separate parts, for which either the Community or the Member States are responsible."<sup>52</sup> Rosas suggests, as an example of this, a treaty containing one chapter on trade in goods and

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<sup>45</sup> Allot, P "Adherence and Withdrawal from Mixed Agreements" in O'Keefe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, p. 118-9.

<sup>46</sup> [1976] ECR 1303 at 1308-1309 (paragraphs 19-34).

<sup>47</sup> [1993] ECR I-1061 at 1076-1077 (paragraphs 7, 12).

<sup>48</sup> [1995] ECR I-521 at 558-560.

<sup>49</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 66.

<sup>50</sup> [1993] ECR I-1061 at 1078-1080.

<sup>51</sup> Rosas, A. "Mixed Union-Mixed Agreements" in Koskeniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 131.

<sup>52</sup> See Rosas, A. "Mixed Union-Mixed Agreements" in Koskeniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 129.

another on military defence. This situation could be seen as if we were dealing with two different treaties presented in one document.<sup>53</sup> In this respect, P. Allot notes that for such mixed agreements "in the weak sense" it should not be possible to separate completely the Community and Member States parts of the agreement.<sup>54</sup> In the book by Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Claredon Press Oxford, 1996, the authors mention as an example the Physical Protection of Nuclear Material Convention discussed in Ruling 1/78 (See Ruling 1/78, *Re the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports*).<sup>55</sup>

If there are real national competencies involved which "coexist" with EC competencies, then the nature of the agreement may make it difficult to separate the agreement into two parts.<sup>56</sup> In this respect, the ECJ has said that the Community and the Member States share competence where an agreement covers both matters within the exclusive competencies of the Member States and matters within the exclusive competence of the EC.<sup>57</sup> An example which gives evidence of this is the Natural Rubber Opinion 1/78, which addressed a scheme where under a commodities agreement, Member States would have directly financed the agreement, with the pertinent implications for its decision-making procedures, even if the essential policy of such an

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<sup>53</sup> See Rosas, A. "The European Union and Mixed Agreements," in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, 2000, p. 204.

<sup>54</sup> Allot, P. "Adherence to and Withdrawal from Mixed Agreements" in O'Keefe, D. & Schermers, H. (eds.) *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, pp. 97-121 at pp. 118-119.

<sup>55</sup> [1978] ECR 2151.

<sup>56</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Claredon Press Oxford, 1996, p. 131.

agreement came within the Community's exclusive competence under Article 133 EC.<sup>58</sup> On the relevance of Member State financing of the agreement, see Opinion 1/94 (*Re WTO Agreement*)<sup>59</sup> and Case C-316/91, *Parliament v. Council*<sup>60</sup> and Opinion of Advocate-General Jacobs, paragraphs 55-59. This Natural Rubber case is related to Community participation in commodities agreements in pursuance of the common commercial policy.

In the case of coexistent competence, there is what Rosas calls a presumed "horizontal" (sectorial) distribution of competencies (commercial policy, due to trade in goods, and defence policy, due to military policy). One can also imagine a more "vertical" distribution of competencies. By this, we mean a situation in which "the Community would be competent to conclude the main substantive parts of the agreement, while Member State participation would be deemed necessary because of the nature of its obligations relating to the implementation and enforcement of those substantive parts."<sup>61</sup> As an example we can take into account the agreement considered in Ruling 1/78 (*Re the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transport*), in which, as far as its provisions on penal sanctions and extradition were concerned, Member State participation was required.<sup>62</sup>

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<sup>57</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 65.

<sup>58</sup> See [1979] ECR 2871, at 2917-2918 (paragraphs 57-60); [1978] ECR 2151, at 2180 (paragraph 36); Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 65.

<sup>59</sup> [1995] 1 CMLR 205 at paragraphs 19 and 20.

<sup>60</sup> [1994] ECR I-625.

<sup>61</sup> See Rosas, A. "Mixed Union-Mixed Agreements" in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 130.

<sup>62</sup> Ruling 1/78 [1978] ECR 2151, at 2180 (paragraph 36).

One more example could be that of the 1995 UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. This agreement, mainly because of its provisions on compliance and enforcement (Part VI), has been defined by the Council of the EU as a mixed agreement. Following this line of argument, in an EC Declaration submitted upon signature in accordance with article 47, it is noted that, while the Community has exclusive competence with respect to the conservation and management of living marine resources, including the regulatory competence granted under international law to the flag State in this respect, measures such as refusal, withdrawal or suspension of authorisation to serve as masters and other officers of fishing vessels, as well as certain enforcement measures relating to the exercise of jurisdiction by the flag State over its vessels on the high seas, are within the competence of the Member States.<sup>63</sup>

However, in many cases the provisions relating to possible "coexistent" Member States competencies may be of such a limited relevance that they should be seen as ancillary (subsidiary) to the essential objectives of the agreement.<sup>64</sup> The ECJ has cases on subsidiary provisions, which are often related to Article 133 on common commercial policy. I would like to illustrate one case and two opinions from the ECJ as examples of what has been previously said: Opinion 1/78 (*Re Draft International Agreement on*

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<sup>63</sup> See (1996) Law of the Sea Bulletin 32, p. 26.

<sup>64</sup> See Rosas, A. "Mixed Union-Mixed Agreements" in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 130.



*Natural Rubber*),<sup>65</sup> Opinion 1/94 (*Re WTO Agreement*)<sup>66</sup> and Case C-268/94 *Portugal v. Council*.<sup>67</sup> In this last case, the ECJ concludes in its paragraph 77 as follows:

Furthermore, with regard to the linking of Article 10 of the Agreement [Co-operation Agreement between the European Community and the Republic of India on Partnership and Development] to commercial policy, it is sufficient to point out that the Community is entitled to include in external agreements otherwise falling within the ambit of Article 133 ancillary provisions for the organisation of purely consultative procedures or clauses calling on the other party to raise the level of protection of intellectual property (see, to that effect, Opinion 1/94, paragraph 68).

MacLeod *et al.* (1996) assert that “the principal consequence of shared competence is that the Member States still have power to enter into agreements and to take action in the areas in question [...]. Although the concept of shared external competence is well established in Community law and practice, it has not always been possible to persuade third States to recognise that the legal powers and interests of the Community and Member States co-exist.”<sup>68</sup> Third States have tended to insist that either the Community or the Member States should accept legal responsibility for a given matter, and that both cannot be responsible, or exercise rights at the same time, on the same matters. The extent to which international law recognises the concept of “shared competence” is therefore open to debate”.<sup>69</sup>

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<sup>65</sup> [1979] ECR 2871 at 1917 (paragraph 56).

<sup>66</sup> [1994] ECR I-5278, at I-5408 (paragraphs 66-68).

<sup>67</sup> Judgement of 3 December 1996, paragraphs 75, 77.

<sup>68</sup> This is mainly the case in the World Intellectual Property Organisation.

<sup>69</sup> Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 63.

At the same time, it must be said that the fact that Member States will have obligations concerning the implementation and execution of the agreement does not classify the agreement as mixed. As means of evidence, we have Opinion 1/75 (Understanding on a Local Cost Standard).<sup>70</sup> Here the Court held that “it is of little importance that the obligations and the financial burdens inherent to the execution of the agreement envisaged are borne directly by the Member States.”<sup>71</sup> Another example is Opinion 2/91 (ILO Convention No 170).<sup>72</sup>

#### B.- Type of Mixity

Mixity can also be classified as facultative and obligatory, i.e. legally necessary. Where the competence of the EC is *non-exclusive* but there are *no competencies* specifically reserved for Member States either, then as a matter of EC Law this mixity becomes facultative, optional, non-compulsory. An example of it are the Environmental Agreements. As Rosas argues, in cases of concurrent competencies, mixity is facultative *ab initio*. However, if the Council and the Member States insist on mixity for political reasons, the question arises as to whether parts of the agreement become reserved for the Member States, in which case they should all become Contracting Parties.<sup>73</sup> We should also illustrate, in this same line of argument, the example of an Opinion (No. 20/1995)

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<sup>70</sup> [1975] ECR 1355.

<sup>71</sup> [1975] ECR 1361 at 1364.

<sup>72</sup> [1993] ECR I-1061 at 1082 (paragraph 34).

<sup>73</sup> See Rosas, A. “Mixed Union-Mixed Agreements” in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 132.

given on 30 November 1995 by the Constitutional Committee to the Foreign Affairs Committee of the Finnish Parliament. This Opinion discusses problems concerning the ratification of the 1995 Europe Agreement establishing an association between the European Communities and their Member States, on the one part, and the Republic of Estonia, on the other part.<sup>74</sup>

As far as obligatory mixity is concerned, it is understood that it is necessary to have the participation of both the Member States and the EC on a particular issue. A classical example of obligatory mixity is the Law of the Sea Convention, where it is highly difficult to have one voice representing the EU. In such a case, we deal with what is called “subordination clauses”,<sup>75</sup> which provide that the EC can become a party only if one or more of the Member States have become parties. As an example we have Article 3 of the Annex IX to the Law of the Sea Convention (1982), which advocates that the EC may become a party only if a majority of the Member States ratify or accede.<sup>76</sup>

This distinction between obligatory/facultative mixity is not always recognised in practice. Proof of it are the discussions in the framework of the Council of the EU (including COREPER and the Working Groups) on the European Community v. mixed

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<sup>74</sup> Ibid. p. 143.

<sup>75</sup> See Close, G. “Subordination Clauses in Mixed Agreements” (1985), 34 ICLQ, pp. 382-91.

<sup>76</sup> See Simmonds, K. R. “The Communities Declaration Upon Signature of the UN Convention of the Law of the Sea” (1986) 23 CMLRev, 521-44. The LOSC entered into force on 16 November 1994. However, an agreement on Part IX of the LOSC has meant that there is a much greater likelihood that more Member States will ratify. Ratification of the LOSC by the EC is under active consideration. A delay in ratification already announced by the UK in May 1996 may delay EC ratification.

character of a given agreement, where it is almost always taken for granted that the lack of exclusive Community competencies of necessity requires mixity.<sup>77</sup>

However, it may sometimes be difficult to apply to certain cases, as can be deduced from uncertainties such as whether Opinion 1/94 implies that Member States participation in the WTO Agreements on services (GATS) and intellectual property rights (TRIPS) was legally necessary or simply legally possible. Here we must remember that the Court was asked by the Commission to rule that the Community had exclusive competence to adhere to GATS and TRIPS, either under Article 133, the ERTA doctrine, implied powers in accordance with Opinion 1/76,<sup>78</sup> or Articles 95 and 235 EC. In denying their existence of exclusive competencies for the whole subject areas covered by these two treaties, the Court concluded GATS and TRIPS. Some of the Member States had argued that those provisions of TRIPS fall within their competence. The Court replied that "if that argument is to be understood as meaning that all those matters are within some sort of domain reserved to the Member States, it cannot be accepted. The Community is certainly competent to harmonise national rules on those matters...".<sup>79</sup>

What has been said so far concerning the types of competencies in the External Relations of the EU can be graphically shown as follows:

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<sup>77</sup> See Rosas, A. "Mixed Union-Mixed Agreements" in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 132, note 34.

<sup>78</sup> Opinion 1/76 (Re the Draft Agreement for a Laying-up Fund for Inland Waterway Vessels) (Rhine Navigation Case) [1977] ECR 741.

<sup>79</sup> [1994] ECR I-5418-5419, paragraph 104.

**A.- Type of competence****A.1.- parallel competencies****A.2.- Shared competencies****a.- Concurrent competencies****b.- Coexistent competencies****b.1.- Horizontally****b.2.- Vertically****B.- Type of mixity****facultative mixity****facultative mixity****obligatory mixity**

Lena Granvik denotes that "mixed agreements are concluded especially in the field of the environment, entailing that both the European Community and some or even all of its Member States individually become parties to the international environmental agreement."<sup>80</sup> According to this author there are two types of mixed agreements: complete and incomplete mixed agreements. Complete mixed agreements means that both the EC and *all* its Member States are treaty-parties, whereas the concept of incomplete mixed agreements implies that only *some* of the EC Member States have acceded to the agreement in question along with the EC. However, it must be said that incomplete mixed agreements bind *all* the Member States of the Community.<sup>81</sup> What the case-law and primary legislation indicate is that Member States, whether they are parties or not, "have the obligation to co-operate with the EC in the implementation of the

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<sup>80</sup> See 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.

Community's international obligations."<sup>82</sup> In addition to that, a mixed agreement, which does not distinguish between the rights and obligations of the EC and the Member States, gives obligations to both the EC and its Member States under all its provisions.

It should be mentioned that the above given typology should only and merely be seen as a tool to assist in the structuring of the discussion on the legal nature and implications of mixed agreements.<sup>83</sup> Some agreements may fall under several of these categories, as can be seen from the ILO Convention No. 170 as interpreted by the Court of Justice in its Opinion 2/91.<sup>84</sup> In this Opinion, the Court seemed to hold that Part III of the Convention belonged to exclusive EC competence and the other parts to non-exclusive EC competence. This is due to the fact that the relevant Community directives set minimum standards only. With respect to the representation of certain dependent territories, it belonged to the competence of some Member States. However, this right of representation is, strictly speaking, not a question of mixity, as the Member States involved do not act in their capacity as EU Member States.<sup>85</sup>

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<sup>81</sup> See 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. 269.

<sup>82</sup> See 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. 270.

<sup>83</sup> Rosas, A. "The European Union and Mixed Agreements," in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, 2000, p. 207.

<sup>84</sup> [1993] ECR I-1061.

<sup>85</sup> Rosas, A. "The European Union and Mixed Agreements," in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, 2000, p. 207; Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, pp. 65-66.

#### IV. Implications of Mixed Agreements for Third Parties

In this subtitle we shall evaluate the validity and the effects that the EC's international agreements have on non-Member States of the EU. As we know, mixed agreements are, together with the exclusive Community agreements, one of the two methods by which the Community undertakes contractual international obligations.<sup>86</sup> The answer to be given to specific legal problems arising from the issue of mixity may vary depending on the subject-matter, in other words, the jurisdiction of the Court of Justice in the field of mixed agreements and the responsibility and liability of the EC and its Member States *vis-a-vis* third States, *inter alia*.<sup>87</sup> This, then, leads me to the next section of this subtitle.

##### A.- Liabilities of the EC and the Member States to Third Parties

Within the EC legal order, the Community and the Member States are responsible for the implementation of those parts of a mixed agreement which fall within their respective competencies. The only authoritative discussion of the liability of the Community and the Member States under a mixed agreement is in the opinion of Advocate-General Jacobs in Case C-316/91, where he literally said:

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<sup>86</sup> See Ehlermann, C. D. "Mixed Agreements: A List of Problems" in O'Keeffe, D. & Schermers, H. *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, pp. 3-21.

<sup>87</sup> Rosas, A. "The European Union and Mixed Agreements," in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, 2000, p. 207.

The Lome Convention was concluded as a mixed agreement (i.e. by the Community and its Member States jointly) and has essentially a bilateral character. This is made clear in Article 1 which states that the Convention is concluded between the Community and its Member States of the one part, and the ACP States of the other part. *Under a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion.* (Emphasis added).<sup>88</sup>

Generally each party to an international agreement is responsible for performance of its own obligations, and joint liability under an agreement is not usually to be presumed. However, the special circumstances of the EC and the Member States may lead to an exception to this rule. The EC and the Member States generally work together in pursuit of a common policy. Since it is very difficult to determine where legal powers lie between the EC and the Member States, for the third party the most convenient conclusion is that the EC and the Member States assume joint obligations and that they are required to assure these joint obligations. This is also the view of the ECJ, with its emphasis on the “requirement of unity” in the external representation of the Community. The ECJ also emphasises this view in cases such as Ruling 1/78 (Re Draft Convention on the Physical Protection of Nuclear Materials)<sup>89</sup> and Case 104/81 *Hauptzollamt Mainz v. Kupferberg*.<sup>90</sup>

In agreements where the rights and obligations of the EC and the Member States are inter-linked, the problem of the respective liabilities of the Community and the Member States will arise quite clearly. In other words, we are dealing here with cases

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<sup>88</sup> [1994] ECR I-625, at para. 69.

<sup>89</sup> [1978] ECR 2151, at para. 35.

<sup>90</sup> [1982] ECR 3641, at paras. 13 and 14.



where the nature of the agreement is such that a third party is entitled to respond to Community or Member State action in one area covered by the agreement by retaliation of another area. The main example is the WTO Agreement and those agreements associated with it, but in principle the issue could arise in any international agreement to which the Community and the Member States were parties. Macleod *et al.* (1996) go further in the explanation by saying that “if the action and retaliation take place in respect of matters entirely within the competence of the Community or entirely within the competence of the Member States, the problems are less intractable. If, however, the third party responds to action in an area of Member State competence by retaliation in an area within the competence of the Community, the need for close co-operation between the Community and the Member States is evident.”<sup>91</sup>

When an agreement is covered by a general rule of the law of treaties, by which a party is responsible for all obligations of the treaty unless it makes a reservation, we are dealing with an agreement which is not mixed under a formal or under a substantive definition of mixed agreements. In extreme cases, as Schermers mentions, the position might be defended that, in such a case, adherence by the Community implies a tacit reservation in the sense that the EC cannot be held liable for matters which are outside its competence.<sup>92</sup> In these cases, Article 46 of the 1986 Vienna Convention on the Law

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<sup>91</sup> Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, pp. 159-60.

<sup>92</sup> See Schermers, H. G. 'A Typology of Mixed Agreements' in O'Keeffe, D. & Schermers, H. (eds.) *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983, p. 28.

of Treaties between States and International Organisations or between International Organisations (VCLTIO)<sup>93</sup> will apply. It reads as follows:

1.- 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.

2.- An international organisation may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organisation regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3.- A violation is manifest if it would be objectively evident to any State or any international organisation conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organisations, and in good faith.

#### B.- Effects on Third Parties of Mixed Agreements Concluded in Violation of EC Law

Despite the fact that the internal legal competence of the Communities and the Communities' procedures for concluding agreements are matters of EC Law, both the validity and the effects of agreements, in relation to third countries, concluded in the framework of any rules of EC Law must be taken into consideration in terms of international law, and not EC Law.<sup>94</sup> As Brownlie points out, the rules of customary law on these issues are not easy to state with certainty.<sup>95</sup>

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<sup>93</sup> The 1986 Vienna Convention has not yet entered into force but it follows almost to the letter the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

<sup>94</sup> See in this respect Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, pp. 129-32.

<sup>95</sup> See Brownlie, I. *Principles of Public International Law*, Clarendon Press, 1990, pp. 622-24.

Within the doctrine, some argue that international law leaves the matter to the internal rules of the international organisation to determine the procedures by which its consent to be bound has to be expressed. Therefore, any violation of the internal rules of the organisation “vitiates the expression of such consent, and renders the agreement which has been concluded void or voidable.”<sup>96</sup> Others believe that the acts of a representative of an organisation acting within his authority bind the organisation in international law, “even if the internal rules of the organisation have not been complied with.”<sup>97</sup> As a matter of fact, the principles which appear in Article 46 of the 1986 VCLTIO fall somewhere between the two previously cited schools and represent the views of the majority of jurists.

When looking carefully at Article 46, it will be noted that agreements concluded in the framework of an organisation’s internal rules are not *ipso facto* void. As Macleod *et al.* (1996) argue, the rule in Article 46 applies in principle in favour of the State or international organisation which has acted in violation of its own internal rules and amounts to a defence against a claim for performance of the agreement by the “innocent” party. Therefore, the rule in Article 46 would not apply to a State or organisation which has concluded an agreement with the EC to claim that such an agreement was void because it had been concluded against a rule of the EC’s internal legal order. The rest of Article 46 reinforces this presumption in favour of the validity of agreements which have been duly concluded. One of the parties in the agreement must

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<sup>96</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford 1996, p. 130.

<sup>97</sup> *Ibid.*

show that the violation of its internal rules was “manifest” in order to invoke an expression of consent to be bound by that agreement. In order to determine whether a violation is “manifest”, Article 46(3) clarifies the situation: the violation must have been “objectively evident” to a party acting in accordance with normal practice and in good faith. In addition to that, the internal rule involved must have been “of fundamental importance”.

To determine the extent to which the powers of the Communities go in relation to a given agreement is not always easy. Same thing applies to saying whether these powers are exclusive or shared with the Member States. Sometimes the particular roles and competencies of each of the Community institutions in the process of concluding agreements may not be so obvious. In this regard, irregularities when concluding an agreement may not be “manifest” to third parties. This is so because if an agreement which has been irregularly concluded is voided, it could be a problem for third parties.

The ECJ supports this view in Case C-327/91 *France v. Commission*.<sup>98</sup> This case was about whether the Commission had power to conclude an agreement between the Community and the United States in relation to competition. The Court’s opinion was that the Commission had no such power, but this did not affect the validity of the agreement in international law: “there is no doubt... that the [Competition] Agreement is binding on the European Communities...In the event of non-performance of the Agreement by the Commission, therefore, the Community could incur liability at

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<sup>98</sup> Case C-327/91 *France v Commission* [1994] ECR I-3641, at para. 25.

international level.”<sup>99</sup> Thus, an agreement concluded by, or in the name of, one of the Communities will almost always be binding on that Community as a matter of international law. In the light of this argument, Schermers comments that “[Foreign States] cannot be expected to know the extent of the competence of the Community. Whenever the Community concludes a treaty, foreign States may presume that it has power to do so. If the Community acted beyond its powers, it will nonetheless be bound unless it or its Member States can prove both its lack of competence and its manifest character. The latter will be especially complicated because of the complicated nature of EC Law.”<sup>100</sup>

In this regard, it is pertinent to mention Article 230 EC,<sup>101</sup> which suggests that international acts are unusual in that, unlike other acts, they cannot be voided. From the reading of Article 230 EC, first paragraph, however, one could interpret that it is possible to annul the conclusion of international agreements concluded by the European

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<sup>99</sup> Ibid., at para. 25.

<sup>100</sup> Schermers in “The Internal Effect of Community Treaty Making” in O’Keeffe & Schermers (eds.) *Essays on European Law and Integration*, Kluwer, 1982, pp. 167-78 at p. 173,

<sup>101</sup> Article 230 EC reads as follows:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the European Parliament, by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

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

Community. An example of it could be the case mentioned earlier where the European Commission concluded an agreement *vis-à-vis* the USA on behalf of the EC on competition (Case C-327/91 *France v Commission*).<sup>102</sup> The French Republic argued that the Commission had no power to conclude agreements for it is only the Council of the European Union the institution which has competence to conclude international agreements on behalf of the EC. In this particular case-law, in its paragraph 7, the Court literally arguments as follows (I cite the position of the ECJ):

As we know, under the first paragraph of Article 230, the Court reviews the legality of acts of the institutions “other than recommendations or opinions”. According to the relevant case-law, however, for the purposes of judicial review, it is not the form of the act which matters but its effects and its content which must be verified.<sup>103</sup> The Court pointed out in the ERTA judgement<sup>104</sup> that an action for annulment must be available against “all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effect”.<sup>105</sup>

Concerning the European Community institutions and the Member States, it is not easy to see how they could be obliged as a matter of EC Law to give effect to an agreement which was out of the demarcation of the EC’s powers or which had been concluded in the framework of constitutional principles of EC Law. However, as Macleod *et al.* mention, if agreements concluded in violation of internal rules of EC

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

<sup>102</sup> [1994] ECR I-3641.

<sup>103</sup> See most recently, the judgement in Case C-325/91 *France v Commission* [1993] ECR I-3283, at paragraph 9.

<sup>104</sup> Judgement in Case 22/70 *Commission v Council* [1971] ECR 263, at paragraph 42.

Law usually remain valid within international law and, therefore, bind on the Community *vis-à-vis* third States, then the institutions and the Member States must make sure that the rights of the third State or international organisation under the agreement are respected.<sup>106</sup> According to Macleod *et al.* (1996), there are three ways by which the EC institutions and the Member States would have to take steps to align both the internal and external effects of the agreement: 1) by withdrawing from the agreement, supposing this is possible, 2) by rectifying the defect of EC Law or practice which has made that agreement invalid or 3) by securing the participation of the Member States in the agreement along with the Community. A good example of the second way is the Commission's proposal for a Council decision concluding the Competition Agreement with the US which was the subject of annulment proceedings in Case C-327/91 *France v. Commission*.<sup>107</sup>

However, although the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations almost completely assimilates international organisations to States, its main weakness is that it does not make a distinction as to treaties between an international organisation and one or more of its Member States and third parties.<sup>108</sup> Nevertheless, the International Law Commission proposed a new Article 36 *bis*, which reads as follows:

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<sup>105</sup> Case C-327/91 *France v Commission* [1994] ECR I-3647, at paragraph. 7.

<sup>106</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p 132.

<sup>107</sup> [1994] ECR I-3641. See Dec. 95/145 ([1995] OJ L95/45).

<sup>108</sup> See 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, pp 262-63.

Obligations and rights arise for States members of an international organisation from the provisions of a treaty to which that organisation is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if: a) the States members of the organisation, by virtue of the constituent instrument of that organisation or otherwise, have unanimously agreed to be bound by the said provisions of the treaty, and if: b) the assent of the States members of the organisation to be bound by the relevant provisions of the treaty has been duly brought to the notice of the negotiating States and negotiating organisations.<sup>109</sup>

This proposal of a new Article 36 *bis* came into existence mainly because Member States of an international organisation appear as “third States” in regard to treaties to which the international organisation is a party. Following the words of Riphagen, “this fiction is manifestly absurd in most cases” due to the fact that Member States are usually closely involved in the conclusion of a treaty by an international organisation and also because the other party to that treaty expects performance of the Member States. This proposed Article 36 *bis* followed very closely the idea underlying Articles 34 to 37 of the Vienna Convention of the Law of Treaties. In other words, it followed the requirement of consent of a third State. In the eyes of Professor Riphagen, Article 36 *bis* conserves the idea of consent, “be it possibly given (1) before the fact, i.e. before the determination of the rights and obligations by the Treaty concluded with the

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<sup>109</sup> Yearbook of International Law Commission 1982, Vol. II (part 2), p. 43.



international organisation, and (2) given collectively.”<sup>110</sup> In addition to that, Member States are usually very involved in the performance of the treaty.<sup>111</sup>

The Vienna Convention of the Law of Treaties did not address the question of direct effect. In the eyes of Professor Riphagen, this attitude of a system of general international law ignoring the domestic legal systems is remarkable in view of the emphasis nowadays [1987] placed on the international protection of human rights and fundamental freedoms.

## V. Exclusive EC competence in International Relations<sup>112</sup>

With respect to the EC position in international organisations, when a matter falls within the exclusive competence of the EC, **only** the Community acts with regard to that matter on the international level.<sup>113</sup> Therefore, only the EC, not the Member States, expresses a position or a vote on such matters. When dealing with EC competencies, a main distinction can be drawn between: a) exclusive and non-exclusive EC competencies, b) external and internal EC competencies and c) implicit and explicit attribution of external EC competencies.

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<sup>110</sup> Capotorti, F., Ehlermann, E.-D., Frowein, J., Jacobs, F., Joliet, R., Koopmans, T. & Kovar, R. (eds.) *Du droit international au droit de l'integration*, Nomo Verlagsgesellschaft, 1987, p. 568.

<sup>111</sup> See Riphagen, W. “The Second Round of Treaty Law” in Capotorti, F., Ehlermann, E.-D., Frowein, J., Jacobs, F., Joliet, R., Koopmans, T. & Kovar, R. (eds.) *Du droit international au droit de l'integration*, Nomo Verlagsgesellschaft, 1987, pp. 565-581.

<sup>112</sup> A good article that deals with the exclusivity of Community competencies *vis-à-vis* shared competencies is the following one: Torrent, R. “Whom is the European Central Bank the Central Bank of?: Reaction to Zilioni and Selmayr”, *Common Market Law Review* 36, 1999, 1229-41, especially pp. 1236-38.

### A.- Exclusive and Non-Exclusive EC Competencies

When the services of the Commission assure that the content of an international agreement belongs to “Community competence”, do they mean European Community’s exclusive competence or non-exclusive competence? This same question could be addressed to civil servants, Community or national ones, who very often use the expression “concerning the first pillar” to refer to works done in the framework of ASEM meetings.<sup>114</sup> These assertions have a completely different meaning depending on whether we are dealing with exclusive or non-exclusive Community competence. In the framework of exclusive competencies, **only** the Community can act, whereas in the framework of non-exclusive competencies, if the Community does not act, Member States may do so and, in certain cases, they may continue to act even if the Community also acts.

#### A.1.- Exclusive EC Competence

The case-law of the ECJ has established that the EC has exclusive competence in the field of common commercial policy. Therefore, Member States are no longer competent to act in areas dealing with common commercial policy. The Court clearly

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<sup>113</sup> MacLeod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p 171.

<sup>114</sup> ASEM meetings are held between the European Union and the Asian States.

acknowledges in its Opinion 1/75<sup>115</sup> the exclusivity of the EC on the basis that the commercial policy was conceived in the context of the common market and for the defence of the common interests of the EC. The ECJ concluded that it could not be accepted that the Member States could exercise powers which were concurrent with those of the EC in this field. As a logical consequence, one could say that national commercial policy measures are only permissible by virtue of specific authorisation by the EC. As an example of it we have Case 41/76, *Criel, née Dockenwolcke et al. v. Procureur de la Republique au Tribunal de Grande Instance, Lille et al.*<sup>116</sup> The exclusive nature of the EC's competence has most recently been confirmed in Opinion 1/94.<sup>117</sup>

### A.2.- Effects of Exclusivity

The main effect of exclusivity in EC competence is that Member States may no longer act in the areas in which the EC has exclusive competence. The Court has pronounced itself in this way in Opinion 1/75 (Re OECD Local Costs Standard) by saying that “the exercise of concurrent powers by the Member States in this matter is impossible.”<sup>118</sup> In Case 804/79 *Commission v UK* (which is not an external relations case), the ECJ expressed herself in the same terms when saying that “the power to adopt measures...has belonged fully and definitively to the Community. Member States are

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<sup>115</sup> Opinion 1/75 [1975] ECR 1355, at 1363-4.

<sup>116</sup> [1976] ECR 1921, at 1937.

<sup>117</sup> Opinion 1/94 [1995] 1 CMLRev 205, paras. 22-34.

therefore no longer entitled to exercise any power of their own in [these matters]. The adoption of...measures is a matter of Community Law. The transfer to the Community of powers in this matter being total and definitive,...a failure [of the Council] to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field.”<sup>119</sup>

In legal theory, the powers of the Member States have been transferred completely to the EC level, and the Member States may not enter into any international agreements which could affect measures adopted by the EC or change the scope of these measures. It must be clarified, though, that the exclusivity of the EC Common Commercial Policy is *not* the same as the exclusivity of the EC's implied powers under the ERTA principle. In this respect, we have Case 22/70 *Commission v Council* at paragraph 22 as an example given by the Court. Paragraph 22 reads as follows:

If these two provisions are read in conjunction, 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.<sup>120</sup>

As we see in Opinion 1/75 (Re OECD Local Costs Standard), Member States no longer have the right to adopt positions which differ from those which the EC intends to adopt in relations with third countries, or take over actions which would hinder the EC

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<sup>118</sup> [1975] ECR 1355, at 1364.

<sup>119</sup> [1981] ECR 1045, at paras. 17, 18 and 20.

<sup>120</sup> [1971] ECR 263, at 275.

in the exercise of its tasks.<sup>121</sup> Nor may they adopt internal legislation which undermines, or contradicts, measures adopted, externally or internally, by the Community.

Another effect of exclusivity is that the EC must be allowed to exercise its powers with total freedom. Ruling 1/78 (*Re the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports*) in this respect concludes that “the Member States, whether acting individually or collectively, are no longer able to impose on the EC obligations which impose conditions on the exercise of prerogatives which thenceforth belong to the EC and which therefore no longer fall within the field of national sovereignty.”<sup>122</sup> Therefore, the EC may have to become party to international agreements which relate to areas of exclusive competence, in order to be in a position to comply with the obligations in the agreements in question,<sup>123</sup> and in order that the fulfilment of the tasks given to the European Communities by the Treaties is not put in jeopardy.<sup>124</sup> In addition to that, as we can gather from the Joint Cases 3, 4 and 6/76 *Cornelis Kramer*, 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 such agreements.<sup>125</sup>

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<sup>121</sup> [1975] ECR 1355, at 1364.

<sup>122</sup> [1978] ECR 2151, at para. 32.

<sup>123</sup> *Ibid.*, at para. 22.

<sup>124</sup> *Ibid.*, at para. 33.

<sup>125</sup> [1976] ECR 1279 at paras. 44-45 of the judgement.

### A.3.- Non-Exclusive EC Competence

As for non-exclusive Community competence, there are two types depending on the kind of exercise of these competencies. This exercise may be alternative or parallel (or complementary) with the exercise of Member States' competencies. In the **first case** (when the exercise of non-exclusive Community competence is alternative with the exercise of Member States' competencies), if the Community exercises its non-exclusive competence, Member States lose the possibility to exercise theirs.<sup>126</sup> However, from the moment in which the Community exercises its non-exclusive competence and to the extent where it will do so, this exercise pushes away the possibility for Member States to act individually. The **second case** (when the exercise of non-exclusive Community competence is parallel or complementary with the exercise of Member States' competencies) appears in two occasions:

- a) when the Community is competent to put into practice "action's programmes" over a Community policy which co-exists with national policies on the same field. The typical example would be the one of research policies or co-operation policies to development.
- b) when the Community produces a regulation which, by its own nature, can co-exist with non-harmonised national rules. This is an exceptionally hypothetical

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<sup>126</sup> See Torrent, R. *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*, <<<http://www.ub.es/dpecp/ep/livreTorrent.html>>>, 1998, at chapter 2.

case which occurs in practice only in the field of intellectual property: the Community introduces a title and/or a mechanism for protection of the additional intellectual property which co-exists with the titles and/or mechanisms of the various Member States. Some people may say that this hypothetical case shows an exclusive Community competence (and not non-exclusive competence) since only the Community can create a Community title of protection of intellectual property. This argument, however, runs the risk of transforming all Community competencies in exclusive competencies; since only the Community can act at a Community level, all Community actions belong to the exclusive Community competence. It is, then, preferable to reserve the term “exclusive” for cases where Community competence excludes any possible national regime in the same field.

One should also observe that the analysis of Community competencies must be done in relationship with specific legal situations which are the subject of a potential regulation. An international agreement can regulate different legal situations. Those situations which do not belong to EC exclusive competence keep belonging to Member States’ competencies (unless the Community exercises its non-exclusive competence, assuming that it exists in an specific issue).

### B.- External and Internal EC Competencies

Concerning the distinction between external and internal competence, this is a problematic issue.<sup>127</sup> During the early times of the Community, there was a strong tendency to consider that the EC external competence had a more limited scope than the internal competence. The evolution of the ECJ case law in its European Road Transport Agreement (ERTA) case [Case 22/70, *Commission v Council*]<sup>128</sup> and its Opinions 1/68 and 1/76<sup>129</sup> consolidated the thesis of “parallelism” between external and internal competencies.<sup>130</sup> McGoldrick explains this thesis as follows:

“[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>131</sup>

With regard to the ERTA Case, I would like to write a few lines. The thesis of parallelism previously mentioned gained approval in the ERTA Case.<sup>132</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

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<sup>127</sup> See Torrent, R. *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*, <<<http://www.ub.es/dpecp/ep/livreTorrent.html>>>, 1998, chapter 2.

<sup>128</sup> The ERTA Case (1970): [1971] ECR 263.

<sup>129</sup> Opinion 1/76 (Re the Draft Agreement for a Laying-up Fund for Inland Waterway Vessels) (Rhine Navigation Case) [1977] ECR 741.

<sup>130</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>131</sup> McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, p. 48.



by enough of the contracting States, which meant that the Member States began negotiations to conclude a second ERTA. In the mean time, 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>133</sup>

The European Court of Justice, in its Case C-327/91 *France v Commission*,<sup>134</sup> deals with parallel internal and external powers of the European Community. In the above case, the Court gives the following view: "the ERTA judgement,<sup>135</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>136</sup> The ECJ goes further

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<sup>132</sup> For a good explanation of the ERTA Case (1970), Case 22/70, *Commission v Council* [1971] ECR 263, see McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, pp. 50-61.

<sup>133</sup> Kent, P. *Law of the European Union*, Financial Times Pitman Publishing, 1996, p. 28.

<sup>134</sup> [1994] ECR I-3661, paragraph 35.

<sup>135</sup> Judgement in Case 22/70 *Commission v Council* [1971] ECR 263, paragraphs 12 to 15 and 20 to 22.

<sup>136</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] ECR I-2821, paragraph 39.

by saying in this same judgement [Judgement in Case 22/70 *Commission v Council*]<sup>137</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>138</sup>

Under this theory of parallelism (or implied powers), the treaty-making or external competence of the EC should reflect its internal jurisdiction. 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 recall that the EC’s treaty-making powers may be divided into two categories: express powers and implied powers. Agreements are negotiated by the Commission and concluded by the Council, normally after consultation with the European Parliament.<sup>139</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

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<sup>137</sup> [1971] ECR 263, paragraphs 16 to 19.

<sup>138</sup> See Case C-327/91 *France v Commission* [1994] ECR I-3661, paragraph 35.

<sup>139</sup> See Kent, P. *Law of the European Union*, Financial Times Pitman Publishing, 1996, p. 28.

sphere, still belong to Member States' competencies. 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 competencies.

### C.- Implicit and Explicit Attribution of External EC Competencies

The third distinction which I would like to present deals with the implicit and explicit attribution of external EC competencies. This distinction deals only with the external EC competencies. It is the result of the interpretation given by the ECJ to the provisions of the Treaty in a constant case law whose main steps are, in the past, the principle ERTA<sup>140</sup> and Opinion 1/76 "Rhine and Moselle Navigation Case"<sup>141</sup> and, more recently, Opinions 2/91, 1/94 "Uruguay Round"<sup>142</sup> and Opinion 2/92 "OECD national treatment".<sup>143</sup> The Court has decided in its Opinion 1/76 that "competence to be internationally engaged can result not only from an explicit attribution by the Treaty but also as an implicit consequence from its [the Treaty's] provisions"<sup>144</sup> "and from acts taken, in the framework of these provisions, by the Community's institutions."<sup>145</sup>

Two more points concerning this distinction between the implicit and explicit attribution of EC external competencies:

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<sup>140</sup> Case of 31 March 1971, ERTA, ECR p. 273.

<sup>141</sup> ECR 1977, p. 741.

<sup>142</sup> ECR 1994, p. I-5267.

<sup>143</sup> ECR 1995, p. I-521.

<sup>144</sup> Opinion 1/76, para. 3.

<sup>145</sup> See ERTA Case, para. 16.

1.- among the explicitly attributed external competencies, some are exclusive (mainly article 133 EC, dealing with the Common Commercial Policy) and others are not (such as article 181 TEU, dealing with co-operation to development).

2.- among the implicitly attributed external competencies, some are exclusive (see ERTA case) and others are not. An example of implicitly attributed external competencies which are non-exclusive is the general principle by which a non-exclusive competence can be exercised directly on the external sphere to conclude an international agreement without any prior exercise on the internal sphere.

## VI. Conclusion

To sum up this chapter, and following the line of thought of Timmermans, C. & Völker E. (1981), "mixed agreements are one of the most distinctive features of the external relations law and practice of the Communities as well as one of the most difficult."<sup>146</sup> We find three types of competence for matters covered by an international agreement: 1) competence exclusively with the Community; 2) competence shared between the Community and the Member States; 3) competence exclusively with the Member

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<sup>146</sup> See generally, Timmermans, C. & Völker, E. (eds.) *Division of Powers between the European Communities and their Member States in the Field of External Relations*, Kluwer, 1981; O'Keeffe, D. & Schermers, H. (eds.) *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983.

States.<sup>147</sup> In the case where the Community is the only one competent for matters covered by an international agreement, then the Community **alone** should become party of that agreement. However, there are some cases where even if the substance of the agreement is of exclusive Community competence, the participation of Member States may also be necessary.<sup>148</sup> In such cases it is important to distinguish between the theoretical situation and how it is in practice. Theoretically speaking, in these cases Member States do not participate in the table of negotiations alongside the European Community.<sup>149</sup> Nevertheless, in practical terms the agreement itself may require the participation of Member States in the agreement so that the Community can exercise its competencies and participate effectively.<sup>150</sup>

In the case where Member States and the Community share competence, there are several ways to carry out this task. Some of the obligations in the agreement may have to do with matters for which the Community is exclusively competent. Others have to do with issues for which the Member States are exclusively competent.<sup>151</sup> Sometimes it is so that by virtue of the provisions of the Treaties the agreement is related to an area in which the Member States and the Community share competence to act. In other occasions the agreement may deal with issues where the powers of the Member States and the Community run in parallel so that each has an independent and separate interest

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<sup>147</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 142.

<sup>148</sup> *Ibid.*, p. 142.

<sup>149</sup> This is so because Member States have transferred their competencies to the Communities.

<sup>150</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 142.

<sup>151</sup> *Ibid.*

in participating in the agreement. As we see in the book of MacLeod *et al.* (1996) "where competence for the subject matter of an agreement is shared between the Community and the Member States, the full implementation of the obligations in the agreement will usually require the participation in the agreement of the Communities and the Member States together, each in respect of their powers and interests."<sup>152</sup>

Though most mixed agreements involve just the EC (with the Member States, obviously), agreements involving the EC and the European Coal and Steel Community (ECSC) are not rare. In this sense we find many association agreements in the EC legislation. However, agreements involving all three Communities<sup>153</sup> are uncommon. An example of this are some of the regional environmental agreements.

In the view of Allan Rosas, "pure Community agreements may be preferred not only by the Commission but sometimes also by some or all of the Member States, mainly in order to speed up the process and avoid complications of various sorts. There have been situations where third States, out of similar considerations, have expressed a preference for a pure Community agreement."<sup>154</sup> A practical alternative seems to be the adoption of soft law instruments in the form of a declaration plan, which may be adopted by the Council and in some cases also signed by the Council Presidency and/or the Commission, but without the need of 15 national ratifications. Examples are the

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<sup>152</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 143.

<sup>153</sup> The European Communities are composed of: European Coal and Steel Community -Treaty of Paris, 1952; European Economic Community -Treaty of Rome, 1957 and European Atomic Energy Community-Euratom, 1957.

<sup>154</sup> See Rosas, A. "The European Union and mixed agreements" in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, Sweet & Maxwell, 2000, p. 216.

Barcelona Declaration adopted at the Euro-Mediterranean Conference of 27-28 November 1995 and the New Transatlantic Agenda signed by President Clinton, Prime Minister González of Spain (representing the then Spanish Council Presidency) and President Santer of the European Commission.<sup>155</sup>

With regard to treaties, and notably bilateral agreements, one could try to devise the negotiation directives to be adopted by the Council,<sup>156</sup> and to conduct the actual negotiations in order to avoid areas of national competence. One should note that Member States are often unwilling to authorize the Community alone to conclude bilateral agreements containing concurrent competencies.<sup>157</sup> An example would be the existence of substantive provisions relating to intellectual property rights (as well as in services and direct investment). Such provisions in a bilateral agreement would almost inevitably lead to mixity, as some Member States seem to interpret Opinion 1/94 as establishing exclusive national competence in this field. On the potential competence of the Community to conclude international agreements in the field of intellectual property rights, it is pertinent to see Case C-53/96 *Hermes International*.<sup>158</sup> The Commission

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<sup>155</sup> (1996) 1 *European Foreign Affairs Rev.* 125. See also the documents adopted at the EU-US Summit in London on May 18, 1998 with a view to resolve the so-called Helms-Burton dispute (Understanding with Respect to Disciplines for the Strengthening of Investment Protection, Transatlantic Partnership on Political Co-operation, Understanding on Conflicting Requirements). See Smis, S. & Van der Borgh, K. "The EU -US Compromise on the Helms-Burton and D'Amato Acts", (1999) 93 *American Journal of International Law*, 227-236; *idem*. "The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Some Aspects from the Perspective of International Economic Law", *Revue Belge de Droit International* 1998/1, pp. 217-258.

<sup>156</sup> See Article 300 (1) EC.

<sup>157</sup> See Rosas, A. "The European Union and mixed agreements" in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, Sweet & Maxwell, 2000, p. 217.

<sup>158</sup> [1998] ECR I-3603.

may try to avoid provisions on questions such as intellectual property rights, services, investment or monetary policy in order to avoid assertions of mixity.

Development co-operation agreements and environmental agreements often belong to the category of concurrent competencies above mentioned, as concurrent competencies are spelled out in the EC Treaty,<sup>159</sup> but a potential competence may exist in many other areas such as intellectual property rights, investment or services, covered by the EC Treaty as well. It should be recalled that concurrent competencies are subject to the ERTA principle (*Case 22/70 Commission v. Council*)<sup>160</sup> on exclusive Community competence, i.e., that the adoption by the EC of common rules may create exclusive Community competence also in the fields covered by Articles 111, paragraph 5, (agreements relating to economic and monetary policy) 174, paragraph 4 (environmental agreements) and 181 paragraph 2 (agreements relating to development co-operation) of the EC Treaty, which provide that not only the Community but also the Member States may negotiate in international bodies and conclude international agreements.

It, then, remains to be seen to what extent the Council will agree to the Community becoming a party to such agreements and conventions, without insisting on Member States participation. In most cases, this will probably not be the case and mixity will continue to exist.<sup>161</sup> The fact that the last Intergovernmental Conference in Nice in December of 2000 did not want to broaden Article 133 EC so as to cover all questions of services, intellectual property rights, and investment is a clear sign of the

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<sup>159</sup> Article 174 EC, para. 4, and Article 181.

<sup>160</sup> [1971] ECR 263.



unwillingness of Member States to give up mixity even in areas of commercial policy. Another example is that of a trade and co-operation agreement negotiated with South Africa that Member States refused to accept in the spring of 1999 as a pure Community agreement, even if it was obvious that there was no legal need to conclude the agreement as a mixed agreement. The agreement was signed on October 11, 1999.<sup>162</sup> While the Commission preferred a Community agreement, the great majority of Member States wanted the agreement to become mixed.

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<sup>161</sup> See Rosas, A. "The European Union and mixed agreements" in Dashwood, A. & Hillion, C. (eds.) *The General Law of EC External Relations*, Sweet & Maxwell, 2000, p. 219.

<sup>162</sup> The proposal from the Commission to the Council to conclude an agreement on trade, development and co-operation between the Community and South Africa is contained in document COM (1999) 245 final of May 11, 1999.

## **CHAPTER IV: EC INSTITUTIONS IN THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY**

- I. Introduction**
- II. European Union, European Community & European Communities**
- III. Role of the national ministers responsible. What Member States have to say**
- IV. The Commission as a negotiator**
- V. The Council as a consultator and concluser**
  - A.- The Council of the EU *versus* the 15 Member States**
- VI. The European Parliament as a consultator**
- VII. Decision Making Process**
  - A.- The three internal tensions**
    - A.1.- Competence**
    - A.2.- Control**
    - A.3.- Efficiency vs. Accountability**
- VIII. Conclusion**

### **I. Introduction**

This chapter is meant to arise a problem which has always existed in the construction of Europe, i.e. the logical disagreement over the division of powers between the EC and the Member States.<sup>1</sup> This provokes internal tensions in European policy-making. Proof of it is the EC commercial policy, which is carried out by technocrats (from national and

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<sup>1</sup> Timmermans, C. & Völker, E. (eds.) *Division of Powers between the European Communities and their Member States in the Field of External Relations*, Kluwer, 1981.

European Administrations).<sup>2</sup> This chapter will also deal with the main actors in the EC external trade relations and will analyse the role they play in the European Commercial policy-making. It intends to go actor by actor and see their influence in the policy-making process.<sup>3</sup>

The major institutions dealing with the External Relations of the European Community will also be analysed in the current chapter. Here we shall see that as far as actors (by actors we understand Contracting Parties) are concerned, “third States may face [in mixed agreements] one or more of the Communities, one or more of the Communities together with one or more of the (by now 15) Member States, the Member States acting jointly, for instance, under the Common Foreign and Security Policy (CFSP) spelled out in Title V of the Treaty on European Union (TEU), and the Member States acting in a more individual capacity.”<sup>4</sup>

The European Union, acting under Title V (or Title VI) of the TEU, is not a legal person in its own right (but the three Communities, constituting the foundation of the Union [see Article 1, paragraph 3, of the Treaty on European Union, according to which the Union “shall be founded on the European Communities, supplemented by the policies and forms of co-operation established by this Treaty”] remain legal persons). Thus, when the EU Administration for the City of Mostar was set up in September 1994 by a Memorandum of Understanding between the EU and the Western European Union,

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<sup>2</sup> Maresceau, M. *The European Community's Commercial Policy after 1992: The Legal Dimension*, Martinus Nijhoff Publishers, 1993.

<sup>3</sup> Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996.

on the one hand, and various ex-Yugoslavia actors, on the other, the EU side was defined as “the Member States of the European Union acting within the framework of the Union in full association with the European Commission”. At the Intergovernmental Conference in Amsterdam, the question whether the Union should be endowed with legal personality in its own right was raised (possibly implying at the same time a merger of the three existing legal persons –the Communities).

To this can be added that, while Community treaties should normally be concluded by the Council, the Commission, too, has certain powers to enter into international agreements (albeit on behalf of the Communities), and a general right to represent the Union in its external relations. Even some quasi-independent Community agencies have been given certain external functions.”<sup>5</sup> In this respect, it should be mentioned that Article 300 paragraph 2 EC<sup>6</sup> states that agreements shall be concluded by the Council “subject to the powers vested in the Commission in this field.” Therefore, the Commission can conclude, *inter alia*, technical co-operation agreements under Article 302 of the EC Treaty and financing agreements under Article 106 of the Financial Regulation of 21 December 1977.<sup>7</sup> According to Article 3, paragraph. 2, Treaty on European Union (TEU), it is not only the Council, but also the Commission, which is responsible for ensuring the consistency of external activities of the Union. The

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<sup>4</sup> See Rosas, A. “Mixed Agreements” in Koskeniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 126.

<sup>5</sup> See Rosas, A. “Mixed Agreements” in Koskeniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 126.

<sup>6</sup> On Article 300 of the EC Treaty, see Frid, R. *The Relations between the EC and International Organisations: Legal Theory and Practice*, Kluwer Academic Publishers, Dordrecht, 1995, p. 126.

<sup>7</sup> OJ N. L 356, 31 December 1977, p. 1.

Commission negotiates international agreements to be concluded by the EC (Article 300, para. 1, EC Treaty) and is responsible for representations (called Commission delegations) in about 130 countries.<sup>8</sup>

In section II of this chapter, we intend to clarify some terminological concepts in the European integration project, which often are misused in the literature. Section III analyzes the role of national ministers in the External Relations of the EC. A thorough analysis of certain European institutions such as the Commission (Section IV) shall also be taken into account. We shall see, *inter alia*, how the Commission, the negotiator of international agreements, is limited by the Council in its initiatives and in its negotiation autonomy.<sup>9</sup> Many of these issues deal with the division of roles between the Commission and the Presidency of the EU in the field of international trade.<sup>10</sup> The Council, i.e. the intergovernmental body of the Union and consultator of international agreements, shall be analysed as the responsible authority for conclusion of agreements (Section V). We shall study how far the Community is competent to adhere to a certain international agreement and what is left to the Member States' competence.<sup>11</sup>

Section VI is devoted to the role and competence of the European Parliament in these issues. The last sub-title of this chapter (Section VII) is devoted to the decision making processes in EC commercial policy and the analysis of why the EU has been

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<sup>8</sup> See Article 16 TEU.

<sup>9</sup> See Louis, J.-V. "Preface" in Flaesch-Mougin, C. *Les Accords Externes de la CEE. Essai d'une Typologie*, Editions de l'Universite de Bruxelles, 1980, at p. 12.

<sup>10</sup> See Beseler, H. F. "The representation of the European Community on issues of international trade", in a note to the attention of the Heads of Delegations of the EU, 12 April 1999.

<sup>11</sup> See Grosses, S. I. H. "Contribution to the Discussion" in Timmermans, C. & Völker, E. (eds.) *Division of Powers between the European Communities and their Member States in the Field of External Relations*, Kluwer, 1981, at p. 127 ss.

criticised for its commercial policy, for being unable to negotiate without internal agreement and incapable of negotiating with one voice, due to a constraining mandate.<sup>12</sup>

## II. European Union, European Community & European Communities<sup>13</sup>

As Ramon Torrent<sup>14</sup> indicates, the institutional system of the European Union (EU) is perceived in a confusing way, not only by the citizens of the Union but also by those who direct the Union, those politically responsible for it, and by the civil servants of the European Institutions.<sup>15</sup> In such a case, we must approach the institutional system of the EU with a double perspective, a double side: a *legal* side and a *political* side. A legal side, because one cannot direct or guide a system without knowing the rules of the game; a political side, because one must know the reasons for a malfunctioning of the system.<sup>16</sup>

Since the Treaty on the European Union came into force (Maastricht Treaty or TEU)<sup>17</sup> on the 1<sup>st</sup> of November 1993, the use of the expression "European Union" has been generalised. 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

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<sup>12</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", p. 9. (Unpublished Article).

<sup>13</sup> See Westlake, M. *The Council of the European Union*, Cartermill, 1995, pp. 5-7.

<sup>14</sup> Ramon Torrent is Professor of Political Economy at the University of Barcelona and was Director responsible for the External Trade Relations of the European Community in the Legal Service of the Council of the European Union until May 1998.

<sup>15</sup> Torrent, R. *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*, <<<http://www.ub.es/dpecp/ep/livreTorrent.html>>>, 1998, introduction.

<sup>16</sup> *Ibid.*

<sup>17</sup> OJ C 224/1, (1992).

since they tend to create confusion (with an indiscriminate use of the expression "European Union") or they tend to introduce a kind of false compartmentalisation (i.e. division of competencies 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>18</sup>

Throughout this dissertation, terms such as *European Union*, *European Community* or *European Communities* appear continuously. The European Parliament, as well as other institutions, uses the term *European Union* for making reference to the external trade relations. However, lawyers should know that it is the European Community, and not the European Union, the one which has competence in the field of international trade relations. The Community is part of the Union. The European Union is not a member of international organisations.<sup>19</sup> That is why it is said that the EU does not negotiate in the World Trade Organisation's agreements and is not a member of such an organisation. It may be politically convenient to refer to the European Union rather than to the European Community as an international economic actor but it is incorrect.<sup>20</sup>

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<sup>18</sup> Ibid., at chapter 1.

<sup>19</sup> Paemen, H. "The European Union in International Affairs: Recent Developments", *Fordham International Law Journal*, Vol. 22, 1999, pp. 136-48.

<sup>20</sup> See Van den Bossche, P. L. H., "The European Community and the Uruguay Round Agreements" in Jackson, J. & Sykes, A. *Implementing the Uruguay Round*, Clarendon Press Oxford, 1997, footnote 1, p. 23.

Furthermore, Ambassador Hugo Paemen<sup>21</sup> accepts the importance of making a terminological distinction between the EC and the EU when dealing with external trade relations. I cite him literally:

“I should make a clear distinction between the terms “European Community” (or EC) and “European Union”. After all, until the Treaty of Amsterdam<sup>22</sup> comes into force, only the European Community will grant it legal personality. Therefore, please forgive me if occasionally I use the terms European Union where it is not correct: We went through a very painful adjustment period to go from the European Community to European Union, so it is somewhat difficult now to make the distinction.”<sup>23</sup>

Lawyers have long discussed, within the external relations of the EU, whether the EU can have external relations at all. This is so because the Treaties confer legal personality to the three Communities and not to the Union as such. By legal personality we understand the capacity to enter into contractual and other relations with third States and to bear full responsibility for one's actions.

There are interpretations on the capacity of external action of the EU.<sup>24</sup> However, such a capacity is not supported by the preparatory work of the Maastricht Treaty or subsequent practice. As an example of this we have a Memorandum of Understanding of 1994, which set up an EU administration for the City of Mostar. This Memorandum was

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<sup>21</sup> Former Head of the European Commission Delegation to the United States.

<sup>22</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, October 2, 1997, OJ C 340/1 (1997).

<sup>23</sup> See Paemen, H. “The European Union in International Affairs: Recent Developments”, *Fordham International Law Journal*, Vol 22, 1999, p. 136.

<sup>24</sup> See, in this respect, Klabbers, J. “Presumptive Personality: The European Union in International Law”, in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, pp. 231-53.



prepared within the context of the second pillar and had to be concluded on behalf of the “Member States of the European Union acting within the framework of the Union in full association with the European Commission.”<sup>25</sup> Here one could ask whether the cumbersome title of the Mostar Memorandum of Understanding is conducive to assert the “identity” of the EU on an international scene which, according to Article 2 of TEU,<sup>26</sup> is one of the objectives of the Union. Legally binding agreements concluded by the EU are still made on behalf of one or more of the three Communities. It must be said clearly that the EC, and not the EU, is a member of the World Trade Organisation or regional fisheries organisations, to give two examples.<sup>27</sup>

In the post-Maastricht era the concept of the *Union* stands out as a signpost. The general public, as well as third States and international organisations, may well be under the impression that the EC no longer exists. It is normally the EU that enters into an engagement when policy documents, which are not going through the formalities of a treaty, are drawn up. As an example we have the comprehensive political arrangement relating to the EU-US dispute over US unilateral sanctions policy, i.e. Helms-Burton Act. This arrangement was concluded at the EU-US Summit in London on May 18, 1998, and refers continuously to the EU as one of the parties.

The package adopted at this Summit includes an “Understanding with Respect to Disciplines for the Strengthening of Investment Protection”, the “Transatlantic

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<sup>25</sup> See Bury, C & Hetsch, P. “Politique étrangère et de sécurité commune” *Rép. Communautaire Dalloz*, October 1996, pp. 1-11, at p. 8.

<sup>26</sup> Treaty on European Union, February 7, 1992, OJ C 224/1 (1992).

<sup>27</sup> In this respect see Sack, J. “The European Community’s Membership of International Organisations”, *Common Market Law Review*, 32, 1995, pp. 1227-1256.

Partnership on Political Co-operation” and an “Understanding on Conflicting Requirements.” The negotiations leading up to this package were based on an EU-US Understanding of 11 April 1997. This Understanding enabled the EU to suspend a case against the US in the context of the World Trade Organisation.<sup>28</sup> Also a Joint Declaration on EU-Palestinian Security Co-operation agreed with the Palestinian Authority on April 20, 1998, refers to the EU as the other party. In these two examples above illustrated, there are concrete commitments of a political rather than of a legally binding nature (soft law).

As Ramon Torrent explains in his book (Torrent, 1998),<sup>29</sup> the *EU* involves the European Community (EC) and its Member States. The European Union is the political and institutional framework in which the EC's and certain Member States' competencies are exercised. In the case of Member States, the competencies which are within the institutional framework of the EU are the second and third pillars (Common Foreign and Security Policy and Justice and Home Affairs, respectively) of the EU. The EU, established by the Treaty on European Union (TEU) [also known as the Treaty of Maastricht],<sup>30</sup> now has 15 Member States 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) and is served by a single institutional framework (Article 3). However, there are important legal

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<sup>28</sup> For the background to the dispute, see Sterm, B. “Vers la mondialisation juridique? Les lois Helms-Burton et D’Amato-Kennedy”, *Revue Générale de Droit International Public*, 1996, pp. 979-1003.

<sup>29</sup> I have referred to his book earlier in this chapter.

<sup>30</sup> OJ C 191, July 29, 19992.

differences between the European Communities and the EU (of which the Communities form apart, called the first pillar).<sup>31</sup>

One terminological precision is vital for understanding well what we are trying to say. In this study the term *European Community* is often used to refer to the three Communities (The European Economic Community -which became European Community with the Maastricht Treaty-, The European Community of Steel and Coal and Euratom). In fact, the three Communities work as one entity which functions in the framework of three Treaties, even if they are legally different.

As for the *European Communities* it must be said that the WTO-Agreement was concluded by the European Communities and not by the European Community.<sup>32</sup> It was thought that, to the extent the Uruguay Round Agreements concerned matters falling within the scope of the European Coal and Steel Community (ECSC) or Euratom Treaty, these agreements fell outside the competence of the European Community.

Now it must also be said that within the EC there is exclusive and non-exclusive Community competence.<sup>33</sup> In addition to that, Torrent speaks as well of other competencies of the Member States which are exercised outside the institutional framework of the EU. However, in those cases where Member States exercise their competencies outside the institutional framework of the EU, they must respect the obligations imposed by EC Law (and by the Maastricht Treaty, as well). As we can deduce from this framework, the actors with a given legal personality and competencies

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<sup>31</sup> See Kennedy, T. *Learning European Law. A Primer and Vade-mecum*, Sweet and Maxwell, 1998, pp. 49 et seq.

<sup>32</sup> WTO, *The Uruguay Round Results. The Legal Texts* (Geneva, 1995), 6.

are the EC and its Member States. On one hand, the Community always acts in the framework of the EU since its institutional system has been taken by the TEU as an institutional system of the Union. On the other hand, its Member States may act outside the EU's institutional system.

Examples where Member States act outside the EU's institutional system are *inter alia* when in January 2000 the German Foreign Affairs Minister, Mr Fischer (or any Minister from any Member State) went to Moscow to see the current Prime Minister of Russia, Mr Putin. In this case, the German Minister visited Moscow on a bilateral basis and not representing the EU. A more recent example has been the decision adopted by 14 Member States against Austria in February of 2000 because of the creation of a new Government in Vienna with a nationalsocialistic coalition. Measures at the highest political level were taken to show the other 14 Member States disagreement with the creation of such a Government. Again, these measures were taken individually by each and every Member State. Also the humanitarian aid donated by Member States individually to the terrible events occurred in Rwanda in 1997 is another example of Member States acting outside the EU's institutional system.<sup>34</sup>

However, in certain cases Member States' competencies can be exercised within the institutional system of the Union.<sup>35</sup> Here one should understand that there are two functions of the TEC which must be distinguished: 1) application's scope of the TEC and 2) competence's scope of the TEC. By this we mean, for example, that although

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<sup>33</sup> See in this dissertation the chapter on *Mixed Agreements and the European Community* in this respect.

<sup>34</sup> Bajwa, S. & Jason-Lloyd, L. *The Legal Framework of the European Union*, Frank Cass, 1997.

Criminal Law is not outside the application's scope of the TEC, it is competence of the Member States. Another clear example is with education policies. At the moment, there is no common education policy in the EU. Therefore, it is an issue of national competence. However, it is no longer possible to discriminate other nationals of any Member State of the Union when applying for a post as a teacher for not being nationals of the country where the application is taking place. In other words, it is no longer possible to restrict eligibility to a public teaching post on the basis of the nationality within the EU.

As a personal interpretation, it is obvious that there is a commitment among the Member States to put into practice all the necessary tools in order to achieve the goals of the EC Treaty. Perhaps this table might clarify in a visual way what has been said so far:

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<sup>35</sup> See Torrent, R. *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*,

Scope	Actors	Competence
<b>Inside</b> the European Union's <sup>36</sup> institutional framework	European Community <sup>37</sup> (European Institutions) <sup>38</sup>	Exclusive EC Competence <sup>39</sup>
		Non-exclusive (shared) Competence <sup>40</sup>
	Member States <sup>41</sup> (Government, national Parliament and interest groups)	CFSP, <sup>42</sup> police and judicial cooperation in criminal matters <sup>43</sup> 4 <sup>th</sup> Pillar <sup>44</sup>
<b>Outside</b> the European Union's institutional framework	Member States act <b>independently</b> from the EU <sup>45</sup>	

<<<http://www.ub.es/dpecp/ep/livreTorrent.html>>>, 1998, chapter 1.

<sup>36</sup> This new entity embraces both the Treaty of Rome and the two pillars of intergovernmental activity – Common Foreign and Security Policy and Justice/Home Affairs-.

<sup>37</sup> As mentioned above, the EC is a supranational organisation, i.e. one to which the Member States have transferred specific legislative and executive powers and whose decisions are binding on them and their citizens. For further details, see Drost, H. *What's what and Who's who in Europe*, Cassell, 1995, p. 207.

<sup>38</sup> By European Institutions, we understand those institutions which deal with European issues and which are not national institutions. In the Community terminology, the first pillar deals with the European Communities (I should like to remind that throughout this dissertation the term European Community shall be used to refer to the 3 European Communities), whereas the second and third pillars have an intergovernmental character and, therefore, Member States deal with them. This clarification should be shown later on the dissertation.

<sup>39</sup> For a definition of Exclusive EC competence, see the chapter which deals with it in this dissertation.

<sup>40</sup> Ibid.

<sup>41</sup> Member States, as actors in EC legislation, deal with CFSP and JHA, which are forms of intergovernmental co-operation. They retain full sovereign rights, and hence, decision making is by unanimity. See, for further details, Drost, H. *What's what and Who's who in Europe*, Cassell, 1995, p. 207.

<sup>42</sup> CFSP stands for Common Foreign and Security Policy, which appears on Title V of the Treaty on European Union.

<sup>43</sup> It appears on Title VI of the Treaty on European Union.

<sup>44</sup> The idea of the "fourth pillar" is a creation of Professor Torrent.

<sup>45</sup> However, formally speaking, Member States have to follow the EC legal order. Even if Member States act bilaterally, they will be affected by the EC legal order.

### III. Role of the national ministers responsible. What Member States have to say<sup>46</sup>

John Peterson and Helene Sjursen argue that the move from EPC -in retrospect, a strikingly anodyne construction- to the CFSP was propelled by ambitions to create a “common” EU foreign policy analogous to, say, the Common Agricultural Policy or Common Commercial Policy.<sup>47</sup> Yet, French *national* foreign policy decisions to test nuclear weapons in the Pacific, send troops to Bosnia, or propose a French candidate to head the European Central Bank could be viewed as far more momentous and consequential than anything agreed within the CFSP between 1995 and 1997. It is plausible to suggest, as David Allen does, that the EU simply does not have a “foreign policy” in the accepted sense. Going one step further, the CFSP may be described, perhaps dismissed, as a “myth”. It does not, as the Maastricht Treaty promises, cover “all areas of foreign and security policy”. Obviously, it is not always supported “actively and unreservedly by its Member States in a spirit of loyalty and mutual solidarity”.

Having said that, and knowing that the presumption in the European Union is to have collective action,<sup>48</sup> is there really a “common” European interest? If so, is this interest so great as to assume that in certain circumstances Member States will act with a single voice? Do Members States have enough proximity in their national interests to act with one voice in the international sphere?

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<sup>46</sup> Goldstein, J. & Keohane, R. (eds.) *Ideas and Foreign Policy. Beliefs, Institutions and Political Change*, Cornell University Press, 1993.

<sup>47</sup> Peterson, J. & Sjursen, H. “Conclusion. The Myth of the CFSP?”, in Peterson, J. & Sjursen, H. (eds.) *A Common Foreign Policy for Europe? Competing Visions of the CFSP*, Routledge, 1998, p. 169.

Following the same authors<sup>49</sup> the European Union has not yet reached its apogee in terms of its ability to act with power and unity in international affairs.<sup>50</sup> However, some competencies are exclusively of the European Community. Customs duties and protective NTBs (quantitative limits, safety norms, health and hygiene standards, etc.) were and are fixed by the Union as a whole, not by the individual Member States.<sup>51</sup>

The first pillar of the EU (i.e. European Communities)<sup>52</sup> makes use of the legal instruments set out in the Treaty of Rome, unlike the second and third pillars,<sup>53</sup> which have an intergovernmental character. This means that in the first pillar Member States have permanently transferred some of their powers to the EC, so limiting their sovereignty. Evidence of it is Case 6/64 *Costa v ENEL*.<sup>54</sup> As a consequence, "certain competencies (or powers) are now held by the EC -they have been conferred on it, or attributed to it by the Member States. Ex Article 5 (new Article 10) of the EC Treaty refers to the powers "conferred" upon the EC by the Treaty. The EC has only those specific powers which have been conferred upon it. Thus, the presumption of competence lies with the Member States."<sup>55</sup> It can, then, be said that in the first pillar of

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<sup>48</sup> Carlsnaes, W. & Smith, S. (eds.), *European Foreign Policy. The European Community and Changing Perspectives in Europe*, SAGE Publications, 1994.

<sup>49</sup> John Peterson & Helene Sjursen.

<sup>50</sup> Cafuny, A. & Peters, P. *The Union and the World: The Political Economy of a Common European Foreign Policy*, Kluwer Law International, 1998.

<sup>51</sup> Piening, C. *Global Europe. The European Union in World Affairs*, Lynne Rienner Publishers, 1997, p. 13

<sup>52</sup> The European Communities are composed of the European Coal and Steel Community, by the Treaty of Paris, 1952, the European Economic Community, by the Treaty of Rome, 1957 and the European Atomic Energy Community-Euratom, 1957.

<sup>53</sup> The second pillar of the EU deals with the Common Foreign and Security Policy. The third pillar, however, deals with police and judicial cooperation in criminal matters. See <http://europa.eu.int/scadplus/leg/en/cig/g4000p.htm#p3>.

<sup>54</sup> (1964) ECR 585 at 593-4.

<sup>55</sup> McGoldrick, D. *International Relations Law of the European Union*, Longman, 1997, p.42.



the European Union Member States **have to** operate with one voice and they have accepted that the Commission should act on their behalf.

As Professor Weiler points out, will Member States lose their right to engage in international relations in those areas where the Community has competence?<sup>56</sup> This is an obvious question to ask in issues dealing directly with the first pillar of the EU, where Member States are willing to cede the negotiating role over the negotiations to the EC. Furthermore, this aspect of Member States losing their right to engage in international relations in those areas where the Community has competence "is usually the most problematic, as it is this which most directly affects their autonomy and results in their being increasingly dependant upon EC Institutions to further their national interests.

From an EC perspective, however, exclusive competencies have many benefits. They result in an increased autonomy for the EC by forcing third States to deal exclusively with the Community; contribute to a Community identity by making the EC the external representative of internal interests, and strengthen the EC Institutions' negotiating position *vis-à-vis* Member States on internal matters by giving the former an additional source of power which they can wield."<sup>57</sup>

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<sup>56</sup> Weiler, J. "The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle" in O'Keeffe, D. & Schermers, H. (eds.) *Mixed Agreements*, Kluwer Law and Taxation Publishers, 1983.

#### IV. The Commission as a negotiator

In this subtitle attention shall be paid, *inter alia*, to the Commission's competence in commercial policy as defined by the treaties and the European Court of Justice. According to Articles 300(1) EC and 101 Euratom, international treaty negotiations in respect of matters involving an element of Community competence should be conducted *a priori* by the Commission. In theory, the Member States and the Community could each negotiate independently their respective competencies. However, in practice it is unusual for the Member States and the Community to negotiate independently.<sup>58</sup> This puts the Commission in a position in which it is the natural representative, the spokesman and the only negotiator of the Community.<sup>59</sup> "The basic rule under the EC Treaty has always been that the Commission negotiates agreements on behalf of the Community".<sup>60</sup> Article 300 (1) EC reads as follows:

Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organizations, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

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<sup>57</sup> Chalmers, D. & Szyszczak, E. *European Union Law. Volume II. Towards a European Polity?*, Dartmouth, 1998, p. 178.

<sup>58</sup> Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 152.

<sup>59</sup> Beseler, H. F. "The representation of the European Community on issues of international trade", in a note to the attention of the Heads of Delegations of the EU, 12 April 1999, p. 2.

<sup>60</sup> Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 85.

In exercising the powers conferred on it by this paragraph, the Council shall act by a qualified majority, except in the cases provided for in the second sentence of paragraph 2, which it shall act unanimously.

With regard to the management of the EC external relations, there are two types of international agreements to take into account, bilateral and multilateral agreements. In bilateral agreements, in Article 300 (1)<sup>61</sup> the Treaty of Rome imposes a duty on the Commission to “negotiate in consultation with any committees established for the purpose by the Council. Secondly, the Treaty requires the Commission to respect the Council’s instructions regarding the conduct of the negotiations, as such instructions may from time to time be given in directives of the Council.”<sup>62</sup> The participation of a Community representative in the negotiation of the agreement must be based on an authorization obtained by the Commission in accordance with the appropriate procedure pursuant to the relevant Treaty provision.<sup>63</sup> In the context of Article 300 (1) EC, a negotiating directive constitutes an instruction to the Commission on the content of the negotiation.<sup>64</sup> It must be said, though, that negotiations under Article 300 EC are not affected by the bilateral or multilateral nature of the agreements.

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In exercising the powers conferred on it by this paragraph, the Council shall act by a qualified majority, except in the cases provided for in the second sentence of paragraph 2, for which it shall act unanimously.

<sup>62</sup> See Macloed, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 88.

<sup>63</sup> See Macloed, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 151.

<sup>64</sup> *Ibid.*

In the eyes of Macleod *et al* (1996), negotiating directives are generally attached to the authorization given to the Commission by the Council at the beginning of the negotiation.<sup>65</sup> This mandate of negotiation must be discussed by the EU Council. In certain cases, it is evident that the bulk of the agreement relates to matters within the competence of the Member States but that certain incidental aspects involve the competence of the EC.<sup>66</sup> The 1998 Vienna Convention on Illicit Trafficking in Drugs related for the most part to matters that fell under the competence of the Member States, such as penalizing certain conduct and arrangements for extradition, *inter alia*. However, one part of what would become Article 12 of the Convention related to trade in precursors, and the Commission sought and obtained from the Council authorization to participate in the negotiations with respect of that Article. It is these cases in which the Commission seeks to participate to safeguard the interests of the Community.<sup>67</sup>

In bilateral agreements, the European Commission ‘shall make recommendations.’<sup>68</sup> The right to initiate proposals for Community action rests with the Commission:

“In the first instance, therefore, it is for the Commission to consider whether it would be appropriate for the Community to enter into agreements in a particular area or with a particular State, and to make the necessary recommendations to the Council. In practice, such recommendations take the form of a communication from the Commission to the Council, explaining why it is thought that conclusion of an agreement would be desirable, and proposing that the Council should authorize the Commission to negotiate such an agreement in

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<sup>65</sup> *Ibid.*

<sup>66</sup> [1990] OJ 326/56.

<sup>67</sup> *Ibid.*

<sup>68</sup> See article 300, para. 1 EC Treaty.

accordance with a set of negotiating directives suggested by the Commission, and annexed to the recommendation.”<sup>69</sup>

In the case of multilateral agreements like the GATT Agreements, on certain issues such as services or intellectual property rights, Member States have competence to decide whether they want to be a party to the proposed agreement, such as the WTO Agreement where Member States play a secondary role and the Community negotiates.

Macleod *et al.* (1996)<sup>70</sup> comment that the EC should be able to participate and take action internationally in areas in which it has competence to legislate for itself internally. To decide what the correct legal basis should be in a case of conclusion of an agreement in the process of being negotiated is not always possible.<sup>71</sup> Within the Council of Ministers, or between the Council and the Commission, there was argument as to know the correct legal basis for Community action. This issue was solved by saying that only after the agreement had been negotiated did the Council have a view on the legal basis for conclusion of an agreement.

In the case of the European Commission, as it is stipulated in the Treaty of Rome, it will negotiate on behalf of the European Community in issues dealing with the first pillar. The intention to have the Commission as the organ in charge of exercising the role of representative of the external relations of the Community appears as well in Article 302 EC, which says that the Commission shall “ensure the maintenance of all

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<sup>69</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, pp. 86-7.

<sup>70</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 51.

<sup>71</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 89.

appropriate relations with the organs of the United Nations and of its specialised agencies.”<sup>72</sup> When there is exclusive Community competence, the international representation of the EC should only be assured by the Commission. The Commission is engaged in negotiations with the authorisation of the Council.<sup>73</sup>

However, “the Commission cannot act as the sole negotiator [in mixed agreements]. The [European] Court [of Justice] has established a practice of emphasizing “the duty of close cooperation” in order to ensure consistency of the external activities of the EU as a whole. This “duty of close cooperation” is a fundamental feature of the legal basis of EC external relations. It is intended to ensure some degree of democratic legitimization in the external trade policy process.”<sup>74</sup>

Since we are dealing with the EC external trade relations, we must examine the special role of the European Commission which, according to Art. 133 EC, has the exclusive competence in the field of European Commercial Policy, leading the negotiations with third parties under a mandate of the Council.<sup>75</sup> In order to oversee the Commission in negotiating, the 133 Committee was set up, which consists of high-level Member States civil servants. This proves that even in “exclusive” areas, such as Article

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<sup>72</sup> Beseler, H.-F. “La représentation de la Communauté européenne pour les questions du commerce international”, Note to the attention of the Heads of Delegation of the European Commission, 12 April 1999.

<sup>73</sup> Bridge, J. W. & Lasok, D. *Law & Institutions of the European Union*, Butterworths, 1994.

<sup>74</sup> See Mortensen, J. L. “The institutional challenges and paradoxes of EU governance in external trade: coping with the post-hegemonic trading system and the global economy” in Cafruny, A & Peters, P. (eds.) *The Union and the World: The Political Economy of a Common European Foreign Policy*, Kluwer Law International, 1998, p. 217.

<sup>75</sup> This information has been gathered from a paper written by students from the Political and Administrative Studies Department, 1998-99, College of Europe, Brugges, Belgium, with the title *EU-US Relations*.

133, negotiations are still held jointly through the 133 Committee, which means that Member States do not fully renounce control.<sup>76</sup>

## **V. The Council as a consultator and concluder<sup>77</sup>**

The Council consists of representatives of the Member States. Its composition may vary according to the subjects discussed. It is assisted by a General Secretariat under the responsibility of a Secretary-General, High Representative for the Common Foreign and Security Policy, assisted by a Deputy Secretary-General. The General Secretariat carries out all the necessary work for the activities of the Council, the Permanent Representatives Committee (COREPER)<sup>78</sup> and all the committees and working parties set up within the Council. The Council is assisted by a Committee consisting of Permanent Representatives of the Member States. The Permanent Representatives Committee's task is to prepare the Council's work and to carry out any instructions given to it by the Council. In order to deal with all the tasks entrusted to it, the Permanent Representatives Committee meets in two parts: Part 1 (Deputy Permanent Representatives) and Part 2 (Ambassadors). Items for examination are divided between the agendas for each part of the Committee.

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<sup>76</sup> Johnson, M. 113. *European Co-operation in Action*, 1998.

<sup>77</sup> For a general overview of the EU Council, see Westlake, M. *The Council of the European Union*, Cartermill, 1995.

<sup>78</sup> Comité des Représentants PERmanents. For a precise definition of COREPER, see Cassel, *What's what and who's who in Europe* (1995) p. 102.

In EC practice, “conclusion” within the meaning of the relevant EC Treaty provisions (Articles 114 [now repealed], 300 and 310), thus covers simultaneously two different measures: (1) the measure whereby the internal procedure to conclude an agreement is completed and (2) the measure whereby the EC binds itself internationally. This final act of the Council takes the form of a decision or a regulation. This decision or regulation is published in the Official Journal of the EC.<sup>79</sup>

As it is mentioned in this subtitle, the Council remains as the institution whose role is to conclude (mixed) agreements. The Council takes its decision of signing the agreement by the Community and decides upon one or more people for this purpose. In most cases, it is a Commissioner and a member of the President of the Council. It is, therefore, the Council who, in commercial policy, concludes and ratifies international agreements. The conclusion of these agreements is according to a procedure which follows the different phases of revision of Treaties. First of all, the Commission negotiates, with or without the participation of Member States. The European Parliament is called for his opinion (this is certainly the case since the entry into force of the Single European Act.) when we are dealing with an association agreement or a co-operation agreement based on Article 310 EC. The Council concludes the agreement on behalf of the EC. Member States ratify the agreement according to their respective

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<sup>79</sup> See Bourgeois, J.H.J. “The European Court of Justice and the WTO: Problems and Challenges” in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 77.



constitutional rules.<sup>80</sup> Ratification of agreements by Member States is only necessary where agreements are mixed.

The 133 Committee, which is provided for in Article 133 EC, is a Council committee chaired by the Council Presidency and it is responsible for assisting the Commission in the negotiations on trade and tariff matters which the latter conducts on behalf of the Community.<sup>81</sup> It has a key role in ensuring that the Council accepts the final results of negotiations, and therefore in the formation of unity.

In order to have a close co-operation between the national and the European levels in issues of exclusive and mixed competence, there are continuous informal negotiations between the Article 133 Committee, composed of national Civil Servants, and the Commission. Different commercial issues are discussed at the 133 Committee before being sent to the WTO for negotiation.<sup>82</sup> Most issues are, then, treated in 133 Committee, so in principle there is no need to go into the political level (COREPER, General Affairs Council) for solving problems. The Committee of Permanent Representatives (COREPER is the French abbreviation for *Comité des Représentants Permanents*) is an institution of the European Union. Composed of the Member States' ambassadors to the Community, it is responsible for preparing meetings of the Council (composed of ministers from the national governments) and following up its decisions. It liaises closely with the European Commission, the organisation's

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<sup>80</sup> Beseler, H.-F. "La représentation de la Communauté européenne pour les questions du commerce international", Note to the attention of the Heads of Delegation of the European Commission, 12 April 1999, p. 3. Unpublished document.

<sup>81</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p.11.

administrative and executive arm, and is assisted by a large number of working parties. The ambassadors are assisted by committees of national civil servants.

With regard to the EU Council of Ministers, some national experts have proposed to have a Trade Ministers Council instead of the General Affairs Council.<sup>83</sup> The reason behind this is to have a more efficient European commercial policy. It is said that Ministers of Foreign Affairs are more concerned with political issues than technical ones. They usually do not show much interest in trade issues, which makes commercial policy-making less efficient. This takes me to the next point, which is very controversial, i.e. the trade-off between efficiency and accountability.

Here one could ask whether the accomplishment of this procedure does not annul any possibility of control of legality *a posteriori* in all these agreements. The possibility of judicial control remains untouched for those provisions which deal with EC competence.<sup>84</sup> These provisions can be interpreted by the ECJ: in a judgment of 30 September 1987, Case 12/86, *Demirel*,<sup>85</sup> the Court affirmed its competence to interpret provisions of mixed agreements (for example, the association agreement with Turkey and the additional protocol).

Trade agreements concerning goods can be concluded on the basis of Article 133 EC, which provides for the Council to act by qualified majority. However, if an

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<sup>82</sup> Hayes, J. P. *Making Trade Policy in the European Community*, MacMillan, 1993.

<sup>83</sup> I have personally gathered this information at a round table held at the Royal Institute of International Affairs in February 1998 during the discussion of a paper written by Johnson, M. 113. *European Cooperation in Action*, 1998.

<sup>84</sup> Louis, J.-V. *L'Ordre Juridique Communautaire*, Office des Publications Officielles des Communautés Européennes, 1993, pp. 117-18.

<sup>85</sup> Judgment of 30.09.1987, Case 12/86, *Demirel*, [1987] ECR, pp. 3719 et seq.

agreement (also or solely) concerns concessions relating to services, intellectual property or investments, the general rules of the Treaty apply. Under those rules, agreements are concluded by qualified majority or unanimously depending on whether the Community's internal decisions in that area are taken by qualified majority or unanimously. In addition, Member States often wish to exercise their residual powers in those fields in which no internal Community rules apply or do not yet apply.<sup>86</sup>

In the case of mixed agreements, they “require a number of different procedures, including consultation procedures with the European Parliament and unanimous decision-making in the Council.”<sup>87</sup> Acts of the Council dealing with the conclusion of agreements could require the Council to follow the co-operation procedure.<sup>88</sup> The decision-making process leading to Community conclusions does not depend on whether the agreement is mixed (except for the fact that as a matter of practice, the Council will not formally conclude a mixed agreement until all Member States have ratified). It is a function of the legal base chosen. An example of this is the Council decision relating to the conclusion of the Framework Agreement on Science and Technology with Iceland.<sup>89</sup>

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<sup>86</sup> <<[http://europa.eu.int/comm/archives/igc2000/geninfo/fact-sheets/fact-sheet6/index\\_en.htm](http://europa.eu.int/comm/archives/igc2000/geninfo/fact-sheets/fact-sheet6/index_en.htm)>>

<sup>87</sup> See Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996.

<sup>88</sup> Macleod, I., Hendry, I. & Hyett, S. *The external relations of the European Communities*, Clarendon Press Oxford, 1996, p. 83.

<sup>89</sup> See (1990) Official Journal L 14/18.

A.- The Council of the EU versus the 15 Member States<sup>90</sup>

It is important to explain the difference between the Council of the European Union and the 15 Member States.<sup>91</sup> Journalists have made fashionable to write statements such as this one: “The Commission proposes the 15” a directive on accepted added values on alimentation products. At this point we do not know whether it is the 15 who adopt the new directive or whether the 15 agree that the Commission adopt it (the above statement tends to transmit this second idea). What is serious is not so much that journalists use this kind of statements but that the public opinion perceives the functioning of the Community in such a way: to the eyes of the public opinion, EC regulations are the work of eurocrats in Brussels. What is even more serious is that civil servants perceive what they do in such a way. Let us examine this mistaken perception a bit closer:

1.- a national civil servant who participates in a meeting of a working group at the Council of the European Union goes often to Brussels as the football player who plays a match away from home, without knowing the match field. His main aim is not to produce a good Community legislation but to prevent this legislation from being uncomfortable for his country and from obliging him to modify national legislations. His attitude is not one of deciding but one of trying to control (without much hope) what “Brussels does”.

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<sup>90</sup> Hartley, T. C. *The Foundations of European Community Law. An Introduction to the Constitutional and Administrative Law of the European Community*, Oxford University Press, 1998.

<sup>91</sup> Demaret, P. *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels*, Story-Scientia, 1988.

2.- when an official from the Commission that represents this institution in a working group at the Council of the European Union addresses himself to his interlocutors, he never uses the expression “you, the Council” or “you, members of the Council”. The expression used in a more systematic way is “you, the Member States”, that is to say, “you, the 15”, as the journalists from before.

3.- the most common Freudian slip among national civil servants is to speak of the Commission’s competencies instead of the Community’s competencies.

4.- Representatives from national Administrations at meetings in the framework of the CFSP talk to each other using the term *partners* (there are 16 *partners*, the 15 Member States and the Commission). However, when an issue from the first pillar appears during the negotiation at these meetings, national representatives no longer use the term *partner* to refer to the Commission. This is a clear prove of the exclusive competencies of the EC in the so-called first pillar. In the CFSP both the European Commission and the 15 Member States are *inter pares*.

So what do all these attitudes and expressions have in common? Well, the answer is the disappearing of the Council of the European Union as an institution. The 15 are there but the Council does not exist anymore. The Council is the access key to any institutional building of the European Union since only the Council can integrate in

a coherent way all the subdivisions of the table shown above.<sup>92</sup> The Council has a horizontal decision power in the framework of Community treaties,<sup>93</sup> as it is also an institution which has in exclusivity the decision power in the framework of CFSP and JHA. However, the Council, by the fact that it is composed of representatives from the 15 national governments, could always get these 15 countries together, allowing the right permeability of the borderline between Member States' competencies inside and outside the EU's institutional framework. On the other hand, if the Council plays a minimal role on the European integration process, then "the Community" will be wrongly interchanged with "the Commission" and the Union will only become an intergovernmental grouping of 15 Member States, with a six-month rotation presidency.<sup>94</sup>

However, since it is obvious that there is "something else" apart from the 15 Member States, this "something else" is identified with the 16<sup>th</sup> partner, i.e. with the Commission. This is how to the eyes of certain people the Commission becomes not only synonymous of European Community but also of European Union.<sup>95</sup> One should also point out that the Council integrates the 15 Member States but it is not limited to just being "the 15". According to Torrent, "the Council is the only institution capable of guaranteeing coherence in the single external action of the EU."<sup>96</sup> The question that the

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<sup>92</sup> Torrent, R. *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*, <<<http://www.ub.es/dpecp/ep/livreTorrent.html>>>, 1998, at chapter 1.

<sup>93</sup> This institution is the Council of the European Communities.

<sup>94</sup> Torrent, R. *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*, <<<http://www.ub.es/dpecp/ep/livreTorrent.html>>>, 1998, at chapter 1.

<sup>95</sup> For further clarification, see Torrent, R. *Droit et Pratique des Relations Economiques Exterieures dans l'Union Europeenne*, <<<http://www.ub.es/dpecp/ep/livreTorrent.html>>>, 1998, at chapter 1.

<sup>96</sup> Ibid.

reader should think about is to know how the Council can exercise in a proper way its role if the Council and the people who compose it are not conscious of its existence or believe that the Council is just the place where 15 Ministers get together with the Commission. How can a self-proclaimed “Presidency of the European Union” properly fulfil its functions if it does not understand that it has only powers by the fact of being the Presidency of the Council of the EU and to the extent to which the powers of the Council are respected, being the rest just empty protocol?

#### **VI. The European Parliament as a consultator<sup>97</sup>**

For the conclusion of international agreements, the European Parliament is consulted generally speaking by *avis simple*. An exception to this rule are those agreements based on Article 133 EC, in which in theory the Parliament does not have to be consulted at all. Certain agreements can only be concluded if the Parliament takes a favourable *avis conforme*. This form of consultation gives the Parliament a real right to veto. It is used in the conclusion of association agreements, agreements with a specific institutional framework, agreements having obvious budgetary implications as well as agreements which imply modifications of an act adopted for a co-decision procedure.<sup>98</sup>

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<sup>97</sup> Beseler, H.-F. “La representation de la Communauté européenne pour les questions du commerce international”, Note to the attention of the Heads of Delegation of the European Commission, 12 April 1999, p. 3. Unpublished document.

## VII. Decision Making Process

There has been much criticism on the EC commercial policy, mainly for being unable to negotiate without internal agreement and for being incapable of negotiating with one voice, due to a constraining mandate. Such criticism has come from the EU's trading partners and in particular from the USA<sup>99</sup> and has been largely focused on the EC's position on agriculture.<sup>100</sup> Work on the Uruguay Round suggests, however, that although some of what has been stated above may be true, the EC has in general performed as well as most of its trading partners in developing and articulating common positions.<sup>101</sup> The EU's policy making processes have worked remarkably well given the diversity of interests within the EU, even if, inevitably, the policies it has produced have not been to everyone's liking.<sup>102</sup> The EU decision making process is coming under strain as a result of the deepening of the multilateral system. The strain is creating tensions in EU decision making on the following issues:

- the competence issue: EC or national competence in commercial policy
- the control issue: who controls the EC's position in negotiations
- the tensions between efficiency and accountability.

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<sup>98</sup> Article 300 paras 1 & 2 EC Treaty.

<sup>99</sup> Frellesen, T., Jones, E. & Ludlow, P. *EC-US Relations. Priorities for the Next Four Years*, Center for European Policy Studies, 1993.

<sup>100</sup> Johnson, M. 113. *European Co-operation in Action*. 1998.

<sup>101</sup> See Hodges, M. & Woolcock, S. "The European Union in the Uruguay Round: the Story behind the Headlines", in Wallace, H. & Wallace, W. *Decision Making in the European Union*, Oxford University Press, 1996.



### A. The three internal tensions

Out of the three tensions, it is the second one (the issue of who controls the EC's negotiating position) which has created the most difficulties for the EU.<sup>103</sup> However, it is likely that the dilemma of efficiency vs. accountability will be of greater importance in the near future. As commercial policy participates more and more in areas of domestic competence, there will be a necessity for transparency and accountability in policy-making.

Before getting into more details about these three tensions, let us see and clarify some aspects of the EC Commercial policy-making process. The approach towards EC commercial policy decision making is somehow technocratic, which is obvious since the treaties did not give competence to the European Parliament in commercial policy issues.<sup>104</sup> In addition to that, the difficulty in co-ordinating 15 different national parliaments excluded them from getting into the details of commercial diplomacy. Until recently, the trade policy community in Europe has been composed of officials and very few experts from the private sector. This leads us to what has been said previously about the lack of democratic action in the process of policy making. However, it is evident that the technocratic approach in the EU has been more efficient than the approach based on

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<sup>102</sup> Woolcock, S. "The European Union's Role in International Commercial Diplomacy", p. 9. Unpublished paper.

<sup>103</sup> See paper by Stephen Woolcock, presented at the American Political Science Association Conference in San Francisco, August/September 1996, under the title "The European Union as an International Actor in Commercial Policy", p. 11.

<sup>104</sup> Breton, P., Scott, H. & Sinclair, P. *International Trade. A European Text*, Oxford University Press, 1997.

parliamentary control. If it is already difficult to reach an agreement between 15 trade ministries, then trying the approval of an agreement by each of the 15 legislatures would have been a tremendous amount of time-consuming and not very effective.

On the other hand, such a technocratic approach of policy making makes it incompatible with it being democratic. There have been critiques in this respect by interest groups, which have questioned the legitimacy and accountability of common commercial policy decisions. Here the real problem is that to reach an agreement between 15 different Member States makes it far more complicated than when there is just one single voice. If the EU wants to be heard differently and have more efficiency and coherence in its actions, it needs to speak with one single voice, i.e. to have one single executive power. Therefore, it is obvious that by reacting separately European countries can do little to influence events. If Member States are to act together more effectively and to make themselves heard, they urgently need to establish mutual trust. This takes me to the first of the three points which I pointed out, the issue of competence.

#### A.1.- Competence

The issue of competence is not always clearly defined and therefore causes tension between the Member States of the European Union and the European Institutions, especially the Commission (the negotiator of agreements). A considerable part of this tension would be minimised should the EU become a sovereign State, for the principal

actors in International Law are States.<sup>105</sup> As McGoldrick says “once an entity satisfies the international law requirements for being a state, it is, in normal circumstances, accepted as a member of the international community of states and entitled to sovereign equality with other states”.<sup>106</sup> It is accepted as having various rights and being subject to various obligations.<sup>107</sup> As a state, it also has certain powers. This combination of rights, obligations and associated powers is described by McGoldrick as expressions of the sovereignty of the state. “If the European Union underwent a sufficient metamorphosis and became a single, federal state, it would then be treated as a State rather than a *sui generis* international organisation”.<sup>108</sup>

Since the beginning of the then EEC, there has been a constant development of the EC competencies. However, only in certain sectors such as the common commercial policy, the common agricultural policy, fisheries,... the Community competencies are exclusive. In other words, Member States are *a priori* barred from acting in their own name. There is shared competence between the EC and its Member States in other areas. The European Court of Justice, in its Opinion 1/94<sup>109</sup> on the conclusion of the Uruguay Round Agreements, held that EC competencies are exclusive as far as trade in goods in

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<sup>105</sup> See Jennings, R.Y. & Watts, A. (eds) *Oppenheim's International Law*, 9<sup>th</sup> edn, Harlow, Longman, 1992, pp. 117-329.

<sup>106</sup> McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, p. 40.

<sup>107</sup> Jennings, R.Y. & Watts, A. (eds), *Oppenheim's International Law*, 9<sup>th</sup> edn, Harlow, Longman, 1992, pp. 330-554.

<sup>108</sup> See McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997, p. 40.

<sup>109</sup> See Opinion 1/94 [1994] ECR I-5267.

concerned but are non-exclusive with respect to services (GATS)<sup>110</sup> and intellectual property rights (TRIPS).<sup>111</sup>

An expansion of the EU goes together with a desired gradual increase of its competencies. The issue of *national sovereignty* is of course very delicate when it comes to ceding powers and competencies to the European level. However, the Member States have accepted the fact that the Commission of the EC will act on behalf of the European Community and of all the Member States in order to defend their commercial interests. The Amsterdam Treaty has the intention to extend the competence of the Common Commercial Policy to the key issues of intellectual property and services -New Article 133(5) EC Treaty-. This is a sensible acceptance by the Member States since they have recognised that a divided Europe is less likely to defend its interests in international negotiations. Unfortunately, Article 133 of the Amsterdam Treaty makes no definition of “commercial policy.”

That said, one could say that the originality of the European integration tends to the fact that for certain objectives that have been assigned to it, Member States have transferred to the EC their original sovereign competencies. By the principle of “attribution of competencies”, EC law is conceived and built upon terms of “issues”, which are often called “common policies”. The division of roles and competencies should be done on the basis of issues.<sup>112</sup> In the field of the common commercial policy, the international representation is exercised by the Commission. Only in the field of

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<sup>110</sup> GATS stands for General Agreement on Trade in Services.

<sup>111</sup> TRIPS stands for Agreement on Trade-Related Aspects of Intellectual Property Rights.

CFSP and JHA (the so-called second and third pillars) is the EU represented by the Presidency of the Council.<sup>113</sup> This means that the Community can be a member of an international organisation or a contracting party in an agreement. However, as far as the EU is concerned, it constitutes the common institutional framework for the “three pillars” of the European integration. In other words, the EU covers the Community policies from the first pillar, but also CFSP and JHA.

Back to the field of trade, both the EC and the Member States are members of the World Trade Organisation (WTO).<sup>114</sup> During the GATT (General Agreement on Tariffs and Trade) the EC was not a member although it acted as if it were one. Since the Uruguay Round there is a tendency to give the EC the right to act on behalf of all the Member States. On multilateral trade agreements it is the Commission which speaks for the EC. From a legal point of view there is one Opinion by the European Court of Justice (Opinion 1/94) by which we find a clear classification of competencies, those which are *exclusive competence* of the EC and those which are *mixed competence* between the Member States and the EC. However it must be said that in practical terms of the everyday activity of the WTO it is the Commission which intervenes in multilateral negotiations. In other words, the mixed competence issue does not cause a problem at all.

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<sup>112</sup> Cafuny, A. & Peters, P. *The Union and the World: The Political Economy of a Common European Foreign Policy*, Kluwer Law International, 1998.

<sup>113</sup> Beseler, H. F. “The representation of the European Community on issues of international trade”, in a note to the attention of the Heads of Delegations of the EU, 12 April 1999, p. 1.

<sup>114</sup> Lanjouw, G. J. *International Trade Institutions*, Longman, 1995.

The European Community and the Member States are under a legal duty to co-operate on the negotiation, conclusion and implementation of mixed agreements. This duty results from the “requirement of unity in the international representation of the Community.”<sup>115</sup> Proof of it are Ruling 1/78 (Natural Rubber), paragraphs 34-6;<sup>116</sup> Opinion 2/91 (ILO), paragraph 36<sup>117</sup> and Opinion 1/94 (WTO), paragraph 108.<sup>118</sup> Such co-operation is “all the more necessary” if the European Community cannot become party to the agreement. With regard to co-operation obligations, Article 5 European Community and Article 3 of the TEU deal in the treaties directly with it.

In the context of the WTO, it has been largely possible to have the Commission as the spokesman for the entire EC, acting of behalf of the EU, even in cases of mixed competence. As an example we have the case where the USA has initiated consultations with some EU Member States rather than the European Commission in issues dealing with TRIPS and GATS. Proof of this are Cases Nos. 80 (against Belgium concerning commercial telephone directory services), 82 (against Ireland concerning copyright and neighbouring rights), 83 and 86 (against Denmark and Sweden, respectively, concerning the enforcement of intellectual property rights). The US has also started a Panel case against two Member States in an area of exclusive EC competence: *European Communities-Customs Classification of certain Computer Equipment*, Report of the

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<sup>115</sup> McGoldrick, D., *International Relations Law of the European Union*, Longman, 1997.

<sup>116</sup> [1978] ECR 2151.

<sup>117</sup> [1993] ECR I-1061.

<sup>118</sup> [1994] ECR I-5267.

Panel of 5 February 1998.<sup>119</sup> In all previous consultations and cases the Commission has shown its interest in being involved.

The Commission believes that the EC should be a co-defendant in cases dealing with the GATS and TRIPS, given the fact that both the EC and its Member States are jointly responsible for their implementation. In this respect, there is a recent judgment by the Court of Justice (*Hermès*) which shows a new tendency in this direction (Case C-53/96 *Hermès International*).<sup>120</sup> The Court, in refuting the argument of three Member States that a certain provision of the TRIPS agreement is outside the scope of Community law, noted that “the WTO agreement was concluded by the EC and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties.”<sup>121</sup>

Following the same logic, offensive GATS and TRIPS cases initiated by the EU against third countries should be taken jointly between the EC and its Member States as has been the case until now. As examples we have *United States-The Cuban Liberty and Democratic Solidarity Act* (Panel established but case suspended until 21 April 1998; Panel mandate lapsed on that date), *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products* and, last but not least, *Canada-Patent Protection of Pharmaceutical Products. Canada-Measures Affecting Film Distribution Services*. This is a clear case of *the duty of co-operation and unity of representation*, which is articulated by the European Court of Justice *inter alia* in its Opinion 1/94 and in its Case

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<sup>119</sup> Report of the Appellate Body AB-1998-2 of 19 May 1998.

<sup>120</sup> Judgment of 16 June 1998.

<sup>121</sup> *Ibid.*

C-25/94 *Commission v Council*.<sup>122</sup> With regard to trade in goods, the WTO Appellate Body has confirmed in the Case *European Communities-Customs Classification of Certain Computer Equipment* that in this area (let us remember that trade in goods is an area of exclusive EC competence) the export market for third countries “is the European Communities, not an individual Member State.”<sup>123</sup>

The context of the WTO shows that also in areas of non-exclusive EC competence it is necessary to have co-ordinated action in an EC framework.<sup>124</sup> It is important to note that non-exclusive EC competence does not mean non-existent EC competence. In areas of non-exclusive EC competence the EC can, if the Council so decides, enter into agreements with third countries without formal adherence of Member States to these agreements. However, Member States normally insist on the mixity of international agreements even if mixity would not be legally necessary. Speaking with one voice has in many domains to be ensured through co-operation between the EC and its Member States, with the idea of achieving unity of representation.<sup>125</sup>

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<sup>122</sup> [1996] ECR I-1469.

<sup>123</sup> Report of the Appellate Body AB-1998-2 of 19 May 1998 in the Case *European Communities-Customs Classification of Certain Computer Equipment*, p. 39, paragraph 96.

<sup>124</sup> Professor Torrent speaks of a fourth pillar, meaning by that the use of national competencies in a European Union framework. See Torrent, R. “Le quatrième pilier de l’Union Européenne”, in Bourgeois, J. Dewost, J.-L. & Gaiffe, M.-A. (eds.) *La Communauté Européenne et les Accords Mixtes*, Collège d’Europe, 1997, pp. 49-63.

<sup>125</sup> Rosas, A. “The External Relations of the European Union: Problems and Challenges” in *The Forum for US-EU Legal-Economic Affairs*, The Mentor Group, 1998, p. 66.



A.2.-Control

Who controls the EU's negotiating strategy or policy has caused serious problems in the past. Treaty provisions and established practice give the Commission the right of initiative in areas of EC competence. So the Commission makes proposals on negotiations and policy positions. These are then discussed in the 133 Committee or COREPER and finally adopted by the General Affairs Council.<sup>126</sup> The Council decision, formally on a qualified majority, authorises the Commission to negotiate in consultation with the 133 Committee. This authorisation is sometimes called a mandate. This Commission mandate to negotiate on behalf of the Member States does not imply a transfer of competencies, which remain with the Member States.

Article 133 also provides for the Council to issue directives at any time to the Commission on the substance of negotiations. In other words, the Commission is the sole negotiator but the Member States have plenty of opportunity to intervene in negotiations as they progress.<sup>127</sup> There is also scope for differing interpretations of mandates. This has led to tensions over negotiating tactics, and differences between Commission and Council have emerged at critical times inflicting considerable damage on the credibility of the EC's negotiating position.<sup>128</sup> As an example of such a conflict over negotiating tactics is the EC's position in the critical agricultural negotiations at the Ministerial Meeting of the GATT in 1990 which was due to complete the Uruguay

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<sup>126</sup> Le Heron, R. *Globalized Agriculture. Political Choice*, Pergamon Press, 1993.

<sup>127</sup> Heidensohn, K. *Europe and World Trade*, Pinter, 1995.

Round.<sup>129</sup> The Commission, seeking to break a deadlock in negotiations, engaged in informal talks with its leading negotiating partners. In the course of these talks, the Commission discussed EC concessions which went beyond the restricting mandate laid down by EU agricultural ministers. When national ministers learned of the move, they called the Commission to task, denounced any such concession and thus undermined the credibility of the EC's negotiating position.<sup>130</sup>

The following question can, then, be raised: what if a Member State does not agree with the Commission's view or its interests are not the same as the Commission's in the international trade arena? Mixed competence issues must be decided on the basis of unanimity. There is a process of co-ordination before.<sup>131</sup> Meetings take place between the Commission and the Member States, where the lines of the Commission in the WTO are explained. This is discussed with the Member States. There is a close relationship between the Member States and the EC when dealing with mixed competence issues. The countries of the EU accept, then, a single voice in multilateral negotiations in areas of mixed competence, on the condition that there is co-ordination with Article 133 Committee, since it is considered to be more effective.<sup>132</sup>

Another issue which affects relations between the Commission and the Council is the *de facto* practice of only adopting agreements by consensus. The Treaty provides

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<sup>128</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p.11.

<sup>129</sup> Le Heron, R. *Globalized Agriculture. Political Choice*, Pergamon Press, 1993.

<sup>130</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, endnote N. 16, p.17.

<sup>131</sup> Bridge, J. W. & Lasok, D. *Law & Institutions of the European Communities*, Butterworths, 1987.

for a qualified majority vote on the adoption of commercial agreements under Article 133. However, in practice the Council has felt obliged to seek consensus on all major commercial policy issues. The expectation that consensus will be required has a clear impact on the EC's negotiating position, since the Commission must ensure that all Member States are in agreement with any position. If the Council applied the Treaty and voted by qualified majority on the adoption of commercial agreements, there would be much more flexibility in negotiations.

As an example we have the Uruguay Round, where the Commission, with the backing of a qualified majority of the Member States, negotiated the so-called Blair House agreement with the United States on the inclusion of agriculture in GATT disciplines.<sup>133</sup> This agreement would have formed the key element in conclusion of the Uruguay Round at the end of 1992.<sup>134</sup> France rejected the Blair House agreement and insisted on further modification. This meant that a further 18 months were needed before the round could be concluded. Agreement could only be reached when both the Belgian Presidency of the Council and the Commission accepted that the results of the round would only be adopted by unanimity.<sup>135</sup>

The tensions over the control of the EC commercial policy can only increase with the greater membership of the EU due to enlargement. A number of suggestions

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<sup>132</sup> Lopes, G. (ed.) *Las Relaciones Exteriores de la Comunidad Europea*, Facultad Latinoamericana de Ciencias Sociales, 1993.

<sup>133</sup> Wallace, H. & Wallace, W. *Policy-Making in the European Union*, Oxford University Press, 1996.

<sup>134</sup> Latter, R. *A New-Transatlantic Bargain*, London: HMSO, 1993.

<sup>135</sup> See Devuyst, Y. "The European Community and the Conclusion of the Uruguay Round" in Rhodes, C. & Mazey, S (eds.) *The State of the European Union. Vol. 3. Building a European Polity?* Lynne Rienner Publishers, Inc., 1995.

have been made to ease the management of such tensions. For example, various Member States have suggested that the Presidency of the Council should be present in the room when the Commission negotiates in order to ensure that the Council be involved in any negotiating stance that the Commission adopts during meetings. The EC's position is agreed before negotiations. However, the Commission has opposed this reduction in its power and argued that it would result in the removal of any negotiating flexibility for the Commission and thus the EU.<sup>136</sup>

An alternative approach would be for the Council to desist from intervening in negotiations and give the Commission scope to negotiate. The EU Council still retains ultimate authority to accept or reject the outcome, but the Commission would have scope to negotiate a package. This approach is rejected by the Council because it would reduce the ability of the EU Council and the Member States to shape negotiations. In the absence of any reform, the only means to avoid damaging conflicts between the Commission and the EU Council is for continuous efforts by both institutions to ensure that communication is effective.

### A.3.- Efficiency vs. Accountability

If the EU has been relatively efficient in its commercial policy making despite the difficulties reaching a common position among the sometimes diverging interests of the 15 Member States, this has come at the price of democratic accountability. Decision

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<sup>136</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished

making in EC commercial policy is predominantly technocratic in nature. EC commercial policy is created by a technocratic core comprising the officials in the European Commission's Directorate-General for Trade and national trade officials who compose the 133 Committee.<sup>137</sup> This lacks a democratic approach to policy-making although it has the advantage of being considerably efficient.<sup>138</sup> The General Affairs Council provides nominal political and democratic legitimacy to the process. However, given the technical nature of commercial policy and the wider interests of foreign ministers, it is not surprising that the full General Affairs Council seldom debates detailed technical issues. In other words, Foreign Ministers are more concerned with developments in Bosnia or Kosovo, for example, than on the permissible level of BST (hormones) in beef and whether science can be used to determine this level.<sup>139</sup>

The concept of democratic deficit in EU decision making is well known and some efforts have been made to address the problem. In the area of commercial policy, difficulties are accentuated by the technical nature of the negotiations. National ministers reporting back to national legislatures tend to limit their comments to the objectives of policy. By doing so, effective scrutiny of the negotiations is lost. Concerning national parliaments, they also have difficulties following the detail of negotiations and the fact that negotiations take place at two steps removed from national

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paper, p. 12.

<sup>137</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p. 12.

<sup>138</sup> See paper by Stephen Woolcock, presented at the American Political Science Association Conference in San Francisco, August/September 1996, under the title "The European Union as an International Actor in Commercial Policy", at p. 18.

<sup>139</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p. 12.

parliamentary control (one in Brussels and the second in Geneva) means that national politicians do not believe they can influence the outcome of negotiations. The result is that national legislatures tend not to undertake any effective scrutiny of EC commercial policy.<sup>140</sup>

At a European level, the European Parliament does its best to provide some scrutiny of EC commercial policy. However, since it has very limited powers, this is not always an easy task. The Parliament might give its assent to bilateral agreements under Article 310 EC, such as between the EC and South Africa<sup>141</sup> or the Europe Agreements but it has no power under Article 133 EC, which is the main multilateral instrument of the European Union.<sup>142</sup> Nor does the European Parliament have a say in changes to EC commercial instruments such as anti-dumping measures.<sup>143</sup>

The Council of the EU and the Commission have reached informal agreements with the European Parliament on consultation. However, the views of the Parliament are not sought until the Commission has reached a deal with the EU's trading partners and it has been endorsed by the 133 Committee, if not the EU Council.<sup>144</sup> Having said that, the chances of the EP having any impact on the substance of the agreement is almost non-existent. The assent of the EP is required when a commercial policy agreement has budgetary implications, when there are institutional implications for the EU and when

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<sup>140</sup> Ibid., at p. 13.

<sup>141</sup> Henig, S. *External Relations of the European Community. Associations and Trade Agreements*, Chatham House: PEP, 1971.

<sup>142</sup> Geiger, T. & Kennedy, D. *Regional Trade Blocs, Multilateralism and the GATT: Complementary Paths to Free Trade?*, Biddles, 1996.

<sup>143</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p. 13.

policy areas are concerned in which the EP has co-decision rights. As co-decision making is slowly increasing, this suggests that the EP may have to give its asset to more international commercial agreements.

In this sense, the Luns-Westerterp Procedures were developed for association agreements (Luns) in 1964 and international commercial agreements (Westerterp) in 1973.<sup>145</sup> These provide for the Council and Commission to give information to the relevant committees of the European Parliament on the content of an agreement and for a debate to be held in the European Parliament (EP) before the negotiations begin. The Council is also to provide information to the relevant EP committees after an agreement is signed but before it is concluded. During the Uruguay Round, the then Commissioner with responsibility for commercial policy, Sir Leon Brittan, made special efforts to inform the European Parliament of developments in commercial policy.

Although the European Parliament is continuously informed of the EC external trade relations, it has little influence over multilateral trade negotiations and national parliaments have even less. We can, then, talk of a lack of effective scrutiny by the European or national parliaments. In addition to that, although there are no formal procedures for consultation with non-governmental organisations, the Commission does have informal contacts with them. There has been criticism of the endogamic, technocratic nature of EU policy.

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<sup>144</sup> See Breton, P., Scott, H. & Sinclair, P. *International Trade. A European Text*, Oxford University Press, 1997.

<sup>145</sup> Markusen, J., Melvin, J., Kaempfer, W., & Maskus, K. *International Trade. Theory and Evidence*, McGraw-Hill, 1995.

In order for the EU to be in a real position of strength in multilateral trade negotiations, it is a necessity to speak with one voice.<sup>146</sup> This is so even in the case of services, where Member States sit along with the Commission in the WTO and have the right to speak in negotiations. Whenever the EC deals with the WTO in issues concerning goods (Article 133 EC), the Commission negotiates itself, according to Article 300 EC. Member States “sit” behind the Commission during the negotiations. In other words, Member States are physically present but it is the Commission that carries the negotiations on behalf of the EC and the Member States.<sup>147</sup> However there are co-ordinations between the Commission and the Member States in Brussels and Geneva before negotiating in the WTO. There are occasions when Member States do not agree with the Commission’s proposals. They try to reach a common position. So far there has not been a strong resistance from Member States to the Commission’s proposals.

In addition to accountability via public representative bodies such as the national and European Parliaments, accountability and legitimacy can be achieved through contacts with representative interest groups, such as producer groups, environmental and consumer NGOs, trade unions and other such organisations. In this respect, we see that active NGOs such as environmental NGOs see the Article 133 Committee as closed and undemocratic. National and Commission trade officials resist the “politicisation” of EU commercial policy. On the other hand, the Economic and Social Committee is consulted

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<sup>146</sup> Featherstone, K. & Ginsberg, R. *The United States and the European Union in the 1990s. Partners in Transition*, Macmillan Press Ltd. 1996.



on important policy initiatives by the Commission and feeds its opinion, along with that of the European Parliament into the policy debate.

Trade policy is probably the most important tool of Foreign Policy. Hence a division between trade and politics should not be made radically since they both go together. There is a risk of losing some accountability since the everyday work in commercial policy is driven by different Directorate-Generals (DG) in the Commission, although the main responsible one is DG Trade, concerned with the EC external trade relations. The Commission keeps the Member States informed of what they are doing. Before any major decision is taken the Commission notifies the Member States.

To sum up on efficiency versus accountability, the EU policy process may have been relatively efficient to date, but has not been especially open. There is also no scrutiny of decision making outside the nominal structures of accountability through the Council, which is less effective. As the WTO agenda deepens and gets more and more into domestic policy making, the number of parties expands. For example, linking trade and environment means that the environmental policy communities in the EU will have an active interest in trade policy in order to ensure that their policy preferences are not undermined by EU commercial diplomacy. Given the trends in international commercial diplomacy, this tension between efficiency and accountability can be expected to increase.<sup>148</sup>

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<sup>147</sup> This clarification has been gathered from an interview with Mr Alain Van Solinge, Legal Adviser in the Legal Service of the European Commission, held on May 24, 2000.

### VIII. Conclusion

Trade is no longer just about negotiations on tariffs on goods between industrialized economies. Trade policy has become complicated on both sides of the matrix –new actors and new issues-. Trade policy needs to change to become more efficient and more accountable. At the same time, it is important to address the issue of lack of transparency and legitimacy of the current system of governance, including trade policy matters handled in the WTO.

With regard to transparency, it means ensuring that a given organization is more internally accountable to its members. As for efficiency and accountability, the world has moved on, and so must the Treaty of Rome. It is necessary to ensure that negotiations on services, intellectual property rights and investment are handled the same way as negotiations on trade in goods by qualified majority voting. Unanimity, specially in an enlarged EU of over 30 Member States, makes no sense in policy-making. That said, the Commission's compromise proposal allows for a Member State to call for unanimity on a point of real national sensitivity. It also calls for the European Parliament to be fully involved in EU trade policy-making. There needs to be a change in the EU's negotiating methods.<sup>149</sup> On the other hand, having the Commission as the

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<sup>148</sup> See Woolcock, S. "The European Union's Role in International Commercial Diplomacy", (Unpublished Article).

<sup>149</sup> See Lamy, P. "Trade is changing –so must Europe," in <<[http://europa.eu.int/comm/trade/speeches\\_articles/spla41\\_en.htm](http://europa.eu.int/comm/trade/speeches_articles/spla41_en.htm)>>.

trade negotiator on behalf of the EC Member States implies a more efficient but less democratic system of EU trade policy-making.<sup>150</sup>

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<sup>150</sup> Information gathered from an interview in June of 2001 with Mr. Richardson, Head of the Delegation of the European Commission to the UN.

## **CHAPTER V: THE EUROPEAN COURT OF JUSTICE AND THE EC EXTERNAL TRADE RELATIONS**

- I. Introduction**
- II. The Jurisdiction of the European Court of Justice in International Trade**
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- V. The Hermès Judgment**
- VI. Conclusions**

## I. Introduction

The main focus of study in this chapter is the explanation of why the World Trade Organization (WTO) and the various Agreements which form an integral part of the Agreement establishing the WTO raise problems and are challenges for the Court of Justice of the European Communities (ECJ).

Section II deals with the ECJ's jurisdiction as it is organized by the EC Treaty and focuses on the role of the ECJ in relation to exclusive and shared competence. Section III is devoted to the question of the status of international agreements in EC Law, while section IV deals with the status of the WTO in the EC legal system. Section V deals with the discussion of Case *Hermès v FHT Marteking*<sup>1</sup> concerning the interpretation of Article 50 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) annexed to the 1994 Agreement establishing the WTO –the first case where the jurisdiction issue is addressed by the Court outside the context of association agreements. The judgment and its implications will be analyzed in the light of the ECJ's earlier case law.<sup>2</sup>

The EC is a major player in the GATT both before and after the creation of the WTO. It plays a major role in the shaping of the GATT/WTO and is a common player in dispute resolutions. The EC, together with the U.S., Japan and Canada, is one of the four major players of international trade law.<sup>3</sup> The new mechanisms

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<sup>1</sup> Case 53/96, [1998] ECR I-3603.

<sup>2</sup> Heliskoski, J. "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements", *Nordic Journal of International Law*, Vol. 69, No. 4, 2000, p. 395.

<sup>3</sup> Weiler, J.H.H. "Cain and Abel –Convergence and Divergence in International Trade Law" in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 2.

introduced by the WTO Dispute Settlement Understanding are not perhaps comparable to the full judicial system within the EU, but they have changed both the rules and legal culture concerning the adjudication and enforcement obligations. Although the WTO is still an intergovernmental organization, powerful private actors have already learnt to manipulate the system to reach legal adjudication under the guise of intergovernmental disputes.<sup>4</sup> All these issues will be analyzed throughout this chapter.

## **II. The Jurisdiction of the European Court of Justice in International Trade**

### **A.- An Overview**

We will analyze the jurisdiction of the ECJ with regard to international trade, as well as the acts susceptible to judicial review and to interpretation by the Court in Luxembourg. Both agreements entered into by exclusive EC competence and shared competence will be treated.

#### **A.1.- Limited Jurisdiction in the ECJ**

The ECJ has jurisdiction only in so far as the EC Treaty and other legal instruments have conferred jurisdiction upon it, as can be inferred from Article 7, paragraph 1 EC Treaty. The ECJ's jurisdiction may be implied. By implied jurisdiction we mean situations where there is a prevailing need for it in order to fill a lacuna in the system

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<sup>4</sup> *Ibid.*, at p. 4.

of remedies expressly provided for, such as where the complete absence of any other form of legal redress creates a serious injustice and is inconsistent with the rule of law in the EC.<sup>5</sup>

The ECJ relied on the concept of “a Community based on the rule of law” to develop a more general theory on which it can base the so-called implied jurisdiction. In this sense, in *Les Verts* the ECJ stated as follows:

[T]he European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic charter, the Treaty...

...the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.<sup>6</sup>

In the “Chernobyl Case” (*European Parliament v Council*),<sup>7</sup> the ECJ believed that in order to perform its task under Article 220 EC, it had to be able to guarantee the maintenance of the institutional balance and the respect for the European Parliament’s prerogatives. Even if Article 230 EC did not provide for an application for annulment by the European Parliament, the ECJ concluded that it had jurisdiction in an annulment proceeding brought by the European Parliament to the extent that the purpose of the proceeding was to protect the European

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<sup>5</sup> Lasok, K.P.E. *The European Court of Justice. Practice and Procedure*, 2<sup>nd</sup> edn. (Butterworths, London, 1994), 9.

<sup>6</sup> European Court of Justice, Judgment of 23 April 1986, *Les Verts v European Parliament*, [1986] ECR 1339.

<sup>7</sup> [1990] ECR I-2041.

Parliament's prerogatives.<sup>8</sup> Therefore, in the absence of expressed authority, the ECJ has the freedom to intervene and allows the correction of defects in the system of remedies created by the Treaties.<sup>9</sup>

#### A.2.- Acts Susceptible to Judicial Review by the ECJ

Article 230 EC<sup>10</sup> provides for an action of annulment against acts adopted jointly by the Council and the European Parliament, acts of the Council, of the Commission and the European Central Bank, other than recommendations or opinions, and of acts of the European Parliament intended to produce legal effect *vis-à-vis* third parties.

Within the EC external relations, two groups in the ECJ's case law can be made:

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<sup>8</sup> This case can be contrasted to the so-called "Comitology Case" *European Parliament v Council* [1988] ECR 5615. See, in this respect, Weiler, J. "Pride and Prejudice-Parliament c. Council", 14 EL Rev. (1989) 334, for a more detailed comment.

<sup>9</sup> Arnall, A. "Does the Court of Justice have inherent jurisdiction?" 27 CMLRev. (1990), 683 at 701.

<sup>10</sup> Article 230 EC reads as follows:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and the European Central Bank, other than recommendations or opinions, and of acts of the European Parliament intended to produce legal effect *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the European Parliament, by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

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

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



*A.2.a.- Council Decision to Leave to the Member States the negotiation of an International Agreement.*

The position of the Commission in the *ERTA* case (1970), Case 22/70, *Commission v Council*<sup>11</sup> was to ask the Council for authorization to renegotiate the European Road Transport Agreement on behalf of the EC to be entered into with third countries in the framework of the United Nations.<sup>12</sup> The decision of the Council was that the then six EC Member States should negotiate on their own behalf and become individual parties to ERTA. To this response, the Commission reacted by challenging the Council proceedings in the ECJ. The ECJ then considered that the Commission application was admissible in the following way:

Since the only matter excluded from the scope of the action for annulment...are "recommendations or opinions"-which by the final paragraph of Article 189 [new Art. 249 EC] are declared to have no binding force- Article 173 [new Art.230 EC] treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force.<sup>13</sup>

In the analysis of the content and purpose of the Council proceedings, the ECJ reacted in such a way:

It thus seems that in so far as they concerned the objective of the negotiations as defined by the Council, the

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<sup>11</sup> [1971] ECR 263.

<sup>12</sup> See Bourgeois, J.H.J. "The European Court of Justice and the WTO: Problems and Challenges" in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 76.

<sup>13</sup> *Commission v Council* [1971] ECR 263, para. 39.

proceedings of 20 March 1970 could not have been simply the expression or the recognition of a voluntary co-ordination, but were designed to lay down a course of action binding on both the institutions and the Member States, and destined ultimately to be reflected in the term of the [EC] regulation [that would have to be amended following the conclusion of ERTA].

In the part of its conclusion relating to the negotiating procedure, the Council adopted provisions which were capable of derogating in certain circumstances from the procedure laid down by the [EC] Treaty regarding negotiations with third countries and the conclusion of agreements.<sup>14</sup>

The concluding remarks of the ECJ were as follows:

...the proceedings of 20 March 1970 [i.e. the position taken by the Council] had definitive legal effects both in relations between the Community and the Member States and in the relationship between the institutions.<sup>15</sup>

Another case to be taken into consideration is *Commission v Council* (FAO),<sup>16</sup> where the ECJ considered that giving the right to Member States, rather than to the EC, to vote in the FAO for the adoption of an agreement on fisheries conservation measures had legal effects. Therefore, the ECJ held that the Commission application for annulment of that decision was admissible.

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<sup>14</sup> [1971] ECR 263, para. 53.

<sup>15</sup> [1971] ECR 263, para. 55.

<sup>16</sup> [1996] ECR I-1469.

*A.2.b.- International Agreements*

Under Article 300, paragraph 7 EC, agreements “concluded” under the conditions which appear in this provision are “binding on the institutions of the Community and on Member States.” However, the institutional provisions remain silent on the question of whether an agreement binding on the EC becomes part of EC law. In EC practice, legislation implementing an international agreement, i.e. transforming it into EC legislation, is considered necessary only where the agreement both entails precise legal obligations and requires changes of rules in force internally, or where the provisions of the agreement call for special measures of internal law in order to be implemented in a clear and effective manner. From here, the question that comes to light is whether an international agreement concluded by the EC is an act of an EC institution within the meaning of Article 230 EC open to challenge or whether only the decision to conclude an international agreement can be the subject of a review of legality by the ECJ.

In the case *France v Commission*<sup>17</sup> concerning the 1991 Agreement entered into by the Commission and the US Government regarding the application of their competition laws, the French Republic brought an action under Article 230 EC for a declaration that this agreement was void on the grounds that the Commission had no competence to conclude such an agreement.

The position of the ECJ with regard to the admissibility of the action was the following:

In its defense, the Commission raises the question whether the French Government should have challenged the decision whereby it authorized its vice-president to sign the agreement with the United States on its behalf, rather than challenging the agreement itself.

Suffice it to note that, in order for an action to be admissible under the first paragraph of Article 173 [new Art. 230] EEC Treaty, the contested act must be an act of an institution which produces legal effects.<sup>18</sup>

The Court finds that, as is apparent from its actual wording, the agreement is intended to produce legal effects. Consequently, the act whereby the Commission sought to conclude the agreement must be susceptible to an action for annulment.

Exercise of the powers delegated to the Community institutions in international matters cannot escape judicial review, under Article 173 of the Treaty, of the legality of the acts adopted.

The French Republic's action must be understood as being directed against the act whereby the Commission sought to conclude the Agreement. Consequently, the action is admissible.<sup>19</sup>

The ECJ did not annul the agreement. It declared void the act whereby the Commission sought to conclude the agreement with the US.

### A.3.- Acts Susceptible to Interpretation by the ECJ

If the ECJ has jurisdiction to annul or declare void an act of an EC institution, it can also interpret such act. Article 234 EC deals with the so-called "preliminary ruling", one of the main features of the EC system of judicial review.

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<sup>17</sup> [1994] ECR I-3641.

<sup>18</sup> See Case 22/70 *Commission v Council* [1971] ECR 263 (the ERTA Case).

<sup>19</sup> [1994] ECR I-3641, paras 13-17.

*A.3.a.- Agreements entered into by Exclusive EC Competence*

A relevant case of an agreement entered into force by exclusive EC competence is *Haegeman*,<sup>20</sup> where a Belgian Greek-wine importing company sought repayment of countervailing duties exacted from it by Belgium. The Belgian company argued before a Belgian court that the imposition of those charges was unlawful having regard to the then Association Agreement between the EEC and Greece. The Belgian court submitted a number of questions of interpretation of the Association Agreement to the ECJ.

The ECJ examined its jurisdiction and referred to Article 234 EC. In this case, the provision whose interpretation was sought by the Belgian court was a provision of the Association Agreement itself, which is not listed in Article 234 EC among the acts covered by the ECJ's jurisdiction. The ECJ assimilated the Association Agreement to "an act of an institution of the Community", and considered that its provisions form an integral part of Community law, since this agreement had been approved by a Council Decision. In subsequent judgments, such as *Polydor*,<sup>21</sup> *Kupferberg*,<sup>22</sup> *Demirel*,<sup>23</sup> and *Greece v Commission*,<sup>24</sup> the ECJ has taken the same view.

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<sup>20</sup> [1974] ECR 449.

<sup>21</sup> [1989] ECR 329.

<sup>22</sup> [1982] ECR 3641.

<sup>23</sup> [1987] ECR 3719.

<sup>24</sup> [1989] ECR 3711.

*A.3.b.- Mixed Agreements/Shared Competence*

A well-known case of a mixed agreement is the ILO Convention concerning the Safety in the Use of Chemicals at Work.<sup>25</sup> The advantage of having mixed agreements is that it allows to define the exact demarcation of EC competence. Mixed agreements, therefore, pose problems every time an international agreement with shared competence within the EC is concluded.<sup>26</sup> What is, then, the extent or scope of the ECJ's jurisdiction with respect to mixed agreements? Authors such as Bleckmann and Krück argue that the ECJ may interpret mixed agreements in their entirety.<sup>27</sup> Others, such as Hartley, Waelbroeck and Schermers, believe that the ECJ's jurisdiction is limited to clauses of a mixed agreement that do not extend beyond the EC's field of operation.<sup>28</sup>

In *Demirel*,<sup>29</sup> the ECJ faces this issue. A German court requested for a preliminary ruling by the ECJ. Mrs. Demirel, a Turkish national, challenged her expulsion from the German territory on the grounds that her visa had expired. She wanted to remain in Germany with her husband, who resided in Germany. Mrs. Demirel relied on certain provisions of the Association Agreement between the EEC and Turkey. In the proceedings of the ECJ, two EC Member States (Germany and

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<sup>25</sup> See Opinion 2/91, ECR I-1061, para. 36.

<sup>26</sup> See Dashwood, A. "Why continue to have Mixed Agreements at all?" in Bourgeois, J., Dewost, J. & Gaiffe, M. *La Communauté européenne et les accords mixtes, Quelles perspectives?*, Presses Interuniversitaires Européennes, 1997, p.94.

<sup>27</sup> Krück, H. "Ad Art. 177" in Groeben, Thiesing, Ehlerman (eds.) *Kommentar zum EU/EG Vertrag*, 5<sup>th</sup> edn., vol. 4 (Nomos, Baden-Baden, 1997), p. 615; Bleckmann, A. "Der Gemischte Vertrag in Europarecht", (1976) *Europarecht* 301.

<sup>28</sup> See Hartley, T.C. *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, Oxford University Press, 1994, 186, 273; Schermers & Waelbroeck, *Judicial Protection in the European Communities*, 5<sup>th</sup> edn., Kluwer, Deventer, Boston, 1992, p. 430.

<sup>29</sup> *Meryem Demirel v Stadt Swäbisch Gmünd* [1987] ECR 3719.

the United Kingdom) intervened and put the jurisdiction of the ECJ into question.

The ECJ reacted in such a way:

However, the German Government and the United Kingdom take the view that, in the case of “mixed” agreements such as the Agreement and the Protocol at issue here, the Court’s interpretative jurisdiction does not extend to provisions whereby Member States have entered into commitments with regard to Turkey in the exercise of their own powers which is the case of the provisions on freedom of movement for workers.

In that connection it is sufficient to state that that is precisely not the case in this instance. Since the agreement in question is an association Agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty. Since freedom of movement for workers is, by virtue of Article 48 *et seq.* of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238. Thus the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers does not arise.

Furthermore, the jurisdiction of the Court cannot be called in question by virtue of the fact that in the field of freedom of movement for workers, as Community law now stands, it is for the Member States to lay down the rules which are necessary to give effect in their territory to the provisions of the agreements or the decisions to be adopted by the Association Council.

As the Court held in its judgment of 26 October 1982, in Case 104/81 *Hauptzollamt Mainz v Kupferberg*<sup>30</sup> in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement.

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<sup>30</sup> [1982] ECR 3641.

Consequently, the Court does have jurisdiction to interpret the provisions on freedom of movement for workers contained in the Agreement and the Protocol.<sup>31</sup>

This agreement could have been concluded by the EC alone, even if it was finally a mixed agreement. The clauses of the agreement, for whose interpretation the ECJ considered that it had jurisdiction, came within the competence of the EC under Article 238 EC. With regard to the interpretation of those clauses of mixed agreements that come equally within the competence of EC Member States, the situation is somehow different.

#### B.- With regard to WTO Law

Given the existence of shared competence between the EC and its Member States, this raises the issue of the ECJ's jurisdiction in relation to GATS and TRIPS. In the case *Hermès International*<sup>32</sup> on Article 50, paragraph 6 of the TRIPS Agreement, the issue of the ECJ's jurisdiction was put to the ECJ by a request for a preliminary ruling. Article 50 of the TRIPS Agreement deals with procedural rules applying to judicial remedies contemplated in the TRIPS Agreement. The ECJ rejected the European Commission's view that the EC had exclusive competence to conclude the GATS and TRIPS Agreements, in its Opinion 1/94 (Re WTO Agreement).<sup>33</sup> The ECJ also rejected the view of EC Member States that a number of clauses of the TRIPS Agreement fall only within the exclusive competence of Member States. The

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<sup>31</sup> [1987] ECR 3719, paras. 8-12.

<sup>32</sup> [1998] ECR I-3603.

<sup>33</sup> Opinion 1/94, competence of the Community to conclude international agreements concerning services and intellectual property (15 November 1994), [1994] ECR I-5267.



ECJ's conclusion in this respect was that the EC and its Member States "are jointly competent to conclude the TRIPS Agreement."<sup>34</sup>

In *Hermès International*, the opinion of the Advocate General Tesauro of 13 November 1997 was that the ECJ had jurisdiction to interpret Article 50 of the TRIPS Agreement. He based his argument on the requirement of a uniform interpretation and application of all provisions of mixed agreements, on the EC's international responsibility,<sup>35</sup> the duty of the EC and its Member States to co-operate implying the duty to endeavour to adopt a common position, and the EC legal system that seeks to function and to represent itself to the outside world as a unified system.<sup>36</sup>

The ECJ pointed out in its judgment of 16 June 1998<sup>37</sup> that the WTO Agreement was concluded by the EC and its Member States "without any allocation between them of their respective obligations towards the other contracting parties." At the time the WTO was signed, the EC Regulation on the Community trade mark had already been in force for a month. EC Member States courts are required to apply the remedies of the EC Regulation on the Community trade mark as far as possible, in the light of the wording and purpose of Article 50 of the TRIPS Agreement. The ECJ concluded from this argumentation that it had jurisdiction to interpret Article 50 of the TRIPS Agreement.

Even if in *Hermès* the ECJ managed to avoid the issue of its jurisdiction, sooner or later it is bound to face this issue with regard to clauses of mixed

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<sup>34</sup> Opinion 1/94, [1994] ECR I-5267, para. 105.

<sup>35</sup> The EC and its Member States are parties to the TRIPS Agreement. This Agreement is binding on the EC and its Member States, according to Article 300 EC.

<sup>36</sup> [1998] ECR I-3603, 3606, at paras. 20-1.

<sup>37</sup> [1998] ECR I-3603.

agreements that cannot be regarded as coming within the powers of the EC. The consequences from the absence of a uniform interpretation throughout the EC of GATS and TRIPS Agreement provisions are “undesirable, artificial and perhaps unworkable.”<sup>38</sup> If the ECJ fails to rule on whether international agreements such as GATS and TRIPS provisions are to be interpreted uniformly within the EC, a WTO panel or Appellate Body could be called upon to do so.

A challenge for the ECJ is the creation of a theory that justifies its jurisdiction to interpret the entire WTO law and not only those provisions that can be regarded as coming within the EC’s powers. In the *Hermès* case, Tesaro AG clarified that the EC is a party to the TRIPS Agreement *vis-à-vis* the other WTO Members and that an international agreement concluded by the EC is, according to Article 300 EC, binding on both the EC Member States and the EC institutions. Tesaro’s conclusion is that the EC is responsible for each part of the agreement in question. Third parties will be in a position to call the EC rather than its Member States to account in an international agreement, except where, upon the conclusion of a mixed agreement, third parties have insisted on the fact that the EC make a declaration making clear which parts of the agreement are concluded by the EC. In line with Article 46 of the Vienna Convention on the Law of Treaties,<sup>39</sup> the EC would probably be estopped from claiming that under its “constitution”,<sup>40</sup> Member States are bound by a given clause of a mixed agreement, since the EC is in part

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<sup>38</sup> Eeckhout, P. “The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems”, 34 CML Rev. (1997) 11 at 20.

<sup>39</sup> The 1986 Vienna Convention has not yet entered into force but it follows almost to the letter the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

<sup>40</sup> For a commentary of the debate on the EU Constitution, see Piris, J.-C. “Does the European Union have a Constitution? Does it need one?,” Lecture given by Jean-Claude Piris, Legal Adviser of the Council of the European Union, on 3<sup>rd</sup> May 1999.

responsible for the uncertainty on who had the power to bind itself for which parts of a mixed agreement.<sup>41</sup>

The Commission argued in *Hermès* that there is no perfect parallelism between the EC's powers to enter into international agreements and the ECJ's jurisdiction to interpret such agreements. Article 220 EC may justify the ECJ's jurisdiction to interpret an international agreement that is not binding on the EC. Such is the case of *Burgoa*<sup>42</sup> or *Poulsen and Diva Navigation*.<sup>43</sup> According to Warner AG in *Haegeman v Belgium*,<sup>44</sup> the ECJ has jurisdiction to interpret an international Agreement only "where its interpretation is relevant to the question of the validity of an act of a Community institution or to the question of the interpretation to be given to such an act."<sup>45</sup> In Opinion 1/91 (First EEA Opinion),<sup>46</sup> the ECJ limits its interpretation "insofar as that Agreement is integral part of Community law."<sup>47</sup> Along the same lines, is the reasoning of the ECJ rejecting the challenge to its jurisdiction to interpret the Eurocontrol Agreement in *SAT v Eurocontrol*.<sup>48</sup>

In the eyes of Eeckhout, the extension of the ECJ's jurisdiction to such cases could not affect the division of competence between the EC and its Member States.<sup>49</sup> This raises the question of the legal basis of the ECJ's jurisdiction in such cases.

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<sup>41</sup> Bourgeois, J.H.J. "The European Court of Justice and the WTO: Problems and Challenges" in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 86.

<sup>42</sup> [1980] ECR 2787.

<sup>43</sup> [1992] ECR I-6019.

<sup>44</sup> [1974] ECR 449.

<sup>45</sup> *Ibid.*, at 473.

<sup>46</sup> [1991] ECR 6079.

<sup>47</sup> *Ibid.*, at para. 39.

<sup>48</sup> [1994] ECR I-43, para. 9.

<sup>49</sup> Eeckhout, P. "The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems", 34 CML Rev. (1997) 11, at 23-4.

### III. International Agreements in EC Law

In this section we will analyze the relationship between international law in general terms and EC law together with the effects of international law on the EC legal system and the reliability on an EC international agreement both in the EC courts and national courts.

#### A.- The Relationship between International Law and EC Law

The EC Treaty does not pronounce itself on the effects of an international agreement in the EC legal system. Under the EU decision-making process, Member States have the guarantee that their interests will be taken into account,<sup>50</sup> given the fact that international negotiations are concluded by the Council, which consists of representatives of Member States. There are more and more examples of cases in which international agreements are concluded by the Council acting by qualified majority. There is also an increased involvement of the European Parliament in these situations. The EC Treaty provides that the European Parliament must be consulted before the conclusion of international agreements,<sup>51</sup> except for international agreements based on Article 133(3) EC. However, in the everyday practice the European Parliament must be consulted even in these agreements.<sup>52</sup>

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<sup>50</sup> Bourgeois, J.H.J. "Trade Policy-making Institutions and Procedures in the European Community," in Hilf, M. & Petersmann, E.U. (eds.) *National Constitutions and International Economic Law* (Kluwer, Deventer, 1993) 175, at 191; McGoldrick, D. *International Relations Law of the European Union*, Longman, 1997, pp. 89-92.

<sup>51</sup> See Article 300, paragraph 2 EC.

<sup>52</sup> See Article 300, paragraph 3 EC.

In addition to that, certain types of international agreements now require the assent of the European Parliament. Such is the case of agreements entailing amendments of an act adopted under the co-decision procedure, association agreements, agreements establishing a specific institutional framework by organizing co-operation procedures and agreements having important budgetary implications for the EC.<sup>53</sup>

An international agreement that has entered into force and been properly concluded by the Council is part of EC law, according to the case law of the ECJ, from *Haegeman*:

“the [Association] Agreement [with Greece] was concluded by the Council under Article 228 and 238 of the Treaty...The Agreement is therefore, in so far as concerns the Community, an act of one of the institutions of the Community...The provision of the Agreement, from the coming into force thereof, form an integral part of Community law.”<sup>54</sup>

to *Racke*:

“An agreement with a third country concluded by the Council in conformity with the provisions of the EC Treaty, is, as far as concerns the Community, an act of Community institutions and the provisions of such Agreement form an integral part of Community law.”<sup>55</sup>

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<sup>53</sup> *Ibid.*

<sup>54</sup> [1974] ECR 449.

<sup>55</sup> [1998] ECR I-3655, para. 41.

The legal literature generally approves the approach taken by the ECJ in this respect.<sup>56</sup> Some legal authors argue that it is not possible to give an answer to the question of the relationship between EC law and public international law<sup>57</sup> or that recourse to monist or dualist theories is not productive.<sup>58</sup> It is said that an international agreement is as such part of the EC legal system once the EC's constitutional procedures required for the EC to be bound internationally have been complied with, that is to say, in order to have effect in the EC legal system, the international agreement in question does not have to be transformed in a regulation or a directive.<sup>59</sup>

The ECJ has never explained why an international agreement forms an integral part of EC law because that agreement has been concluded by the EC. Some authors refer to Article 300 EC as the explanation to the issue.<sup>60</sup> However, Article 300 EC only provides that international agreements are binding on the EC and its Member States.<sup>61</sup> In *Bresciani*,<sup>62</sup> the ECJ held that a private party could rely on the Yaoundé Convention even though its conclusion had been approved by way of a *decision* rather than by way of a *regulation*, which is by definition directly

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<sup>56</sup> Tomuschat, Ch. "Ad Article 228" in Groeben, Thiesing, Ehlerman (eds.) *Kommentar zum EU/EG Vertrag*, 5<sup>th</sup> edn., vol. 4 (Nomos, Baden-Baden, 1997), p. 502.

<sup>57</sup> Messen, K. "The Application of Rules of Public International Law within Community Law" 13 CML Rev. (1976) 485, at 500-1; Verloren van Themaat, P. "The Impact of the Case Law of the Court of Justice of the European Communities on the World Economic Order," *Festschrift Eric Stein* 82 Mich. L. Rev. (1984), 1423, 1435.

<sup>58</sup> Everling, U. "The Law of the External Economic Relations of the European Community" in Hilf, M. Jacobs, F & Petersmann, E.U. *The European Community and the GATT* (Kluwer, Deventer, 1986) 85, at. 95.

<sup>59</sup> See Howse, R. "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence," in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, chapter 3.

<sup>60</sup> See Pescatore, P. "Treaty-making by the European Communities," in Jacobs, F.G. & Roberts, S. (eds.) *The Effects of Treaties in Domestic Law*, Sweet & Maxwell, London, 1987, p. 179.

<sup>61</sup> See Jacot-Guillarmod, O. *Droit Communautaire et Droit International Public* (Georg, Librairie de L'University, Genève, 1979), 92.

<sup>62</sup> [1976] ECR 129.

applicable. The Council, however, has maintained its no-consistent practice of approving the conclusion of international agreements by way of decisions or regulations, making clear that it considers the type of legal acts as irrelevant for the status of international agreements in the EC legal system.<sup>63</sup>

### A.1.- Hierarchical Ranking of International Agreements

Whenever there is a conflict between an international agreement and the EC Treaty, the international agreement does not take precedence. An example is *Opinion 1/91*<sup>64</sup> on the Agreement establishing the European Economic Area (EEA) between the EC and EFTA countries. According to the ECJ, the jurisdiction conferred on the EEA Court was incompatible with EC law. This was so because before the EEA Agreement could lawfully be entered into, the European Communities Treaties had to be amended. The implication is that the Treaties are the “constitution” of the EC and that international agreements which conflict with the Treaties cannot take precedence over these Treaties.<sup>65</sup>

However, there are some *obiter dicta* of the ECJ where, in case of conflict between an international agreement and EC secondary law, the former takes precedence over the latter. As examples are *International Fruit*<sup>66</sup> and *Germany v*

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<sup>63</sup> Bourgeois, J.H.J. “The European Court of Justice and the WTO: Problems and Challenges” in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 94.

<sup>64</sup> [1991] ECR I-6079.

<sup>65</sup> See Tomuschat, Ch. “Ad Article 228” in Groeben, Thiesing, Ehlerman (eds.) *Kommentar zum EU/EG Vertrag*, 5<sup>th</sup> edn., vol. 4 (Nomos, Baden-Baden, 1997), at 511.

<sup>66</sup> [1972] ECR 1219, para. 7.

*Council*.<sup>67</sup> The intention of the ECJ is to avoid a conflict between an EC measure and an international obligation. Such is the case of *Carciati*<sup>68</sup> and *Poulsen and Diva Navigation*.<sup>69</sup> The ECJ has not found a case of conflict between an EC measure and an international agreement. In such a case, and following the most prominent literature in this respect, international rules binding on the EC take precedence over inconsistent EC secondary law.<sup>70</sup>

#### B.- The Effect of International Law on the EC Legal System

Here we shall review what function international agreements may have as legal instruments under which EC and Member States courts review measures of the EC and its Member States. We will see that international law has many effects on the EC legal system. It cannot be limited to the question whether international law gives rise to individual rights that may be enforced in national courts.<sup>71</sup> 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

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<sup>67</sup> [1994] ECR I-5039, para. 111.

<sup>68</sup> [1980] ECR 2773, para. 2.

<sup>69</sup> [1992] ECR I-6019, para. 16.

<sup>70</sup> See Jacot-Guillarmod, O. *Droit Communautaire et Droit International Public* (Georg, Librairie de L'University, Genève, 1979), at 120; Krück, H. “Ad Art. 177” in Groeben, Thiesing, Ehlerman (eds.) *Kommentar zum EU/EG Vertrag*, 5<sup>th</sup> edn., vol. 4 (Nomos, Baden-Baden, 1997), p.386; Pescatore, P. “Treaty-making by the European Communities,” in Jacobs, F.G. & Roberts, S. (eds.) *The Effects of Treaties in Domestic Law*, Sweet & Maxwell, London, 1987, p. 182; Schermers, H. in Commission of the EC (ed.) *Thirty Years of Community Law* (OOPEC, Luxembourg, 1981), 241, at 253.; Schermers and Waelbroeck, *Judicial Protection in the European Communities*, 5<sup>th</sup> edn., Kluwer, Deventer, Boston, 1992, at 217; Tomuschat, Ch. “Ad Article 228” in Groeben, Thiesing, Ehlerman (eds.) *Kommentar zum EU/EG Vertrag*, 5<sup>th</sup> edn., vol. 4 (Nomos, Baden-Baden, 1997), at 512.

<sup>71</sup> Eeckhout, P. “The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems”, 34 CML Rev. (1997), p. 13.



whether they are “directly enforceable.”<sup>72</sup> The question is that once an international agreement forms integral part of EC law, is it reliable a such in court or does it need certain criteria in order to rely on it to challenge the legality of an EC act?

*B.1. Reliability on an EC International Agreement in an EC Member State Court*

To be relied upon in an EC 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
5. No further act by either the EC or the Member State should be required

Where EC law provisions meet such technical criteria, they are enforceable in EC Member States courts, since, as can be inferred from *Van Gend en Loos*, the EC “constitutes a new legal order of international law...the subject of which comprises not only Member States but also their nationals.”<sup>73</sup> In *Costa v Enel*, the ECJ argues in the same direction by saying that “the EEC has created its own legal system, which, on the entry into force of the Treaty became an integral part of the legal

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<sup>72</sup> 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>73</sup> [1963] ECR 1 at 12.

system of the Member States...”<sup>74</sup> Also in *Opinion 1/91*, the ECJ refers to the EEC Treaty as “the constitutional charter of a Community based on the rule of law...The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.”<sup>75</sup>

In *Bresciani*, the ECJ held that the prohibition in Article 2(1) of the Yaoundé Convention on the abolition of charges having equivalent effect to customs duties was “capable of conferring on those subject to Community law the right to rely on it before the courts” on the ground that “this obligation is specific and not subject to any implied or express reservation on the part of the Community.”<sup>76</sup> According to the ECJ, Article 2(1) of the Yaoundé Convention met the necessary requirements which make it capable of being applied by a court.

In *International Fruit*, the ECJ required that a provision of international law be not only binding on the EC but also “capable of conferring rights on citizens of the Community which they can invoke before the courts.”<sup>77</sup> Schermers criticized the ECJ for introducing an additional condition for the application of international law in EC law.<sup>78</sup> In *Kupferberg*,<sup>79</sup> the ECJ analyzed Article 21 of the Free Trade Area with Portugal. Kupferberg relied as a private party on this agreement. The ECJ verified whether “the nature” or “the structure” of the agreement “may prevent a trader from

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<sup>74</sup> [1964] ECR 585 at 593.

<sup>75</sup> [1991] ECR I-6079, para. 21.

<sup>76</sup> [1976] ECR 129, para. 25.

<sup>77</sup> [1972] ECR 1219, para. 8.

<sup>78</sup> Schermers, “Community Law and International Law” 12 CMLRev (1975), 77 at 80.

<sup>79</sup> [1982] ECR 3641.

relying on the provisions of the said Agreement before a court in the Community.”<sup>80</sup>

The ECJ clarified this in *Demirel* in the following way:

“A provision of an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and *the purpose and nature of the agreement* itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (emphasis added).”<sup>81</sup>

As can be inferred from *Demirel*, for a private party to rely on an EC international agreement, it depends not only on whether its content is applicable by a court<sup>82</sup> but also on the nature and structure of the international agreement of which it is part. Some legal authors have criticized this approach,<sup>83</sup> while others have approved it.<sup>84</sup> One practical difference between relying on an EC law provision and on an EC international agreement is that, in the latter, a private party needs not only to demonstrate that the required technical criteria of direct effect are met but also that the context of that clause, i.e. the agreement, its wording, nature and purpose, is such as to justify direct effect. This should not be understood as that EC international agreements never have direct effect, i.e. never give rise to rights that are legally enforceable in EC Member States courts.

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<sup>80</sup> *Ibid.*, paras. 10-22.

<sup>81</sup> [1987] ECR 3747, para. 14.

<sup>82</sup> See criterion number 2 above for EC law provisions to be relied upon in an EC Member State court.

<sup>83</sup> Pescatore, P. “Treaty-making by the European Communities” in Jacobs, F.G. & Roberts, S. (eds.) *The Effects of Treaties in Domestic Law*, Sweet & Maxwell, London, 1987, p. 187.

*B.2. Reliability on an EC International Agreement in the EC Courts*

An applicant who relies on an EC rule in a direct action in the ECJ or the Court of First Instance (CFI) of the EC does not need to demonstrate that such rule has direct effect.<sup>85</sup> The ECJ has so far not pronounced itself for such a requirement. It has just stated that if private parties are subjects of a given legal system (the EC legal system), “they are entitled to rely on any provision of that legal system, provided this provision is technically capable of being applied by a court.”<sup>86</sup> The question that arises is whether, in order to be relied upon in a direct appeal before the ECJ, the ECJ would require that a clause of an EC international agreement meet the same sort of direct effect test as it requires when such a clause is relied upon in a national court.

The enforceability of a clause of an EC international agreement in the ECJ and in the CFI would depend not only on the technical requirements of the clause by also on its context, i.e. the international agreements of which it is part. This seems to be the conclusion from the *Bananas* cases. Gulman AG took the view that it is not because a provision does not have direct effect in a Member State court that it may not be relied upon in a direct appeal in the ECJ.<sup>87</sup> The ECJ rejected his view and applied the same test in this direct appeal as the test applied in preliminary rulings

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<sup>84</sup> Tomuschat, C. “Ad Article 228” in Groeben, Thiesing, Ehlerman (eds.) *Kommentar zum EU/EG Vertrag*, 5<sup>th</sup> edn., vol. 4 (Nomos, Baden-Baden, 1997), pp. 506-510.

<sup>85</sup> Bourgeois, J.H.J. “The European Court of Justice and the WTO: Problems and Challenges” in Weiler, J.H.H. (ed.) *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?*, Oxford University Press, 2000, p. 101.

<sup>86</sup> *Ibid.*

<sup>87</sup> [1994] ECR I-4980, para. 135.

for the purpose of application by EC Member States courts.<sup>88</sup> Of course, this does not mean that no EC international agreement would ever pass the test. An example is *Opel Austria*,<sup>89</sup> where the applicant challenged in the CFI a duty imposed on gearboxes manufactured by Opel Austria to counteract subsidies granted by Austria to Opel Austria. According to the applicant, such duty infringed several clauses of the Agreement on the European Economic Area (EEA). The CFI applied only the technical test to Article 10 of the EEA Agreement to find that it had direct effect.<sup>90</sup>

There are also cases where there is some form of legislative implementation by the EC. In *Fediol III*,<sup>91</sup> according to the applicant the Commission had misinterpreted various GATT provisions when it rejected the applicant's complaint lodged under the EC's New Commercial Policy Instrument. The holding of the ECJ was that the applicant could on those provisions on the grounds that the New Commercial Policy Instrument defined "illicit practices" against which private parties may complain by reference to the GATT. Van Gerven AG took the view in his opinion that an international law provision which does not have direct effect *per se* may, none the less, be transformed within a particular legal order, by a rule of that legal order, into a rule having direct effect.<sup>92</sup>

The ECJ went even further in *Nakajima*,<sup>93</sup> where the applicant was questioning the applicability of the EC basic anti-dumping regulation by claiming that it was incompatible with Article VI of the GATT and certain clauses of the GATT Anti-dumping Code. To the eyes of the ECJ, the applicant could rely on these

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<sup>88</sup> [1994] ECR I-4973, para. 105.

<sup>89</sup> [1997] ECR II-39.

<sup>90</sup> *Ibid.*, para. 102.

<sup>91</sup> [1989] ECR 1781.

<sup>92</sup> *Ibid.*, at 1806, footnote 8.

GATT provisions on the ground that the basic anti-dumping regulation had according to its preamble been “adopted in order to comply with the international obligations of the Community.”<sup>94</sup> In of the *Bananas* cases, the ECJ made clear that it will review the legality of an EC act under the GATT “only if the Community intended to implement a particular obligation entered into within the framework of GATT, or Community act expressly refers to specific provisions of GATT.”<sup>95</sup> So where under an objective test an international agreement has no direct effect, this means that contracting parties have no international duty to allow its enforcement in national courts.

#### **IV. The WTO Agreement in EC Law**

Section V, in contrast with the previous section, deals specifically with international trade law. The relationship between the WTO Agreement and EC law, as well as its effect in the EC legal system are treated throughout this section.

##### **A.- The Relationship between the WTO Agreement and EC Law**

The ECJ has avoided stating that the GATT “forms integral part of Community law.” This may be due to the fact that the EC was not a contracting party in GATT 1947. The ECJ has avoided this qualification also in relation to the WTO Agreement.

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<sup>93</sup> [1991] ECR I-2069.

<sup>94</sup> *Ibid.*, para. 31.

<sup>95</sup> *Germany v Council* [1994] ECR I-4973, para. 11.

In *Fediol II*, the ECJ examined the Commission's interpretation of the term "subsidy" in light of the GATT and the Tokyo Round Subsidies Code. It held that "the Commission was not wrong or arbitrary in concluding that the concept of subsidy...presupposes the grant of an economic advantage through a charge on the public account."<sup>96</sup> In *Nakajima*, the ECJ compared the EC Anti-dumping Regulation and the relevant international provision and concluded that the EC Anti-dumping Regulation was in conformity with the international law provision "inasmuch as, without going against the spirit of the latter provision, it confines itself to setting out, for the various situations which might arise in practice, reasonable methods of calculating the constructed normal value."<sup>97</sup>

In the *International Dairy Agreement* case, the Commission brought proceedings against Germany for having breached obligations under the EC Treaty resulting from its failure to comply with the International Dairy Agreement, one of the agreements concluded in the framework of the Tokyo Round. According to Germany, the IDA did not cover goods imported and exported under inward processing arrangements. This interpretation was rejected by the ECJ on the basis of the text<sup>98</sup> and on the basis of the context of the relevant provision and of the "general rule of international law requiring the parties to any agreement to show the good faith in its performance"<sup>99</sup> and the purpose of the IDA.<sup>100</sup>

From this evidence, it can be argued that when interpreting GATT agreements, the ECJ follows the same approach as in the case of other international

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<sup>96</sup> [1988] ECR 4155, para. 12.

<sup>97</sup> [1991] ECR I-2069, para.37.

<sup>98</sup> [1996] ECR I-3989, paras. 21-4.

<sup>99</sup> *Ibid.*, para. 30.

<sup>100</sup> *Ibid.* paras. 31-7.

agreements. Though the ECJ has not held yet a provision of secondary EC law illegal for breach of a GATT or a WTO obligation, the possibility has been accepted in *Fidelio II* and *Nakajima*.

### B.- The Effect of WTO Agreements on the EC Legal System

In this subsection, we will study the reliability on WTO agreements both in the EC courts and national courts.

#### B.1.- Reliability on WTO Agreements in EC Member States Courts

Ever since *International Fruit*, the ECJ has held that GATT and GATT agreements cannot be relied upon by private parties in EC Member States courts to challenge EC or Member State measures. After *Nakajima*, where the ECJ set the door to reliability on a GATT agreement, one could have wondered whether the ECJ would display a more open attitude with respect to enforcement of GATT and GATT agreements by Member States courts. The ECJ did no longer have to worry about the risk of the uniform application of EC law if Member States courts were to enforce the GATT and the GATT agreements.

For example, the main *Bananas* judgment<sup>101</sup> revealed that uniform application of EC law by Member States courts was not the ECJ's main concern. However, one should not infer from the previous statement that the ECJ is not concerned with the uniform application of EC law or that uniform enforcement of



GATT is left to national courts. Rather one should interpret it in the following way: since the EC and its Member States are jointly competent for concluding the GATS and TRIPS agreements, it is likely that some Member States courts will consider that provisions of these agreements may be relied upon before them and enforced by them. This was so in the *Hermès* case:<sup>102</sup> within less than ten days after the ECJ came up with the *Hermès* judgment, a Dutch court in another case specifically submitted to the ECJ a request for a preliminary ruling on the direct effect of the same TRIPS provisions.<sup>103</sup>

### B.2.- Reliability on WTO Agreements in the EC Courts

In the main *Bananas* case, the ECJ tried the possibility to rely on the GATT in a direct appeal to practically the same direct effect test to be used by EC Member States courts for the purpose of applying international agreements. It was in this same case that the ECJ defined the issue as “assessing the scope of GATT in the Community legal system.” It applied the test based on “the spirit, the general scheme and the terms of the GATT.”<sup>104</sup> The conclusion is that the GATT cannot be relied upon in the EC courts to challenge the lawfulness of EC measures, be it by private parties or by Member States. In the words of the ECJ:

It is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the

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<sup>101</sup> [1994] ECR I-4973.

<sup>102</sup> Case C-53/96 [1998] ECR I-3603.

<sup>103</sup> The Hague District Court on 25 June 1998 in *Parfums Christian Dior v Tuk Consultancy*.

<sup>104</sup> [1994] ECR I-4973, para. 105.

Community act expressly refers to specific provisions of GATT, that the Court can review of the GATT rules.<sup>105</sup>

The GATT may only be relied upon against EC measures if the EC political bodies have so decided. This results from the statement previously reported. However, in *Kupferberg*<sup>106</sup> the ECJ considered that the courts had the right to decide on the effect of an international agreement in the internal legal order, where contracting parties to such agreement have not agreed in this effect. By leaving it to the EC political bodies to decide on the effect of the GATT in the EC legal system, the ECJ has effectively introduced some sort of “sovereignty shield”<sup>107</sup> against the GATT.

The different outcomes of the direct effect test as applied by the ECJ to the GATT and as applied to other EC international agreements remain a bit unclear from an international law point of view. Distinctions made in the past, such as in *Kziber*,<sup>108</sup> where van Gerven AG contrasted the GATT and the Co-operation Agreement with Morocco, do no longer apply since the entry into force of the WTO agreement. From a WTO point of view, the ECJ did not draw major consequences from the change brought by the Dispute Settlement Understanding. If the ECJ wants to maintain its doctrine that the GATT does not meet the direct effect test and extends it to other WTO agreements, it will need to devise standards, other than the standards it has used up to now, to deny direct effect to the GATT and WTO agreements.

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<sup>105</sup> *Ibid.*, para. 111.

<sup>106</sup> [1982] ECR 3641, para. 18.

<sup>107</sup> This term was used in the European Parliament’s *Report on the Relationship between International Law, Community Law and Constitutional Law of the Member States* (PE 220.225/fin).

<sup>108</sup> [1991] ECR I-199.

## V. The *Hermès* Judgment

This famous judgment is the first of its kind where the Court of Justice of the European Communities has been requested to interpret a mixed agreement other than an association agreement. In the *Hermès* case,<sup>109</sup> the Court interprets an article of the TRIPS agreement. The Court was asked to rule on whether an interim measure, as provided for in Article 289 of the Netherlands Code of Civil Procedure, constituted a provisional measure in the sense of Article 50 of TRIPS, so that a time-limit should be fixed for *Hermès* to initiate proceedings on the merits on a dispute concerning an alleged infringement of its trade-mark rights by *FHT*, according to paragraph 6 of the provision in question.

The French, Dutch and UK Governments challenged the Court's jurisdiction by referring to the Court's reasoning in Opinion 1/94, where it had been stated that, insofar as no common rules were adopted in the sense of the ERTA judgment,<sup>110</sup> the EC's competence to conclude TRIPS would remain non-exclusive.<sup>111</sup> The only exception was the subject-matter covered by a Council Regulation<sup>112</sup> laying down measures to prohibit the release for free circulation of counterfeit goods which fell within the Community's exclusive competence by virtue of Article 133 EC.<sup>113</sup> The three Governments argued that Article 50 of TRIPS fell within the competence of the Member States and not that of the Community, since there had been no decision to

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<sup>109</sup> [1998] ECR I-3603.

<sup>110</sup> *Commission v Council* [1971] ECR 263, paras. 17 and 22.

<sup>111</sup> Opinion 1/94 [1994] ECR I- 5267, para. 104.

<sup>112</sup> Council Regulation (EEC) No. 3842/86, OJ L 357 [1986] p. 1.

<sup>113</sup> Opinion 1/94, para. 55.

exercise non-exclusive Community competence at the time of conclusion of the WTO Agreement.<sup>114</sup>

Advocate General Tesauro argued that apart from the areas where the Community is deemed to enjoy exclusive competence under Article 133 EC, competence is vested in the Community insofar as the latter has effectively exercised its non-exclusive competence. However, Member States remain competent in those areas where no common rules have been introduced.<sup>115</sup> Both the Advocate General and the Court rejected the claim that Article 50 of TRIPS was outside the Court's jurisdiction under Article 234 EC. The Court noted, in addition, that when the Final Act and the WTO Agreement were signed by the Community and its Member States on 15 April 1994, Council Regulation (EC) No. 40/94 on the Community trade mark had already been in force for one month.<sup>116</sup>

Rights arising from a Community trade mark might be safeguarded by the adoption of "provisional, including protective, measures."<sup>117</sup> It is true that the measures envisaged by Article 99 were those provided for by the domestic law of the Member States concerned for the purposes of the national trade mark. However, since the EC was a party to TRIPS and since that agreement applied to the Community trade mark, the courts referred to in Article 99 of Regulation No. 40/94, and when called upon to apply national rules with a view to ordering provisional

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<sup>114</sup> Case C-53/96 *Hermès v FHT* [1998] ECR I-3603, para. 23.

<sup>115</sup> *Ibid.*, paras. 12-13 of the opinion of Mr. Tesauro. See also Garzón Clarina, G. "La mixité: Le droit et les problèmes pratiques" in Bourgeois, J., Dewost, J. & Gaiffe, M. *La Communauté européenne et les accords mixtes, Quelles perspectives?*, Presses Interuniversitaires Européennes, 1997, p. 17 and Piris, J.C. & Torrent, R. "Les problèmes juridiques posés à la Communauté européenne par la conclusion des accords de Marrakech" in Société Française de Droit International, *Colloque de Nice – La réorganisation mondiale des échanges (problèmes juridiques)* (Pedone, Paris, 1996) p. 251 at 270-71.

<sup>116</sup> Case C-53/96 *Hermès v FHT* [1998] ECR I-3603, paras. 26-29.

<sup>117</sup> Article 99 of Regulation No. 40/94.

measures for the protection of rights arising under a Community trade mark, they were required to do so, in the light of the wording and purpose of Article 50 of the TRIPS agreement.<sup>118</sup> In fact, the ECJ had jurisdiction to interpret Article 50 of TRIPS.<sup>119</sup> In the eyes of the ECJ, it was immaterial that the dispute in the main proceedings concerned trade marks whose international registrations designated the Benelux. Therefore, the Court came to the conclusion that it had jurisdiction to rule on Article 50 of TRIPS.<sup>120</sup>

Taking into account the argument put forward by the three Governments<sup>121</sup> challenging the Court's jurisdiction, the question arises as to the implications of the decision for the Court's competence to interpret mixed agreements. One wonders whether the reasoning on the issue of jurisdiction means that the ECJ regards itself as competent to rule also on those provisions of a mixed agreement which have been concluded under national powers. Should that be the case, is that power limited to areas where the EC has non-exclusive competence? Does it also cover provisions within the sole competence of the Member States?

As regards the latter question, the *Hermès* judgment does not resolve the question. The ECJ made clear that no provisions of the TRIPS Agreement should be understood as being within "some sort of domain reserved to the Member States."<sup>122</sup> The EC was competent to harmonize national rules on those matters, insofar as they directly affected the establishment of functioning of the common market provided by

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<sup>118</sup> The ECJ referred, by analogy, to Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9, and to Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52.

<sup>119</sup> Case C-53/96 *Hermès v FHT* [1998] ECR I-3603, paras. 26-29.

<sup>120</sup> *Ibid.*, para. 33.

<sup>121</sup> The French, the Dutch and the UK Governments.

<sup>122</sup> *Opinion 1/94*, [1994] ECR I-5267.

Article 95 EC.<sup>123</sup> According to Professor Dashwood, on the Opinion 1/94 premises, the ECJ was not in a position to give any light on the question of whether its jurisdiction under Article 234 EC covers the provisions of a mixed agreement which are within the sole competence of the Member States.<sup>124</sup> However, other authors, such as Kaddous<sup>125</sup> as well as Correa & Yusuf, conclude that “international treaties concluded by the Community, or mixed agreements such as TRIPS, are directly applicable and binding upon the Community, and once approved by its organs the agreement becomes also binding upon individual EEC Members as Community law.”<sup>126</sup>

As for provisions where the EC has non-exclusive competence, the reasoning in *Hermès* affirms the ECJ’s jurisdiction for their interpretation. The ECJ’s logic is that the court has jurisdiction to interpret all provisions of a mixed agreement falling within the exclusive or the non-exclusive competence of the EC, regardless of whether it has been decided to exercise the EC’s non-exclusive powers. In other words, it has been suggested that what the ECJ said on Article 50 of TRIPS seemed to be equally applicable to any of the provisions of the WTO Agreement and other mixed agreements that relate to a field of activity where the competence is shared

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<sup>123</sup> *Ibid.*, para. 104. See Rosas, A. “Mixed Union-Mixed Agreements” in Koskenniemi, M. (ed.) *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 135.

<sup>124</sup> See Dashwood, A. “Preliminary Rulings on the Interpretation of Mixed Agreements” in O’Keefe, D. & Bavasso, A. (eds.) *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. 1, Kluwer Law International, The Hague, 2000; see also, Eeckhout, P. “The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems”, 34 CML Rev. (1997), p.11 at pp. 20-24.

<sup>125</sup> Kaddous, C. *Le droit des relations extérieures dans la jurisprudence de la Cour de justice des Communautés européennes* (Helbing & Lichtenhahn, Bâle, 1998), pp. 76-78.

<sup>126</sup> Correa, C.M. & Yusuf, A.A. *Intellectual Property and International Trade*, Kluwer Law International, The Hague, 1998, p. 114.

between the EC and its Member States.<sup>127</sup> This would result from the fact that in every such field there is likely to have been some piece of internal legislation enacted, which would be enough to bring the relevant provisions of the agreement in question within the scope of EC law.<sup>128</sup> Rosas takes the same view and submits that “the Court is competent to rule on all provisions of TRIPS.”<sup>129</sup>

According to Heliskoski, the above interpretation of the *Hermès* case would seem too broad. In the first place, the assumption that in every field where the EC has competence there was at least some EC legislation enacted does not seem to be correct.<sup>130</sup> The ECJ pointed out in Opinion 1/94 that harmonization achieved within the EC in certain areas covered by TRIPS is only partial and, in other cases, no harmonization has been envisaged.<sup>131</sup> With regard to areas where no harmonization has been envisaged, the ECJ referred to the protection of undisclosed technical information, industrial design as well as patents. Secondly, the rationale of the decision in *Hermès* was that Article 50 of the TRIPS affected, in the meaning of the ERTA judgment, Article 99 of Regulation No. 40/94, that is, the adoption of provisional measures. According to the ECJ, there was a Community interest that the interpretation of Article 50 of TRIPS was uniform in both cases.

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<sup>127</sup> Heliskoski, J. "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements", *Nordic Journal of International Law*, Vol. 69, No. 4, 2000, p. 395 at 404.

<sup>128</sup> Dashwood, A. "Preliminary Rulings on the Interpretation of Mixed Agreements" in O'Keefe, D. & Bavasso, A. (eds.) *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. 1, Kluwer Law International, The Hague, 2000, p. 173.

<sup>129</sup> Rosas, A. "Book Review" of J.H.J. Bourgeois, J.-L. Dewost and M.-A. Gaiffe (eds.) *La Communauté européenne et les accords mixtes. Quelles perspectives?* (Presses interuniversitaires européennes, Bruxelles, 1997), 37 *Common Market Law Review*, (2000) p. 1007 at p. 1009.

<sup>130</sup> Heliskoski, J. "The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements", *Nordic Journal of International Law*, Vol. 69, No. 4, 2000, p. 395 at 404.

<sup>131</sup> Opinion 1/94 [1994] ECR I-5267, para. 103.

The judgment seems to suggest that where one and the same provision of such an agreement might apply to both areas of Community and Member State competence, the Court is entitled to give a preliminary ruling on its interpretation, irrespective of whether the dispute in the main proceedings concerned a matter within the competence of the Member States. Insofar as the EC's competence is still and only potential, the competence to conclude an agreement such as TRIPS remains vested in the Member States. Advocate General Tesauro put forward a whole series of arguments to justify his conclusion that the ECJ should be considered to have jurisdiction to interpret Article 50 of TRIPS. He mentioned that sectors in which there was shared competence were not the "private preserve" of the Member States and therefore were not outside the scope of Community law.<sup>132</sup>

However, it might not be easy to establish precisely whether a given provision falls within the Community or Member State preserve. Nor can it be ruled out that a given national interpretation might affect the application of Community provisions and/or the functioning of the system. Thus, according to Mr. Tesauro, the requirement of uniformity in the interpretation and application of all the provisions of a mixed agreement could be regarded as fundamental.<sup>133</sup> Moreover, as the EC and its Member States constituted a single contracting party *vis-à-vis* other WTO Members, the ECJ's jurisdiction was necessary in order to ensure uniformity in its interpretation and application throughout the EC and in order to protect the EC's interest in not being obliged to assume responsibility for infringements committed by

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<sup>132</sup> Case C-53/96 *Hermès v FHT* [1998] ECR I-3603, para. 19 of the Opinion of Mr. Tesauro.

<sup>133</sup> *Ibid.*, at para. 20.



one or more Member States.<sup>134</sup> In addition to the above, the recognition of the ECJ's jurisdiction represented a contribution to the fulfillment of the duty of co-operation between the EC institutions and the Member States, as emphasized by the ECJ in its Opinion 1/94.<sup>135</sup>

In the case *Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & Co KG and Layher BV*, Advocate General Cosmas has taken the view that the judgment in *Hermès* was based on the close connection between the rules of the EC trade mark and the national trade-marks, which therefore could not prejudice whether the Court was entitled to interpret Article 50 of TRIPS in a dispute which did not relate to the protection of a trade-mark but an industrial design. He refers to the ECJ's observation that the measures envisaged by Article 99 of Regulation 40/94 on the EC trade-mark and the relevant procedural rules are those provided for by the domestic law of the Member State concerned for the purposes of the national trade-mark.<sup>136</sup> What can be inferred from all this is that there is a close link between the situations concerning the EC trade-mark and those concerning the national trade-marks which, according to Mr. Cosmas, justified the ECJ's jurisdiction in *Hermès*.<sup>137</sup> Desmedt takes the view that in *Hermès* "the Court seemed to infer its competence for interpreting Article 50 TRIPS from the fact that this provision is relevant to the

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<sup>134</sup> *Ibid.*, paras. 14 and 20.

<sup>135</sup> [1994] ECR I-5267, para. 21.

<sup>136</sup> Case C-53/96 *Hermès v FHT* [1998] ECR I-3603, para. 28.

<sup>137</sup> Joint Cases C-300/98 *Parfums Christian Dior SA v. Tuk Consultancy BV* and C-392/98 *Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & Co KG and Layher BV* [2000] ECR I-11307, paras. 40 of the Opinion of Advocate General.

interpretation of national provisional measures which can be taken by virtue of Article 99 of the Community Regulation 40/94.”<sup>138</sup>

According to Heliskoski, there is no such connection between the rules concerning the EC trade mark and the rules concerning the national trade marks the ECJ relied upon in *Hermès*. Hence, the judgment does not give the ECJ an unlimited jurisdiction to interpret Article 50 of TRIPS or any other provision in a mixed agreement which might apply to both areas of Community and national competence but is limited to the specific case of trade-marks.<sup>139</sup> One can conceive two interpretations of *Hermès* with regard to the ECJ's jurisdiction to give preliminary ruling on mixed agreements. On the one hand, one can argue that the Court is competent to interpret all those provisions of a given agreement which apply to both areas of EC and Member State competence, regardless of whether the dispute in the main proceedings actually concerned a matter within the competence of the Member States. On the other hand, and following the lines of the Opinion of Advocate General Cosmas in *Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & Co KG and Layher BV*, it might be suggested that there also has to be a substantive link between the respective spheres of EC trade-mark and the national trade-marks respectively.

Neither interpretation resolves the question of whether the ECJ is entitled to interpret those provisions in a mixed agreement which have been concluded under Member State powers either because they go beyond the competence of the EC or

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<sup>138</sup> Desmedt, G.A. “European Court Rules on TRIPS Agreement” 1 *Journal of International Economic Law*, (1998) p. 679 at 680.

<sup>139</sup> Heliskoski, J. “The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements”, *Nordic Journal of International Law*, Vol. 69, No. 4, 2000, p. 395 at 407.

because it has not been decided to exercise the EC's non-exclusive competence. In this sense, *Hermès* is not very different from the ECJ's case-law on association agreements.<sup>140</sup>

## VI. Conclusions

The ECJ faces various challenges with regard to international trade law in general, and more precisely with respect to WTO agreements. The first of them is about jurisdiction. The ECJ will face the issue of its jurisdiction over matters which justified Member States' participation in mixed agreements and with respect to which EC rules have been enacted. This will be so as a result of both the mixed WTO membership of the EC and its Member States and the joint competence of the EC and its Member States for most of the matters covered by GATS and TRIPS. The ECJ can take a narrow approach and declare that it has no jurisdiction over GATS and TRIPS provisions coming within the scope of Member States' powers and leave it to the Member States and the EC political bodies to sort out the rather messy situation both within the EC and *vis-à-vis* other WTO members. The ECJ could also make a distinction between situations that are purely internal to a Member State and those that are not. It is also up to the ECJ to draw a line dividing EC and Member States' external powers. This would be a politically controversial exercise. The mixed agreement formula is a solution of creative ambiguity that avoids difficult discussions and decisions.

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<sup>140</sup> Gasparon, P. "The Transposition of the Principle of Member State Liability into the Context of External Relations" 10 *European Journal of International Law* (1999) p. 605 at p. 613 and Turner, C. "Arret Hermès" *Revue du Marché Unique Européen* (1998) p. 241 at p. 243.

The ECJ can also take jurisdiction without, firstly, calling into question its Opinion 1/94 on the result of the Uruguay Round and, secondly, pre-empting a decision of the EC political bodies, under Article 133(5) EC on trade in services and intellectual property rights. This would mean exercising jurisdiction over Member States' legislation and their international obligations in cases where the ECJ is not able to link Member State legislation to EC legislation. The ECJ could exercise jurisdiction via a broad interpretation of Article 10 EC on the Community loyalty principle. Even without referring to Article 10 EC, in Opinion 1/94 the ECJ identified a duty of "close co-operation", which extends to "the fulfillment of the commitments entered into." This close co-operation could be applied to Member States' courts so that they have an obligation to seek a preliminary ruling under Article 234 EC.

Another challenge that the WTO agreements present to the ECJ is their enforceability in the EC legal system. The question that raises is whether or not to recognize a degree of enforceability to WTO agreements where they contain provisions that are as such capable of being enforced judicially. There is no consensus among EC Member State governments against judicial enforceability of WTO agreements as a matter of principle. The ECJ will touch on traditionally held views on the effect of international agreements and on the interest of these agreements in a globalizing world economy.

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## CONCLUSIONS

My conclusion is that since the European integration is an on-going process, very often WTO issues are subject to political consideration and political will in order to really have a common position by the EC and its Member States on **all** trade matters. Before the Treaty of Nice of December of 2000, EU Member States had a veto power in issues of mixed competence (such as trade in services, intellectual property rights, investment and monetary policy), which made the answer to my research question virtually impossible. After Nice, the EU has moved to a system of qualified majority voting, leaving behind the old system of unanimity in the EU Council and therefore getting closer to the desired EC unitary representation in all WTO matters. In Nice it was decided that trade agreements relating to services or commercial aspects of intellectual property can, in principle, be concluded by the Council acting by qualified majority.<sup>1</sup> The old system of unanimity made negotiations more complex and sometimes less effective.<sup>2</sup>

From the point of view of the negotiating opponent, the EC is a much stronger adversary if EU Member States retain tight control over the negotiating process by sharing competence with the EC than if the EC acts with exclusive competence and the European Commission acts with a centralized power. To give an example, the U.S. would be able to successfully negotiate bilateral agreements with most EU Member

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<sup>1</sup> The European Commission, "Factsheets. Qualified Majority Voting: Common Commercial Policy", in <<[http://europa.eu.int/comm/archives/igc2000/geninfo/fact-sheet6/index\\_en.htm](http://europa.eu.int/comm/archives/igc2000/geninfo/fact-sheet6/index_en.htm)>>

<sup>2</sup> European Commission, TREATY OF AMSTERDAM: WHAT HAS CHANGED IN EUROPE 20 (1999).

States if the EU Member States did not integrate their trade policy and trade negotiating authority. This happened in the case of “open skies” agreements, since air traffic regulation is not exclusive EC competence.<sup>3</sup> Although each party to an international agreement is responsible for performance of its own obligations and joint liability under an agreement is not to be presumed, the special circumstances of the EC and its Member States may amount to an exception to this rule. They generally act **together** in pursuit of a common policy.<sup>4</sup> Macleod *et al.*, comment that “for the third party, the most convenient conclusion is that the Community and the Member States assume joint obligations, the performance of which all are required to assure.”<sup>5</sup>

The EC faces problems similar to those of federal states. In Germany, to take an example of a prominent European federation, the *Laender* strongly protested against the silent transfer of their powers to the Community, and they are justified by the German Constitution. It might simply not be realistic to strive for a unitary character of EC external trade relations. Mixity may function as an invitation to pursue parochial national interests. However, equally important, the unitary tendency is controversial in normative terms. In this sense, Professor Weiler indeed has underlined that the EC “may not speak with one voice but increasingly speaks like a choir.”<sup>6</sup>

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<sup>3</sup> SOPHIE MEUNIER, *Divided but United: European Trade Policy Integration and EU-U.S. Agricultural Negotiations in the Uruguay Round*, Program for the Study of Germany and Europe, Working Paper Series #7.3, p. 29.

<sup>4</sup> Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, Clarendon Press Oxford, 1996, p. 159.

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

<sup>6</sup> Weiler, J. H. H., “The Evolution of Mechanisms and Institutions for a European Foreign Policy. Reflections on the Interaction of Law and Politics”, European University Institute Research Paper No. 85/202, 1992.

The legal recognition by the European Court of Justice in its Opinion 1/94<sup>7</sup> of mixed competencies departs from the founding principle that the EC has a single voice in international trade negotiations and from previous case law on external relations. The Court's encouragement of a return to intergovernmentalism in the field of external trade is clearly setting the stage for future disputes over competencies and may affect the future character of the EC as an international trade actor.<sup>8</sup>

Proof of this are the words of Rod Eddington, chief executive of British Airways, who believes that, with regard to bilateral air services agreements with foreign governments, "Brussels should aim to replace national ownership rules in present agreements with a European ownership regulation to open the way for the consolidation of the European airline industry."<sup>9</sup> In addition, he warned that "a continued fragmentation would cause the European industry to lag behind the U.S."<sup>10</sup> More clearly, he expresses that the EU "cannot compete globally with North American carriers if we [the EU] have 14 to 15 network carriers in Europe."<sup>11</sup> In this same line of thought is an argument by Louis Uchitelle, who claims that Mercosur's Member States, and particularly Brazil and Argentina, would benefit from a strong common position in

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<sup>7</sup> Opinion 1/94, competence of the Community to conclude international agreements concerning services and intellectual property (15 November 1994), [1994] ECR I-5267.

<sup>8</sup> See SOPHIE MEUNIER, *Divided but United: European Trade Policy Integration and EU-U.S. Agricultural Negotiations in the Uruguay Round*, in CAROLYN RHODES ed., *THE EUROPEAN UNION IN THE WORLD COMMUNITY* 193, 209 (Colorado) (1998).

<sup>9</sup> Kevin Done, Aerospace correspondent in London, "Airlines press bigger role for Brussels" in *Financial Times*, p. 5, March 13, 2002.

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

<sup>11</sup> *Id.*



Mercosur, which has given the two countries a more powerful voice when negotiating with the U.S. and Europe.<sup>12</sup>

As Keith Richardson<sup>13</sup> argues, “the need to negotiate as one, to speak with one voice in all international economic negotiations, is about competitiveness, jobs and economic survival and it is being trivialized by national administrations which treat it as a petty bureaucratic turf battle”.<sup>14</sup> He argues that our living standards (in the European Union) are increasingly determined by global flows, “not only trade in goods but also services, intellectual property and investment. Europe is the world’s largest trading unit, and European industry is strong enough to hold its own. But these flows take place within a framework of globally agreed rules, and except in the specific case of trade in goods European negotiators cannot hold their own because they negotiate not as one but as 15.”<sup>15</sup> The European Community only has exclusive competence with respect to trade in goods. With respect to trade in services, intellectual property and investment, there is no European Community exclusive competence.<sup>16</sup>

Richardson supports his thesis about the importance of a single voice in the European Union by comparing the European Union’s and the United States’ power in negotiating multilateral trade agreements. “But where would some of our dynamic American friends stand in world markets if their interests were represented by 50

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<sup>12</sup> Louise Uchitelle, *Argentina’s Woes May Strngthen Its Ties to Brazil*, The New York Times, Business Day, January 10, 2002, p. C1.

<sup>13</sup> Keith Richardson is Secretary General of the European Round Table of Industrialists.

<sup>14</sup> Richardson, K. “Speak with one voice in trade negotiations” Letters to the Editors in *Financial Times*, 17 March 1997.

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

<sup>16</sup> *Id.*

separate state-level negotiating teams?”<sup>17</sup> This question shows the important role that the United States plays in multilateral trade negotiations by negotiating on behalf of all fifty states with one voice. The comparison is not perfect since the fifty American states are not sovereign States (they have no international legal personality) and, therefore, cannot sign any international treaties. However, in the case of the European Community its Member States are sovereign states and can therefore sign international agreements. The idea behind this transatlantic parallelism is that, although the European Union is composed of 15 sovereign Member States, it is in their national interest to give up their national sovereignty to the European level in order to have a stronger negotiating position. This would only be legally possible by amending the Treaties.

### Reflecting on the Future

International trade relations are changing rapidly, and it is of vital importance for the European Union to give shape to and change the governing rules and institutions of international trade according to its own fundamental aims. In the past, the European Union had a defensive attitude when dealing with international trade issues in the multilateral trade system. This is no longer possible. The EU needs an innovative trade policy, the institutional capacity to act on a long-term basis, a permanent Council of Trade Ministers.<sup>18</sup> This would make EU policy-making far more efficient. There is also

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<sup>17</sup> *Id.*

<sup>18</sup> I have personally gathered this information at a round table held at the Royal Institute of International Affairs in February 1998 during the discussion of a paper written by Johnson, M. 113. *European Co-operation in Action*, 1998.

a tendency among certain scholars to believe in the importance of giving trade matters at the highest political level of policy-making to the EU Ministers of Trade instead of being competence of the General Affairs Council, which is *a priori* more interested in Foreign Policy issues and usually not so interested in trade matters.<sup>19</sup>

Although shared competence will be used for the near future between the EC Institutions and Member States when dealing with the EC External Trade Relations, it still creates a great deal of uncertainty at the international negotiation table. The EU must be sure that the present realities of the global economy mesh with the institutional design in Europe. However, and unfortunately, there has been little political will to reform the present system. There is still a lack of transparency and democratic accountability within the EC Institutions.

With the decline of the U.S. hegemony, the EU can no longer have a defensive trade policy in international trade diplomacy, especially in an era of globalization. The EU must accept global responsibilities, as it is an important international economic actor and has a duty to assure a stable international trading system. Will the existing EC institutional structures for external trade policy meet the challenge of self-reform?

It is vital for the European Community to reach a common position for effective policy-making. Are EU Member States prepared to lose part of their sovereignty in order to have “more common” policies? Undoubtedly, when the EC negotiates as one in multilateral trade negotiations, as in the Uruguay Round negotiations, between more than 100 trading nations, it can negotiate a better deal for its companies and open up

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

markets overseas, more quickly. However, the supranational trade policy powers of the Commission have made Member States envious. The Amsterdam Treaty has made it possible for the Commission to have a bigger role in negotiations in international agreements, as long as there is agreement by the Council, but the system seems to be undemocratic. Non Governmental Organizations (NGOs) complain about the undemocratic accountability within the EU policy-making. The trend in the EU seems to be harmonization. But only in the long run.

Mixity often makes life more difficult for everybody involved. It is, therefore, desirable that the EU be able to tackle the following issues in the near future:

1. The extension of the application of Article 133 EC on common commercial policy, by Council decisions, to all international agreements on intellectual property rights and services.<sup>20</sup> By so doing, the EC will be able to apply its common commercial policy to areas which have become crucial elements of international trade. When GATT was created in 1947, goods were the predominant feature of world trade, not services or intellectual property rights.
2. Respect for the duty of co-operation in areas of shared competence between the EC and its Member States. As long as Member States insist

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<sup>20</sup> Article 133.5 EC, added by the Treaty of Amsterdam, reads as follows:

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

on obligatory mixity,<sup>21</sup> they must also accept the duty to accede themselves to the mixed agreement in question without undue delay.

3. The possibility of having pure Community rather than mixed agreements in areas of concurrent competencies.<sup>22</sup> For practical reasons, it may be favourable to have Community agreements even in areas where Member States participation is legally permissible. Often, Member States participation in such agreements may matter very little from a strictly legal view point, as the agreement may be fully applicable as a Community agreement, legally binding not only the EC institutions but also the Member States.<sup>23</sup>

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<sup>21</sup> See subtitle on Typology of Mixed Agreements.

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

<sup>23</sup> According to Article 300 (7) EC, Community agreements “shall be binding on the institutions of the Community and on Member States.”

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## ANNEX

The graphs which appear in this annex have been taken from the book European Commission, *Participation des Communautés Européennes aux Accords Multilareaux*, Direction General I A, 1997, Graphiques.