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United we Stand, Divided we Fall - The European Community and its Member States in the WTO Forum: towards greater Cooperation on Issues of Shared Competence?

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Abstract

The paper is divided into two parts: Chapter 2 explores the problem of the EC in its external trade relations on issues of shared competence with its Member States in a general way, while chapter 3 examines more specifically the EC and mixed agreements from a legal perspective. Here we have analyzed the legal implications of mixed agreements for third parties. The paper concludes that mixity makes life more difficult for everybody involved in any given international trade negotiation and thus gives some recommendations to simplify the complex issue of mixed agreements/shared competence.

Keywords: *mixed agreements, single voice, duty of cooperation, international trade negotiations*

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1. Introduction

The intention of this paper is to study how the external trade relations of the European Community (EC) are managed. In the framework of the European Union (EU), there is Community competence, national competence and mixed competence. Through Article 133 of the EC Treaty, the EC has been given exclusive competence to create common commercial policy (CCP) in the field of the external trade relations. However, the treaty also limits this competence since it is not exclusive to the EC in such areas as services, investment and intellectual property rights, where Member States share competence with the EC. These cases involve so-called "shared competence" between the EC and its Member States.

I will then try to show that international trade negotiations would be simpler and more transparent for the EC and third parties if the EC were to speak with a so-called "single voice." The basic idea is to show that the EC can act with and is better off by having a single voice in its external trade relations in those areas where there is shared competence between the Member States and the EC.

Allan Rosas (1998) argues that only when the fifteen Member States "speak with one voice" can they aspire to be a powerful voice, and thus collaborate with the United States on equal terms. Further evidence of this is the fifth preambular paragraph of the Single European Act (1986), in which the (then 12) Member States declared that they were "aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice. . . ."[1] This all seems fairly self-evident, however, in the words of the Edinburgh European Council (December 1992), "the EU involves independent and sovereign States."[2]

2. The Problem of the European community in its External Trade Relations

In this chapter, I will analyze the view of the ECJ with regard to agreements where some of their provisions are under EC competence, while others remain under the competence of the Member States. Unfortunately, although the ECJ deals with the issue throughout its case law, it does not say how to solve the problem.

2.1 The "Duty Of Close Cooperation" In The External Relations Of The Communities

The ECJ, in its Opinion 1/94 upon the WTO,[3] emphasizes the duty of cooperation between the Member States and the Community institutions. The ECJ stated that "...it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation to co-operate flows from the requirement of unity in the international representation of the Community..."[4]

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1 Single European Act, OJ L 169/1 (1987).
2 Conclusion of the Presidency, Part B, Annex 1, OJ No C 348, 31 December 1992, p. 2.
3 Opinion 1/94, competence of the Community to conclude international agreements concerning services and intellectual property (15 November 1994), 1994 E.C.R. I-5267.
4 Opinion 1/94, para. 108.

Since the essence of mixed agreements[5] is that some of their provisions fall within the competence of the Community, while others fall within the competence of the Member States, it is hard to precisely divide powers between the Member States and the Communities within an agreement. The ECJ has discouraged attempts to allocate competence between the Member States and the Community, Ruling 1/78.[6] Instead, when considering issues dealing with mixed agreements, the Court has emphasized the need for common action, or close cooperation, between the Community and its Member States "in close association" with each other in the negotiation and implementation of mixed agreements (O´Keefe/Schermers 1983). The duty of cooperation, which follows from what the Court calls the "requirement of unity in the international representation of the Community,"[7] is one of the fundamental principles of the external relations of the Communities.

As for the origins of the duty of close cooperation, they may be tracked back to the Treaties themselves, particularly to the duty of loyal cooperation derived by the Court from Articles 86 ECSC, 192 Euratom and 10 EC.[8] A similar duty is contained in Article 3 TEU, where the Council and the Commission are responsible for ensuring the consistency of the external activities of the Union as a whole in the context of its external relations, security, economic and development policies. This duty applies as much to mixed agreements as to any other area of the Union's activity.

With regard to mixed agreements, the duty of close cooperation first emerged in Ruling 1/78. The Court had to adjudicate on the division of powers between Euratom and the Member States with regard to a draft Convention on the Physical Protection of Nuclear Materials.[9] The Court said that "the draft convention...can be implemented as regards the Community only by means of a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into".[10] Regarding the implementation of the convention, the Court said that the Community would implement measures falling within its competence, the Member States would implement measures falling within their competence, and the Council would arrange for coordination of the actions of each.[11]

In Opinion 2/91 (Re ILO Convention 170),[12] the Court had to face an agreement which covered matters falling within the exclusive competence of the Community, matters where both the Community and its Member States shared competence, and matters within the competence of the Member States in Opinion 2/91 (Re ILO Convention 170).[13]

The agreement under consideration in Opinion 2/91 was not a mixed agreement *stricto sensu*. The Community could not formally become a party to it.14 This limitation may stem from ILO provisions restricting membership and participation only to States. However, the agreement did involve matters within the competence of the Community and of the Member States.

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5 Let us remember that a mixed agreement is an agreement signed by one, more than one or all the 15 Member States of the EU and the European Community, on the European side, with a third party.

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

7 Ruling 1/78, paragraphs 34-36 as well as Opinion 2/91, 1993 E.C.R. I-1061, at para. 5.

8 For further discussion on the duty of loyal cooperation, see Kapteyn, P.J.G. and P. Verloren Van Themaat (1982), chapter III, 5.2.

9 Ruling 1/78, 1978 E.C.R. 2151.

10 *Id*., at para. 34.

11 *Id*., at para. 36.

12 1993 E.C.R. I-1061.

13 1993 E.C.R. I-1061.

14 Opinion 2/91, paragraph 1, 1993 E.C.R. I-1061.

The issue of cooperation between the Member States and the Community institutions was raised even more acutely in Opinion 1/94. The Commission raised the issue of potential problems regarding the administration of the various agreements that were part of the WTO package, if the Community and the Member States were to share competence to participate in the conclusion of the GATS and TRIPS agreements. According to the Commission, the Community's unity of action *vis-à-vis* the rest of the world would be undermined and its negotiating power greatly weakened if the Member States were allowed to express their own views in the WTO, or if the Community position had to always be adopted by consensus (Bourgeois 1995). According to the Commission, the Community should have sole responsibility for conclusion of the agreement.

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

> first, that any problems which may arise in implementation of the WTO Agreement and its annexes as regards the co-ordination necessary to ensure unity of action where the Community and the Member States participate jointly cannot modify the answer to the question of competence, that being a prior issue...
>
> (108) Next, where it is apparent that the subject matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation flows from the requirement of unity in the international representation of the Community...
>
> (109) The duty to co-operate is all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which are inextricably interlinked, and in view of the cross retaliation measures established by the Dispute Settlement Understanding.[15]

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

Let me, then, briefly comment on the principles of coordination and cooperation.

Community Coordination

When engaged in proceedings involving a mixed agreement, both Member States and the EC institutions are obliged to inform each other of their positions, to seek to reach a common view on matters that fall within the scope of a mixed agreement, and to proceed by common action within the framework of international bodies (O´Keeffe 1999). This involves meetings between the representatives of the Member States and the institutions (usually the Commission) to seek a common position. These meetings are called Community co-ordination and take place within the framework of the Council, either in Brussels or in an international forum in which the Community and the Member States are participants.[16] Community co-ordination in the negotiation of international agreements is well established in practice. There are informal understandings between the Commission and the Council. For example, there are co-ordination arrangements in international commodity agreements and in international organizations, particularly in the FAO and the UN.

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[15] One of the Agreements that make up the WTO package.

[16] When meetings between representatives of the EC institutions and its Member States take place within the framework of an international forum to seek a common position, they are known as *sur place* coordination.

Close Cooperation and Unity

Trying to reach an agreement on a common position will inevitably lead to difficulties and disagreements. For example, a Member State may wish to take a position different from that of the Community and the rest of Member States during the negotiation of an agreement. An agreement also may not be of equal relevance among all the Member States. Therefore, the question arises whether the duty of cooperation requires all the Member States to reach a common position or just to use their best effort to reach such a position. In the end, each Member State will have to defend its own interests. It is important to distinguish between failure to agree on a position on matters falling within the exclusive competence of the EC, and failure to agree on a common position on matters where the Community and Member States share competencies. With regard to matters exclusively within the Member State competence, the EC Treaties have in principle nothing to say (although the provisions of Titles V and VI TEU may be relevant), (Pescatore 1999).

In those cases where a common position between the Community and the Member States is not possible, Member States will be able to express their own national views on matters within national competence and exercise their national powers. Support for this proposition may be derived from the practice of the EC Council. In addition, there could be cases in which a Member State might claim that its participation in an agreement was contrary to its national interests or for some other reason undesirable or even impossible.

3. The European Union and Mixed Agreements

In this first section of this chapter, we shall firstly explain what is meant by a mixed agreement (chapter 3.1). We shall then look into the effects of the EC's international agreements *vis-à-vis* third parties (chapter 3.2).

We shall also see that within the EC treaty-making, there is a tendency to sign mixed agreements rather than agreements of exclusive EC competence in areas dealing with the external relations of the EC. This shows their importance for the EC and for its position in the world (Ehlermann 1983, p.3). Although the EC increasingly wants to become an international actor and somehow assert its international personality and identity, it also has to accept that Member States and third parties have legitimate interests.[17] EC Treaty practice has become increasingly dominated by mixed agreements (McGoldrick 1997, chap. 5) for they reflect the legal and political reality that the EC is not a single State for the purposes of international law.[18] We shall see how the EC´s membership and participation in international organizations[19] is highly variable for an organization which pretends to act as a single actor.

3.1 Definition of Mixed Agreements

McGoldrick (1997), note 24, chap. 2 and 10, holds that:

> "an agreement can be regarded as mixed if the European Community and one or more of the Member States

[17] The relationship between the EC and third States is a unique experience in international law and international relations.

[18] This is also the case for the EU, "it is difficult to see anything short of a major war provoking a transition to a statehood", cf. Hill (1993), p.325.

[19] For the participation of the EC in International Organizations, see Frid, R. (1995).

> are parties to it…An agreement can also be regarded as mixed if the European Community and the Member States share competence in relation to it, even if only Member States can be parties. Finally, an agreement can be in a mixed form because of requirements relating to its financing or relating to its provisions on voting."

His explanation continues by saying that "if competence in the subject matter of a Treaty lies partly with the EC and partly with the Member States, then the agreement is described as a mixed one." Furthermore, he gives a more precise description of mixed agreements by saying that "the expression *mixed agreement* more accurately describes agreements where the EC and the Member States genuinely share competence." (ibid, p. 79)

3.2 Implications of Mixed Agreements for Third Parties

In this subtitle we shall evaluate the validity and the effects that the EC's international agreements have on non-EU Member States. Mixed agreements are, together with the exclusive Community agreements, one of the two methods by which the Community undertakes contractual international obligations (Ehlermann 1983, pp. 3-21). The answer to specific legal problems arising from the issue of mixity may vary depending on the subject-matter, in other words, the jurisdiction of the Court of Justice in the field of mixed agreements and the responsibility and liability of the EC and its Member States *vis-a-vis* third States, *inter alia* (Rosas 1998, p. 207). This, then, leads me to the next section.

Liabilities of the EC and the Member States to Third Parties

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

> The Lome Convention was concluded as a mixed agreement (i.e. by the Community and its Member States jointly) and has essentially a bilateral character. This is made clear in Article 1 which states that the Convention is concluded between the Community and its Member States of the one part, and the ACP States of the other part. *Under a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion.*(Emphasis added).[20]

Generally each party to an international agreement is responsible for performance of its own obligations, and joint liability under an agreement is not usually to be presumed. However, the special circumstances of the EC and the Member States may lead to an exception to this rule. The EC and the Member States generally work together in pursuit of a common policy. Since it is very difficult to determine where legal powers lie between the EC and the Member States, for the third party the most convenient conclusion is that the EC and the Member States assume joint obligations and that they are required to assure these joint obligations. The ECJ, with its emphasis on the "requirement of unity" in the external representation of the Community, concurs. The ECJ also emphasises this view in cases such as Ruling 1/78 (Re Draft Convention on the Physical Protection of Nuclear Materials)[21] and Case 104/81 *Hauptzollamt Mainz* v. *Kupferberg*.[22]

In agreements where the rights and obligations of the EC and the Member States are interlinked, the problem of the respective liabilities of the Community and the Member States will

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[20] 1994 E.C.R. I-625, at para. 69.
[21] 1978 E.C.R. 2151, at para. 35.
[22] 1982 E.C.R. 3641, at paras. 13 and 14.

arise quite clearly. In other words, we are dealing here with cases where the nature of the agreement is such that a third party is entitled to respond to Community or Member State action in one area covered by the agreement by retaliation of another area. The main example is the WTO Agreement and those agreements associated with it, but in principle the issue could arise in any international agreement to which the Community and the Member States were parties.

When an agreement is covered by a general rule of the law of treaties, by which a party is responsible for all obligations of the treaty unless it makes a reservation, we are dealing with an agreement which is not mixed under a formal or under a substantive definition of mixed agreements. In extreme cases, as Schermers mentions, the position might be defended that, in such a case, adherence by the Community implies a tacit reservation in the sense that the EC cannot be held liable for matters which are outside its competence (Schermers 1983, p. 28). In these cases, Article 46 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO)[23] will apply.

4. Conclusion

Three types of competence are covered by an international agreement: 1) competence exclusively with the Community; 2) competence shared between the Community and the Member States; 3) competence exclusively with the Member States (MacLeod/Hendry/Hyett 1996, p. 142). In the case where the Community is the only one competent for matters covered by an international agreement, then the Community *alone* should become party to that agreement. However, there are some cases where even if the substance of the agreement is of exclusive Community competence, the participation of Member States may also be necessary (ibid). In such cases it is important to distinguish between the theoretical situation and how it is in practice. Theoretically speaking, in these cases Member States do not participate in the table of negotiations alongside the EC.[24] Nevertheless, in practical terms the agreement itself may require the participation of Member States in the agreement so that the Community can exercise its competencies and participate effectively (ibid, note 39).

In the case where Member States and the Community share competence, there are several ways to carry out this task. Some of the obligations in the agreement may have to do with matters for which the Community is exclusively competent. Others have to do with issues for which the Member States are exclusively competent (ibid). Sometimes it is so that by virtue of the provisions of the Treaties the agreement is related to an area in which the Member States and the Community share competence to act. On other occasions the agreement may deal with issues where the powers of the Member States and the Community run in parallel so that each has an independent and separate interest in participating in the agreement. As we see in MacLeod I., Hendry I. and Hyett S. (1996, note 39, p. 143),

> "where competence for the subject matter of an agreement is shared between the Community and the Member States, the full implementation of the obligations in the agreement will usually require the participation in the agreement of the Communities and the Member States together, each in respect of their powers and interests."

With regard to treaties, and notably bilateral agreements, one could try to devise the negotiation directives to be adopted by the Council,[25] and to conduct the actual negotiations in order to

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[23] The 1986 Vienna Convention has not yet entered into force but it follows almost to the letter the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[24] This is so because Member States have transferred their competencies to the Communities.

[25] Article 300 (1) EC.

avoid areas of national competence. Member States are often unwilling to authorize the Community alone to conclude bilateral agreements containing concurrent competencies (Rosas 2000, p. 217). An example would be the existence of substantive provisions relating to intellectual property rights (as well as in services and direct investment). Such provisions in a bilateral agreement would almost inevitably lead to mixity, as some Member States seem to interpret Opinion 1/94 as establishing exclusive national competence in this field. On the potential competence of the Community to conclude international agreements in the field of intellectual property rights, it is pertinent to see Case C-53/96 *Hermes International*.[26] The Commission may try to avoid provisions on questions such as intellectual property rights, services, investment or monetary policy in order to avoid assertions of mixity.

It remains to be seen to what extent the Council will agree to the Community becoming a party to such agreements and conventions, without insisting on Member States' participation. In most cases, this will probably not be the case and mixity will continue to exist (Rosas 2000, p. 219). The fact that the last Intergovernmental Conference in Nice in December of 2000 did not want to broaden Article 133 EC so as to cover all questions of services, intellectual property rights and investment, is a clear sign of the unwillingness of Member States to give up mixity even in areas of commercial policy. Another example is that of a trade and cooperation agreement negotiated with South Africa that Member States refused to accept in the spring of 1999 as a pure Community agreement, even if it was obvious that there was no legal need to conclude the agreement as a mixed agreement. The agreement was signed on October 11, 1999.[27] While the Commission preferred a Community agreement, the great majority of Member States wanted the agreement to become mixed.

5. Recommendations

1. From Unanimity to Qualified Majority Voting in the EC Council on Trade Matters

WTO issues are often subject to political consideration and political will in order to achieve a common position by the EC and its Member States on *all* trade matters. Before the Treaty of Nice in December 2000, EU Member States had veto power on issues of mixed competence (such as trade in services, intellectual property rights, investment and monetary policy), which made the answer to my research question virtually impossible. After the Nice Intergovernmental Conference in December 2000, the EC has moved to a system of qualified majority voting, leaving behind the old system of unanimity in the EC Council and therefore getting closer to the desired EC unitary representation in all WTO matters. At the Nice Intergovernmental Conference it was decided that trade agreements relating to services or commercial aspects of intellectual property can, in principle, be concluded by the EC Council acting by qualified majority. Although there are exceptions to this principle, it has decided to put an end to most mixed agreements and to open decision-making to qualified majority voting (European Commission 2000). The old system of unanimity made negotiations more complex and sometimes less effective (European Commission 1999, p. 20).

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[26] [1998] ECR I-3603.

[27] The proposal from the Commission to the Council to conclude an agreement on trade, development and cooperation between the Community and South Africa is contained in document COM (1999) 245 final of May 11, 1999.

2. The EC's negotiating Opponent

From the point of view of the negotiating opponent, the EC is a much stronger adversary if EU Member States retain tight control over the negotiating process by sharing competence with the EC than if the EC acts with exclusive competence and the European Commission acts with a centralized power. To give an example, the U.S. would be able to successfully negotiate bilateral agreements with most EU Member States if the EU Member States did not integrate their trade policy and trade negotiating authority. This happened in the case of "open skies" agreements, since air traffic regulation is not exclusive EC competence (Meunier 1998a, p. 29). The same argument can be made from the European point of view: "contrary to the popular conventional wisdom about internal unity as external strength, in certain circumstances being "divided but united" could give the EC an edge in international bargaining." (Meunier, 2002).

Another recent example comes from the September 11th terrorist events on U.S. territory, where the EC rejected financial aid to European airlines. European airlines understand that the financial aid provided by the U.S. Government to U.S. airlines disadvantages European airlines. The European Commission believes that there has been unfair competition from subsidized airlines elsewhere. Furthermore, the Commission argues that since the sector does not come under the jurisdiction of the WTO, EC carriers have been left at a disadvantage compared with airlines that have received state aid to cut prices (Dombey 2002, p. 5). In order to solve this problem, EU Member States decided to negotiate individually various agreements with the U.S. Government in order to receive the same aid provided to U.S. airlines. Even if the Commission offered to negotiate on behalf of the EC with the U.S. Government to obtain better conditions for European airlines, the 15 Member States would prefer to negotiate individually with the U.S. Government.[28] From a third party point of view, it is not in their interest that the EC have a single voice or representation since, as argued earlier, it empowers the EC with greater bargaining and negotiating power. In the "open skies" issues, *"Brussels does not regard [these] current bilateral […] deals with the US as valid. Instead, it sees the measure as a means of pressing for a global EU-US aviation deal."* (Dombey 2002, p. 5).

3. From Traditional to New Trade Sectors

"When the EEC Treaty was signed, the Community's economy and external trade were geared mainly to production and trade in industrial products. This no longer applies, because the services sector is now the main source of jobs within the EC and accounts for a substantial proportion of its international trade. This change is due partly to very stiff competition from newly industrialized countries in traditional sectors and partly to the economic changes brought about by the new information and communication technologies.

Following the Uruguay Round negotiations under the GATT, the setting-up of the WTO clearly reflected this trend. In order to cope with the changing nature of trade, the WTO embraces within the same structure trade negotiations on products (GATT), services (GATS) and intellectual property (TRIPS).

In the face of the new pattern of international trade, the EC must be able to develop its trade mechanisms rapidly if it wishes to maintain its leading role in world trade relations. The scope of Article 113 (renumbered Article 133) is still rather vague and until it takes account of the global-

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[28] La UE rechaza ampliar las ayudas a las aéras e insta a los Quince a negociar con EE UU. Las compañías europeas pedían que la UE pagase los sobrecostes de los seguros durante seis meses. www.elpais.es/articlo.html?d_date=20011016&xref=2001016elpepueco_2&type=

isation of trade negotiations, the EC will continue to create difficulties for itself vis-à-vis its trading partners."[29]

4. Democratizing and Simplifying the EC

Democratizing and simplifying Europe is an aim of the European integration project. The Commission's Opinion on the 1996 Intergovernmental Conference (IGC) (European Commission, 1996) clearly states this point by arguing that we should make

> "the Union more open and democratic – push forward the subsidiarity principle; -closer involvement of national parliaments in Union business by giving them timely access to all the information they need; - simplification and consolidation of the Treaties as far as possible." (ibid, para. 3.1).

However, as Meunier and Nicolaïdis point out,

> "if member states feel that they have lost control of the Commission during the negotiations, there will be a higher likelihood of difficulties at the ratification stage." (Meunier/Nicolaïdis 2000).

5. Federalism v. Intergovernmentalism in EC's trade policy

Even the Commission's Opinion presented on the Intergovernmental Conference of 1996 clearly advocates a more effective Community external action:

> "clarification of Community powers to reflect the increasingly important role played by services, intellectual property and direct foreign investment in the world economy; introduction of explicit provisions to ensure that the Union can speak with one voice in international organizations and thus defend all the relevant interests more effectively." (European Commission 1996).

Following the two-level games theory developed by Robert Putnam (1988), there is reciprocal influence between the intra-EC level and the international level. The two-level approach recognizes the inevitability of intra-EC conflict about what the "EC interest" requires. For central decision-makers the two-level approach tries to reconcile intra-EC and international imperatives simultaneously. This brings me to show some of the features of the links between diplomacy inside and outside the EC borders. For example, sometimes intra-EC leverage may actually foster or promote EC international co-operation. Sometimes strategic moves at an intra-EC table might facilitate unexpected coalitions at the international table. At other times, institutional arrangements which strengthen decision-makers at an intra-EC level might weaken their international bargaining position and *vice versa*. Often the link between diplomacy inside and outside the EC borders is seen by divergences of interest between an EC leader and those on whose behalf he/she is negotiating, and in particular, the international implications of his/her fixed investments in EC politics.

The EC faces problems similar to those of federal states. In Germany, to take an example of a prominent European federation, the *Laender* strongly protested against the silent transfer of their powers to the Community. It might simply be unrealistic to strive for a unitary character of EC external trade relations. Mixity may function as an invitation to pursue parochial national interests. However, equally important, the unitary tendency is controversial in normative terms. In this sense, Professor Weiler indeed has underlined that the EC *"may not speak with one voice but increasingly speaks like a choir."* (Weiler 1992).

The legal recognition by the ECJ in its Opinion 1/94[30] of mixed competencies departs from the founding principle that the EC has a single voice in international trade negotiations and

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[29] *The Amsterdam Treaty: A Comprehensive Guide. An effective and coherent external policy*, http://europa.eu.int/scadplus/leg/en/lvb/a20000.htm

from previous case law on external relations. The Court's encouragement of a return to intergovernmentalism in the field of external trade is clearly setting the stage for future disputes over competencies and may affect the future character of the EC as an international trade actor (Meunier 1998b). Proof of this are the words of Rod Eddington, chief executive of British Airways, who believes that, with regard to bilateral air services agreements with foreign governments, *"Brussels should aim to replace national ownership rules in present agreements with a European ownership regulation to open the way for the consolidation of the European airline industry."* (Done 2002, p. 5). In addition, he warned that "a continued fragmentation would cause the European industry to lag behind the U.S." (ibid). More clearly, he expresses that the EC "cannot compete globally with North American carriers if we [the EC] have 14 to 15 network carriers in Europe." (ibid). In this same line of thought is an argument by Louis Uchitelle, who claims that Mercosur's Member States, and particularly Brazil and Argentina, would benefit from a strong common position in Mercosur, which has given the two countries a more powerful voice when negotiating with the U.S. and Europe (Uchitelle 2002, p. C1).

As Keith Richardson[31] argues, "the need to negotiate as one, to speak with one voice in all international economic negotiations, is about competitiveness, jobs and economic survival and it is being trivialized by national administrations which treat it as a petty bureaucratic turf battle" (Richardson 1997). He argues that our living standards (in the EC) are increasingly determined by global flows (ibid),

> "not only trade in goods but also services, intellectual property and investment. Europe is the world's largest trading unit, and European industry is strong enough to hold its own. But these flows take place within a framework of globally agreed rules, and except in the specific case of trade in goods European negotiators cannot hold their own because they negotiate not as one but as 15."

Richardson supports his thesis about the importance of a single voice in the EC by comparing the EC's and the United States' power in negotiating multilateral trade agreements. He speculates, "but where would some of our dynamic American friends stand in world markets if their interests were represented by 50 separate state-level negotiating teams?" (ibid) This question shows the important role that the United States plays in multilateral trade negotiations by negotiating on behalf of all fifty states with one voice. The comparison is not perfect since the fifty American states are not sovereign States (they have no international legal personality) and, therefore, cannot sign any international treaties. However, in the case of the EC its Member States are sovereign states and can therefore sign international agreements. The idea behind this transatlantic parallelism is that, although the EC is composed of 15 sovereign Member States, it is in their national interest to give up their national sovereignty to the European level in order to have a stronger negotiating position. This would only be legally possible by amending the Treaties.

6. Reflecting on the Future

International trade relations are changing rapidly, and it is of vital importance for the EC to shape the governing rules and institutions of international trade according to its own fundamental aims. In the past, the EC had a defensive attitude when dealing with international trade issues in the multilateral trade system. This is no longer possible. The EC needs an innovative trade policy, the institutional capacity to act on a long-term basis, a permanent Council of Trade Ministers and an

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

[31] Keith Richardson is Secretary General of the European Round Table of Industrialists.

institutionalized "fast track authority".[32] This would make EC policy-making far more efficient. There is also a tendency among certain scholars to believe in the importance of giving trade matters at the highest political level of policy-making to the EU Ministers of Trade instead of being competence of the General Affairs Council, which is *a priori* more interested in Foreign Policy issues and usually not so interested in trade matters. (ibid)

Although shared competence will be used for the near future between the EC Institutions and Member States when dealing with the EC external trade relations, it still creates a great deal of uncertainty at the international negotiation table. The EC must be sure that the present realities of the global economy mesh with the institutional design in Europe. However, and unfortunately, there has been little political will to reform the present system. There is still a lack of transparency and democratic accountability within the EC Institutions. While the political unwillingness to strengthen the role of the Commission is understandable because of its inefficiency, the importance of the ability of EC diplomacy to function in an effective manner regardless of the political situation should not be underestimated.

With the decline of U.S. hegemony, the EC can no longer have a defensive trade policy in international trade diplomacy, especially in an era of globalization. The EC must accept global responsibilities, as it is an important international economic actor and has a duty to assure a stable international trading system.

Closer cooperation is characterized by legal difficulties on one hand and political opportunities on the other. After the unsatisfactory reform of Article 133 EC through the Amsterdam Treaty, the representation of the EC in multilateral negotiations on services and intellectual property (GATS and TRIPS, the second and third WTO pillars) is another issue where some Member States seem willing to move towards closer cooperation (Ceubner 1999, pp. 11-19). While the legal justification of differentiation in this area is doubtful, the centripetal effect of such an arrangement seems quite certain (Kölliker/Milner 2000, p. 27).

It is vital for the EC to reach a common position for effective policy-making. Are EU Member States prepared to lose part of their sovereignty in order to have "more common" European policies? Undoubtedly, when the EC negotiates as one in multilateral trade negotiations, as in the Uruguay Round negotiations, between more than 100 trading nations, it can negotiate a better deal for its companies and rapidly open up markets overseas. However, the supranational trade policy powers of the Commission have made Member States envious. The Amsterdam Treaty has made it possible for the Commission to have a larger role in negotiations in international agreements, as long as there is agreement by the EC Council, but the system seems to be undemocratic. Non Governmental Organizations (NGOs) complain about the undemocratic accountability within the EC policy-making. The trend in the EC seems to be harmonization. But only in the long run.

Trade agreements concerning different fields very often have to be concluded unanimously. The Treaty of Amsterdam introduced a method which could provide a partial solution to the problems resulting from legal complexity raised by mixed agreements. Under Article 133 (5) EC, the Council can deal with all matters relating to services and/or intellectual property as an integral part of commercial policy. However, this link would require a unanimous decision. From a more practical view point, a consequence of mixed agreements is that the Community's dealing with third countries has to be conducted on a unanimity basis. Statistically, EC enlargement will increase the risk of a Member State using its veto to prevent the Community from adopting a

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[32] I have personally gathered this information at a round table held at the Royal Institute of International Affairs in February 1998 during the discussion of a paper written by Johnson, M. *113. European Cooperation in Action*, 1998.

common position. This collective weakness may work to the advantage of the Community's trading partners (European Commission, 2000).

Mixity often makes life more difficult for everybody involved. It is, therefore, desirable that the EC be able to tackle the following issues in the near future:

1. The extension of the application of Article 133 EC on common commercial policy, by Council decisions, to all international agreements on intellectual property rights and services. By so doing, the EC will be able to apply its common commercial policy to areas which have become crucial elements of international trade. When GATT was created in 1947, goods were the predominant feature of world trade, not services or intellectual property rights. Today's world economy has a different structure and services play a more relevant role than goods in international trade.
2. Respect for the duty of cooperation in areas of shared competence between the EC and its Member States. As long as Member States insist on obligatory mixity, they must also accept the duty to accede themselves to the mixed agreement in question without undue delay.
3. The possibility of having pure Community rather than mixed agreements in areas of concurrent competencies (ibid). For practical reasons, it may be favourable to have Community agreements even in areas where Member States participation is legally permissible. Often, Member States participation in such agreements may matter very little from a strictly legal view point, as the agreement may be fully applicable as a Community agreement, legally binding not only the EC institutions but also the Member States.[33]

[33] According to Article 300 (7) EC, Community agreements "shall be binding on the institutions of the Community and on Member States."

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