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Comments welcome

**The EU with a Single Voice:  
An Institutionalist Analysis of the External Impact of European Integration  
on EC-US Trade Negotiations**

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I would like to thank the many EU officials who kindly shared with me their experience of EC-US trade negotiations and, in particular, of the recent dispute over the EU's "mixed competences" in external trade. Their individual contributions are kept confidential.

Since the early days of European integration in the 1950s, internal developments in processes of policy-making in the European Community (EC) have preceded or coincided with the successive rounds of international trade negotiations. The creation of the Common Market prompted the Dillon Round of GATT; the setting up of the Common Agricultural Policy triggered the Kennedy Round; the first enlargement of the EC incited the Tokyo Round; the Single Market program and its accompanying institutional reforms enabled in part the launching of the Uruguay Round. European integration has recently entered a new stage with the current Inter-Governmental Conference and the expected enlargement of the European Union (EU). Trade relations between the United States and the European Union have also entered a new stage, characterized by more offensiveness and assertiveness on the part of the EU. These internal European changes can once again be expected to have an external impact on any upcoming round of multilateral trade negotiations.

Why is there a linkage between the EC's internal developments and external influence? Through which mechanisms does the EC shape the international trading system? This paper focuses on the ways in which the integration of trade policy and negotiating authority in the EC has affected its external bargaining capabilities. It analyzes how the bargaining constraints and opportunities for the EC created by its obligation to negotiate as a single entity have impacted upon trade negotiations with the United States in the past decade.

The central argument of this paper is that the EC does indeed affect international outcomes through its institutional features --mainly the voting rules and the autonomy of the Commission. The direction of this effect is determined by the negotiating context --defensive or offensive. This institutionalist argument goes against both the realist view that integration has no impact because it does not alter the structure of preferences of the

member states and the opposite argument that integration transforms the European identities and leads the member states to adopt new positions. This paper also argues that in certain circumstances, contrary to the conventional assumption that the EC's cumbersome decision-making procedures have negative effects on its external bargaining potential, the EC can indeed use its institutional constraints strategically in order to reach its negotiating objectives.

This institutionalist study of the effectiveness of the EU as an international actor is relevant on several dimensions. Theoretically, this analysis reveals that the EU is indeed an international actor to be reckoned with, if only because its institutional structure alters the international bargaining power of its constituent members. The EU indeed has an external influence on its own since, through the mitigating or amplifying role of its institutional design, it is able to shape the process and outcome of international negotiations. Scholarly, this paper offers one of the first systematic studies of the external impact of European integration and analytical probe of the rhetorical assumption that unity brings strength. The realist bias against non-state actors has long prevented a thorough analysis of the mechanisms through which the international power of states was altered by their belonging to a supranational enterprise, while the constant state of political experiment which the Western European countries have experienced since the 1950s has prompted most scholars of European integration to explain the evolution of the EC and analyze its consequences on internal polities. Empirically, this paper offers historical and analytical insights into four recent cases of EU-US trade negotiations, assessing the lessons to be learned from the EU's use or non-use of a single voice and pointing to recent trends in the evolution of the Transatlantic partnership. Practically, this study has many practical implications. First, negotiating opponents of the EU can better understand how they might be affected by the transforming role of the EU institutions. Second, other groupings of countries in formation can benefit from discovering which aspects of the EU's unique institutional structure need to be emulated or rejected.

The first section of this paper studies the external impact of the EU's institutional features as both constraints and leverage in international negotiations. Section two analyzes the external impact of the EC's single voice (or lack thereof) in a series of EC-US trade negotiations -- open skies negotiations in international aviation, agricultural negotiations during the Uruguay Round, the dispute over reciprocity in banking and public procurement-- which each offer some variation in the institutional variables. Section three examines the institutional changes to trade policy-making currently taking place in the EU and assesses their likely impact on third countries and on the overall process of European integration. Finally, the conclusion offers policy prescriptions by suggesting what other regional groupings in formation in the world could try to emulate in the EC's unique institutional structure.

### ***Section 1: International Effects of the EC's Institutional Structure --the Internal/External Linkage***

Nowhere more than in trade matters has the European Community been as integrated institutionally. Whereas member states still cannot agree on a common course of action in most affairs of security and foreign policy and no institutional constraints can force them to do so, they have relinquished for several decades their power to act as autonomous actors in trade negotiations. Instead, they first have to agree on a common bargaining position, which is then carried out in international negotiations by members of the supranational Commission. Therefore, nowhere more than in the international political economy sphere should we expect to witness the external impact of the European Community, if there has been one at all. This section analyzes the EC's internal/external linkage in trade negotiations by focusing on the international effects of the EC's unique institutional structure.

*1) The EC as agent or actor in the internal/external linkage?*

How does the obligation for the EC to negotiate trade agreements as a single entity contribute to shaping the international trading system? Does the Community behave as an effective actor or as a passive agent when it relays the hardly reached common position of the diverse member states to the international negotiating arena? Three competing analyses suggest whether or not we can expect a linkage between the EC's internal developments and external influence.

*Realism and member state preferences.* The standard realist analysis of the world sees the states as the primary, if not unique, actors in international relations. States are motivated by their rational self-interest. Their preferences, however they are reached, drive their actions on the international scene. Their primary goal is to maintain, or better, increase, their relative standing in the worldwide balance of power. Transposed to the study of European integration, this analysis has given birth to the intergovernmentalist approach, which views the European Union as a mere gathering of sovereign states.<sup>1</sup> Member states delegate power to the supranational institutions only when it serves their interests to do so. The corollary is that member states retain their ultimate authority at all times.

Applied to the issue of external negotiations, the intergovernmentalist analysis would suggest that European integration cannot have external consequences of its own. The EU acts as a mere agent, which relays the preferences of the member states from one forum to another but does not alter them. The common EU position, which is reached internally through an intergovernmental bargain, can only reflect the preferences of the more powerful member states. Therefore, the internal/external linkage observed is

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<sup>1</sup>The work of Andrew Moravcsik exemplifies this school of thought.

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pointless. Developments inside the Community appear to have an effect on international negotiations only in so far as the big member states have changed their strategic analysis of what is desirable for them to achieve in the international arena. For instance, the 1983 reassessment by France of the best instruments to restore its economic stature led first to changes about what was acceptable policy at the European level, and later to an impetus given to international negotiations designed to liberalize the international economy. It is not the fact of belonging to the Community which forced France into accepting the liberal Single Market program that, in turn, enabled the international agreement to launch the Uruguay Round.

It is therefore not surprising that intergovernmentalist scholars have not attempted to study the external effects of European integration. By definition they do not expect to see any external consequences that can be directly attributed to integration and not to independent changes in the preferences of the member states. Indeed, the history of international trade negotiations in which the EU had to come up with a single negotiating position points to a resilience, not a disappearance, of national preferences. The virulence of French arguments on agriculture or the Portuguese insistence on textiles during the Uruguay Round do not suggest an increasing solidarity in the determination of collective preferences. However, the history of the Community's single voice in international trade negotiations also reveals that its bargaining power differed from the mean of its member states' bargaining power, if they acted as free agents, or from what a simple balance of power analysis would suggest. There are also several instances in which the EC succeeded in defending a common position antagonistic to the preferences of one big member state. There must therefore be another explanation of the EU's international outcomes, one that is not based on preferences.

*Integrationism and member state preferences.* By contrast to the intergovernmentalist school, many scholars of the Community have speculated that

European integration may have an indelible effect on its participants. Early studies of the emerging process of European integration posited that belonging to the Community would transform the preferences and behavior of its participants, and therefore alter the external environment. The debate centered around the mechanisms through which this alteration of preferences would occur.

Karl Deutsch and his “communitarian” followers argued that successive stages of integration could be expected to gradually build a sense of community in the region, at the expense of those excluded from this community.<sup>2</sup> By working together and becoming socialized as “Europeans,” EC policy-makers, negotiators, and technical experts would progressively develop ways of working which would increasingly isolate those who do not belong to this network. Therefore, the stronger the sense of European solidarity, the harder the EC would defend its position against outsiders. Giving the EC a single voice in international trade negotiations would contribute to strengthening its bargaining position. This theory finds echo in today’s constructivist approach to international relations, which would suggest that the creation of a European entity has altered national identities and that the internal interdependence of the EU’s constituent members leads to interdependence in the face of external pressure.

Ernst Haas and other neo-functionalists scholars have argued that European integration is not a passive process. On the contrary, the Community actively transforms whatever gets into it into a whole bigger than the sum of its parts. The spillover mechanism, at the heart of the Community’s successful expansion, occurs independently of the will of the member states.<sup>3</sup> Although one could derive from this reasoning an argument about how this internal transformation affects the EC’s external relations, neo-functionalist

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<sup>2</sup>See Deutsch et al. (1957).

<sup>3</sup>See Haas (1958).

scholars have nonetheless remained rather silent on the expected effects of negotiating as a single entity. Philippe Schmitter presented the "theory of externalization," a first attempt at formulating the institutional mechanisms through which regional integration in the EC could be translated into political influence at the international level.<sup>4</sup> "Externalization" suggests that the regional unit can achieve international status and influence when the collective institutions are strengthened and more competences are transferred to the supranational level. The less national governments retain control over policy decisions, the more third countries will come to consider the regional entity as a whole and bargain to avoid the discriminatory effects of being "left out" from the sharing of the integration benefits. Therefore, deeper integration is expected to increase the international bargaining leverage of the European Community. Other political scientists, such as Leon Lindberg and Stuart Scheingold, have claimed that in theory, "acting in concert can generate significant bargaining power."<sup>5</sup>

This integrationist view suggests a direct linkage between internal developments in the Community and external negotiations. Since the process of integration affects both the national and supranational identities, it should also affect its relations with third countries and its international bargaining power. This integrationist reasoning also suggests that in international trade negotiations, the EU is as an actor in its own right, able to successfully conduct negotiations with the collective interest of the EU in sight. This would result in the collective bargaining power of the Union being both different from and stronger than the sum of the individual bargaining power of each of the member states in the absence of European integration.

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<sup>4</sup>Schmitter (1969).

<sup>5</sup>Lindberg and Scheingold (1970).



The history of international trade negotiations in which the EU has taken part as a single voice speaking on behalf of its component states reveals, indeed, that its bargaining power may have differed from what could have been expected from the member states acting as free agents. However, this outcome does not seem to stem from the integrationist mechanism, since member states have not obviously altered their national preferences as a result of their belonging to the EU. Therefore, an explanation of the EU's external outcomes which does not rest on the internal preferences of the member states is needed to explain the observed internal/external linkage.

*Institutionalism and the transforming role of the EC's institutional structure.* I believe that institutionalist arguments, which provide a middle ground between the whole-or-nothing international consequences of European integration, offer the most convincing analysis of the internal/external linkage. Although the EU negotiators are ready to carve their own autonomy out of what the member states accept to delegate through their negotiating mandate, the Community is neither an effective actor (although it strives to become one), nor a passive agent (although member states strive to reduce its role to one). In this view, the external effects of the EU are independent of the preferences of the member states, which are defined exogenously. They are also independent from the preferences of supranational officials willing to promote their pro-integrationist agenda. The EU is merely an institutional framework, but far from simply adding the national bargaining power of each of its constituent states, some of its institutional features specifically amplify or mitigate the bargaining power of some member states. As a result, the process and outcome of international negotiations in which the EU participates are different from what would have resulted from an independent participation of each of the member states. This is the analysis that I have chosen to develop further in this paper.

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## 2) *Institutional structure as the linkage mechanism*<sup>6</sup>

The institutional structure of the EU is key to understanding the influence of European integration on international outcomes. It is the institutional process through which widely divergent preferences are aggregated into one single coherent whole which determines the EU's external impact. Does the EU's institutional structure, which is handicapped by the conflicting preferences of the member states and at the same time their reluctance to transfer sovereignty to solve these conflicts, always constrain its capacity to act on the international scene? Can these institutional constraints be used, in certain conditions, as bargaining leverage instead of handicap?

The competence to negotiate international trade agreements for the EU has been mostly transferred to the Commission, acting on behalf of the member states to defend a previously agreed on "common" position.<sup>7</sup> The EU, however, suffers from several institutional weaknesses which, independently of the preferences of the member states, handicap its bargaining power in international negotiations. Hugo Paemen, who was chief EC negotiator during the Uruguay Round, identified three "fundamental institutional flaws" in his own account of the negotiations.<sup>8</sup> First, the decision-making procedures tend to produce a bargaining position that is the lowest common denominator of all member states' positions. This prevents the Community from making innovative proposals and therefore from having a lot to offer to its negotiating opponent in order to extract concessions of a similar nature. Second, the institutional design of the EC deprives Community negotiators

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<sup>6</sup>This section is based extensively on Meunier, Ph.D. dissertation, in progress, as well as on Meunier, "Divided but United," forthcoming 1997.

<sup>7</sup>The cases in which the Commission shares this competence with the member states are discussed in Section 3.

<sup>8</sup>Paemen and Bensch, *From the GATT to the WTO*, p. 95. Mr. Paemen is currently the EU Ambassador to the United States.

of one crucial bargaining element: uncertainty. Because each member state reveals its position during Council meetings and a negotiating mandate setting the limits within which Commission negotiators are allowed to proceed has to be agreed on, the Community cannot hide its bottom line. Finally, as a result of the sharing of power between the Commission and the member states, the Community is ill-equipped to act swiftly in the final hours of a negotiation, when agreements are always hammered out. As a result, EU negotiators have been relentlessly asking the member states for further devolution of authority to the supranational institutions in order to fix these institutional handicaps.

In certain conditions, however, I argue that it might be possible for the EU to use some of its institutional flaws strategically in order to gain concessions from its negotiating opponent. As Thomas Schelling suggested in *The Strategy of Conflict*, having one's hands tied internally can be useful for extracting concessions externally and the "power to bind oneself," for instance through inflexible negotiating instructions and divisions highly visible to the opposite party, can confer strength in negotiations.<sup>9</sup>

The well-known principle that one should pick good negotiators to represent him and then give them complete flexibility and authority --a principle commonly voiced by negotiators themselves-- is by no means as self-evident as its proponents suggest; the power of a negotiator often rests on a manifest inability to make concessions and to meet demands.<sup>10</sup>

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<sup>9</sup>The more recent literature on two-level games addressed how the constraints imposed on the negotiator by the coexistence of the domestic and international levels could become a bargaining asset in certain circumstances (Putnam, "Two-Level Game"). Some scholars modelled the conditions under which division can be an asset or liability in international negotiations (for instance Mayer, "Managing Domestic Differences"), while others attempted to test empirically the interactions between domestic politics and international bargaining, including how internal divisions affect the success and distribution of gains in international negotiations (Evans et al., *Double-Edged Diplomacy*). They concluded that although logically plausible and potentially beneficial, the strategy of the divided bargainer has not been used much or effectively in practice. Yet these studies did not address directly the issue of European integration and international trade negotiations, where such an analysis seems promising to explain bargaining outcomes.

<sup>10</sup>Schelling, *The Strategy of Conflict*, p. 19. Emphasis added.

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It remains to be determined in what situations the EU can use its internal divisions over the negotiating mandate and the ratification requirement of the external agreement in international negotiations for its own benefit in international negotiations.

I argue that the external impact of the Community on international negotiations is partly determined by the following three variables: the nature of demands in the negotiations, the internal decision-making rules in the EU, and the amount of autonomy exercised by EU negotiators. The various combinations of these variables contribute to explaining the bargaining power of the EU in international negotiations and the shape of the final international agreement.

*a) Nature of demands.* The negotiating context serves to alter the direction of the external effects of the Commission's institutional structure. Whether the EC is in a defensive or offensive negotiating position has a different impact on its external bargaining capabilities.

•*Defensive:* In a "defensive" situation, the EC's negotiating opponent demands change in EC policy while the Community fights to preserve the status quo. In this case, the EC can use its internal divisions as an excuse for not coming up with enough concessions, because it is easier to resist liberalization of one's own trade policy, especially if the negotiating opponent has nothing to offer in exchange, than to force access to the markets of others. The majority of conflictual EC-US trade negotiations since the 1960s involved the preservation of the European status quo, especially in the agricultural sector.

•*Offensive:* There are also cases in which the EC is the one making demands on a recalcitrant negotiating partner and trying to pry open its market. In this "offensive" instance it is likely that the Community's case would be strengthened by the absence of internal division because it takes only one deviant country to cut short the offense. The Community's offensiveness in international trade negotiations dramatically

increased in the early 1990s. The advent of the Single Market program, which offered the EC more to bargain with as well as the more credible threat of an alternative option, and the simultaneous return to protectionism and unilateralism in US trade policy produced a rapid increase of trade negotiations in which the EC went on the offensive. For instance the EC tried to pry open its competitors' markets with negotiations on reciprocity in the original Second Banking Directive in 1988 and the third-country provisions of the Utilities Directive on public procurement in 1990.

*b) Voting rules.* The rules used *de facto* by the Council to make decisions on trade policy determine whether the existence of the Community has the effect of amplifying or on the contrary attenuating the bargaining power of its extreme member states.

- Unanimity:* Decision-making in the Community has often taken the form of unanimity, either because of the existence of a formal veto right by individual member states or as a result of the general practice of consensus. In the most extreme case where each country possesses the power of veto, the terms of the final international agreement are dictated by the most reluctant member state. Unanimity (either in the treaties or in practice) amplifies the power of one single member state by ensuring that the negotiating position adopted is the lowest common denominator, while enabling this position to resonate internationally through the combined weight of the whole Community. Therefore, all the other member states lose from being forced to negotiate with a single voice when their willingness to find a compromise with the negotiating opponent is held up by the extreme position of one country.

- Defensive:* The unanimity rule has the strategic effect of serving as negotiating leverage for the EC. With unanimity, it takes only one deviant country to block progress in the negotiations and the consensus can only occur around that country's position. The threat of having one outlying country eventually overturn the international

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agreement makes the other member states prefer to settle on this country's position, rather than being left with no agreement at all. Once the Community has been forced to adopt this position as its own, the institutional impossibility to alter it, also known to the negotiating opponent, makes the EC a very tough bargainer, in Schelling's sense, since it cannot deviate from its offer. Therefore, in a defensive case, the negotiating opponent has to make the concessions known to be acceptable to the most reticent state in order to avoid complete failure of the negotiations. In that sense, unanimity reinforces the bargaining strength of the EC.

•*Offensive*: In an offensive case, however, the unanimity requirement has the strategic effect of making a Community-led offensive less likely. The negotiating opponent only needs the support of one member state in order to see the Community offensive dropped. In this case, unanimity reduces the bargaining strength of the EC. Unanimity, therefore, turns the Community into an amplifier of its most reluctant member, with the effect of aligning its collective bargaining position with the most extreme national preferences.

•*Majority*: Increasingly, at least on paper, Council decisions are made according to Qualified Majority, by which a number of votes roughly equivalent to two thirds are needed in order for a proposal to be accepted. By contrast to unanimity, majority rule has the effect of mitigating extreme positions. When majority is implemented, the terms of the final agreement satisfy the median rather than the deviant countries. Therefore, the losers from the single voice arrangement are the states with extreme preferences.

•*Defensive*: In a defensive case, majority means that the most reticent state cannot impose its preference to preserve the status quo upon the other member states. The strategic effect of the majority rule is to make the likelihood of reaching an agreement in international negotiations higher, since there is no uncertainty that the final

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deal will be approved by the Council. On the other hand, it also means that the EC cannot use its institutional handicaps a la Schelling as bargaining leverage. Therefore, the negotiating opponent can try to use a "divide and rule" strategy and reward some member states for their positions in order to obtain a majority in favor of its preferred position.

•*Offensive*: In an offensive case, by contrast, the strategic effect of the usage of majority voting is to enhance the collective bargaining power of the Community. The absence of veto power deprives the negotiating opponent of the option of driving a wedge among member states by convincing only one country of the wrongness of the EC's offensive.

c) Commission autonomy. The degree of autonomy exercised by Commission negotiators also contributes to determining the external impact of the Community on international trade negotiations.

•*No supranational autonomy*: Member states may be reluctant to delegate sovereignty to the Community, even though they are required to do so by the treaties, when the issue at stake is particularly salient for them or on matters of principle. In practice, for instance, the Commission's negotiating autonomy may be limited by the requirement to constantly report to the member states and await further negotiating instructions. In this case, negotiators have very little room for manoeuvre and certainly cannot hide their bottom line. This is generally seen as a handicap, but it can also enhance the credibility that the offer made is of a "take it or leave it" form, prompting the negotiating opponent to make concessions for fear of being left with no agreement at all.

•*Some supranational autonomy*: There are also cases where the Commission seizes more negotiating autonomy. Indeed, the authority of the Commission is a day-to-day struggle, where Commission representatives attempt the delicate balance of exercising as much autonomy as possible without ever asserting it so much that it provokes

a backlash from the member states worried about their own sovereignty.<sup>11</sup> In this case EC negotiators work within the limits set by the negotiating mandate agreed to by the Council of Ministers but are left free to conduct the bargaining as they wish until the final agreement is submitted to the member states for approval. This procedure is closer to the American "fast track" used as a model by Commission officials. Negotiations proceed faster and are more likely to lead to a final agreement. Nevertheless, the partial removal of the internal constraint (it is less plausible that a member state will veto the whole agreement instead of several individual elements of the agreement) may deprive EC negotiators of some key leverage over their opponents.

In practice, Commission autonomy and voting rules are most often positively correlated. Commission negotiators have more autonomy when integration is deep and decisions are made according to the majority rule. When unanimity is used, the member state holding the extreme position tends to keep a tight leash on the Commission to ensure that the negotiating mandate is respected. Because of this correlation, I grouped them under the single heading of "degree of supranational competence" in the following table, in which the combination of variables produces the following predictions about the institutional structure of the EC's impact on international trade negotiations.

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<sup>11</sup>I am grateful to a Commission official for pointing out to me the difference between practice and assertion of Commission autonomy.



**Table 1:****Effects of the EU's Institutional Structure on International Trade Negotiations**

		Nature of demands	
		Defensive	Offensive
Degree of supranational competence	No EU competence	(1) " <i>Chacun pour soi</i> "  •Each member state, acting as free agent, can attempt to resist external attempts at changing the status quo but has no control over the fallout of its neighbors' own international agreements.	(4) " <i>Lost cause</i> "  •Without support from a collective bargaining position, one member state alone does not have sufficient weight to successfully launch an offensive against a third country.
	Low  (Unanimity and no Commission Autonomy)	(2) " <i>Tied Hands</i> "  •The agenda is set by the deviant state; the hands of EC negotiators are tied; the opponent is forced into making concessions or keeping the status quo.	(5) " <i>Trojan Horse</i> "  •One deviant state, possibly bribed by the opponent, can set the agenda and cut short the offense; the opponent does not have to make concessions unless member states are united.
	High  (Majority and some Commission Autonomy)	(3) " <i>Divide and Rule</i> "  •Median states set the bargaining agenda; the opponent can influence the final negotiating outcome by playing member states against one another.	(6) " <i>Unity is Strength, Disunity is Weakness</i> "  •Only a majority of member states is needed to launch an offensive; internal trade-offs and side-payments are more likely, possibly resulting in successful bargaining.

## ***Section 2: The Internal/External Linkage in EC-US Trade Negotiations***

Since its creation, the European Community has conducted many trade negotiations with the United States, its main trading and investment partner. The EC and US have successfully reached agreements on non-conflictual issues when their bargaining position easily converged or when trade-offs between sectors were possible, such as the successive reductions of industrial tariffs since the 1960s. Many other EC-US trade negotiations have been conflictual, some very publicly. In order to illustrate my argument that the institutional structure of the Community affects its effectiveness as an international actor, I have chosen to study four cases of conflictual EC-US trade negotiations. These cases were selected because they each provide some variation in the combination of the central independent variables --degree of supranational competence and nature of demands in negotiation. They all point to the fact that, given exogenous member states' preferences and depending on the defensive/offensive negotiating context, the degree with which member states let go of their sovereignty affects the process and outcome of the final trade agreement.

**Table 2:**

**Effects of the EU's Institutional Structure on Specific EU-US Trade Negotiations**

		Nature of demands	
		Defensive	Offensive
	No EU competence	<i>Open Skies agreements</i>	
Degree of supranational competence	Low (Unanimity and no Commission Autonomy)	<i>Uruguay Round agricultural negotiations after Blair House</i>	
	High (Majority and some Commission Autonomy)	<i>Uruguay Round agricultural negotiations before Blair House</i>	<i>Second Banking Directive</i>  <i>Public Procurement negotiations</i>

### *1) Multiple voices: the “open skies” agreements*

In a defensive case where no supranational competence has been delegated to the Community level, third countries interested in changing the European status quo have the opportunity to conclude bilateral agreements with the member states open to compromise without being held up by the recalcitrant member states. The recent EU-US row over the “open skies” agreement provides an interesting illustration of how third countries can strike better deals when the member states are free agents in the external sphere than they would have if the European negotiating authority had fallen under Community competence. In the case of the deregulation of international aviation, the US exploited the absence of Community discipline by concluding a series of bilateral agreements with several small member states. These agreements would not have been reached, had the Commission been the sole negotiator for the EU, and whatever the voting mode in place, because the three big member states opposed this US-led liberalization.

International aviation has operated since 1944 under the framework of the Chicago Convention and the ensuing thousands of bilateral Air Service Agreements, which determine among others the routes, frequency, seat capacity, and fare regulations applicable to airline carriers. Since the deregulation of its domestic airline industry in 1978, the United States has led the international effort to liberalize international air transport through “open skies” agreements.

When the issue of international aviation deregulation first arose in 1990, France, Germany and Great Britain went on the defensive, resisting US attempts to open up the transatlantic skies because of the large international stakes held by their national carriers. However, an internal debate over competences erupted in the Community. The Commission claimed that Article 113 gave it the authority to negotiate with third countries

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over international air services, as it did for any other external trade agreement. France and Germany insisted on having the Community negotiate as a whole in international aviation, in the hope of obtaining a favorable agreement. On grounds of sovereignty principles, however, the British government opposed the Commission's proposal to take over aviation negotiations. The UK was supported by several small member states, which had different preferences regarding air travel deregulation. The internal conflict was temporarily settled by preventing the Community from taking over external negotiating competences in this field.

As a result of the big member states' opposition to the US policy, the small states of the European Union became the focus of the EU-US "open skies" dispute and of the internal EU feud. The United States hoped that the agreements with the smaller EU countries, which were expected to increase competition, offer greater capacity and lower Transatlantic fares, would pressure the big countries to conclude similar deals.<sup>12</sup> Since the member states had not resolved to transfer the negotiating authority to the Commission, the US could legally enter into bilateral agreements with individual members of the EU.

Airlines in small EU countries --such as Sabena in Belgium, KLM in the Netherlands, and Luxair in Luxembourg-- were particularly interested in the international liberalization offered by the US because they were not offering domestic service and therefore needed to compete aggressively on international routes. "Ex-imperial countries such as Belgium and the Netherlands, have inherited large stakes in the long-distance market, sustained by the commercial and cultural networks that empire leaves behind."<sup>13</sup> In September 1992, the Netherlands and the US signed the first of the "open skies"

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<sup>12</sup> Staniland, 1996, p. 4.

<sup>13</sup> Staniland, 1996, p. 15.

agreements, much to the displeasure of the Commission and the big member states, which believed that the unilateral Dutch action would undermine future negotiations.<sup>14</sup>

The Commission, backed by France and Germany, attempted again to assert its negotiating authority in the field of international aviation. In February 1995 Transport Commissioner Neil Kinnock wrote to the governments of six small EU states --Austria, Belgium, Denmark, Finland, Sweden and Luxembourg-- to ask them not to sign their planned "open skies" agreements with the US. Kinnock argued that such arrangements would benefit the US at Europe's expense. The Commission's rationale was that if, instead, the EU negotiated as one, it would have the clout to get a better bargain. Kinnock threatened to take the governments to court if they pushed ahead with their plans.<sup>15</sup>

In June 1996, despite opposition from Great Britain, the EU Transport Ministers finally authorized the Commission to begin negotiation of a multilateral aviation agreement with the United States. Bilateral talks between senior US and EU aviation officials started in October 1996, with the goal of allowing American carriers to fly to any of the 15 EU countries and offer EU airlines access to every US city. An overall EU-US agreement would replace all the existing bilateral agreements between the US and EU member states, such as pacts between United Airlines and the German Lufthansa, Northwest Airlines and KLM, and Delta Airlines and Swissair, Sabena and Austrian Airlines.

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<sup>14</sup>"Especially under the Carter and Clinton administrations, the US has openly adopted such a "divide-and-rule" tactic in dealing with the EU. The tactic has failed to break down the resistance of the more obdurate Member States, but it has (in association with a policy of encouraging alliances between US and European carriers) been highly successful in diverting trade toward more cooperative countries such as the Netherlands. But the strategy that this tactic serves does not imply that the US is in principle against negotiating with the EU under the "single negotiator" procedure favored by the EU Commission since 1990 and reasserted recently by Neil Kinnock as transport commissioner. The US might well be wary of this procedure, since the latter is promoted as a way for Europeans to get better deals from Washington by offering a united front." Martin Staniland, 1996, pp. 4-5.

<sup>15</sup> The Economist, "Of airlines and airwaves", 18 March 1995.

Nevertheless the agreement to delegate some negotiating competence to the supranational level came too late for many. The absence of prior common EU front on the issue of international aviation undoubtedly affected the current European bargaining position and will therefore have consequences on the content of the final agreement eventually reached with the United States. By concluding bilateral agreements with several member states before the negotiating authority was transferred to the Community level, the US managed to change the bargaining conditions for the upcoming negotiations in its favor. Given the initial opposition of the three biggest member states to the “open skies” agreements proposed by the US, it would have been much more difficult for the US administration to secure a favorable deal for its international airline carriers if the EU had negotiated as a whole with decisions taken under the unanimity rule. The “open skies” dispute is a clear case where the absence of unitary bargaining position played to the benefit of the EU’s negotiating opponent. The outcome would have been very different, had the EU negotiated as a single entity, because the European negotiating position would have been captured by the big member states, thereby preventing the conclusion of agreements between the US and the smaller states.

## 2) *Single voice, defensive: the EC-US Blair House agreement*<sup>16</sup>

The EC-US negotiations on agriculture during the Uruguay Round provide a particularly good illustration of the external consequences of the EC’s institutional structure in a “defensive” situation. These negotiations are representative of EC behavior in most conflictual trade negotiations, with the defensive attitude combined with the “extremism” of one stubborn member state. At the same time, these negotiations provide some unusual contrast between the apex of Commission autonomy versus the subsequent reining in of the

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<sup>16</sup>This section is based heavily on Sophie Meunier’s chapter “*Divided but United: European Trade Policy Integration and EC-US Agricultural negotiations in the Uruguay Round*” in The European Union in the World Community, Carolyn Rhodes ed., Lynne Rienner, forthcoming 1997.

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Commission negotiators and between the institutional confusion following the Single European Act versus the subsequent reinstatement of veto power.

*Negotiating stalemates*

The EC was put in a defensive position on agriculture from the start of the Uruguay Round, as it had been in all previous rounds of multilateral trade negotiations in which the issue of the Common Agricultural Policy (CAP) was raised. The initial impetus for tackling once and for all agricultural liberalization in the Uruguay Round was American. The subsidies war between the US and the EC, which had intensified in the early 1980s when each side retaliated to each other's agricultural subsidies with the imposition of other protectionist measures, had become too costly for the US.

The main reason for the EC's defensive reaction to agricultural talks was the fear of their potentially divisive nature within the Community. The ten, and then twelve EC countries had extremely divergent preferences with respect to agriculture. Great Britain and the Netherlands, both net financial contributors to the CAP, hoped that the multilateral negotiations would provide an "external push" enabling the EC to slow the increasing agricultural costs. Other member states, above all France, but also to some extent Belgium, Ireland, Italy and Germany, wanted to keep a high degree of agricultural protection in Europe. As Europe's first and the world's second agricultural exporter, France was particularly adamant about maintaining the current system of export subsidies and protected market access for agricultural products, especially given the importance of the rural vote in French domestic politics.<sup>17</sup> The breakthrough enabling the EC to finally accept the launching of a new round of multilateral trade negotiations occurred when France, a major services provider, agreed in March 1985 to discuss agriculture in exchange for the

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<sup>17</sup> See Keeler 1996.



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inclusion in GATT talks of its most important concerns, such as liberalization of investment and services and the "rebalancing" of former privileges.<sup>18</sup>

The launching of the Uruguay Round in September 1986 was followed by a long series of negotiating stalemates in the agricultural sector as a result of the wide divergences separating the European from the American positions. In July 1987 the US called for a complete elimination of all subsidies in agriculture by the year 2000 and demanded a phase-out over ten years of all export barriers as well as of the quantities exported with the aid of export subsidies.<sup>19</sup> By contrast the EC only reiterated its initial plea for short-term measures, non-negotiability of the CAP, and reduction of all forms of support. The institutional inability of the EC to offer concessions going beyond its lowest common denominator led to a series of negotiating stalemates, which almost terminated the Uruguay Round altogether. It seemed that EC negotiators "evidently assumed that, as in past GATT rounds, agriculture would be taken off the table before the end of the negotiations."<sup>20</sup>

The EC representatives' lack of negotiating autonomy prevented a successful conclusion of the Brussels ministerial meeting of December 1990, originally intended to close the Uruguay Round. After an initial crisis triggered by an American ultimatum, the Italian president of the Council asked the Commission to continue the negotiation while exercising "a degree of flexibility in keeping with the spirit of its mandate."<sup>21</sup> The US and other countries agreed to a compromise by Swedish Agriculture minister Mats Hellström, which eventually proved to be beyond the Commission's negotiating mandate.<sup>22</sup> The

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<sup>18</sup> Paemen and Bensch 1995 pp. 36, 46-48.

<sup>19</sup> Paemen and Bensch 1995, p. 106.

<sup>20</sup> Schott 1994.

<sup>21</sup> Paemen and Bensch 1995, pp. 185-186.

<sup>22</sup> The Hellström compromise proposed a reduction of 30 percent in export subsidies, import restrictions, and domestic supports from 1990 levels to be implemented over five years

Brussels meeting consequently collapsed, and participants criticized the crucial lack of flexibility of EC negotiators.

Negotiations made no progress until December 1991 when Arthur Dunkel, the Director General of GATT, drafted a proposal providing specific terms for reductions in export subsidies, domestic support, and import restrictions. Most countries accepted the Dunkel Draft as a basis for the final agreement on agriculture, but the EC Council rejected the text.<sup>23</sup> Dunkel also introduced the principle whereby no amendment to his draft would be taken into consideration unless the proposing country had held informal negotiations beforehand with the other parties and obtained their support. For the European Community, this meant that a bilateral pre-agreement on agriculture had to be concluded with the US.

*Capping the CAP.* The US-EC agricultural negotiations were put on hold while the EC, facing increasing isolation internationally and rising budgetary pressures, undertook an internal reform of its Common Agricultural Policy. On May 21, 1992, after a year of intense debate, the EC Council of Ministers adopted the revolutionary reform of the CAP designed by Agriculture Commissioner Ray Mac Sharry, which limited production, entailed a substantial reduction in support prices (to be compensated by aids) and set-aside land from production. Unlike the negotiations in GATT, however, the reform did not address the crucial issues of market access and export subsidies. The Commission wanted a reform in order to avoid a budgetary crisis and diffuse internal criticism of the EC's wasteful and protectionist policies. The Commission also hoped to derive a more flexible negotiating mandate from the reform in order to successfully reach a deal with the US. Countries reluctant to change the CAP, such as France, eventually agreed to the reform because the combination of budget constraints, Commission agenda-setting and outside

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<sup>23</sup> Schott 1994, p. 46.

pressures made such a reform inevitable.<sup>24</sup> France could also use the strategic advantage of locking in the CAP reform now to avoid making further concessions to the US later.

By redefining the negotiating mandate, quieting internal divisions and granting more flexibility to Commission negotiators, this reform enabled the bilateral negotiations to move forward. However, European and American officials disagreed over its meaning. European policy-makers argued that this reform represented the upper limit of changes that the EC could make to its agricultural policy. By contrast, the US argued that the reform was an internal EC matter. Above all, the US government wanted to avoid rigidity in the European position and therefore rejected EC attempts to "lock in" a negotiating position by reaching internal agreements first--that is, having its "hands tied" by a prior internal agreement. When EC negotiators first demanded reciprocal concessions as a result of the CAP reform, Carla Hills, the United States Trade Representative (USTR), suggested instead several ways in which the reform could be expanded to deal directly with the issues in the trade talks.<sup>25</sup>

#### *Supranational competence and conclusion of the Blair House agreement*

A series of intense bilateral negotiations on agriculture started in Brussels in October 1992. However, they failed to produce results as France pressured the Community to make new demands and brandished its veto threat. The US responded to the failure of the negotiations by linking the oilseeds dispute to the ongoing discussions and menacing the EC with a full-blown trade war.<sup>26</sup> Carla Hills announced a retaliatory 200 percent punitive tariff on \$300 million of European food imports effective December 5 if the EC did

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<sup>24</sup> See Keeler 1996.

<sup>25</sup> "No Concessions Offered to Europeans in Washington Trade Talks, US Says," *Washington Post*, 28 May 1992.

<sup>26</sup> The dispute erupted when the US challenged EC oilseeds subsidies in GATT. Successive GATT panels found against the EC, which refused to comply.

not reduce its oilseeds production from 13 to 8 million tons. By targeting French, but also German and Italian products for retaliation, the US was trying to capitalize on internal divisions in the EC and hoped to increase the member states' pressure on France. The US administration also tried to exploit the obvious lack of cohesiveness in the EC by forcing the member states favorable to its views to simply disregard the outliers and reach a bilateral agreement. The US attempted to obtain a favorable agreement by playing the "divide and rule" strategy, in order to avoid the final capture of the collective EC position by the preferences of the most extreme member state.

*The Blair House agreement.* On 18 and 19 November 1992, MacSharry and External Affairs Commissioner Frans Andriessen met with Madigan and Hills in the Blair House residence in Washington. After a series of proposals and counterproposals, MacSharry enabled a breakthrough in the negotiations by offering a reduction of 21% in the volume of subsidized exports, as well as 36 percent in budget over six years, using 1986-1990 as the base period. The Blair House compromise also provided for a 20 percent reduction in internal price support over six years, with the years 1986-88 as reference. Finally, European and American negotiators agreed to a "peace clause" that would exempt from trade actions those internal support measures and export subsidies that do not violate the terms of the agreement. A separate deal on oilseeds was also concluded, ending several years of EC-US disputes and GATT litigation and canceling the promised US trade sanctions against the EC.

The increased autonomy seized by the EC negotiators, which made the Blair House compromise possible, was apparent from the beginning of the talks. When MacSharry agreed to return to the talks as Agriculture Commissioner after an October dispute with Commission president Jacques Delors, newspapers reported that he was given a "free

hand."<sup>27</sup> As Andriessen was entering the actual negotiations, he told reporters that he was flexible in his position, shouting: "The message from Brussels? Go ahead and make a deal!"<sup>28</sup> American negotiators were also very conscious that the EC representatives had a fairly broad mandate and adequate flexibility to negotiate.<sup>29</sup> "Madigan, speaking with reporters as he entered the Blair House, where the talks were being held, said that the EC negotiators reportedly were coming to the talks with "enhanced flexibility."<sup>30</sup>

The autonomy of EC representatives during the Blair House negotiations, which took place in the absence of observers from the member states, gave rise to accusations that the Commission had negotiated the agreement in secret.<sup>31</sup> While the Commission held a meeting on November 20 to present the broad characteristics of the agreement, the only specific text that the member states had in hand for a week was a two-page US Trade Representative press-release. Only a week later did the Commission finally send a ten-page document to the member states, including five pages confirming the compatibility of the agreement with the CAP reform.

The Blair House agreement was interpreted at the time as a relative negotiating success for the EC. The agreement was able to occur in spite of strong opposition from France, the most recalcitrant country, because the Commission representatives exercised a particularly high degree of autonomy during the Blair House negotiations. The combination of weakened unanimity in the decision-making of the negotiating mandate and greater

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<sup>27</sup> "The anatomy of a trade agreement: US gamble pays off in deal with EC," *New York Times News Service*, 23 November 1992.

<sup>28</sup> "US, EC Trade Talks Adjourn, to Resume Later," Reuters, 19 November 1992; "Struggle continues for GATT formula," *The Independent*, 20 November 1992.

<sup>29</sup> Interview with senior USDA official, January 1995.

<sup>30</sup> "US, EC begin talks on farm subsidies as officials claim agreement is near," *The Bureau of National Affairs*, 19 November 1992.

<sup>31</sup> "Obfuscation by the Commission on EC-US GATT deal," *Agra Europe*, 4 December 1992.

Commission autonomy during the negotiations actually "freed the hands" of EC negotiators, thereby breaking the negotiation paralysis to the benefit of both the US and the majority of member states.

*Veto, tied hands and the symbolic renegotiation of the Blair House agreement*

France, the member state who apparently held the most extreme preferences on the issue of agricultural liberalization, attempted to reclaim some of the institutional competence delegated to the supranational Commission in order to alter the already negotiated "pre-agreement." The French government, supported by Belgium, Italy and Spain, immediately questioned the compatibility of the Blair House agreement with the CAP reform.<sup>32</sup> Fueled by violent domestic protests from angry farmers and by crucial national elections in March 1993, the French government embarked on a crusade to denounce the content of the agreement and contest the conditions under which it had been reached. Above all, French policy-makers blamed the EC negotiators for exceeding their mandate. In private, French officials criticized the personalities of Andriessen and MacSharry, but they also denounced the EC institutions, which seemed to drift away from intergovernmentalism and allowed the overruling of fundamental objections by a member state.<sup>33</sup>

The successive French governments ardently tried to reassert the unanimity rule in the EC in order to reject the agreement. American negotiators were closely following the legal arguments in the EC about the constitutionality of a veto under the provisions of the 1986 Single European Act.<sup>34</sup> The veto threat was reinforced by the March 1993 election of a Center-Right government in France after a long campaign, in which the protection of French farmers, the CAP reform, and the Blair House deal negotiated by "foreign"

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<sup>32</sup> "GATT: la France retrouve ses amis latins," *Libération*, 28-29 November 1992.

<sup>33</sup> Interviews with French officials, 1994.

<sup>34</sup> Interviews with senior USDA official and USTR official, January 1995.

commissioners were central issues.<sup>35</sup> The official stance of the new government on Blair House was finally unveiled on May 12 in a memorandum accepting the oilseeds deal but vowing to fight the other parts of the agreement. France blamed the conclusion of the Blair House agreement on institutional flaws in the EC. French European Affairs Minister Alain Lamassoure said that EC decision-making was not working properly and the Commission's methods were unsatisfactory, resulting in "a certain confusion of responsibilities." He complained about the unclear definition of competences in the Community and asked governments to ensure that the Commission stick to its negotiating mandate and that national parliaments be associated with the aims of that mandate.<sup>36</sup>

The US administration made clear that it had no intention of reopening Blair House and treated the renegotiation issue as an internal EC matter. The Commission and all member states, with the exception of France and Ireland, also opposed the renegotiation of a deal that had been legitimately agreed to by the EC representatives. "Opening up Pandora's Box," in Commissioner Steichen's words, could also prove risky, because many American agricultural groups felt that the US had granted too many concessions to the EC. Finally, renegotiating Blair House could provoke a crisis in the EC about the legitimacy of the Commission's representation, especially in the current atmosphere of mistrust of the EC created by the Maastricht debate.

France spent the next five months trying to find allies to reopen the Blair House deal. In June Belgium offered France some welcome support by making the compatibility of the Blair House agreement with the 1992 CAP reform a priority of its upcoming presidency.<sup>37</sup> In July the French government formally requested a special "jumbo" meeting

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<sup>35</sup>Julie Wolf, "Putting CAP on and making sure it fits," *The Guardian*, 27 March 1993.

<sup>36</sup> "EC decision-making is not working--French minister," *Reuters*, 22 April 1993.

<sup>37</sup> "Belgium to seek changes to Blair House deal," *Reuters*, 23 June 1993.

of EC foreign affairs, trade and agriculture ministers to discuss the reopening of Blair House. Germany, which initially expressed firm opposition to any reopening of the Blair House deal, played a crucial role in mediating the renegotiation crisis. In late August Chancellor Kohl surprised everyone by announcing that Germany shared some French concerns about the Blair House compromise: "Europe should affirm its personality and identity in the trade negotiations and have the means to defend its essential interests.(...) That means the Blair House agreement in its present form is unacceptable for us (and) that Europe should have trade policy instruments that make it equal to the others."<sup>38</sup> Kohl's concessions to France were interpreted as either a trade-off for the financial crisis of the summer or as an extraordinary gesture of Franco-German solidarity.<sup>39</sup>

The exceptional "Jumbo Council" of September 20 eventually enabled the EC to present a common front in the multilateral negotiations, at the expense of Commission autonomy and majority decision-making. After an intense session, thirty-five ministers of trade, agriculture and foreign affairs agreed on the need for "clarification" of the Blair House agreement and reaffirmed the fundamental principles of the CAP. This was a compromise solution, which achieved the objective of preventing France's isolation while not overtly jeopardizing the results of the Uruguay Round.

The Commission's negotiating autonomy proved to be the dominant and most controversial issue during the Council. France had called for changes in EC internal procedures to ensure national governments' closer control over the Commission during multilateral negotiations and to avoid the scarcely transparent conditions under which Blair

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<sup>38</sup> "Kohl leans toward France in GATT farm dispute," *Reuters*, 26 August 1993; "Bonn says not seeking to renegotiate Blair House," *Reuters*, 27 August 1993; "Germany wavers on farm concessions to France," *Reuters*, 27 August 1993; "Kohl says Germany shares some French GATT concerns," *Reuters*, 26 August 1993.

<sup>39</sup> "Franco-German alliance sought over GATT/ERM issues," *Agra Europe*, 27 August 1993.



House was negotiated.<sup>40</sup> Complaining that a Franco-German proposal risked tying his hands in the negotiations, Brittan urged the ministers not to demand any new negotiating mandate.<sup>41</sup> French Foreign Minister Alain Juppé angrily retorted that Brittan, a "petty official who had exceeded his brief," had no right to oppose member states' negotiating instructions. This internal drama further strengthened suspicions of the Commission's excessive power.<sup>42</sup> Although in the end no new mandate was given to Brittan, only "certain general orientations" for maintaining the EC's export capabilities and ensuring that international commitments are compatible with the CAP reform, the Council decided to "monitor constantly the negotiations" on the basis of Commission reports during each session of the General Affairs Council.<sup>43</sup> This decision was the first step toward a return to strict intergovernmentalism in trade negotiating matters and a reining in of the Commission's negotiating powers.

Another result of the Jumbo Council was the clear reinstatement of unanimity as the basic decision-making principle in trade negotiations. The Council decided to approve the Uruguay Round results by consensus. This important decision was confirmed informally during the November General Affairs Council, which also discussed the issue of Commission autonomy and decision-making in external trade negotiations. In October, at France's demand, the member states agreed to ask the Commission for a written report on the trade talks every two weeks until the December deadline.<sup>44</sup>

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<sup>40</sup> "France calls for sweeping changes to Blair House," *Agra Europe*, 3 September 1993.

<sup>41</sup> "Rift hits EC as Germany backs France on farm pact," *International Herald Tribune*, 21 September 1993; "Vague EC plan defuses French trade row," *Reuters*, 21 September 1993; "EC ministers instruct negotiators to clarify Blair House accord with US," *International Trade Reporter*, 22 September 1993.

<sup>42</sup> "Leap of solidarity," *European Insight*, 24 September 1993.

<sup>43</sup> Devuyt 1995. See also "French coaxed back into farm trade fold," *Financial Times*, 22 September 1993.

<sup>44</sup> "Balladur says trade jockeying to go down to wire," *Reuters*, 15 October 1993; "European Council: Franco-German stratagem sets hare running in Brussels," *European Report*, 30 October 1993.

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*Renegotiation of Blair House.* The threat of a major crisis if EC demands for "clarification" of Blair House were not met contributed to a reversal of the US position on the renegotiation of the agreement.<sup>45</sup> The US administration ultimately agreed to renegotiate specific elements of the agreement, rather than confront a possible breakdown of the talks before the crucial ultimatum enforced by the expiration of the US Congressional Fast Track Authority on December 15, 1993.

The Commission's negotiating autonomy was severely limited during the final days of the negotiations. The EC-US agricultural agreement, finally concluded on December 6, symbolically changed several elements of the original Blair House accord. The "peace clause" was extended from six to nine years, as well as the timetable for cutting subsidized farm exports. Market access for imports was fixed according to the type of product (animal feed, meat, dairy products, etc.), instead of the more restrictive product-by-product curbs. Direct assistance to farmers provided under the 1992 CAP reform was not challenged. Finally, and most importantly, 1991-92 was taken as the reference period instead of 1986-88. This would allow the EC to export an additional 8 million tons of grain compared to the original Blair House agreement.

In exchange for accepting the agricultural agreement, France demanded a toughening of the EC's unfair trading procedures.<sup>46</sup> Germany dropped its long-standing opposition to a measure giving the Commission greater power to impose anti-dumping duties on unfairly priced imports. The French government had succeeded in making it easier for a defensive member state to capture the negotiating position of the EC, while at the same time enhancing the EC's offensive capabilities by making it harder for reluctant member states to reject an offensive trade action.

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<sup>45</sup> "Airbus, agriculture trade-off on GATT not impossible," *Agence France Presse*, 2 November 1993.

<sup>46</sup> "EC-US close to framework trade pact, problems remain," *Reuters*, 6 December 1993.

The EC gained more than mere "clarification" in the final agreement on agriculture, while the US was forced to retreat during the last weeks of the negotiations. As a result of the constraints created by the EC obligation to negotiate as a whole while retaining the principle of unanimity and tight control over the Commission, the most recalcitrant country exerted a preponderant influence on the final outcome. When the Uruguay Round was concluded on December 15, 1993, the veto right had been reinstated, the Commission's autonomy was curtailed, and Juppé was able to "voice admiration for the way Brittan had obtained a better deal on subsidized farm exports than the 1992 Blair House accord..."<sup>47</sup>

### *3) Single voice, offensive EU: reciprocity and EC-US negotiations in banking and public procurement*

The decision to complete the Single Market by 1992 gave the EC a new impetus in international trade negotiations by providing it with the means to be offensive. A large internal market was both more attractive and more threatening to third countries, as the EC had the credible option of retreating domestically if the international concessions were not satisfactory. In the late 1980s the Commission developed the concept of reciprocity in order to retain its international negotiating leverage by ensuring that its liberalization measures were not unilateral in those areas not yet covered by existing GATT rules, such as services. A corollary of this new offensiveness was the accompanying switch to majority voting, since the Community could afford to be offensive in those areas in which the Single Market liberalization was being shaped successfully. As a result, most cases of negotiations in which the EC went on the offensive are also cases in which there was some degree of supranational competence.

#### *Reciprocity and the Second Banking Directive:*

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<sup>47</sup> "France could back Brittan for EC president," *Reuters*, 14 December 1993.

The drive to include strict reciprocity provisions in the directive liberalizing the internal market in banking in order to obtain reciprocal concessions from the US and Japan was the first ever real “offensive” attempt by the EC. The controversial definition of reciprocity included in the 1988 Second Banking Directive was the result of a particularly autonomous Commission. It was immediately met with opposition from a couple of member states and provoked a flurry of lobbying activity on the part of the United States. The intense anti-reciprocity campaign led by the US government and banking industry to “divide and rule” the member states eventually resulted in a redrafting of the original provisions. Therefore the offensive aspect of the Community legislation was dropped even before it came to bilateral negotiations. This is an interesting case of an aborted attempt at EC offensiveness, which reflects how third countries can take advantage of the member states’ reluctance to delegate more sovereignty to the supranational institutions.

The Commission presented the first draft of its Second Banking Directive on 13 January 1988. This was supposed to be the legislative cornerstone of its program to liberalize the EC internal market in financial services. The core of the directive was the concept of a single European banking license, according to which a bank licensed by any EC member state could automatically be able to establish a branch or subsidiary in any other member state without further authorization.

The Commission, acting autonomously from the member states, also included in the original draft of its Second Banking Directive some harsh provisions for third-country reciprocity. The original wording of Article 7 suggested that the EC would grant access to the financial services market in Europe only if European firms received reciprocal treatment abroad. When pressed to give a more precise definition of the mirror-image reciprocity, Willy de Clercq, the External Affairs Commissioner, caused a further stir by declaring in July that even non-EC banks already licensed to operate in a Community country would not

automatically benefit from the planned single market in financial services.<sup>48</sup> The “grandfathering” issue was a bold attempt by the Commission to toughen up the interpretation of the draft directive, which had not yet been approved by the Council of Ministers.

The member states were far from unanimous in their support for the directive’s definition of reciprocity. Most national capitals were surprised by the last minute inclusion of the reciprocity provisions in the directive without prior consultation with representatives of the member states and criticized the form of the Commission’s autonomous move.<sup>49</sup> Nevertheless, France led the camp of the supporters of the offensive reciprocity provisions because it hoped to derive some external benefits from the internal liberalization of the EC banking market. The UK became the leader of the opposition to Article 7 because it feared for the future of its City, which hosted more third country banks than the rest of the EC put together, in case the grandfathering clause would be implemented.<sup>50</sup> Germany, in particular the Bundesbank, also had some reservations about the Commission’s takeover of the authority to admit foreign firms’ subsidiaries into its home market.<sup>51</sup> Financial officials from the Netherlands and Luxembourg also shared some concerns about the EC’s new authority and its potential for protectionism.<sup>52</sup>

The US banking industry was particularly concerned about the EC’s proposed reciprocity provisions, which were directly targeting US banking laws such as the Glass-

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<sup>48</sup>See Guy de Jonquieres, “Call to limit banks’ access to EC market.” *Financial Times*, 13 July 1988, p. 1.

<sup>49</sup>Ralph Atkins, “Minister hits at plan for bank protection.” *Financial Times*, 16 May 1988, p. 7.

<sup>50</sup>David Lascelles, “EC wrestles with creation of integrated market in banking.” *Financial Times*, 7 June 1988, p. 3.

<sup>51</sup>Bayard and Elliott, 1994, pp. 287-88.

<sup>52</sup>Bayard and Elliott, 1994, p. 296.

Steagall Act, separating commercial and investment banking, and the McFadden Act, imposing barriers to interstate banking. As a result, the US government was monitoring closely the policy-making in the EC and attempted to influence the Council's final approval of the directive. US policy-makers and banking lobbyists mounted a massive campaign designed to prevent the formation of a "Fortress Europe", about to start in the sector of financial services. The US government warned member states of possible retaliation against EC restrictions on foreign banks in the hope of accentuating internal divisions in the Community. Internal unity is much more crucial to the success of an offensive move than of a defensive position, where only one extreme member can hold its partners hostage by brandishing a threat of veto. As US analysts Thomas Bayard and Kimberly Ann Elliott gathered from their interviews of EC and US officials,

US pressure accelerated these decisions, but that pressure could not have succeeded in the absence of an internal constituency. The clear implication for future disputes is that US negotiators and US firms should form tacit coalitions with those who favor open markets in the target country.<sup>53</sup>

This "little push" given by the US to the recalcitrant EC countries eventually forced the Council to reject the Commission's reciprocity provisions. A change in the composition of the Commission at the beginning of 1989 also helped to bury the old reciprocity provisions and instead establish loose criteria determining how the EC could improve market access for European firms in third countries. The final Second Banking Directive looked like a debacle for the Commission, which had been disavowed by the Council and had been forced to give in to intense US pressure.

Could the EC banking offensive have succeeded? Given the alignment of member states' preferences, could any different institutional structure have produced a different outcome? Before answering this counterfactual question, it should be clear that not one

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<sup>53</sup>Bayard and Elliott, 1994, p. 304.

European country alone, no matter how internationally powerful, could have succeeded in getting the US to change its domestic banking regulations. There is some strength lying in numbers, as other examples of the Community's negotiating experience have shown. Under unanimity voting, such an offensive would not even have been considered since from the start the British would have announced their decision to veto the move. Under qualified majority following strictly the rules for counting the countries' votes, the EC might have engaged the US into a formal negotiation of banking regulations, but support may have waned as the US put more pressure on individual countries to change their votes. The pro-deregulation countries in this case may at least have won by putting the issue on the agenda, which they most likely would not have done if acting as free agents. Nevertheless, the external push given by the US administration's virulent attack against the EC's reciprocity provisions chattered any hope of consensus on the issue and consensus was needed for the Community to proceed with the rest of its Single Market program.

*Reciprocity and the negotiations on public procurement*

By contrast to the banking case, the EC-US negotiations on public procurement illustrate a rather successful "offensive" attempt by the Community. Building on the lessons of the Second Banking Directive, the Commission used once again the strategy of reciprocity in order to pry open the American public procurement markets. Despite its intense attempts at dividing the member states through retaliatory measures and playing a "Trojan horse" strategy, the US did not succeed in diluting the European offensive. This resulted in the 1994 EC-US agreement on public procurement, which was generally held as a success for the European negotiators.

As part of the Single Market program, the member states deregulated the national bastions of public procurement markets through a series of directives. In September 1990 the Council adopted the so-called "Utilities Directive", which opened up to competition

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public contracts in the previously excluded sectors of water, energy, transport and telecommunications.

After a long-fought internal battle between the member states, the Council agreed to include in the Utilities Directive the controversial Article 29 (also known as the “reciprocity clause”) in order to deal preemptively with the external consequences of the EC’s internal liberalization measures. The directive provided that EC producers would receive a mandatory 3 percent price preference in the award of public procurement contracts and that the contracting entities were allowed to exclude offers in which less than half of the value of the goods or services to be provided were of EC origin.

The Commission had argued strongly in favor of the inclusion of an EC preference clause in the hope of using it as part of a strategy of “offensive reciprocity” in the upcoming international negotiations on public procurement taking place in parallel to the Uruguay Round. In particular, the EC wanted to use this institutionalized EC preference as negotiating leverage in order to get rid of the discriminatory preferences in the US legislation. The 1933 “Buy American” Act imposed a mandatory price preference of 6% (12% in specific cases) in favor of products of US origin on all purchases by US federal agencies and agencies funded by federal funds. Moreover, the EC hoped that the future multilateral agreement on public procurement would also cover purchases made by subcentral entities in the US, such as states and cities. Therefore, the Commission’s strategy was to use the reciprocity clause as leverage against the US and then drop it from the directive once an agreement had been reached on public procurement.

The EC Commission was responsible for negotiating the Government Procurement Agreement on behalf of the member states, who had given EC negotiators some latitude in order to obtain some concessions from the US side. According to the treaties, the voting rule governing issues of public procurement was qualified majority. Unlike in the case of the Second Banking Directive, however, the member states seemed united behind their



Utilities Directive. Even the United Kingdom agreed to the eventual inclusion of the reciprocity clause, despite earlier criticisms.

The US tried to counter the EC offensive. At first, the US government used the tactic of targeted retaliation in order to divide up the member states and hopefully change the EC consensus on the reciprocity clause. In February 1992 the US administration threatened to impose sanctions upon the entry into force of the Utilities Directive in January 1993, unless the EC removed the reciprocity clause. In February 1993 the US Trade Representative announced its intention to prohibit awards of Federal contracts for products and services from the EC.<sup>54</sup> In reaction, the General Affairs Council discussed the possibility of counter-retaliation and its Danish president argued that “it is important that the Community speak with a single voice” during the bilateral contacts due to take place in the following days.<sup>55</sup>

The EC and the US concluded a partial deal in April 1993. According to the agreement, the EC would disapply the reciprocity clause in some cases (mostly in the electrical equipment sector). In exchange, the US would remove all discrimination against EC bids for procurement by the five publicly owned federal electrical utilities, plus the Tennessee Valley Authority. The US also agreed to set in train a process designed to eventually eliminate Buy American provisions carried out at subfederal level. Finally, both sides agreed to launch a joint, independent study of access to the EC and US procurement markets.<sup>56</sup>

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<sup>54</sup>“Commission responds to US trade measures in telecoms and procurement.” *Rapid*, Commission of the European Communities, 1 february 1993.

<sup>55</sup>“Council unanimously denounces latest US trade decisions.” *Agence Europe*, 3 february 1993.

<sup>56</sup>“Details of EC/US partial agreement on public procurement.” *Reuters*, 22 April 1993.

The agreement struck with the US was only partial, however, and for the most part, the EC had kept the reciprocity clause. The US therefore decided to apply some limited sanctions anyway and the EC agreed to retaliate by applying its own counter-sanctions to the US. Given the limited success of its earlier retaliatory strategy, the US administration changed tactics and attempted to introduce a “Trojan Horse” in the Community, by heating up the opposition of one of the member states.

In June 1993, it was discovered that Germany had breached European solidarity by concluding a surprise telecommunications deal with the US. The US intentionally revealed that Germany agreed to ignore the public procurement directive mandating preferential treatment for EC suppliers in telecommunications on the basis of a 1954 German-US treaty prohibiting trade discrimination. The bilateral move effectively freed German and US suppliers from EC-US sanctions and counter-sanctions imposed in a dispute over mutual charges of discrimination against outside suppliers.<sup>57</sup> The Commission argued that this surprise bilateral deal was illegal and immediately threatened legal action against Germany.

Understandably, this unexpected breach of European solidarity by one of the EC’s foremost pro-integrationist members was expected to have external consequences. This is precisely why the US administration pursued secret negotiations with Germany, concluded a secret deal, and then revealed very publicly the existence of this deal. “If the Americans’ plan was to try to erode Europe’s admirable yet shaky unified stance on trade policy, they succeeded,” wrote an analyst at the time.<sup>58</sup> “What Mr. Rexrodt thought would be an under-the-table agreement, Mr. Kantor made public with great fanfare, taking advantage of this opportunity to sow the seeds of discord among the member states and to put the Commission in a difficult position, right in the middle of GATT negotiations.”

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<sup>57</sup>“France condemns US-German telecoms pact.” *Reuters*, 14 June 1993.

<sup>58</sup>EC/US: German public procurement opt-out heading to the top.” *European Report*, 16 June 1993.

Contrary to US expectations, however, this Trojan Horse strategy did not eventually succeed. The EC immediately acted as if the deal was illegal and therefore void. Moreover, the EC did not have to be unanimous to pursue its offensive on the US public procurement policy. Germany had declared its opposition to the reciprocity clause from the start. Had unanimity been the decision-making rule in place in the EC at the time, the negotiations on public procurement would not have proceeded under the shadow of Article 29. The absence of the unanimity requirement coupled with the strong Community reaction to the US-German deal on telecommunications reinforced the bargaining power of the EC and influenced the final outcome of the Government Procurement Agreement.

In the end, when the bilateral agreement on public procurement was concluded in April 1994, the US acquiesced to many of the initial EC demands (at least on paper), while the EC withdrew concessions on telecommunications, which had been the US central objective in the negotiations. This result, which reflected the position of the median rather than extreme member states, was achieved partly thanks to the transfer of negotiating competence to the supranational level.

### *Section 3: From Single to Multiple Voices Again*<sup>59</sup>

Despite the theoretical and practical evidence pointing to a higher effectiveness of the EU in international negotiations when its collective position cannot be torn apart by third countries, especially in offensive cases, it seems that member states are currently trying to regain some of the supranational autonomy they delegated earlier in the history of the Community. The principle of unitary representation in international trade negotiations

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<sup>59</sup>I would like to thank the many DGI officials who shared with me their views on Opinion 1/94, the current IGC, and more generally their experience as trade negotiators.

was a cornerstone of the Common Commercial Policy, itself one of the major pillars of the emerging institutional framework of the European Community in 1957. Member states have often contested this transfer of negotiating power to the supranational authority when it does not serve their immediate national interests. This resulted in internal EU crises and confusion for the negotiating partners. For the first time in the history of European integration, however, a formal reassessment of external trade competences is taking place. The Commission is currently trying to undo in the Inter-Governmental Conference the damage done to its external trade competences by the 1994 ruling by the Court of Justice, according to which the member states and the Commission share mixed trade competences in the “new areas” of services and intellectual property.

This section explores the current institutional shift in the EU away from supranational competence. It tries to assess how important is the shift that is taking place and whose interest it was to push for a return to intergovernmentalism in the field that was the most successfully integrated in the EU. In particular, this section applies the institutionalist model developed earlier to predict how this shift will likely affect the effectiveness of the EU as an international actor in future international negotiations.

### *1) The shift towards “mixed competences” in trade negotiations*

At the opening of the Uruguay Round in Punta del Este in 1986, a legal question about competences emerged in the Community. Who, of the Commission or the member states, was responsible for negotiating the “new issues” (services and intellectual property) not explicitly covered in the Treaty of Rome? The temporary settlement granted the Commission powers to negotiate on behalf of the EC and the member states, although it was stated that this did not prejudge the question of the competence of the Community and the member states on particular issues.

The issue of the division of competences between the Commission and the member states was formally raised before the ratification of the Final Act concluding the Uruguay Round in April 1994. Whether the document would be signed by the member states individually or by the Commission on behalf of the EC was subject of heated political and legal debate. A compromise was eventually agreed on in March 1994: both the Council President and Commissioner Leon Brittan signed the Final Act on 15 April 1994 in Marrakesh on behalf of the Community. Representatives of each of the member states also signed, in the name of their respective governments.

A major debate also arose as to the EC's representation and repartition of responsibilities in the new World Trade Organization (WTO).<sup>60</sup> Several member states insisted on being granted their own competences with respect to the "new issues" not covered under the original Treaty. The Commission, always cautious about asserting (not exercising) its competence, offered the member states to become contracting parties in the WTO provided that they would accept the principle of unitary representation of the EC in external trade negotiations. The Commission even suggested that the WTO agreement should be agreed to by an unanimous Council and approved by the European Parliament, when neither was required by law. The Commission and the Council were unable to agree on a compromise, however. In the hope of maintaining the cohesion of the Community, the Commission asked the European Court of Justice for an "advisory opinion" on the issue of competence, with the expectation that the Court would confirm the exclusive authority of the Community with respect to the negotiation and conclusion of external trade agreements. The Council, the European Parliament, and eight member states (Denmark, France, Germany, Greece, the Netherlands, Portugal, Spain and the UK) contested the Commission's request for the Court's opinion, even qualifying the Commission's position

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<sup>60</sup>See Devuyst, *"The European Community."*

on the issue as “extravagant.”<sup>61</sup> The difficult role of the Court was therefore to arbitrate between the Commission and the member states --and between two opposite approaches to European integration.

On 15 November 1994, the Court delivered its key 1/94 Advisory Opinion, ruling that although the Community had sole competence to conclude international agreements on trade of goods, the member states and the Community shared joint competence to deal with non-goods trade.<sup>62</sup> This legal recognition of mixed competences in some cases departs from the founding principle that the Community has a single voice in international trade negotiations and from previous case-law on external relations. The Court’s encouragement to a return to intergovernmentalism in the field of external trade is undoubtedly setting the stage for future disputes over competences and may affect the future effectiveness of the EC as an actor in international trade negotiations.

The dispute between the member states and the Commission has not stopped since then. The Commission’s Directorate for External Affairs is fighting hard in the current Inter-Governmental Conference to include in the revised treaty changes to Article 113 in order to undo the damage done by the Court’s ruling. In particular, the Commission wants to explicitly state that the responsibility to negotiate trade agreements on any type of services and intellectual property should be given exclusively to the Commission on grounds of practical effectiveness. Sir Leon Brittan, the Trade Commissioner, argues that

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<sup>61</sup>See Hilf, “The ECJ’s Opinion 1/94 on the WTO,” p. 246.

<sup>62</sup>Court of Justice of the European Communities, *Opinion 1/94*, 15 November 1994, I-123.

(1) The Community has sole competence, pursuant to Article 113 of the EC Treaty, to conclude the multilateral agreements on trade in goods.

(2) The Community and its Member States are jointly competent to conclude GATS.

(3) The Community and its Member States are jointly competent to conclude TRIPS.

On the Court’s advisory opinion, see Bourgeois, “The EC in the WTO” and Hilf, “The ECJ’s Opinion 1/94 on the WTO.”

wider powers for the Commission and an end to the unanimity rule would “speed up negotiations, simplify decision-making and increase the EU’s trade policy influence in relation to the US and Japan.”<sup>63</sup> The Commission also argues that the extension of Article 113 to cover all matters of trade would render the Community a more efficient bargainer, since currently “the need for unanimity leads to the EU adopting lowest-common-denominator bargaining positions easily exploited by other countries.”<sup>64</sup> How the member states work out the redrafting of Article 113 will be clearer a month from now.

## *2) Why move away from a single voice?*

How can we explain this institutional shift? I argue that this tightening of member states’ control over external trade policy making and negotiating can be explained in part by the experience of the Uruguay Round. The Blair House agreement represented indeed a turning point in the delegation of negotiating authority to the supranational representatives. The informal “flirtation” with majority rule and increased autonomy of Commission negotiators, which enabled the Blair House agreement to be concluded, were rapidly followed by a reaffirmation of the veto right and fundamentally intergovernmentalist nature of the EC decision-making process. It is therefore not surprising to find France at the forefront of the dispute with the Commission over the issue of external competences.

The whole Blair House renegotiation debate triggered questions about the legitimacy of the Commission’s representation not only inside but also outside the Community. By reneging on a deal negotiated by Commission officials on behalf of the EC, France may have weakened the credibility of the Commission and rendered its negotiating task more difficult in the future. Already during the Uruguay Round some of

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<sup>63</sup>Lionel Barber, “Brussels strives to call the tune on trade,” *Financial Times*, 12 March 1997, p. 6.

<sup>64</sup>Lionel Barber, “Brussels strives to call the tune on trade,” *Financial Times*, 12 March 1997, p. 6.

the EC's negotiating partners criticized those "who seek to unravel the mandate of the Commission once the deal is done" and questioned the credibility of the EC Commission if it "cannot deliver on the outcome of a negotiation."<sup>65</sup>

The re-capture of power by the member states is also part of a more general trend in the European Union, which is undergoing dramatic institutional changes as a result of the successive and prospective enlargements. As the Maastricht debate over the creation of the European Union has shown, member states are increasingly wary of further devolution of sovereignty to the supranational level. The ongoing IGC is expected to bring about major institutional reform, because the EU cannot function at twenty or more members as it did when it was created in 1957 with six founding countries. The IGC also seems to point towards a generalized reinforcement of member states' control over the evolution of Community policies.

More problematic to explain than the member states' incentives for the recapture of external trade competences is the Court's rationale for its 1994 decision. It is not in the ECJ's tradition to depart from previous case-law, especially if it means a rollback of supranational powers. The general consensus among legal scholars is that the Court's opinion on "mixed competences" was not an easy decision. First, the Court had to rule under pressure, since the Commission submitted its demand for an opinion on 6 April 1994, while the WTO agreement was to enter into force on 1 January 1995. Moreover, the Court's decision must be seen in the context of uncertainty as to the future of the EU, its own uncertain political future, and recent Court's case-law which has "tended more towards understanding and protecting the legitimate interests of the EC Member States."<sup>66</sup>

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<sup>65</sup>Peter Cook, Australian Trade Minister, quoted in *Bureau of National Affairs*, "US position on Uruguay Round talks needs to be less rigid, French official says," 21 October 1993.

<sup>66</sup>Hilf, "The ECJ's Opinion 1/94 on the WTO." *European Journal of International Law* (No. 6, 1995), pp. 245-259.



The general trend of the Court's opinion was, according to Meinhardt Hilf, "strengthening the competences of the EC in the area of its core competences whilst being rather reluctant to recognize additional competences for the Community if this is not met by the support of the member states."<sup>67</sup>

Certainly there was a legal basis for the Court's ruling of mixed competences. The European Community never formally substituted the member states in GATT, whose creation preceded that of the Community. From the beginning the EC has been the exclusive conductor of all GATT negotiations on behalf of its member states. For all practical purposes, therefore, the EC had been accepted by the other GATT contracting parties as one of theirs. The rationale for not formally replacing the member states by the EC as a GATT contracting party was that it could wait until the GATT was amended for another reason --for instance, the creation of the WTO.<sup>68</sup> Another rationale was that the member states continued to enjoy their individual voting rights in GATT. If the EC formally substituted them, it would certainly be granted only a single vote.<sup>69</sup>

On the other hand, the Commission's main assumption that Article 113, because of its non-exhaustive wording, covers all issues under the WTO agreement could have been valid as well. In its Opinion, the Court indeed confirmed once and for all the Commission's exclusive competence with respect to trade in goods. The Court also confirmed that trade in services cannot be automatically excluded from Community competence, as some member states suggested, because of the growing importance of services in international trade. Moreover, the Court recognized that the Community and the member states must closely cooperate for the negotiation and conclusion of agreements under the WTO, even referring

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<sup>67</sup>Hilf, "The ECJ's Opinion 1/94 on the WTO." p. 255.

<sup>68</sup>See Bourgeois, "The EC in the WTO."

<sup>69</sup>"Only some side-agreements under the Tokyo Round had been signed on behalf of the EC itself." Hilf, "The ECJ's Opinion 1/94 on the WTO." p. 247

to the “requirement of unity in the international representation of the Community.”<sup>70</sup> This unity requirement is particularly crucial, according to the Court, since in trade disputes third countries may use cross-retaliation against the Community or the member states, even in cases when their proper competences are not involved.

EC observers argued that it was always very clear in the past that the negotiation of international trade matters was the exclusive competence of the Commission under Article 113.<sup>71</sup> The Court’s own case-law seemed to imply the exclusivity of Community competence in external trade. Since the ERTA judgment and the Court’s Opinion 1/76 of 1976, the doctrine was that “the EC has powers to act in the international sphere on matters with respect to which the EC has powers to act in the internal EC sphere.”<sup>72</sup> Moreover, the Court had previously declared the exclusivity of the Community’s external powers, stating that member states can no longer assume international obligations which might affect the EC’s internal rules or alter their scope. The Commission hoped that the legal doctrine on “implied external powers” would be sufficient to confirm the exclusivity of its external trade competences, even with respect to the new issues.

Legal scholars have pointed to inconsistencies in the reasoning of the Court in this case and suggest that the Court could plausibly have gone the other way, ruling instead in favor of exclusive Community competence in the field of external trade relations.<sup>73</sup>

The Court could have chosen another approach, again on the basis of the Treaty on European Union (TEU) and the international awareness of the *unitary and important role* of the EU. The Preamble and Article B TEU mention the European identity as well as the *international identity* of the EU. In addition the TEU highlights the fundamental principle of coherence (Articles A and C TEU), aiming at unitary action combining policies under the EC Treaty and under the

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<sup>70</sup>Opinion 1/94, No. 108, cited in Hilf, “The ECJ’s Opinion 1/94 on the WTO.” p. 255.

<sup>71</sup>See Tony Snape, “Euro Court to decide Commission’s world trade role,” Reuters, 10 November 1994.

<sup>72</sup>Bourgeois, “The EC in the WTO.” p. 773.

<sup>73</sup>e.g. Bourgeois, “The EC in the WTO.” p. 776.

cooperation amongst Member States. In addition, the other contracting parties within GATT and now within the WTO, by accepting the EC as a contracting party in Article XI seem to be more and more willing to accept unitary representation of European interests. They would even have accepted the EC taking over the unitary representation of all its Member States within the WTO on the basis of exclusive competences recognized by its Court. [...] In this context, it seems unusual that only the EC itself, i.e. through the Opinion of its Court, states a situation of mixity of competences and thus will have the Member States alongside with the EC as contracting parties in the framework of the WTO. A missed opportunity?<sup>74</sup>

The members of the Commission were surprised, to say the least, about the opinion of the Judges. The Commission consequently had to work out the practical implications of this ruling, drafting for instance a "Code of Conduct" to govern the conduct of negotiations where the Commission and the member states share mixed competences.

### *3) Expected consequences of this retreat away from unity*

The Court's opinion on the division of external trade competences between the Community and the member states is clearly a setback for the process of integration in Europe. It remains to be seen how the demarcation between the competences of the Community and those of the member states will play practically in future trade negotiations.

In order to accommodate for the evolutionary nature of trade, the language of the Court was quite imprecise, so there will be room for interpretation when conflicts on "new issues" arise in the future. The consequences of the ruling might indeed be limited. After all, the Court only ruled that the Commission and the member states would share mixed competences with respect to the new issues. For all the other external trade issues (industrial goods, agriculture), which currently represent the bulk of international trade, the Community still holds the exclusive authority to represent its member states internationally. However, the overall importance of "traditional" products in global trade is waning rapidly, to the benefit of "new issues."

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<sup>74</sup>Hilf, "The ECJ's Opinion 1/94 on the WTO." p. 258.

It also remains to be seen how the ruling of the Court on external trade competences will affect the process of European integration in general. The decision came at a particularly crucial time of institutional reform in the EU. The setback of supranational powers in external trade appears very symbolic since the common trade policy has been the deepest and longest integrated policy in Europe. By signaling that it does no longer necessarily rule in favor of deeper integration but position itself as an arbiter between the Community and the member states, the Court indicated that it is shifting its role.

My institutionalist model suggests that this shift away from supranational competence will overall hurt the effectiveness of the EU as an international actor, since the EU today has more grounds to be more offensive in trade negotiations but will be disserved in its offensive endeavors by the constant threat of having one of its increasingly numerous member states break from its ranks.

Will third countries benefit from these new institutional rules in the EU? I predict that US trade negotiators will increasingly try to play the “divide and rule” strategy of seeking bilateral deals with “friendly” member states when the EU negotiating authority is contested. Such deals should happen with increasing frequency. Indeed, US negotiators have already started to exploit the EU’s institutional uncertainties as bargaining leverage in their favor, for instance by contesting the legality of the negotiators’ competence when the proposals are not in US favor.<sup>75</sup>

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<sup>75</sup>Private interview with DGI official, April 1997.

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## *Conclusion*

This paper presented an institutionalist analysis of the external consequences of European integration. I argued that the Community's effectiveness as an external actor in international trade negotiations is determined partly by institutional mechanisms --the *de facto* voting rules used by the Council and the amount of negotiating autonomy exercised by Commission negotiators. Therefore, the degree to which competence is transferred away from the member states and toward the supranational level explains the process and outcomes of international trade negotiations in which the EU is involved. The direction of the effect is determined by the negotiating context. When the collective position of the Community is defensive, I argued that supranational competence mitigated the extremes and rendered the conclusion of an international agreement more likely, but at the same time deprived the EU of some bargaining leverage. By contrast, a high degree of national control over the bargaining process amplifies the extremes and renders the conclusion of an international agreement less likely, but can successfully tilt the final result of the international negotiation toward the position of the most recalcitrant member state. When the collective EU position is offensive, on the contrary, I argued the reverse. It is very hard for a unanimous offensive to succeed because the position of the most reluctant state is amplified and the third party can try to divide the fragile European consensus to dilute the offensive move. Majority, by contrast, makes the conclusion of an international agreement less likely, but if it does, it may be in favor of the Community position since the institutional structure sends a clear signal to the opponent that the offensive will be carried through.

In sum, the member states do not benefit equally from being forced to share their external trade powers with others. When their preferences diverge from their Community partners, they improve their bargaining power over acting on their own on the international scene by being forced into negotiating with a "single voice" while retaining their power to

veto the deal and control the negotiators' moves. Member states with median preferences, especially if they are small, are better off inside a Community governed by majority rule. Of course the alignment of member states' preferences varies by issue, but member states cannot opt in and out of the Community on an issue-by-issue basis --at least for the moment. My institutionalist model offers a first cut at predicting the bargaining process and possibly the outcome in advance of the negotiation.

This paper presented four cases of EC-US trade negotiations in order to illustrate the argument that the institutional structure of the Community affects its effectiveness as an international actor. These cases were selected because they each provide some variation in the combination of the central independent variables--degree of supranational competence and nature of demands in negotiation. They all confirmed that, given exogenous member states' preferences and depending on the defensive/offensive negotiating context, the degree with which member states let go of their sovereignty affects the process and outcome of the final trade agreement.

This study of the internal/external linkage has theoretical implications, both for the specific study of European integration and more generally for the study of international relations. First, it seems that this approach may be useful for explaining the effectiveness of the EU in other international settings, such as environmental negotiations<sup>76</sup> and foreign affairs. Second, this study shows that the Community has indeed external consequences, even if the very large majority of EU studies have focused so far on the internal consequences of integration. Finally, this internal/external linkage reveals that the EU is an international actor to be reckoned with, no matter what realist scholars preoccupied with the central role of states might want to argue. The mere fact of belonging to the Community transforms a state's chances of shaping the outside world. The realization that small states

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<sup>76</sup>See chapter by Jupille and Caporaso, in Rhodes, forthcoming.

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may exert a disproportionate influence on world affairs through the institutional design of the Community should be seriously considered as the EU expands to more small states and simultaneously takes on new roles in foreign affairs.

The study of the causes of the linkage between internal developments in the EC and external effectiveness has also important practical implications. The European Community was originally a unique experience designed to transcend the old rivalries of the western European nation states. Its institutional design attempted a delicate balance between ripping off the economic benefits of a large internal market while retaining some degree of national sovereignty. Increasingly, the existence of the Community seems to be influencing the behavior of other actors in the international political economy.

Above all, the EU is a model for other regional integration efforts. In Asia, North America and Latin America, other countries are trying to imitate the apparent successes of the EU in the commercial sphere.<sup>77</sup> Unlike the founding members of the Common Market, however, they have the benefit of hindsight and can look back to the successes and failures of the EU's unique institutions. What they can learn about the optimal institutional design to enhance their external effectiveness might weigh crucially in their decision to emulate or reject the Community's original approach to sovereignty-sharing.

The internal/external linkage is also crucial because the EU has an increasingly proactive role in the world's political economy. As the case-studies have shown, the Community is becoming a liberalizing force. It now initiates international policy changes, rather than reacts to them. The institutionalist model presented in this paper suggests that the EU's capacity at setting the agenda in key areas of the international economy depends heavily on its own institutional features. The formidable reassessment which the issue of

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<sup>77</sup>See Carolyn Rhodes, "Introduction." In Rhodes, forthcoming.

trade competence is currently undergoing in the EU might well have the unintended consequence of dampening the Community's new found international strength.



### References

- Bayard, Thomas and Kimberly Ann Elliott. *Reciprocity and Retaliation in US Trade Policy* (Washington, DC: Institute for International Economics, 1994).
- Bourgeois, Jacques H.J., "The EC in the WTO and Advisory Opinion 1/94: An Echemnach Procession," in *Common Market Law Review* (Vol. 32, 1995, pp. 763-787).
- Deutsch, Karl et al., *Political Community and the North Atlantic Area* (Princeton, N.J.: Princeton University Press, 1957).
- Devuyst, Youri. "The European Community and the Conclusion of the Uruguay Round," in Carolyn Rhodes and Sonia Mazey eds., *The State of the European Union, Vol. 3* (Boulder: Lynne Rienner, 1995).
- Evans, Peter, Harold Jacobson and Robert Putnam eds. *Double-Edged Diplomacy: International Bargaining and Domestic Politics* (Berkeley: University of California Press, 1993).
- Haas, Ernst B. *The Uniting of Europe*. (Stanford: Stanford University Press, 1958).
- Keeler, John T. S. "Agricultural Power in the European Community: Explaining the Fate of the CAP and GATT Negotiations." In *Comparative Politics* (Vol. 28, No. 2, January 1996).
- Lindberg, Leon and Scheingold, Stuart. *Europe's Would-Be Polity: Patterns of Change in the European Community* (Englewood Cliffs, NJ: Prentice-Hall, 1970).
- Mayer, Frederick W. "Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments," in *International Organization* (Vol. 46, No. 4, Autumn 1992).

Meunier, Sophie. *Divided but United: European Integration and EC-US Trade Negotiations 1962-1994*, Ph. D. Dissertation, Department of Political Science, M.I.T., in progress.

Paarlberg, Robert. "Why Agriculture Blocked the Uruguay Round: Evolving Strategies in a Two-Level Game," in William Avery ed., *World Agriculture and the GATT* (Boulder, CO: Lynne Rienner, 1993).

Paemen, Hugo and Alexandra Bensch. *From the GATT to the WTO: The European Community in the Uruguay Round* (Leuven, Belgium: Leuven University Press, 1995).

Putnam, Robert. "Diplomacy and Domestic Politics: The Logic of the Two-Level Game," in *International Organization* (Vol. 42, No. 3, 1988).

Rhodes, Carolyn ed. *The European Union in the World Community* (Boulder, CO: Lynne Rienner, forthcoming)

Schelling, Thomas. *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960).

Schmitter, Philippe. "Three Neo-Functional Hypotheses about International Integration", in *International Organization* (Vol. 23, No. 1, Winter 1969).

Schott, Jeffrey. *The Uruguay Round: An Assessment* (Washington, DC: Institute for International Economics, November 1994).

Staniland, Martin. "Open Skies -- Fewer Planes? Public Policy and Corporate Strategy in EU-US Aviation Relations." Center for West European Studies Policy Paper No. 3, University of Pittsburgh, August 1996.