Is EC Trade Policy Up to Par?: A Legal Analysis Over Time - Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty

By

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Abstract

This article is an attempt to a thorough chronological analysis of the European Community’s (EC) existing law and policy in the field of international trade law since the beginning of the European Economic Community. It deals with the evolution of the EC’s common commercial policy competence through the years, starting with the European Coal and Steel Community (ECSC), moving on to the necessary changes brought by the World Trade Organization (WTO) Agreement, signed in Marrakesh in 1994, until the days of the European Union (EU) Constitutional Treaty, with a view to enabling the EC with a coherent trade policy in the WTO framework. Thus, a legal analysis of EC trade policy in the pre-

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Amsterdam Treaty period, at the Treaty of Amsterdam, at the Treaty of Nice, and during the European Convention period, is provided, taking into account the most recent constitutional developments of division of competences between the EC and its Member States.

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I. Introduction

The EC has become an important actor on the international scene, and since the 1970s, its external relations have been growing both in number of agreements signed and in domains of participation.¹ The European Communities have participated in an important number of multilateral conventions within the framework of the international or regional organizations, and are increasingly present in world affairs. In the context of multilateral relations, they have a growing role.² The EC’s progression was not steady but was achieved in small steps, as we will see in the analysis of this article.

This article begins with a legal clarification of Article 133 EC. Then, it continues with an analysis of the emergence of the European Economic Community (EEC) (1958-1967). Next is a discussion of the transfer of competence during the period of the merger of the three European Communities and the end of the transitional period after the formation of the

EEC (1967-1977), as well as other legal bases used by the EC for international trade agreements. Opinion 1/94 of the European Court of Justice and its consequences for EC trade policy is explored. An analysis of the Amsterdam and Nice negotiations, the changes made to Article 133 EC by the Nice Treaty, and the confusion brought by those changes follows. Finally, I will conclude with an analysis of the EU Constitutional Treaty’s work on EU trade policy to see whether it could partly be the optimal solution to the trade-off of efficiency versus accountability in trade policy decision-making.

II. What Is Article 133 EC?

Article 133 EC (formerly Article 113 of the Treaty of Rome) is the legal basis for the common commercial policy. It allows the EC “to negotiate, conclude and implement trade

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3 The Treaty of Nice entered into force on February 1, 2003. It was accepted and ratified by all the Member States between June 7, 2001 and July 2, 2002, most of the time through Parliament. Only Ireland ratified it by referendum: after rejection of the Treaty by 53.87% of the voters in a first referendum on June 7, 2001, it finally passed on the following October 19, with 62.89% of the votes.

4 At present, the EU is founded on four basic treaties that lay down the rules by which it has to operate. These treaties are big and complex, and EU leaders intend to replace them with a single, shorter, simpler document spelling out the EU’s purposes and aims and stating clearly who does what. This new document (technically known as the Constitutional Treaty) will be rather similar to the constitution of a country - even though the EU is not, and does not aim to be, a single country. The text of this new EU Constitution was agreed in June 2004 and signed by all the Member State governments in October 2004 in Rome. It was due to come into force in 2006, but first it must be ratified by all the national parliaments and, in some countries, be approved by referendum.

5 Article 133 EC reads:

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may
agreements with other countries of the world.” EC trade activity includes trade in goods, but only parts of trade in services, trade in the commercial aspects of intellectual property and investment, which are shared with the Member States. Since the Treaty of Amsterdam, the EC is competent to negotiate and conclude international agreements on services and intellectual property rights but only if the EU Council so decides by unanimity, as we see in Article 133(5) of the Amsterdam Treaty (now Article 133 (7) of the Nice Treaty).

As defined by Article 133 EC, “the scope of the common commercial policy […] has been interpreted very broadly by the Court of Justice. However, it does not cover international negotiations and agreements relating to services and intellectual property, two issue to it. The Commission shall report regularly to the special committee on the progress of negotiations. The relevant provisions of Article 300 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.

7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property in so far as they are not covered by paragraph 5.

6 http://europa.eu.int/comm/trade/faqs/133.htm

7 Cremona, M. “EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders,” in Weiler, J. (ed.) The EU, the WTO, and the NAFTA. Towards a Common Law
areas being discussed within the WTO.”8 In relation to the scope of Article 113 (1-4) of the Treaty of Rome on the common commercial policy, it was a non-exhaustive enumeration of subjects covered.9 Paragraph 3 gives explicit and exclusive competence to the EC to negotiate and enter international trade agreements with States or international organizations. Years later, the Amsterdam Treaty inserted Article 133 (5) EC, which does not change the scope of Article 133. It nevertheless authorizes the Council, acting unanimously, to extend application of paragraphs 1-4 to international negotiations on services and commercial aspects of intellectual property. All these issues will be analyzed later in this article.

III. Pre-WTO Period

A. 1952-1958: The ECSC As A Pioneer

The powers attributed to the European Coal and Steel Community (ECSC), specifically to its High Authority in the field of external relations, were limited to the economic areas covered by the Treaty of Paris, as well as being limited in nature. Articles 71-75 of the ECSC Treaty10 merely grant the institutions recourse to specific interventions to avoid undesirable situations. Still, the founders of the ECSC paid close attention to its relations with the rest of the world, the Western world in particular. Jean Monnet, the first president of the ECSC High Authority, never considered the refusal of the UK to join the ECSC as a final “no” to the

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10 The ECSC was created by the Treaty of Paris, 1952.
concept of European integration. On the contrary, he set out to establish a close working relationship with the UK Government and rejected any kind of distinction between members and non-members, who were called “third countries.”

During this period, there were difficult questions as to the right of the High Authority to receive foreign envoys. Days after the High Authority started its work, UK and U.S. diplomatic missions were accredited to the ECSC, and these were later followed by Austrian, Swiss, Swedish and Danish missions, among others. However, by the autumn of 1952, a problem arose. The UK was tabling the so-called “Edenplan”, by which the Council of Ministers and the Common Assembly of the ECSC would function as a kind of inner circle of the Committee of Ministers and the Consultative Assembly of the Council of Europe. They had to decide which institution would be entitled to deal with the UK and with the Council of Europe. Since the Treaty did not address this issue, the ECSC turned to three prominent international lawyers, Maître Reuter, Professor Ophüls and Professor Rossi, who concluded that the High Authority would conduct the negotiations on these matters when they affected the institutional organization of the ECSC.

The invitation from the U.S. to the High Authority to visit Washington in the summer of 1953 also contributed to the establishment of the ECSC’s international position. The then-President of the High Authority and two of his advisers accepted the invitation, meeting with President Eisenhower and members of his cabinet, as well as with influential members of Congress. The U.S. was already supporting European efforts towards integrated policies, of

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12 Stelios Castanos, Principes et Problèmes de Relations Internationales Européennes (1965).
which the ECSC was a shining example. During this period, the High Authority also negotiated the Association Agreement of 1954 with the UK, and other important arrangements with Austria, Switzerland and Sweden on various issues relating to coal and steel markets.

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

B. 1958-1967: The Three Communities Working In Parallel

B.1.- Euratom In The External Policies Of The Communities

The second of the Treaties of Rome of 1957, which established the European Atomic Energy Community (Euratom), played a vital role in the development of the Communities’ external relations. Of the three treaties setting up the European Communities, including the EEC Treaty, the Euratom Treaty contains the most comprehensive provisions for foreign relations. The Euratom Treaty reads: “The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organization or a national of a third State.”

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15 Agreement on the introduction of through international railway tariffs for the carriage of coal and steel through Swiss territory, 1957 O.J. (L 17) 223-229.
16 Let us remember the three Communities (now only two of them remain since 2002): European Coal and Steel Community (ECSC), European Atomic Energy Community (Euratom), and European Economic Community (EEC), which then became simply European Community (EC).
17 TEC, as amended by the TEU.
18 See Chapter X on External Relations, Article 101, para. 1 of the Euratom Treaty.
Today, it is the Commission that negotiates and concludes such agreements, following the directives given by the Council, except those which can be implemented without the Council in the framework of the existing budget. Under the EC Treaty, however, the Council concludes such agreements. Additional provisions address mixed agreements and limitations on the treaty-making power of the Member States.

In the early years of Euratom, a number of important agreements concerning the supply of enriched uranium and cooperation in the development of peaceful use of atomic energy were signed with the U.S. and with Canada. Security played an important role in the implementation of these agreements. The preservation of the control system at the Community level necessitated successful negotiations during the late 1960s and early 1970s with the International Atomic Energy Agency (IAEA) in Vienna and Brussels, which resulted in the Agreement between Belgium, Denmark, the Federal Republic of Germany, Ireland, the Italian Republic, Luxembourg, the Netherlands, the European Community for Atomic Energy and the IAEA in application of paragraphs 1 and 4 of Article III of the Treaty on Non-Proliferation of Nuclear Weapons.

The implementation of the Treaty on the Non-Proliferation of Nuclear Weapons required control arrangements that came into existence in the so-called “Verification Agreement” between Euratom, some of its Member States and the IAEA. It was a mixed agreement based

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20 The International Atomic Energy Agency (IAEA) was established as an autonomous organization on July 29, 1957. It seeks to promote the peaceful use of nuclear energy and to inhibit its use for military purposes. U.S. President Eisenhower envisioned, in his “Atoms for Peace” speech before the UN General Assembly in 1953, the creation of this international body to control and develop the use of atomic energy. The IAEA has its headquarters in Vienna. Two "Regional Safeguards Offices" are located in Toronto and Tokyo. The IAEA has two liaison offices, located in New York and Geneva. In addition, it has laboratories in Seibersdorf, Vienna, Monaco, and Trieste.
on Article 102 of the Treaty establishing the European Atomic Energy Community. The provisions of the Euratom Treaty, as well as the main agreements concluded in the late 1950s on that basis, still had importance in the late 1970s for the external policy of the Community.

B.2.- The Emergence Of The EEC As A Major Negotiating Partner In World Affairs

In the European Coal and Steel Community Treaty (ECSC Treaty), the idea of a common market is based on “harmonized” tariffs, where the tariffs of Member States may not differ more than the cost of transport between their territories. However, the EEC, as a customs union, had a full-fledged common tariff and common commercial policy, as well as provisions concerning negotiations of the common tariff and common commercial policy with third countries. After the transitional period, decisions on these matters are taken by the Council and proposed by the Commission by qualified majority, though in the beginning the decisions had to be unanimous.

What characterizes the EEC Treaty is its wide coverage of both the range of products and various policies, and the institutions can create new policies. Even before the merger of the

21 Agreement between Belgium, Denmark, Germany, Ireland, Italy, Luxembourg, the Netherlands, the European Atomic Energy Community and the International Atomic Energy Agency in implementation of Articles III (1) and (4) of the Treaty on the non-proliferation of nuclear weapons, 1978 O.J. (L 51) 1.
23 Id.
24 On July 1, 1968 a customs union was set in place. From that day, goods can move within the European Community without being taxed and are no longer subject to customs duties. A common customs tariff toward third countries was therefore established by the then EC’s six Member States.
25 Article 131 EC, as amended by the TEU.
26 Id., at Arts. 131 & 133.
Councils and Commissions of the three Communities in 1965, the world viewed the EEC as a general integrative undertaking, able to use political weight to solve problems. Euratom alone would not have had the strength to convey the same political message. However, the EEC, with Euratom as a component, had a considerable impact on world affairs. During this period, third countries gained interest in joining the EEC. Greece was the first to ask for an association agreement in 1961, with an intention of membership. Next came Turkey in 1963, and then Israel.

There were also those who tried to neutralize what they saw as the potential negative effects of these new Communities on their own position. The UK and other non-EEC European States worked together for the creation of a free trade area within the framework

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27 The merger of the European Communities' executive bodies took place on April 8, 1965. Since then, there has been only one Council and a single Commission. The entry into force of the Merger Treaty was on July 1, 1967 and Jean Rey became the first President of the “merged” Commission.

28 THE EUROPEAN COMMUNITY AND GATT (Meinhard Hilf et al. eds., 1986).


30 Agreement establishing an association between the European Economic Community and Greece, 1963 O.J. (L 26) 294.

31 Agreement establishing an Association between the European Economic Community and Turkey, 1964 O.J. (L 217) 3685, 3705.

32 This means a group of countries that have removed barriers to trade among them – barriers such as import tariffs and quotas. Several free trade areas have been established around the world: Mercosur in South America, NAFTA in North America, CAFTA in Central America, ASEAN in South-East Asia, and EFTA in Europe, for example. The European Union is also a free trade area, but it is much more than that because it is built on a process of economic and political integration, with joint decision-taking in many policy areas.

Not everyone agrees with the creation of free trade areas. In North America, for instance, the North American Free Trade Agreement (NAFTA) was a radical experiment in rapid deregulation of trade and investment among the U.S, Mexico, and Canada. Since 1995, NAFTA is considered the symbol of the failed corporate globalization model because its results for most people in all three countries have been negative: real wages are lower and millions of jobs have been lost; farm income is down and farm bankruptcies are up; environmental and health conditions along the U.S.-Mexico boarder have declined; and a series of environmental and other public interest standards have been attacked under NAFTA. NAFTA’s agricultural provisions have been so extreme that Mexican family farmers are demanding a re-negotiation or nullification of the treaty, after its first phase of initial implementation led to displacement of millions of Mexican farmers. NAFTA represents the gold standard of corporate rights in trade and investment agreements because it includes hitherto unheard of corporate privileges, including investor-to-state dispute resolutions, which is the right to sue governments for cash compensation in closed trade tribunals over regulatory costs. This right, contained in NAFTA’s chapter 11 on investment, has been used by numerous multinational corporations to seek financial compensation for public health and safety, or environmental regulations that corporations argue amount to expropriation of their current or future lost profits. NAFTA chapter 11 corporate suits have resulted in the lifting of a Canadian ban on a toxic chemical as well as an attack on a similar California state toxic chemical ban, and the payout of U.S. $16 million by waste dump to be built on ecologically protected land.
of the Organization for European Economic Co-operation (OEEC). This failed, and a smaller free trade area (European Free Trade Association [EFTA]) came into existence. There were also those countries that supported the process of Community construction from without. For example, the U.S. considered the process a major contribution to the stability and prosperity of the world. Finally, there were those like the former U.S.S.R. that condemned this revival of European dynamism as detrimental to the peaceful coexistence of sovereign nations.

There are several Articles in the EEC Treaty that promote greater common action. For example, ex-Article 116 EEC reads:

> From the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organizations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a

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33 The OEEC is the forerunner of the OECD. The Organization for Economic Co-operation and Development (OECD) is an international organization of those developed countries that accept the principles of representative democracy and a free market economy. It originated in 1948 as the Organization for European Economic Co-operation (OEEC), led by Frenchman Robert Marjolin, to help administer the Marshall Plan for the reconstruction of Europe after World War II. Later its membership was extended to non-European states, and in 1960 it was reformed into the Organization for Economic Co-operation and Development. The organization provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice, and co-ordinate domestic and international policies. It is a forum where peer pressure can act as a powerful incentive to improve policy and implement "soft law" — non-binding instruments that can occasionally lead to binding treaties. Exchanges between OECD governments flow from information and analysis provided by a secretariat in Paris. The secretariat collects data, monitors trends, and analyses and forecasts economic developments. It also researches social changes or evolving patterns in trade, environment, agriculture, technology, taxation, and other areas. Over the past decade, the OECD has tackled a range of economic, social and environmental issues while further deepening its engagement with business, trade unions and other representatives of civil society. Negotiations at the OECD on taxation and transfer pricing, for example, have paved the way for bilateral tax treaties around the world. Among other areas, the OECD has taken a role in co-ordinating international action on corruption and bribery, creating the OECD Anti-Bribery Convention, which came into effect in February 1999.

34 The EFTA is an organization founded in 1960 to promote free trade in goods amongst its member states. There were originally seven EFTA countries: Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom (UK). Finland joined in 1961, Iceland in 1970, and Liechtenstein in 1991. In 1973, Denmark and the UK left EFTA and joined the EC. They were followed by Portugal in 1986, and by Austria, Finland and Sweden in 1995. Today the EFTA members are Iceland, Liechtenstein, Norway and Switzerland.


36 Id.
qualified majority, proposals concerning the scope and implementation of such common action.

During the transitional period, Member States shall consult each other for the purpose of concerting the action they take and adopting as far as possible a uniform attitude.37

Ex-Article 116 obliges Member States to act in concert when matters of particular interest to the common market arise in international economic organizations. Article 300 EC38 is a general provision concerning the procedures for negotiation and conclusion of

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37 The original text of Article 116 EEC was repealed by the Treaty of Maastricht. Article 116 remained “empty” until the Treaty of Amsterdam, which inserted a new text for Article 116 EC but also renumbered this Article as Article 135 EC. Therefore, the present text for Article 135 EC (ex-Article 116) is not the original Article 116 EEC.

38 Article 300 EC reads:

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it. In exercising the powers conferred upon it by this paragraph, the Council shall act by a qualified majority, except in the cases where the first subparagraph of paragraph 2 provides that the Council shall act unanimously.

2. Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.

By way of derogation from the rules laid down in paragraph 3, the same procedures shall apply for a decision to suspend the application of an agreement, and for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an agreement, when that body is called upon to adopt decisions having legal effects, with the exception of decisions supplementing or amending the institutional framework of the agreement.

The European Parliament shall be immediately and fully informed of any decision under this paragraph concerning the provisional application or the suspension of agreements, or the establishment of the Community position in a body set up by an agreement.

3. The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3), including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules. The European Parliament shall deliver its opinion within a time limit which the Council may lay down according to the urgency of the matter. In the absence of an opinion within that time limit, the Council may act.

By way of derogation from the previous subparagraph, agreements referred to in Article 310, other agreements establishing a specific institutional framework by organising cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure referred to in Article 251 shall be concluded after the assent of the European Parliament has been obtained.

The Council and the European Parliament may, in an urgent situation, agree upon a time limit for the assent.

4. When concluding an agreement, the Council may, by way of derogation from paragraph 2, authorise the Commission to approve modifications on behalf of the Community where the agreement provides for them to be adopted by a simplified procedure or by a body set up by the agreement; it may attach specific conditions to
agreements with third-countries or with international organizations, where the Commission acts as the negotiator and the Council as the “concluder.” It also opens the possibility of asking for a preliminary opinion from the European Court of Justice (ECJ). Ex-Article 237 EC Treaty, concerning enlargement of the Community, and Article 310 EC, concerning “associations,” are both characterized by mutual rights and duties, common actions and special procedures.

Before the Treaties of Rome were ratified, the six Member States at the time (i.e., West Germany, France, Italy, The Netherlands, Belgium and Luxembourg) had to prepare for negotiations within the GATT framework. The EEC was quickly engaged in various negotiations, and the implementation of the transitional provisions of the Treaty required enormous efforts from the Institutions, which also had to deal with proposals from outside the EEC. Among these initiatives that arose in the following years were four applications for membership, three from the group that had previously formed the European Free Trade Association, and Ireland. This intense international activity during the first years of the EEC was focused on the common external tariff. Ex-Article 111 of the Treaty gave the

such authorisation.
5. When the Council envisages concluding an agreement which calls for amendments to this Treaty, the amendments must first be adopted in accordance with the procedure laid down in Article 48 of the Treaty on European Union.
6. The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.
7. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.
39 LAWMAKING IN THE EUROPEAN UNION (Paul Craig & Carol Harlow eds., 1998).
40 TEC ex Article 237 (repealed), as amended by the TEU.
41 Id., at Article 310 EC, which reads: The Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.
42 THE EVOLUTION OF EU LAW (Paul Craig & Grainne de Burca eds., 1999).
44 TEC ex-art. 111 (repealed), as amended by the TEU.
Community the express task of negotiating this common tariff. Concessions on future common customs duties of the single market also led to important offers from the U.S. The use of the EEC, rather than individual member states, facilitated reductions of trade barriers.

From the perspective of international economic relations, perhaps the most interesting arrangements made by the High Authority during its period of independent activity were the successful consultations with Japan on the world steel market in the early 1960s. Around 1964, the steel market entered a difficult period, with risks of dangerous protectionist reactions coming from the U.S. During the late 1950s and early 1960s, the specific powers of the High Authority in the field of commercial policy were first used in practice.

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


A brief note should be made on the evolution of the concept of “commercial policy” as used in Article 133 of the EC Treaty. At the time of the Treaty of Rome, the common commercial policy did not mean trade in services, intellectual property rights or investment; it just meant trade in goods. That is the explanation for the *raison d’être* of the ECJ’s Opinion 1/94.

Article 133 EC lists several examples of commercial policy, such as tariff changes and liberalization, and national administrations have tended to illogically limit the application of the Article to the examples given above. However, from Article 133 EC we can deduce that the enumeration is not meant to be exhaustive and among the examples listed, there is one with the general wording “export policy.” In addition, there are many examples of commercial policy outside of those listed in Article 133 EC. The rationale of the common commercial policy is to form the external dimension of the creation of a common market, but a Community that would deprive itself of those possibilities would weaken its position in relation to other entities.

The scope of “commercial policy” became relevant on various occasions during the 1970s. An important case arose when a number of Western countries tried to introduce more discipline into export credit policies with state backing. These policies risked degenerating into a competition among the treasuries of different Western countries, with the effect of providing highly industrialized states in Eastern Europe, for example, with credits below the market rate. Was this, then, a matter for the Community or for Member States individually? The European Commission seized the occasion of a rather minor provision within the framework of the OECD to ask for an opinion from the Court under Article 300

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48 TEC Art. 133, as amended by the TEU.
50 PAUL DEMARET, RELATIONS EXTERIEURES DE LA COMMUNAUTE EUROPEENNE ET
EC. The advisory Opinion 1/75\textsuperscript{51} left no doubt as to the “commercial policy nature” of such export credit arrangements with state backing. History and evolving jurisprudence have gradually provided a much clearer and more convincing outline of the concept of common commercial policy.

The status of the so-called “cooperation” activities \textit{vis-à-vis} Article 133 EC is another issue of considerable importance. Member States can still sign individual cooperation agreements (especially with East European countries), but since 1975 there has been an obligation of full consultation on the practical application and terms. The EC can also conclude agreements when cooperation is the primary concern. Commodity agreements are also covered by the EC common commercial policy.

“During this period, the U.S. position as a global economic hegemony deteriorated further in January 1973, when Britain, Denmark, and Ireland joined the EC, making it the world’s largest trading entity.”\textsuperscript{52} The successful participation of the EEC in the greatest multilateral trade negotiations of the time, the Kennedy Round of trade negotiations from 1963-1967, gave the EEC a very strong position in the international forum. The EC was the first major trading entity in the Western world to implement the proposals for generalized preferences adopted in 1968 at UNCTAD II\textsuperscript{53} in New Delhi. In addition, the executive institutions of the three Communities were merged into a single Commission and a single

\textsuperscript{51} Opinion 1/75, 1975 E.C.R. 1355.
\textsuperscript{52} Cohn, T.H. \textit{Governing Global Trade. International institutions in conflict and convergence}, Ashgate, 2002, at p. 281.
\textsuperscript{53} UNCTAD stands for United Nations Conference on Trade and Development, and was established in 1964 as a permanent intergovernmental body. UNCTAD is the principal organ of the United Nations General Assembly dealing with trade, investment, and development issues. The organization's goals are to maximize the trade, investment, and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis. The creation of the conference was based on concerns of developing countries over the international market, multi-national corporations, and great disparity between developed nations and developing nations. Currently, UNCTAD has 191 member States and is headquartered in
Council (1967) at this time. With the end of the transitional period in 1970, these merged institutions would become responsible for the common commercial policy. Notably, this was a time of negotiation between the EEC and many other countries and organizations, which led to a variety of agreements.

In the field of the common commercial policy, authors such as Weiler argue against the popular belief that the 1970s were nothing much to the history of European integration and everything started after *Casis de Dijon*. During that time, the ECJ was the most influential international/supranational court, the Commission was assuming its role of the engine of the integration process and the European Parliament was requesting more institutional powers. The Council found itself more and more restrained in the Community game, probably against the original design of some Member States who regarded the EU Council as an *ultima ratio*, a refuge of nationalism. However, the EC was established originally on an unquestionable transfer of sovereignty from Member States to the EC,

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54 During the transitional period, the EEC was competent to conclude tariff agreements linked to the establishment of the common custom tariff. The Member States had to coordinate their trade relations with third countries. To this end, the EEC decided to insert an EEC clause in the trade agreements, and establish a prior consultation procedure. At the end of the transitional period, the Community became competent to conclude tariff and trade agreements with third countries, except in certain cases, in accordance with Article 133 EC. The EC common commercial policy is based on uniform principles, especially concerning tariff and trade agreements, harmonization of liberalization measures, export policy, and measure of trade defense. The EC’s trade policy has two distinct forms:

1. **autonomous**: unilateral measures decided by the EC. For example, regulations on imports or the fight against antidumping;

2. **conventional**: agreements and arrangements concluded by the EC with third countries. The doctrine, and especially the EU Member States, has rallied either under a strict conception of the common commercial policy, on the basis of the terms laid down in Article 133 EC, or under a modern and extensive conception.

55 On December 31, 1970 was the end of the transitional period. The EC Member States introduced a common commercial policy. Also on this date, the finance of the EC budget by means of financial contributions from EC Member States was replaced by a system of own resources, which meant much greater freedom of action for the EC vis-à-vis its Member States.


57 Sovereignty is one of the most used and misused concepts of international affairs and international law. Sometimes, it refers to the role of states in international organizations. Other times, it refers to internal division of power, or the degree of government authority toward its citizens. Richard N. Haass has defined sovereignty...
with only the doctrine of implied powers as a caveat. Provisions that do not specify exactly what has been transferred to the EC, such as Article 308 EC,\textsuperscript{59} nevertheless constitute an explicit limitation of national sovereignty.\textsuperscript{60}

EC external relations are not limited to the field of trade policy. The Treaty is not very explicit about these other dimensions, but the European Court of Justice has attempted to clarify them. In the famous European Road Transport Agreement (ERTA) case on road transportation (Case 22/70, \textit{Commission v. Council}),\textsuperscript{61} the Court ruled that a matter already regulated by the EU institutions could not be dealt with internationally without Community participation and approval, precisely because it has been regulated by an EU institution.

External activity can take three main forms: 1) autonomous legislation, to set out rules for relations for the outside world; 2) negotiation, to arrive at agreements with third parties; and 3) dialogue, to gain a better understanding of other parties in order to better determine their own attitudes.\textsuperscript{62} It was the dialogue that gained importance in the late 1970s.

\textsuperscript{59} Article 308 EC reads: If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

\textsuperscript{60} Mavroidis, P. “Lexcalibur: The House that Joe Built”, \textit{Columbia Journal of Transnational Law}, Vol. 38, 2000, Number 3, p. 673.

\textsuperscript{61} Commission v. Council, Case 22/70, 1971 E.C.R. 263.

In this context, we see that the EU now has diplomatic delegations in many capitals as well as in the U.N. headquarters (where it obtained official observer status in 1975). Since 1973, the EU has conducted a systematic dialogue with the U.S., Japan, Canada, Australia and New Zealand, separate from the periodic discussions that take place regularly within the OECD. Since 1977, the EU has also been involved in the economic world summits of the seven major industrialized nations, the so-called G 7.63

Already in the late 1970s, the Community had become an important interlocutor, not only in trade but also in areas such as energy, fisheries and development policies. The Community was already a major actor in most world fora, often speaking with one voice, even if some aspects of the debate were not under its direct competence. Examples of this were the Conference on International Economic Cooperation (the so-called “North-South Dialogue”) in Paris in 1976-1977, when the Community had one single delegation to cover all points of the agenda, and the Euro-Arab dialogue.

During the period of the Tokyo Round (1973-1979), the U.S. continued to have much influence in world trade. Some of the early initiatives toward the Tokyo Round came from the American side such as the William Commission. That said, the EC and the U.S. held informal discussions on various issues throughout the Tokyo Round to avoid major potential confrontation. When the U.S. and EC did not cooperate, there was a deadlock in the negotiations of the Tokyo Round since they had effective veto power. When the U.S. and the EC adopted a unified position, the combined efforts of others had minor chances of changing the outcome.64

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63 The main difference between the G8 and the G7 (both coexist) is that the G8 deals with political matters and includes Russia as a member, whereas the G7 is for economic matters, and Russia is excluded.
D.- Other Legal Bases for Trade Agreements

What follows are categories of international agreements that contain provisions on trade despite the fact that they are not based on Article 133 EC. I will categorize the various agreements into six main groups, namely, 1) development aid and cooperation agreements; 2) association agreements; 3) non-preferential trade and cooperation agreements; 4) partnership agreements; 5) agreements with international organizations; and 6) the implied powers doctrine.

D.1.- Development Aid And Cooperation Agreements

The original Treaty of Rome contained guidelines about external relations. First of all, the treaty established a special regime for development aid and cooperation, which initially aided developing countries that had a long-standing relationship (mostly former colonies) with founding Member States. This regime was further developed through the Yaoundé and Lomé Conventions, which linked 70 developing countries to the EC.

In this sense, we see that one of the main reasons for international negotiations between the EEC and third-parties was the historic link between the different Member States of the EC and overseas territories or dependencies. Shortly after the establishment of the EEC, there was an important transformation in the links between these countries and the

Common Market, which, according to Part IV of the EEC Treaty, consisted of a two-way free access for each other’s products and a special Community aid program. To address the issue of access for these countries, the Yaoundé Convention was held.\footnote{Treaty Establishing the European Economic Community [TEEC].}

The Yaoundé Convention took place with eighteen African States and Madagascar.\footnote{It was on January 1, 1971 that the Second Yaoundé Convention entered into force (18 African countries), as well as the Arusha Convention (three Eastern African countries) and the Council Decision concerning the association of the EC Member States’ overseas territories.}

After the first enlargement of the Community, the whole system was renegotiated (1973/1974) with nearly 50 countries (all the former dependencies of the UK in Africa, the Pacific and the Caribbean). In 1975 the Lomé Convention, between the Community and this group of countries, introduced new ideas such as the organization of commercial and industrial cooperation and the stabilization of export earnings.\footnote{For example, an agreement between the European Economic Community and the Government of the Democratic Republic of Madagascar regarding fishing off the coast of Madagascar was signed some years later (OJ L 73/86, p. 25).}

The Yaoundé Conventions linked the EC to African States, providing, \textit{inter alia}, financial and technical assistance for economic development. Two important examples are the Convention of Association between the EEC and Associated African States, of July 20, 1963\footnote{It was on February 28, 1975 that the signature of the so-called Lomé I took place between the European Community and 46 ACP countries.} and the Convention of Association between the EEC and Associated African States, of July 29, 1969.\footnote{2 I.L.M. 971 (1970).} With reference to the Lomé Conventions, there have been four additional agreements negotiated, the European Economic Community-African, Caribbean and Pacific Countries Convention (EEC-ACP Convention), of February 28, 1975,\footnote{9 I.L.M. 484 (1970).} the second ACP-
EEC Convention, of October 31, 1979,\textsuperscript{72} the third ACP-EEC Convention, of December 8, 1984,\textsuperscript{73} and the fourth ACP-EEC Convention, of December 1, 1989.\textsuperscript{74} Thanks to these Conventions, over 99\% of these countries’ imports enjoy free access to the EU.

The status of so-called “cooperation” activities \textit{vis-à-vis} Article 133 EC is an issue of considerable importance. Member States can still sign individual cooperation agreements (especially with East European countries), but since 1975 there has been an obligation of full consultation on the practical application and terms. The EC can also conclude that agreements when cooperation is the primary concern. Commodity agreements are covered by the common commercial policy.

With respect to industrialized nations, in 1976, the Community signed with Canada the first bilateral agreement with an industrialized nation outside Europe. Because trade policy between developed countries is covered by the GATT, it was simply a cooperation agreement.\textsuperscript{75}

\textbf{D.2.- Association Agreements}

The Treaty of Rome also provided for the conclusion of association agreements under Article 310 EC.\textsuperscript{76} Agreements with various degrees of commitment and different economic and

\textsuperscript{72} 19 I.L.M. 327 (1985).
\textsuperscript{73} 24 I.L.M. 571 (1985).
\textsuperscript{74} Fourth ACP-EEC Convention signed at Lome, 1991 O.J. (L 229) 3.
\textsuperscript{75} Council Regulation 2300/76, 1976 O.J. (L 260) 1 (Framework Agreement for commercial and economic cooperation between the European Communities and Canada).
\textsuperscript{76} In addition to the typical cooperation agreements in economic and commercial matters and development aid, the EC concluded association agreements with certain third countries geographically close to the European area, establishing extensive relations in economic matters (Article 310 EC). Countries which today are EU Member States, such as Greece, Spain, and Portugal, have benefited from such agreements prior to joining the EU. Today, Turkey is associated to the EC by such agreements (in 1963, Association Agreement; in 1995, Customs Union Agreement). Other examples of Association Agreements – or of similar nature - are with Chile and
political purposes have been concluded with almost every country, except for some of the most developed countries like the U.S., Japan, and Australia. These Association Agreements represent the closest relationship with the EC and usually involve some kind of reciprocal obligation. Agreements with countries of the European Economic Area, the Mediterranean Agreements, the Europe Agreements with Central and Eastern European countries, and the Euro-Mediterranean Association Agreements fall within this category. Though most mixed agreements involve just the EC (with the Member States, obviously), agreements involving the EC and the European Coal and Steel Community (ECSC) were not rare at the time when the ECSC existed. In this sense, we find many association agreements in the EC legislation. However, agreements involving all three original Communities were uncommon. Examples of this are some of the regional environmental agreements.

The Europe Agreements are a series of association agreements with various Central European countries pursuant to the authority granted in Article 310 EC. Among them are the Europe (association) Agreement between the European Communities and the Republic of Mexico, and in the future with Mercosur (since 2000, the EC and the Mercosur are in the process of negotiating a bi-regional Association Agreement, including a free trade area) and the Andean Community.

77 Council and Commission Decision 94/1/EC, ECSC, 1994 O.J. (L 1) 1 (on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation).

78 Council Regulation 2213/78, 1978 O.J. (L 266) 1 (on the conclusion of the Cooperation Agreement between the European Economic Community and the Arab Republic of Egypt); Council Regulation 150/77, 1977 O.J. (L 23) 13 (concluding the Agreement in the form of an Exchange of Letters relating to Article 9 of Protocol 1 to the Agreement between the European Economic Community and the State of Israel concerning the import into the Community of tomato paste originating in Israel).

79 These specific types of Association Agreements were concluded between the EC and the countries of Central and Eastern Europe in the first half of the 1990’s. They cover trade-related issues, political dialogue, legal approximation and various other areas of co-operation. The Europe Agreements aimed to establish free trade between the EC and the associated countries, and provided for progressive alignment with Community rules as well as a number of specific provisions in areas such as capital movement, rules of competition, intellectual and industrial property rights, and public procurement.

80 The original European Communities were composed of: European Coal and Steel Community –by the Treaty of Paris, 1952; European Economic Community –by the Treaty of Rome, 1957, which in 1992 was renamed as European Community; and European Atomic Energy Community (Euratom) –by the Treaty of Rome, 1957.

81 Roger Goebel, The European Community and Eastern Europe: Deepening and Widening the Community
Bulgaria, the Europe (association) Agreement between the European Communities and their Member States and the Czech Republic, and the Europe (association) Agreement between the European Communities and their Member States and the Republic of Hungary.

Negotiations were conducted with communist and formerly communist countries. In early 1978 a trade agreement was concluded with China and in 1985, a Trade and Economic Cooperation Agreement between the EEC and the People’s Republic of China replaced the previous Commercial Agreement of April 3, 1975. However, with China, and the former U.S.S.R. and its allies, the EC had no official dealings. Today, all of the Eastern European countries have arrangements with the EC on agricultural, steel and textile products, inter alia.

Romania was the first country to approach the EC and was granted special treatment for some of its exports under the generalized scheme of preferences in 1974. A more recent agreement with Romania is the Additional Protocol to the Europe Agreement on Trade in Textile Products between the EEC and Romania.

Before the merger of the institutions mentioned above, the EC composed of the original six Member States (West Germany, France, Italy, The Netherlands, Belgium and Luxembourg) was involved in a series of individual and collective negotiations. For example, the Association Agreements for future membership were concluded in 1961 with Greece and in 1963 with Turkey. Negotiations with the UK and other Western European
countries during the 1960s for membership and special relations with the EC did not end in agreements. Negotiations with Austria continued during this period and talks with Israel\(^{90}\) and Spain were taken up, leading to agreements with the latter country before the end of 1960s. When the UK, Ireland, and Denmark joined the EC in 1973, the enlarged Community (the three Member States which joined in 1973 plus the original six) entered into free trade agreements with the remaining members of EFTA, Austria, Switzerland,\(^{91}\) Sweden, Iceland,\(^{92}\) and Portugal. Finland and Norway\(^{93}\) followed sometime later.

The Community has also signed agreements with a number of Mediterranean countries. Some of these countries received special treatment from the Community because of their historic link with European countries.\(^{94}\) For example, see the Cooperation Agreement between the EEC and the People’s Democratic Republic of Algeria,\(^{95}\) the Cooperation Agreement between the EEC and the Hashemite Kingdom of Jordan,\(^{96}\) the Cooperation Agreement between the EEC and the Lebanese Republic,\(^{97}\) the Cooperation Agreement between the EEC and the Kingdom of Morocco,\(^{98}\) the Cooperation Agreement between the EEC and the Syrian Arab Republic\(^{99}\) and the Cooperation Agreement between the EEC and

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\(^{90}\) Agreement between the European Economic Community and Israel, 1975 O.J. (L 136) 1 (signed on May 11, 1975, this was a free trade and cooperation agreement).

\(^{91}\) Agreement between the European Economic Community and the Swiss Confederation on the application of the rules of Community transit, 1972 O.J. (L 294) 1.

\(^{92}\) Agreement establishing a free trade area between the European Economic Community and the Republic of Iceland, 1972 O.J. (L 301) 1.

\(^{93}\) Agreement between the European Economic Community and the Kingdom of Norway and provisions for its implementation, 1973 O.J. (L 171) 2.


\(^{95}\) Council Regulation 2210/78, 1978 O.J. (L 263) 1.

\(^{96}\) Council Regulation 2215/78, 1978 O.J. (L 268) 1.


the Republic of Tunisia. During this period, the “global Mediterranean policy” was created. This nomenclature is not very precise since it suggests that all of these agreements were similar, but the agreements were very different from those completed between 1973 and 1975.

D.3.- Non-Preferential Trade And Cooperation Agreements

In contrast to the association agreements, the “non-preferential trade and cooperation agreements” provide closer relationships between the EU and many countries of Southeast Asia and Latin America. These agreements are usually aimed at lesser-developed countries. Examples of cooperation agreements are the one signed with the Andean Pact (today Andean Community) as well as with ASEAN (Association of South-East Asian Nations) in 1980. Agreements were also designed to help some Asian countries address problems arising from the loss of certain preferences from the Commonwealth. This was the case with India, Pakistan, Sri Lanka, and Bangladesh.

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102 The Andean Community is a trade bloc comprising until recently 5 South American countries: Venezuela, Colombia, Peru, Ecuador, and Bolivia. In 2006, Venezuela announced its withdrawal, reducing the Andean Community to 4 member states. The trade bloc was called the Andean Pact until 1996, and came into existence with the signing of the Cartagena Agreement in 1969. Its headquarters are located in Lima, Peru.
103 ASEAN is composed of 10 members. The six Founding Countries of ASEAN are Malaysia, Indonesia, The Philippines, Singapore, Thailand and Brunei. The rest of countries are Vietnam, Laos, Cambodia and Myanmar. The aims and purposes of the Association are to accelerate economic growth, social progress and cultural development, and to promote regional peace and stability.
104 The implementation of the “declaration of intent” does not require the conclusion of any agreement.
105 Council Regulation 3113/84, 1984 O.J. (L 292) 1, 5 (Agreement in the form of an exchange of letters between the European Economic Community and the Republic of India on the guaranteed prices for cane sugar for the 1984/85 delivery period).
106 Council Regulation 1196/86, 1986 O.J. (L 108) 1 (on the conclusion of the Agreement for commercial, economic and development cooperation between the European Economic Community and the Islamic Republic of Pakistan).
In Latin America, agreements were concluded with Argentina, Uruguay, Brazil, and Mexico. There was also, inter alia, the Interregional Framework Cooperation Agreement between the EC and its Member States and the Southern Cone Common Market (Mercosur), as well as the Framework Agreement for Cooperation between the EEC and the Federal Republic of Brazil. Regarding preferential access to the Community’s markets, it must be said that Iran requested such a negotiation, but the response was less than positive. There is also an Agreement between the EEC and Malaysia on trade in textile products and a Cooperation Agreement between the EEC and Indonesia, Malaysia, the Philippines, Singapore and Thailand, all member countries of the Association of South East Asian Nations.

D.4.- Partnership Agreements

108 One early agreement with Bangladesh was on commercial cooperation. See Council Regulation 2785/76, 1976 O.J. (L 319) 1.
110 Agreement in the form of an exchange of letters between the European Economic Community and the Eastern Republic of Uruguay on trade in mutton and lamb, 1980 O.J. (L 275) 37.
113 Proposal for a Council Decision concerning the conclusion of the interregional framework cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Cone Common Market and its member countries, of the other part, 1996 O.J. (C 14) 3; see also Council Decision 96/205/EC, 1996 O.J. (L 69) 1 (concerning the provisional application of certain provisions of the Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part). MERCOSUR stands for Mercado Comun del Sur (Common Market of the Southern Cone) and is composed of Brazil, Argentina, Paraguay, and Uruguay. On 9 December 2005, Venezuela was accepted as a new member, but it will be officialized in late 2006. It was founded in 1991 by the Treaty of Asuncion, which was later amended and updated by the 1994 Treaty of Ouro Preto. Its purpose is to promote free trade and the fluid movement of goods, peoples, and currency.
The EC has developed a hybrid of “partnership agreements,” which share features of cooperation accords and Europe agreements to manage its relations with the successor States of the former U.S.S.R. One example is the Partnership and Cooperation Agreement between the European Communities and their Member States and the Russian Federation.\textsuperscript{117}

D.5.- Agreements With International Organizations

The Community’s role in the UNCTAD negotiations was less satisfactory than its fully integrated stand in the GATT.\textsuperscript{118} This is due to the application of Article 116 EC,\textsuperscript{119} which is far more complicated than that of Article 133 EC.\textsuperscript{120} There was also a general problem with the position of the EC (Commission) representatives in international organizations, especially those of the U.N. family. Since at that time only states could be members of these organizations, the Commission’s representatives had many difficulties in international negotiations. Whatever their constitutional powers may have been under EC law (like the exclusive right to negotiate), the Commission’s representatives were at best “observers.”\textsuperscript{121}

There were also problems at the European Conference on Security and Cooperation. The Commission’s representative had to find his place within the delegation of the Member State exercising the Presidency of the EU Council. The conference began with a Dane exercising the presidency and finished with an Italian. The primary goal for the Security

\begin{thebibliography}{121}
\bibitem{116} Council Regulation 1440/80, 1980 O.J. (L 144) 1.
\bibitem{117} Council and Commission Decision 97/800/EC, ECSC, Euratom, 1997 O.J. (L 327) 1.
\bibitem{118} Ernst-Ulrich Petersmann, “Application of GATT by the Court of Justice of the European Communities,” 20 COMMON MKT. L. REV. 397, 420 (1983).
\bibitem{119} Treaty establishing the European Community [TEC], art. 116, as amended by the Treaty on European Union [TEU].
\bibitem{120} Id. at art. 133.
\bibitem{121} DOMINICK MCGOLDRICK, INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION 41
\end{thebibliography}
Conference was to make clear in all statements and documents that certain matters simply could not be addressed unless the Community, through its institutions, agreed to it. Even in 1967, this point made the U.S.S.R. give up its resistance to Community participation in the international wheat agreement.

D.6.- Theory Of Implied Powers\textsuperscript{122}

The sixth category which I would like to present deals with three groups: 1) the implicit\textsuperscript{123} and explicit\textsuperscript{124} attribution of external EC competences;\textsuperscript{125} 2) the exclusive versus non-exclusive EC competences; and 3) the external versus internal EC competences.

The Community’s competence can arise by express conferment in a Treaty Article, or by implication from a Treaty Article. In the former case, we speak of express powers, whereas in the latter case, we speak of implied powers of the Community.\textsuperscript{126} The doctrine of implied powers developed in the jurisprudence of the ECJ ensured that the EC could enter into agreements – within its internal competence - in areas beyond the original areas given by


\textsuperscript{123} Implicit powers refers to a situation in which the European Community has explicit powers in a particular area (e.g., transport), and it also has a power in the same field with regard to external relations (e.g., negotiation of international agreements).

\textsuperscript{124} Explicit powers refers to a situation where the powers are those clearly defined in the Treaties.

\textsuperscript{125} There is a third type of power, which depends on the mode of attribution, i.e., subsidiary powers. This refers to situations where the Community has no explicit or implicit powers to achieve a Treaty objective concerning the single market. In such situations, Article 308 EC allows the Council, acting unanimously, to take the measures it considers necessary.

\textsuperscript{126} Implied powers are often referred to as derived powers.
the EC Treaty, namely the common commercial policy and association agreements. Although
the exact scope of the EC’s implied powers, and the nature of the competence which arose
from the operation of the principles developed by the ECJ were unclear and controversial,
matters have been clarified with case-law\textsuperscript{127} of the ECJ and substantive law. The Treaty of
Rome has resolved some of the contested points of legal theory in the doctrine of implied
powers, whereas the Maastricht Treaty has clarified matters by creating express powers to act
externally in a range of areas where previously such powers were of uncertain scope, or arose
only by implication.

\textit{D.6.a.- Implicit and Explicit Attribution of External EC Competences}

This distinction deals only with the external EC competences. It results from the
interpretation given by the ECJ to the provisions of the Treaty in a constant case-law whose
main steps are, in the past, the ERTA principle\textsuperscript{128} and Opinion 1/76 (Rhine and Mosselle
Navigation Case)\textsuperscript{129} and, more recently, Opinions 2/91, 1/94 (Uruguay Round),\textsuperscript{130} and
Opinion 2/92 (OECD national treatment).\textsuperscript{131} The Court has decided in its Opinion 1/76 that
“competence to be internationally engaged can result not only from an explicit attribution by
the Treaty but also as an implicit consequence from its [the Treaty’s] provisions”\textsuperscript{132} “and
from acts taken, in the framework of these provisions, by the Community’s institutions.”\textsuperscript{133}

\textsuperscript{127} See mainly Opinion 2/91, ECR I-1061; Opinion 1/94; and Opinion 2/92.
\textsuperscript{128} Case of 31 March 1971, ERTA, ECR p. 273.
\textsuperscript{129} E.C.R. 1977, p. 741.
\textsuperscript{132} Opinion 1/76, para. 3.
\textsuperscript{133} ERTA Case, para. 16.
Two more points concerning this distinction between the implicit and explicit attribution of EC external competences:

1.- among the explicitly attributed external competences, some are exclusive (mainly Article 133 EC, dealing with the common commercial policy) and others are not (such as Article 181 TEU, dealing with cooperation to development).

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

D.6.b.- Exclusive versus Non-Exclusive EC Competence in International Relations

With respect to the EC position in international organizations, when a matter falls within the exclusive competence of the EC, only the Community acts with regard to that matter on the international level. Therefore, only the EC, not the Member States, expresses a position or a vote on such matters. However, when the services of the Commission assure that the content of an international agreement belongs to “Community competence”, do they mean

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European Community’s exclusive competence or non-exclusive competence? This same question could be addressed to civil servants, Community or national ones, who very often use the expression “concerning the first pillar” to refer to works done in the framework of ASEM meetings.136 These assertions have a completely different meaning depending on whether we are dealing with exclusive or non-exclusive Community competence. In the framework of exclusive competences, only the Community can act, whereas in the framework of non-exclusive competences, if the Community does not act, Member States may do so and, in certain cases, they may continue to act even if the Community also acts.

D.6.b.1.- Exclusive EC Competence

The case-law of the ECJ has established that the EC has exclusive competence in the field of common commercial policy. Therefore, Member States are no longer competent to act in areas dealing with common commercial policy. The Court clearly acknowledges in its Opinion 1/75137 the exclusivity of the EC on the basis that the commercial policy was conceived in the context of the common market and for the defence of the common interests of the EC. The ECJ concluded that it could not be accepted that the Member States could exercise powers which were concurrent with those of the EC in this field. As a logical consequence, one could say that national commercial policy measures are only permissible by virtue of specific authorization by the EC. As an example of it we have Case 41/76, Criel, née Dockenwolcke et al. v. Procureur de la Republique au Tribunal de Grande Instance,

136 ASEM meetings are held between the European Union and the Asian States.
The exclusive nature of the EC’s competence has most recently been confirmed in Opinion 1/94.\textsuperscript{139} The main effect of exclusivity in EC competence is that Member States may no longer act in the areas in which the EC has exclusive competence. The Court has pronounced itself in this way in Opinion 1/75 (Re OECD Local Costs Standard) by saying that “the exercise of concurrent powers by the Member States in this matter is impossible.”\textsuperscript{140} In Case 804/79 Commission v UK (which is not an external relations case), the ECJ expressed herself in the same terms when saying that:

> “the power to adopt measures…has belonged fully and definitively to the Community. Member States are therefore no longer entitled to exercise any power of their own in [these matters]. The adoption of…measures is a matter of Community Law. The transfer to the Community of powers in this matter being total and definitive,…a failure [of the Council] to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field.”\textsuperscript{141}

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

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\textsuperscript{138} 1976 E.C.R. 1921, at 1937.
\textsuperscript{139} Opinion 1/94, 1995 1 COMMON MKT. L. REV., 205, paras. 22-34.
\textsuperscript{140} 1975 E.C.R. 1355, at 1364.
\textsuperscript{141} 1981 E.C.R. 1045, at paras. 17, 18 and 20.
If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.  

Opinion 1/75 (Re OECD Local Costs Standard) shows that Member States no longer have the right to adopt positions which differ from those which the EC intends to adopt in relations with third countries, or take over actions which would hinder the EC in the exercise of its tasks. Nor may they adopt internal legislation which undermines, or contradicts, measures adopted, externally or internally, by the Community.

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

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144 1978 E.C.R. 2151, at para. 32.
145 Id., at para. 22.
146 Id., at para. 33.
are under a duty to use all the political and legal means at their disposal in order to ensure the participation of the Community in such agreements.\textsuperscript{147}

D.6.b.2.- Non-Exclusive Nature of EC Competence

As for non-exclusive Community competence, there are two types depending on the kind of exercise of these competences. This exercise may be alternative or parallel (or complementary) with the exercise of Member States’ competences. In the first case (when the exercise of non-exclusive Community competence is alternative with the exercise of Member States’ competences), if the Community exercises its non-exclusive competence, Member States lose the possibility to exercise theirs.\textsuperscript{148} However, from the moment in which the Community exercises its non-exclusive competence and to the extent where it will do so, this exercise pushes away the possibility for Member States to act individually. The second case (when the exercise of non-exclusive Community competence is parallel or complementary with the exercise of Member States’ competences) appears in two occasions:

a) when the Community is competent to put into practice “action’s programmes” over a Community policy which co-exists with national policies on the same field. The typical example would be the one of research policies or cooperation policies to development;

\textsuperscript{147} \textit{1976 E.C.R.} 1279 at paras. 44-45 of the judgment.
\textsuperscript{148} \textsc{Ramon Torrent}, \textsc{Droit et Pratique des Relations Economiques Exterieures Dans l'Union Européenne}, <<http://www.ub.es/dpeep/ep/livreTorrent.html>>, 1998, at chapter 2.
b) when the Community produces a regulation which, by its own nature, can co-exist with non-harmonized national rules. This is an exceptionally hypothetical case which occurs in practice only in the field of intellectual property: the Community introduces a title and/or a mechanism for protection of the additional intellectual property which co-exists with the titles and/or mechanisms of the various Member States. Some people may say that this hypothetical case shows an exclusive Community competence (and not non-exclusive competence) since only the Community can create a Community title of protection of intellectual property. This argument, however, runs the risk of transforming all Community competences in exclusive competences; since only the Community can act at a Community level, all Community actions belong to the exclusive Community competence. It is, then, preferable to reserve the term “exclusive” for cases where Community competence excludes any possible national regime in the same field.

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

_D.6.c.- External and Internal EC Competences_
The distinction between external and internal competence is a problematic issue.\textsuperscript{149} During the Community’s early years, there was a strong tendency to consider that the EC’s external competence had a more limited scope than the internal competence. The evolution of the ECJ case-law in its European Road Transport Agreement (ERTA) case [Case 22/70, \textit{Commission v Council}]\textsuperscript{150} and its Opinions 1/68 and 1/76\textsuperscript{151} consolidated the thesis of “parallelism” between external and internal competences.\textsuperscript{152} McGoldrick explains this thesis: “[The doctrine of parallelism] asserts that the competence of the EC to enter into international agreements should run in “parallel” with the development of its internal competence –\textit{in interno in foro externo}.\textsuperscript{153}

With regard to the ERTA Case, I would like to write a few lines. The thesis of parallelism previously mentioned gained approval in the ERTA Case.\textsuperscript{154} It was in 1962 when five of the then six Member States of the EEC had signed an agreement known as the first ERTA with certain other European States. Such an agreement was not ratified by enough of the contracting States, which meant that the Member States began negotiations to conclude a second ERTA. Meanwhile, the Council issued a regulation deriving from its internal power covering the same areas. The Commission objected to the Council’s decision to allow negotiations to continue and tried to annul the resolution to that effect in the ECJ. The second


\textsuperscript{151} Opinion 1/76 (Re the Draft Agreement for a Laying-up Fund for Inland Waterway Vessels) (Rhine Navigation Case) 1977 E.C.R. 741.


ERTA was nevertheless concluded in 1970. According to Kent, “the ECJ held that the EC had the authority to enter into such an agreement. Authority may arise not only out of express provision in the Treaty but also from other Treaty provisions and from secondary legislation. When the EC had adopted common rules to implement a transport policy in 1960, Member States lost their competence to conclude international agreements in this area.” 155

The European Court of Justice, in its Case C-327/91 France v Commission,156 deals with parallel internal and external powers of the European Community. In the above case, the Court gives the following view: “the ERTA judgment,157 as we know, is the frame of reference for identifying the external powers of the Community, the Court having stated that the possibility of concluding international agreements exists not only in the situations exhaustively listed in the Treaty but also whenever the Community has internal powers.158”

The ECJ goes further by saying in this same judgment [Judgment in Case 22/70 Commission v Council]159 that:

“with regard to the implementation of the provisions of the Treaty the system of internal Community measures may not...be separated from that of external relations. Clearly, if no account were taken to the fact that the point at issue in that case was the division of powers between the Community and the Member States, such a statement could be used for recognising, on the assumption that the conditions are fulfilled, the Commission’s limited power to conclude international agreements, which would thus constitute a corollary, as it were, of its specific internal powers in a given area.”160

156 1994 E.C.R. I-3661, paragraph 35.
158 For the same view see, most recently, Opinion 1/92 of 10 April 1992 on the draft agreement between the Community and the EFTA countries concerning the creation of a European Economic Area, 1992 E.C.R. I-2821, paragraph 39.
159 1971 E.C.R. 263, paragraphs 16 to 19.
Under this theory of parallelism (or implied powers), the treaty-making or external competence of the EC should reflect its internal jurisdiction. The reasoning behind this theory is that if the EC has the powers to legislate internally, it should also be competent to enter into international agreements in the same fields. In this line of argument, one should recall that the EC’s treaty-making powers may be divided into two categories: express powers and implied powers. Agreements are negotiated by the Commission and concluded by the Council, normally after consultation with the European Parliament.\footnote{KENT, P. LAW OF THE EUROPEAN UNION, Financial Times Pitman Publishing, 1996, p. 28.}

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

The so-called “open skies” agreement is evidence that, for a given distribution of preferences, internal EC institutional mechanisms affect the outcomes of international trade agreements.\footnote{For a detailed analysis on the transatlantic open skies agreements, see Meunier, S. \textit{Trading Voices: The European Union in International Commercial Negotiations}, Princeton University Press, 2005, pp. 144-65.} Since the U.S. is, and has been, the EC’s main trading and investment partner, many trade negotiations have been successfully concluded between the two parties. This has been the case “when their bargaining position easily converged or when trade-offs between sectors were possible.”\footnote{Sophie Meunier, \textit{What Single Voice? European Institutions and EU-U.S. Trade Negotiations}, 54, 1 INT’L} However, there are still many contested issues in EC-U.S. trade
negotiations. One clear example is the field of aeronautics where, given the Member States’ preferences and depending on the negotiating context, the institutional mechanisms through which Member States transferred their trade sovereignty affected the process and outcome of the final international agreement.164

Open skies agreements eliminate restrictions on how often carriers can fly, the kind of aircraft they can use, and the prices they can charge. The agreement covers both passenger and cargo services, as well as scheduled and charter operations.165 The EC-U.S. dispute over the “open skies” agreement illustrates how third countries can get better outcomes when EU Member States are free from the Commission in international trade negotiations, as opposed to when the EU Member States negotiate with a single voice.

Regarding the deregulation of international aviation, the U.S. concluded various bilateral agreements with several EU Member States. If the Commission had been the sole negotiator for the entire EC, these agreements would not have been reached because three of the big EU Member States (France, Germany, and the United Kingdom) initially opposed this U.S.-led liberalization.166 In 1990, when the international aviation deregulation took place, these three countries resisted U.S. attempts to open up the transatlantic skies because of the large international stakes held by their national carriers. According to the Commission, Article 133 EC gave it the exclusive authority to negotiate international air services with

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164 Id. at Abstract.
third parties. However, most EU Member States opposed the Commission’s proposal to take over aviation negotiations.167

Since there was no supranational negotiating authority, the U.S. was able to enter into bilateral agreements with Member States individually. Its strategy was to negotiate with “one country at a time.”168 The smaller EU Member States became the focus of the EC-U.S. “open skies” dispute. U.S. negotiators hoped that the success they had with bilateral agreements with smaller EU Member States would be replicated with the big EU countries through pressure to conclude similar deals.

Airlines in small EU Member States were interested in international liberalization. They needed to compete in aggressively on world routes since they were not offering domestic service. In December of 1992, the Netherlands and the U.S. signed the first of the “open skies” agreements. The reaction of the Commission and the big EU Member States was that this was an attempt by the U.S. government to “divide and conquer EC aviation.”169 In addition to that, the Commission also was concerned that the unilateral Dutch action would undermine future negotiations should the supranational EC level ever take over.170

The Dutch-U.S. agreement made the Commission attempt to assert its negotiating authority and competence in the field of international aviation in order to “prevent discriminatory rights being gained by individual states at the cost of fellow members.”171

167 Id.
170 Under the Carter and Clinton administrations the U.S. had openly adopted such a “divide-and-rule” approach in dealing with the EC. This approach failed to break down the resistance of the more stubborn Member States but it was highly successful in diverting trade towards more cooperative countries such as the Netherlands.
When EU Member States hold veto power, it is not likely that an EU-led offensive will actually materialize into a genuine negotiation with a third country because it takes only one single Member State to cancel EC demands for change.

IV. The EC In International Trade Affairs During the Decades of the 80s and 90s

A.- An Overview

Looking back to the 1950s, what is most surprising is the place the EC now holds in world affairs. When the process of European integration started, the role of the EC in the international arena was minimal. As time has gone by, it has developed a greater role in international fora. There are a few important examples of EC action in the international arena in 1997. In the trade sector, the EC played an important role in two significant WTO agreements: the Telecommunications Service Agreement,\textsuperscript{173} which covers about 90% of world revenues in the telecommunications sector and the Agreement on Financial Services, which covers about 95% of trade in the banking, insurance, and security sectors.

In the same year, the EU donated Euros 438 million in humanitarian aid, and an EU special envoy was sent to support the Middle East Peace Process. The EU has adopted a strong position with regard to problematic states such as Cuba and Burma and led the industrialized nations in their decision to reduce greenhouse emissions by the year 2010 at

\textsuperscript{172} RICHARD WHITMAN, FROM CIVILIAN POWER TO SUPERPOWER? THE INTERNATIONAL IDENTITY OF THE EUROPEAN UNION (1998).
the Kyoto Summit on Climate Change in the Conference of the Parties to the Framework Convention on Climate Change, Kyoto Protocol, in December 1997. Clearly, the EU has developed into a significant actor in many international spheres.

That said, it is important to note that more than just traditional external policies will define the EU’s role. As the EC has integrated to create a single European Market with a single currency, its domestic policies are increasingly influencing its role in the international arena. Since 1958, the vision of the EEC Founders has been expanding geographically as the EU has grown from six members to the current 25. With the Single European Act and the completion of the single market, economic integration has created a cohesive entity. Already in 1973, with the first enlargement of the EC to nine Member States, the EC had become the world’s largest trading bloc.

The 12-member EC of 1986 was already the largest trading power in the world. However, the EC, just like the U.S., showed some significant internal weaknesses to the outside world: although the European Commission has the power to initiate and execute decisions for its Member States in international trade negotiations, its proposals must, by law, first be approved by the EU Council. Some authors argue that this internal division is

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176 David O’Keeffe, Community and Member State Competence in External Relations Agreements of the EU, 4 EUR. FOREIGN AFF. REV. 7 (1999).
177 The Single European Act (SEA) was signed on February 17, 1986 in Luxembourg by representatives of the then twelve EC Member States. The Danish Parliament had rejected the project of institutional reform, but the Danish people approved it by referendum on February 27, 1986. Apart from minor modifications, this Treaty was the first profound and wide-ranging constitutional reform of the EU since the 1950s. The SEA introduced measures aimed at achieving an internal market (for instance, harmonization) plus institutional changes related to these (such as a generalization of qualified majority voting and a cooperation procedure involving the European Parliament). It also provided legal form for European Political Cooperation.
detrimental for the EC’s role as leader in the international trading system. Toward the end of the Uruguay Round (early 90s), the U.S. leadership was being weakened. President Clinton utilized U.S. protectionist pressures which slowed the moves toward a Uruguay Round agreement. By contrast, Leon Brittan, EU trade commissioner at the time, adopted a more assertive role. This made the leadership between the U.S. and the EC in the framework of the Uruguay Round more balanced.

In the late 1990s, the EC devoted important efforts to encouraging other countries to launch a comprehensive WTO round. One of the reasons for the EC to favor a more comprehensive and broader agenda was that it believed there would be more opportunities for cross-cutting agreements among sectors. It would also facilitate progress in the negotiations themselves. However, the EC had neither the economic power nor the unity of purpose to replace the U.S. as a leader in the world trading system. Thus, a degree of consensus was necessary between the U.S. and the EC if a new WTO round was to be possible. The U.S. and the EC have both become highly dependent on trade and they both had a shared interest in launching the new WTO round at Doha.

B.- Marrakesh: Opinion 1/94 and its Consequences between 1994 and now

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Already during the negotiations to the Maastricht Treaty, the Commission had envisaged the replacement of the common commercial policy with a common external economic policy, whose scope would be larger, including not only trade in services, commercial aspects of intellectual property, and goods but also the external dimension of competition, establishment, and investment. The decision to include aspects of external economic policy within the scope of Article 133 EC thanks to the Nice amendment to that Article was based “on the desirability of specific procedures, reinforcing the ‘open’ nature of the CCP.”

In April 1994, the WTO Agreement was signed in Marrakesh. As a consequence of such agreement, Opinion 1/94 of the ECJ saw the light a few months later. The Court had to examine the question of whether the EC has the exclusive competence to conclude the WTO Agreement, including the GATT, the GATS, the TRIPS Agreement, and the dispute

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180 On February 7, 1992 was the signing of the Maastricht Treaty by the EU Member States’ foreign affairs ministers and finance ministers. The Treaty provides for a reinforcement of the European Parliament’s powers, an increase in legitimacy for the Commission, and the creation of the Committee of the Regions.


183 The General Agreement on Tariffs and Trade, signed in 1947, was created by the Bretton Woods meetings that took place in Bretton Woods, New Hampshire (U.S.), in 1944, setting out a plan for economic recovery after World War II, by encouraging reduction in tariffs and other international trade barriers. The GATT is one of the three mechanisms for global economic governance established at Bretton Woods, being the other two the International Monetary Fund (IMF) and the World Bank. The GATT was a collection of rules applied temporarily, without an institutional basis, unlike the WTO, which is a permanent organization with a permanent framework and its own Secretariat. For almost fifty years, the GATT focused exclusively on trade in goods, leaving tariffs and quotas aside in the various rounds of negotiations of the world trading system. The GATT set the terms for countries who wanted to trade with each other. The GATT signatories were called “contracting parties.” The Uruguay Round, completed in 1994, replaced the GATT with the WTO, a global trade agency with binding enforcements of comprehensive rules expanding beyond trade. The GATT has now become one of the eighteen agreements enforced by the WTO.

settlement understanding (DSU). The answer to this question depended on the scope of Article 133 EC. The European Commission’s position at the hearing was that shared...
competence would bring a series of problems in relation to the administration of these trade agreements, and that the EC had exclusive competence in the areas covered by these agreements. However, the EU Council indicated that these are areas of shared competence between the EC and its Member States and thus one could have a mixed agreement.\(^{187}\)

In Opinion 1/94, the ECJ rejected the Commission’s argument that all trade in services and intellectual property rights were included in the EC’s common commercial policy insofar as they were covered by the TRIPS Agreement.\(^{188}\) That said, the ECJ also refused the exclusion of trade in services from the common commercial policy as a matter of principle: “it follows from the open nature of the common commercial policy, within the meaning of the Treaty, that trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article 113.”\(^{189}\)

The ECJ’s response was that the EC did not enjoy exclusive competence for the conclusion of the WTO Agreement. In trade in goods, the ECJ did accept the EC’s exclusive competence on the basis of Article 133 EC.\(^{190}\) With regard to trade in services and trade-related aspects of intellectual property rights, the Court decided that the EC is only partially competent for these matters.\(^{191}\) With regard to exclusive external EC competence on these areas, it was also denied by the ECJ on the grounds that the EC had neither completely harmonized all services sectors nor all matters covered by the TRIPS Agreement.\(^{192}\) The Court also considered whether an exclusive external EC competence for areas covered by the


\(^{188}\) For a legal analysis of the Court’s problems with international (trade) agreements, see Leal-Arcas, R. “The European Court of Justice and the EC External Trade Relations: A Legal Analysis of the Court’s Problems with Regard to International Agreements,” in Nordic Journal of International Law, 72:2, 215-251, 2003, Kluwer Law International.


\(^{190}\) 1994 E.C.R. I-5267, para. 27.

\(^{191}\) Id. at paras. 47 and 71.
GATS and the TRIPS Agreement could be implied from the necessity to conclude the WTO Agreement as a means to achieve the goals of the EC Treaty, or from Article 95 EC\textsuperscript{193} or Article 308 EC. The Court, however, denied such an interpretation.\textsuperscript{194}

\textsuperscript{192} Id. at paras. 96-97 and 102 et seq.
\textsuperscript{193} Article 95 EC reads:

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

\textsuperscript{194} Id. at paras. 73 et seq., 99 et seq.
The unique nature of the EC in the WTO (the European Communities, along with the EU Member States, are members of the WTO) has some policy and procedural implications. In my opinion, the ECJ is responsible for the fiasco on the interpretation of the WTO Agreement, reflected in Opinion 1/94 (WTO Agreement) for the allocation of powers between the EC and its Member States in trade matters. In this case, the Commission had requested the ECJ to confirm the exclusive EC competence to sign all the agreements which are part of the WTO Agreement. 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 Agreement. 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. According to the Commission, the Community should have sole responsibility for the conclusion of the agreement.


196 The Agreement on Trade-Related Intellectual Property Measures (TRIPS) is a Uruguay Round Agreement that extends WTO disciplines into the protection of patents, trademarks, copyrights, geographical indications, industrial designs, and trade secrets. Unlike most WTO rules, the TRIPS Agreement requires both domestic enforcement and border measures as part of a member’s compliance to prevent piracy and other violations. Developing countries were given longer transition periods for the phase-in of the TRIPS Agreement requirements. The WTO (but also the North America Free Trade Agreement –NAFTA- and the Free Trade Area of the Americas –FTAA-) includes new intellectual property rules which require signatory countries to establish specific patent, copyright and trademark protections in their domestic laws. The pharmaceutical industry exercised heavy influence on WTO negotiations, and these agreements require countries to adopt U.S.-style intellectual property laws, such as granting monopoly sales rights to individual patent holders for extended time periods and including seeds, medicines and other traditionally excluded items as those for which countries must provide patent protections. The TRIPS rules have been subject of a major international fight regarding poor countries’ rights to issue compulsory licenses for essential medicines.

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.198

From this Opinion,199 one can infer that the primacy of the Commission as negotiator of trade agreements was undercut somewhat by the Court of Justice when it ruled in 1994 that certain aspects of matters dealt with by the WTO -involving services trade and intellectual property- did not fall within the scope of the common commercial policy. The Nice Treaty further developed this issue so that today the common commercial policy includes trade in goods, intellectual property rights and services, except health, education, and audiovisual services, which are shared with the EU Member States.200 Since the notion of European identity has not yet coalesced to the point that it is possible to speak of a common good for the entire EU, perhaps for this reason the European Court of Justice, in its Opinion 1/94 upon the WTO, emphasizes the duty of cooperation between the Member States and the Community institutions. It is, nevertheless, important to distinguish between what the law

requires and what the policy adopted by the EU institutions and Member States may be in a particular case.\textsuperscript{201}

\textit{B.1.- Consequences of Opinion 1/94}

B.1.a- The EC and its Member States Have Competence

The European Court of Justice has its own view with regard to agreements where some of their provisions fall under EC competence, and others remain under the competence of the Member States. Unfortunately, although the Court deals with the issue throughout its case-law, it does not say how to solve the problem. The view of a national Court (the French \textit{Conseil Constitutionnel}) on this matter shall be analyzed later to help us understand how this issue is resolved in practice.

In Opinion 1/94,\textsuperscript{202} the European Commission argued that the EC had exclusive competence in all matters covered by the agreement giving effect to the Uruguay Round. In Opinion 2/92\textsuperscript{203} on OECD National Treatment Instrument, the European Commission also argued that the EC had exclusive competence with regard to trade in services. The European Commission was therefore arguing that the EC had exclusive competence with respect to the whole field of external trade relations.

\textsuperscript{200} See Article 133.6.2 of the Nice Treaty.
\textsuperscript{202} Opinion 1/94, competence of the Community to conclude international agreements concerning services and intellectual property (15 November 1994), 1994 E.C.R. 1-5267.
The ECJ rejected this statement. In the case of Opinion 1/94, the ECJ held that the EC and its Member States were jointly competent to conclude the General Agreement on Trade in Services (GATS) and the Agreement on Trade related Aspects of Intellectual Property (TRIPS). With respect to Opinion 2/92, the ECJ held that the EC and its Member States were jointly competent to enter into the instrument in question. When asked to clarify the allocation of competence within the Union to conclude the Uruguay Round Agreements, the European Court of Justice confirmed in November 1994 the Community's exclusive competence with respect to the conclusion of multilateral agreements relating to goods. However, competence to conclude agreements related to certain types of services and intellectual property was shared between the Community and the Member States. Consequently, the WTO Agreements were signed by the Council, Commission and the Member States and ratified by the Council, with the European Parliament's approval, as well as by national parliaments.

In practical terms, this means according to the ECJ that the EC and its Member States can be jointly competent with regard to international agreements. For Member States, this is an important ‘victory’ since their competence is given full recognition for the implementation of the international agreements in question. Along the same line, where the agreements are being negotiated, the Member States’ competence and rights which flow from it are entitled to recognition. Since in both Opinion 1/94 and 2/92 the ECJ clarified the division of competence between the EU institutions and the Member States in areas of

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203 Opinion 2/92, Competence of the Community or one of its Institutions to participate in the Third Revised Decision of the OECD on national treatment, 1995 E.C.R. I-521.
205 For an overview of the great legal and political difficulties in this matter, see Timmermans, Ch. “Organizing Joint Participation of EC and Member States,” in Dashwood, A. & Hillion, C. (eds.) THE GENERAL LAW OF EC EXTERNAL RELATIONS, Sweet & Maxwell, 2000, pp. 239-47.
services, establishment and intellectual property. Therefore, this means that in practice the duty of cooperation will assume great importance.

More recently, we see how Article I-13 (2) of the Constitutional Treaty reflects the case-law of the ECJ on the Union’s exclusive competence to conclude international agreements. The Community’s competence to conclude international agreements arises from two sources:

1. express provisions in the Treaty. For example, Article 133 EC enables the EC to enter into tariff and trade agreements within the scope of the common commercial policy; and

2. The jurisprudence of the ECJ. The Court has held that external competence may flow from other provisions of the Treaty and measures adopted within the framework of those provisions. The existence of internal rules or unexercised Treaty powers to adopt such rules confers external competences to the Community.

As a matter of law, the Community’s ability to conduct external relations is restricted to those areas where it has competence, whether it is exclusive or shared. On the other hand, where and to the extent that the Community has competence, Member States’ freedom of action is limited. A consequence of the supremacy of EC law is that Member States cannot prejudice the operation of Community law by entering into external obligations. Thus, Member States may not enter into agreements between themselves or with third States on the same subject matter. The EC and its Member States share competence in a situation in which the transfer of competence is partial, because the Treaty expressly preserves Member States’

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206 Id.
competence\textsuperscript{210} or because the internal rules do not occupy the whole field. Both will be parties to the international agreement, which is commonly known as a mixed agreement.

As Dashwood suggests,\textsuperscript{211} critics of the ECJ’s Opinion 1/94 have seen that cross-retaliation (for example, imposition of trade restrictions as a sanction for the failure by a third country adequately to protect intellectual property rights) may not be a possible option for the EC and its Member States, where different elements of a strategy fall under different competencies.\textsuperscript{212} According to Dashwood, the problems of legal mixity are not unsolvable or uncontrollable.\textsuperscript{213} As we will see later in this article, zealous efforts were made during the Nice Summit to secure an amendment to Article 133 of the Amsterdam Treaty that would change the consequences of Opinion 1/94 with regard to action within the WTO. The outcome was not very radical: Article 133 (5) EC empowered the EU Council to change the existing law.

According to Weiler, Member States are not prepared to live in a world in which the Community assumes that it is competent in all fields of trade. Proof competence is necessary from now on. Opinion 1/94 is a good example.\textsuperscript{214} The Commission had requested the ECJ under the procedure of Article 300 (6) EC to confirm the exclusive competence of the EC to conclude the WTO Agreement (the GATT, the GATS, and the TRIPS Agreement) which had been negotiated within the framework of the Uruguay Round.\textsuperscript{215} The Council, however,
hoped that the Court would establish a clear dividing line between the Community’s and the Member States’ competence with respect to trade liberalization for purposes of ratification and future negotiations. The outcome was a shock to many: the Commission’s powers in the field of services and intellectual property rights were severely curtailed. The ECJ concluded that the GATS and the TRIPS Agreement had to be concluded as a mixed agreement. Had the ECJ’s interpretation of the ERTA doctrine been more expansive, it would have supported a more pro-Community view. In the post-Opinion 1/94 period, Member States have worked more closely together in international trade issues.²¹⁶ There are signs that the Commission is more cautious now. A new code of conduct has evolved in this field, regulating the interaction between the Commission and EU Member States.²¹⁷

It is important to mention the distinction made by the ECJ between the modes to supply services, on the one hand, and the trade-related intellectual property rights, on the other. As for the modes to supply services, they do not concern the nature of the services rendered, but rather the way in which the services concerned are provided. By contrast, trade-related intellectual property rights concern the nature of these rights.²¹⁸

B.1.b.- Doctrine Of The French Conseil Constitutionnel

Ruling Number 37-394 DC, of December 31, 1997, of the French Conseil Constitutionnel on
the required Constitutional revisions for ratification of the Treaty of Amsterdam, illustrates
some of the problems mentioned above. On one hand, the ruling corrects Article 88-1 of the
French Constitution from the constitutional Act of June 25, 1992, on the division of
competences between the Community and the Member States. By that provision, the
Community will only be a simple mechanism to “exercise in common” certain Member
States’ competences, and the French Conseil Constitutionnel refers consistently to the
“transfer of competences” from the French State to the Community. On the other hand, the
Conseil Constitutionnel continues to develop the thesis by which “the necessary conditions to
exercise national sovereignty” are not affected by the transfer of competences itself but by
the types of exercise of these competences. This would be affected if the Council adopted
decisions by qualified majority but not if unanimity was used. The above thesis had already
been introduced by the Conseil Constitutionnel in its previous Ruling on the Treaty of
Maastricht.

There are three problems with this thesis. First of all, Ruling Number 37-394 DC of
December 31, 1997 of the French Conseil Constitutionnel is relevant to the external
economic relations of the EC because it states that the Community is a mechanism used to
obtain a common position between the EC and its Member States in certain domains. The
ruling states that there will be a transfer of competences from the national to the Community
level. Secondly, in its Opinion 1/94 on the division of competences between the Community
and the Member States regarding the agreements from the negotiations in the Uruguay

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220 “Appendice III: Deux Commentaires a la Doctrine du Conseil Constitutionnel Francais” in TORRENT, R.
DROIT ET PRATIQUE DES RELATIONS ECONOMIQUES EXTERIEURES DANS L'UNION
Round, had the European Court of Justice taken a position stating that the exclusive EC competence covered the integrity of the agreements, the consequence for the French State would have been that it would not have had competences on trade matters. Therefore, it would not have been able to become a member of the World Trade Organization, which was clearly not intended and would not have been agreed to by France.

Finally, the “constitutional” problem is that of the existence, the nature (whether exclusive or non-exclusive) and the limits of EC competences and not of the exercise of EC competences. The exercise of EC competences is primarily a political problem, in which juridical-constitutional apriorisms are often bad advisors. As Professor Torrent points out, the requirement of unanimity in the Council is seen by some as a guarantee of the ability to block the action of a majority that is against the interest of the French government. However, the example could be reversed: unanimity allows the representative of a government of any other Member State to block the action of a majority where the French government participates.

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

B.2.- Trade in Services

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221 Id.
With regard to trade in services, the distinction made by the ECJ between modes to supply services and services as such had an immediate consequence: competencies between the EC and its Member States were divided since trade in services is not restricted to a specific mode to supply services, in other words, cross-border supply of services. As an example, we have the ECJ’s judgment on the legal base of the agreement on government procurement between the EC and the U.S. before the entry into force of the plurilateral WTO Government Procurement Agreement. Here, the ECJ declared void the Council’s decision by which the bilateral agreement between the EC and the U.S. had been approved. Article 133 EC was considered not to be a sufficient legal base for this decision.

The ECJ interpreted that the EC has both explicit and implied foreign trade competencies. The WTO Agreement was jointly ratified by the EC and its Member States. This means that the WTO Agreement is a mixed agreement and, therefore, there is a need for constant cooperation between the EC and its Member States in areas where there is no exclusive EC competence. The ECJ’s Opinion 1/94 on the division of competencies between the EC and its Member States in the area of external trade relations meant that the legal phenomenon of “mixed agreements” had to be relied upon more often, given that new free trade agreements include trade in services and intellectual property rights due to their...
increased economic significance, for example, the mixed agreement between Mexico and the EC on economic partnership,\textsuperscript{227} political coordination, and cooperation.\textsuperscript{228} Another witness of this legal phenomenon is the mixed agreement between the EC and its Member States and South Africa. This agreement’s conclusion was blocked by some Member States on the grounds that the South African concessions in the area of geographic indications for alcoholic beverages such as Grappa, Ouzo and Port were insufficient.\textsuperscript{229}

\textit{B.3.- Intellectual Property Rights}

With respect to intellectual property rights, according to the ECJ, the primary objective of the TRIPS Agreement is “to strengthen and harmonise the protection of intellectual property on a worldwide scale.”\textsuperscript{230} Therefore, those who were hoping to bring into the single procedure of Article 133 EC the whole range of matters that appear in the WTO package where the EC is competent are likely to be disappointed.

\textsuperscript{227} These agreements were done in the framework of the so-called Economic Partnership Agreements. For instance, the ACP countries and the EU have agreed to enter into economic integration agreements -concluding new WTO compatible trading arrangements, progressively removing barriers to trade among them, and enhancing co-operation in all areas related to trade-. To this end, Economic Partnership Agreements will be negotiated with ACP regions, engaged in a regional economic integration process. Economic Partnership Agreements (EPAs) are thus intended to consolidate regional integration initiatives within the ACP. They are also aimed at providing an open, transparent and predictable framework for goods and services to circulate freely, thus increasing competitiveness of the ACP and ultimately facilitating the transition towards their full participation in a liberalizing world economy -thereby complementing any initiative taken in the multilateral context-. Formal negotiations started in September 2002 and EPAs will enter into force by 1 January 2008 at the latest. The non-reciprocal Lomé IV trade preferences will continue to be applied during the interim period (2000-2007).
\textsuperscript{228} OJ 2000 L 276/44.
\textsuperscript{230} \textit{Id.} para. 58.
The exclusive EC competence in trade matters did not extend to certain aspects of the international supply of services,\(^{231}\) or to the harmonization of rules on the protection of intellectual property rights,\(^{232}\) which the Court identified as the primary objective of the TRIPS Agreement.\(^{233}\) Two issues can be analysed from the construction given to Article 133 EC in Opinion 1/94: first, there were large parts of the WTO Agreement where EC competence fell to be exercised on the basis of provisions other than Article 133 EC, including Article 308 EC. This last Article requires the Council to act by unanimity, strengthening thereby the hand of the EC negotiators to resist demands for policy changes; second, EU Member States were free to conclude the relevant parts of the WTO package through the collective exercise of national powers, rather than through the EC.\(^{234}\) In this sense, in Case C-53/96 *Hermes International v. FHT Marketing Choice BV*, the Court said that “the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties.”\(^{235}\)

**B.4.- Duty of Cooperation**

Once again, the ECJ, in the final part of its (in)famous Opinion 1/94,\(^{236}\) opted for the duty of cooperation as the panacea in cases of division of powers between the EC and its Member States. The duty of co-operation seems to be a rather broad formula for the achievement of a

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\(^{231}\) 1994 E.C.R. I-5267, paras. 36 to 53.
\(^{232}\) Id., paras. 54 to 71.
\(^{233}\) Id., para. 58.
\(^{234}\) Id., paras. 78 to 105.
\(^{236}\) 1994 E.C.R. I-5267, paras. 106 et seq.
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unitary character for the EC. An example is the Community’s post-Opinion 1/94 external relations regime. Opinion 1/94 does not give any guidelines as to the more specific implementation of the “duty of cooperation”.237 Co-operation has taken place until now either ad hoc or under an informal “code of conduct” agreed in May 1994 between the Council, the Commission and the Member States at the “post-Uruguay Round” negotiations on services.238 However, the Member States, the Council and the Commission have been unable to reach an agreement –in spite of numerous attempts- upon a permanent and more comprehensive code that would cover the Community and Member States’ participation in the WTO as a whole.

Nor does Opinion 1/94 indicate any provisions of either the EC Treaty or the Treaty on European Union in which the duty of co-operation can be found.239 To justify its position, the Court simply referred to its previous case-law (Ruling 1/78 on the Draft Convention of the International Atomic Energy Agency on Physical Protection of Nuclear Materials, Facilities and Transport, paragraphs 34-36 240 and Opinion 2/91 on ILO Convention 170 on Chemicals at Work, paragraph 36241).242

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238 See European Commission, General Report on the Activities of the European Union 1994, pt. 990. The code has never been officially published but the text is cited in Part XVII of the “Description of the Request” (“Questions put by the Court to the Commission, the Council and the Member States and the answers given to those questions”), Opinion 1/94, at pp. 5365-5366.
Where competence is shared between the EC and its Member States, both Member States and the EC are **obliged** to seek a **common position**. Coordination of their positions is indispensable to prevent inconsistencies or even mutual blockage within the framework of an international organization. According to the ECJ, this requirement of unity in the international representation of the three Communities shows the importance of co-operation or close association between the Member States and the EC institutions in the negotiation or conclusion of agreements and in the fulfillment of commitments at the international level. Community and Member States, since they have an obligation to co-operate, must attempt to organize harmoniously their coexistence in international organizations in which they share membership and competence, such as the WTO, as was already stated in Opinion 2/91.

As for the fulfillment of commitments at the international level, Opinion 1/94 (Re WTO Agreement) describes how Community and Member States are each other’s prisoners. The one cannot act without the other. Achieving a common position of Member States is a **sine qua non** for Community action. As a consequence of Opinion 1/94 of the ECJ, there was a need for a uniform international representation of the EC. In spite of this, the EU Member States tried to pursue more strongly their interests in the area of external trade. One example is the use of voting rights within the Food and Agriculture

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Organization (FAO). Here, the ECJ ruled that the Member States did not respect their duty of cooperation with the EC.

C.- The Amsterdam Treaty

The 1997 Amsterdam Treaty provided for a possible future decision by the Council to extend the common commercial policy to new areas: “The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.” In this sense, the Commission saw the Treaty of Amsterdam as giving an answer to the fundamental question of competence:

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250 The Food and Agriculture Organization (FAO) is a specialized agency of the United Nations that works to raise levels of nutrition and standards of living; to improve the production, processing, marketing, and distribution of food and agricultural products; to promote rural development; and, by these means, to eliminate hunger. In the past, the United States and several European nations have contributed to this organization by providing blankets, food, shelter, and mung beans to those in need. The FAO was founded in 1945 in Quebec City. In 1951 the headquarters were moved from Washington, D.C. to Rome. As of April 2006, it had 190 members (189 States and the European Community). The main activities concentrate on four areas:

1. Developing assistance to developing countries;
2. Information about nutrition, food, agriculture, forestry, and fishery;
3. Advice to governments; and
4. Neutral forum to discuss and formulate policy on major food and agriculture issues.


253 Article 133.5 of the Amsterdam Treaty.
“Questions relating to trade in goods, but only parts of
investment, services and intellectual property are already
included in the day-to-day EU trade activity. Since the Treaty of
Amsterdam, the rest is in an intermediate position: essentially an
EU competence, but only to be used when the Council decides so
by unanimity.”

Paragraph 5 was added to Article 133 EC by the Treaty of Amsterdam as a result of
Opinion 1/94 of the ECJ, which held that the EC and its Member States were jointly
competent to participate in the WTO agreement. This clause has not been used thus far.

“Amsterdam did not succeed in transferring enough policy areas from unanimity to
qualified-majority voting to free up the decision-making process looking ahead to a Union of
28 Member States.” In fact, some commentators speak of unanimity as a dictatorship in
EU policy-making, given the heterogeneity of the Member States’ legal systems. Thus, the
EC continues to face some difficulties in creating a coherent commercial policy. The
Amsterdam intergovernmental conference negotiations did not extend the scope of EC
powers in the field of external trade policy. However, they laid the foundations for a broader
scope of EC powers in this field. Although the Treaty of Amsterdam included some
amendments stating that Article 133 EC procedures could have extended over intellectual

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254 EC Commission, “EU Common Commercial Policy and the Intergovernmental Conference,” MEMO/00/86,
Union- A Continental Perspective,’ Jean Monnet Working Paper 1/01, available at
257 Comment made by Gilles Kerchove, Director of the Directorate-General H (Justice and Home Affairs), EU
Council of Ministers, at a conference at the Europaeische Rechtsakademie Trier, on 10-11 April 2003.
258 Krenzler & da Fonseca-Wollheim, “Die Reichweite der Gemeinsamen Handelspolitik nach Amsterdam,” 33
property and services, it still represents a hurdle because most decisions relating to these sectors must be unanimous,259 in reference to the use of Article 133 (5) EC.

However, not all agreements on intellectual property and services would have to be concluded by unanimous vote, since there are aspects of services and intellectual property which already fall within the scope of the EC’s common commercial policy. In addition, even with the provisions of the Amsterdam Treaty enabling the Commission to act as spokesperson in this type of negotiation,260 it would have been more difficult to reach a Community position if Member States had been forced to reach unanimity.

As a result of shared competence between the EC and its Member States in intellectual property rights, some WTO members have introduced cases related to services and intellectual property rights against individual Member States instead of against the EC as a whole. For instance, the United States has brought various cases under the TRIPS Agreement261 against Denmark, Sweden, and Ireland. In the last case, the U.S. brought a case against Ireland regarding measures affecting the grant of copyrights and neighboring rights.262 The Commission’s main argument in the discussion on expanding EC competence over intellectual property and services was based on the EC’s need to be effective in international negotiations. However, Member States were not readily convinced, perhaps

259 See the consolidated version of the Treaty establishing the European Community, Article 133 (5), 1997 O.J. (C 340) 173, 238.
260 See Treaty of Amsterdam, amending the Treaty of European Union, the Treaties establishing the European Communities and certain related acts, Part one, Substantive amendments, Article 2.20, 1997 O.J. (C 340) 1, 35 (inserting Art. 113(5) into the TEC).
because the success of the Uruguay Round revealed concerns on the balance between the respective roles of the EC and its Member States in international affairs.263

The Amsterdam Treaty thus offered the possibility to modify the EC Treaty autonomously.264 In other words, the EC Treaty could be modified independently of an intergovernmental conference (IGC) and ratification procedures in the Member States.265 Such modification might have ended the so-called “division of powers between the EC and its Member States” in areas of trade in services and intellectual property rights stipulated by the ECJ in its Opinion 1/94, and therefore might have led to an exclusive EC competence.266

This means that the negotiations and conclusions of international trade agreements in these issues would not have required a unanimous decision by the Council anymore and there would not have been need to ratify the agreement in question by all the EU Member States. Thus, the often-criticized interpretation of Article 133 EC by the ECJ in its Opinion 1/94 would have been corrected.267

It is important to be clear on the limits imposed by the drafting of Article 133 (5) of the Treaty of Amsterdam on the EC competence that may be created by the Council. Firstly, Article 133 (5) of the Treaty of Amsterdam made reference to “international negotiations and agreements.” This gave the new competence only an external application, unlike the general competence of the EC under Article 133 EC, which is exercisable both internally and

265 Vedder in Grabitz and Hilf (eds.) DAS RECHT DER EUROPÄISHE UNION, Article 133 EC, para. 56 (forthcoming).
266 Hahn in Callies and Ruffert (eds.) KOMMENTAR ZU EU-UND EG- VERTRAG, Art. 133 EC, para. 41.
externally. Secondly, the Council had not been authorized to create a general competence for
the EC to conclude international agreements on services and intellectual property matters.
The type of agreements in question were those designed to remove impediments to the
supply of services by non-nationals or to ensure the protection of intellectual property rights
that belong to non-nationals.

However, one cannot imagine a situation where a legal basis derived from Article 133
EC was used for concluding an agreement having as its essential objective the harmonization
of important areas of the parties’ internal legislation.\textsuperscript{268} In this sense, as the ECJ explained in
its Opinion 1/94, the EC Institutions may not, by concluding an agreement under Article 133
EC, “escape the internal constraints to which they are subject in relation to procedures and to
rules as to voting.”\textsuperscript{269}

\textbf{V. The End Of A Millenium: The Nice Treaty}\textsuperscript{270}

It is interesting to contrast the Amsterdam IGC negotiations with the Nice IGC
negotiations.\textsuperscript{271} At Amsterdam, little attention was given to trade policy. In relation to
whether it should have been the European Commission or the EU Member States to lead

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\textsuperscript{268} A. Dashwood, “E.C. External Relations Provision Post-Amsterdam” in A. Dashwood & C. Hillion (eds.)
\textsuperscript{269} 1994 E.C.R. I-5267, para.60.
\textsuperscript{270} A deep legal analysis of the common commercial policy according to the Nice Treaty can be found in
Neframi, E. “La Politique Commerciale Commune selon le Traite de Nice,” Cahiers de Droit Européen, Nos. 5-6, 2001, pp. 605-646.
\textsuperscript{271} Meunier, S. & Nicolaïdis, K. “Who Speaks for Europe? The Delegation of Trade Authority in the European
services trade negotiations, this debate took place in complete public indifference. However, various civil society organizations mobilized in an intelligent manner before the Nice summit on the same unresolved issue of services trade negotiations, with the difference that this time they publicized their actions in the media, especially in a document entitled “Red Alert on the ‘133’.”

As noted earlier, the EC does not have exclusive competence in the areas of services, intellectual property rights, and investment in international trade negotiations. Is it because the Founding Fathers thought that Europe would be better off by having exclusive competence only in the area of goods, leaving aside the other areas? Let us remember that when the Treaty of Rome was created in 1957, it was for a group of six relatively homogeneous countries in economic terms. The post-World War II European leaders’ dream was to have an economically and politically unified Europe. However, authors such as Robert M. Dunn argue that “the arrival of the euro as the standard currency [...] does not guarantee the union’s success.”

In any given international negotiation, the European Commission can negotiate on behalf of the Member States under two types of legal framework: exclusive and mixed competence. Under mixed competence, Member States retain a veto power through ratification by their national parliaments and through unanimity voting in the EU Council. In the case of exclusive competence, only a qualified majority vote in the EU Council is theoretically necessary for ratification. Therefore, it seems that with exclusive competence

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273 By foreign direct investment, it is understood the transfer of foreign funds into a country to purchase a service or manufacturing business or to open a new factory or service company.
274 These countries were (West) Germany, France, Italy and the Benelux (Belgium, The Netherlands and Luxembourg).
the EC speaks with one voice (being that of the Commission), whereas with mixed competence there is cacophony.\textsuperscript{276} In practice, the existence of exclusive competence does not guarantee a single voice since some Member States still exercise a veto during trade negotiations.

\textit{A sensu contrario}, Member States have been able to speak with a single voice in areas of mixed competence. In any event, even if the principle of unity of representation by the Commission is often pursued, Member States seek to reduce the Commission’s autonomy, but in areas of exclusive competence the role of the Commission is nevertheless enhanced since Member States do not have a say. Furthermore, there is no frozen EC common position when the EC’s interlocutor is a strong party such as the U.S., Japan or Canada. In other words, there are constant changes in the Member States’ positions. That is to say, when negotiations are dynamic, it is more difficult to have an EC single voice.

The most recent amendments to the EC policy-making system show that indirectly there is a tendency towards exclusive EC competence with time:

1. Before Nice, the so-called “shared competence” issues were ruled under a unanimity system of voting in the EU Council. After Nice, the system has become more flexible towards EC policy convergence. With time, one might think that the future of EC policies might well be exclusive EC competence;

2. At the Intergovernmental Conference of December 2000 in Nice, it was decided that trade agreements relating to services or commercial aspects of intellectual property can, in principle, be concluded by the Council acting by qualified majority. Although

there are exceptions to this principle, this has decided to put an end to most "mixed agreements" and to open decision-making to qualified-majority voting, leaving aside the old system of unanimity. "Among the exceptions to this principle, based on the need for parallel internal and external rules, it should be noted that the Council cannot conclude agreements harmonizing national legislation in the fields of culture, education or human health where the Community does not have internal powers to harmonize. Moreover, the Treaty provides that the Council must act unanimously where the agreement contains provisions requiring unanimity to adopt internal rules or where the agreement relates to an area where the Community has not yet exercised its powers at the internal level. The Treaty also maintains transport as a separate sector."\(^{279}\)

A.- History of the Nice Negotiations

When the GATT was created in 1947, the main engine of world trade was goods. Services hardly played a role in the international trading system. As trade in services became more relevant, there was a debate inside the EC on whether or not trade in services fell within the


\(^{279}\) *Id.*
common commercial policy of the EC (Article 133 EC). For three main reasons was this debate important:

1. the unitary character of EC trade policy among the EU Member States;\(^{280}\)
2. the exclusivity of EC competence in the common commercial policy;\(^{281}\) and
3. the decision-making implications of Article 133 EC. This Article gives responsibility for international negotiations to the Commission, it does not require consultation of the European Parliament, and decisions are adopted in the EU Council by qualified-majority vote.

It might be surprising to see that the Nice Summit agenda included the topic of external trade policy. Why was it the case? Mainly because the EU Council had not taken a decision in accordance with Article 133 (5) of the Amsterdam Treaty to extend the scope of the EC’s common commercial policy.\(^{282}\) Therefore, it seemed appropriate to include the EC’s common commercial policy in the Nice IGC, which had as one of its aims the extension of qualified-majority voting to politically sensitive areas of the EC Treaty. The case-law on the dynamic nature of the common commercial policy and interpretation of Article 133 EC\(^{283}\) supported the extension of the EC’s common commercial policy into services.\(^{284}\) However,


\(^{281}\) See, in this respect, Opinion 1/75 (Re OECD Local Cost Standard) [1975] ECR 1355 & Case 41/76, Criel, née Donckerwolke et al. v Procureur de la Republique au Tribunal de Grande Instance, Lille et al. [1976] ECR 1921.


\(^{283}\) Opinion 1/78 (Re Draft International Agreement on Natural Rubber) [1979] ECR 2871.

this dynamic nature of the EC’s common commercial policy is kept within the control of the EU Council and is limited to intellectual property.\textsuperscript{285}

Article 133 (5) of the Amsterdam Treaty left a series of questions unanswered, one of which was the extent of the EC’s existing external competence in relation to services, based on implied as opposed to express powers.\textsuperscript{286} Since there was a need to find adequate and efficient negotiating mechanisms in the framework of the WTO, a reform of Article 133 EC was imminent at Nice. As we will see below, part of the discussion was about the extension of qualified-majority voting within the EU. In the words of the Commission at the time, “trade issues at this [Nice] IGC essentially concern the replacement of the unanimity rule by qualified majority.”\textsuperscript{287}

Jean-Claude Piris, Director-General of the Council Legal Service, published a note in May 2000 on EC external economic relations.\textsuperscript{288} Four main issues were at stake:

1. EC participation in the WTO;
2. EC single position in relation to third countries and the best decision-making process to achieve this goal;
3. the conclusion of mixed agreements; and
4. the establishment of the EC’s position within a joint body set up under an agreement, when that joint body is to adopt decisions with legal effects.

\textsuperscript{287} EC Commission, “EU Common Commercial Policy and the Intergovernmental Conference,” MEMO/00/86, Brussels, 22 November 2000.
\textsuperscript{288} Legal Adviser to the IGC, Note for the Member State Government Representatives Group on External Economic Relations, 10 May 2000, SN 2705/00.
With regard to the first issue, Piris proposed two options: 1) the revision of Article 133 (5) EC in order to require only a qualified-majority vote, as opposed to unanimity, so that trade in services and intellectual property could be included into the common commercial policy of the EC; 2) the creation of a Protocol on participation in the WTO. The advantage of such a Protocol for the EU’s decision-making process would be the existence of qualified-majority voting, even in the field of Member States competence. The Protocol option was rejected by Mr Lamy, ex-EU trade commissioner.

Since the situation at the time only worked where there is consensus, failure to reach it would lead to a deadlock and to the impossibility to comply with the duty of cooperation expressed by the ECJ.\footnote{Opinion 1/94, at para. 108.} With the imminent phenomenon of enlargement, paralysis would seem even more credible in the EU decision-making process based on unanimity, given the greater diversity of national interests and views. Thus, the need for reformation of the current situation was clear. In Piris’s words, there was a need for “clear, simple, transparent, effective legal rules enabling a common position to be established by a qualified majority in all cases.” Already the draft Protocol proposed common positions to be adopted by the Council, acting by qualified-majority vote; the Commission would be the “spokesman and sole negotiator” for the EC and its Member States in the WTO framework, presenting the common position agreed in the Council. Therefore, as Cremona rightly argues, “the complexity of the Nice amendment is a reminder of just how difficult it is to achieve consensus in this area [commercial policy], and also how important in practice that consensus is.”\footnote{Cremona, M. “A Policy of Bits and Pieces? The Common Commercial Policy After Nice,” The Cambridge Yearbook of European Legal Studies, Vol. 4, 2001, 61-91, at 61.}
In this sense, in January 2000, the Commission’s Opinion\textsuperscript{291} clearly expressed that any change in voting procedures to Article 133 (5) EC would not be the best option. Rather, a better option would be the inclusion of services, intellectual property and investment into Article 133 EC: “The Commission would prefer a substantial amendment of the scope of Article 133 by extending it to services, investment and intellectual property rights.”\textsuperscript{292} France, on the contrary, had already opposed the idea of further broadening of EC powers in the field of external trade during the Amsterdam Summit of 1997.

That said, it was in the best interest of the EC, nevertheless, to benefit from an IGC to improve the EC’s ability to take international actions. In this sense, the European Council of Feira in June 2000 decided to include the external trade policy on the agenda of the Nice IGC. The European Council gave green light to the Presidency Report on IGC negotiations.\textsuperscript{293} Here the Portuguese presidency argued that Article 133 (5) EC is part of those provisions where Council decision by unanimity should be replaced by qualified-majority voting with regard to transfer of competence from national to supranational level. Conversely, other Member States thought that it was not necessary to deal with this same issue in Nice since it had already been in the Amsterdam Summit agenda.

In September 2000, a French Presidency note proposed three alternatives to Article 133 EC:

1. the inclusion of services, intellectual property rights and investment either by amending Article 133 (1) EC or by adding a new paragraph 5 to cover new fields to be defined by a Protocol;

\textsuperscript{293} Brussels, 14 June 2000, CONFER 4750/00, Annex 3.5.
2. change of the voting procedure of Article 133 (5) EC so that the decision to include agreements on trade in services and intellectual property rights would be by qualified-majority vote as opposed to unanimity. The question was whether the EC’s exclusive trade competence should be broadened to include issues such as services and intellectual property rights, where competence is shared between the EC and its Member States, or whether the catalogue of exceptions to the EC’s exclusive trade competence (such as investment, services and intellectual property rights) should remain. In the end, the answer was somewhere in between these two positions; and lastly

3. a new Protocol establishing the rules for a common position in the WTO by qualified-majority vote, without transfer of competence under Article 133 EC.

In November 2000, there were two options presented in the drafts for the new Treaty: 1) the inclusion of trade in services, investment and intellectual property rights in Article 133 (1) EC; 2) the creation of a Protocol for the extension of Article 133 EC to the negotiation and conclusion of agreements on trade in services and intellectual property rights. In December 2000, at the IGC, option 1 was the basis for the final text in Nice, including an explicit reservation of Member State powers; option 2 (the creation of a Protocol) was rejected. Since the Protocol on WTO participation was also dropped, there is no agreement on a single procedure for all WTO negotiations, whether it is for issues of exclusive EC competence, shared competence or Member States’ competence.
B.- The EC Developments in Trade Policy at Nice

During the Nice negotiations, the French presidency played the most active and important role: France wished to control the EC’s common commercial policy as much as possible by insisting that there should be a specific exception for trade in cultural and audio-visual services (the so-called *specificité culturelle*). This is one of the issues which explain the result of the Nice Summit as far as the EC’s foreign trade policy is concerned. Five principal issues were discussed in Nice: qualified-majority voting and the co-decision procedure, the weighting of votes in the Council, the composition of the Commission, the composition of the European Parliament, and closer cooperation. For the purposes of this article, I will only mention the first one of them.

**B.1.- Qualified-majority voting and the co-decision procedure**

The 1957 Treaty of Rome provided for a decision to be taken by unanimity in the EU Council for most of the areas covered. However, a few provisions were already subject to qualified-majority voting and the Treaty of Rome itself foresaw the mechanism of

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296 In fact, there are two types of qualified majority, based on the nature of the text being voted: 1) as a general rule, the ceiling is fixed at the majority of the EU Member States, representing at least 3/5 of the Union’s population (Article I-25 of the EU Constitutional Treaty); 2) however, when the European Council or the EU Council do not act on the basis of a Commission proposal, or on the initiative of the Union’s Foreign Affairs Minister, the ceiling of the qualified majority is fixed at 2/3 of the EU Member States, representing at least 3/5 of the population. This ceiling is susceptible to change if the declaration annexed to the Protocol on the weighting of votes in the European Council and EU Council states that for each accession, the ceiling laid down
qualified-majority voting in many cases after the end of the transitional period in 1966. An example of this period is the so-called France’s “empty chair,” when General De Gaulle rejected a series of Commission proposals blocking their adoption in the Council and refusing to move toward qualified-majority voting. This political crisis was resolved with the Luxembourg compromise in January 1966. The Council had stated in its conclusions that “where very important interests of one or more partners are at stake, the members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all […].” The immediate consequence of this event was the veto culture, which damaged severely the process of European integration.

The Single European Act of 1987, the Council practice of 1985 and Maastricht represent a reduction of Member State participation, by moving from unanimity to a qualified-majority requirement. Weiler points out in his book *The Constitution of Europe* that EC Member States are less willing today to accept ERTA-type decisions by the ECJ. In these decisions, EC Member States, by transferring sovereignty over a given issue to the EC, implicitly acknowledged that the EC can exercise sovereignty over the issue at an international level.

The praxis of qualified-majority voting was seen as a necessary element for the successive EU enlargements. Yet, several important and politically sensitive issues remained subject to the unanimity rule. From Article 205 EC, we can infer that the EU Council acts by in the Protocol is established by the Council.

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297 The empty chair phenomenon describes a situation where General de Gaulle refused to participate in Council meetings. The veto of a single country is brought into question.
298 On January 28, 1966, through the Luxembourg Compromise France agreed to resume its Council seat. It was decided that the majority vote procedure would be replaced by unanimous vote if an EC Member State considers that “very important interests” are at stake.
a majority of its members, as provided by the EC Treaty. Therefore, de iure the simple majority is the rule, whereas qualified majority and unanimity are the exception. However, de facto it seems as if qualified-majority voting will be the rule, whereas unanimity and simple majority will be the exceptions in the Council’s decision-making process. Leaving unanimity aside as a common praxis in the Council is beneficial for an enlarged EU since it will become virtually impossible to take unanimous decisions in an EU of over 30 countries.

At Nice, the discussions seemed to be based on three options:

1. qualified-majority voting as the general rule with limited exceptions listed exhaustively;
2. issues to be transferred to qualified-majority voting with no exhaustive list of the areas excluded; and
3. a case-by-case approach.

At the Nice IGC, the Commission proposed the first option. However, the case-by-case approach prevailed.301

With respect to the co-decision procedure,302 it was introduced by the Maastricht Treaty and then simplified by the Amsterdam Treaty. The aim was to strengthen the powers of the European Parliament. The co-decision procedure is only applied for internal EC legislation, not for international agreements. Yet, the European Parliament can give its approval in trade agreements. In this sense, in the case of the WTO agreement, the EP has power to assent. The

2000, Number 3, p. 671.
302 Article 251 EC.
Commission alerted the fact that there is inconsistency when combining unanimity in the EU Council with the co-decision procedure. Thus, the Commission proposed instead the harmony of qualified-majority voting and the co-decision procedure. In the eyes of the Commission, commercial policy _inter alia_ should come under the co-decision procedure.\(^\text{303}\)

The Commission’s Opinion on the IGC in January 2000 suggested the extension of co-decision to the common commercial policy.\(^\text{304}\) This proposal did not see the light because the European Council refused to apply the principle of parallelism and, in the words of the Commission, this failure to increase the role of the European Parliament in EU decision-making under Article 133 EC is “regrettable for the democratic accountability of the Union’s trade policy.”\(^\text{305}\) Some authors refer to this phenomenon of lack of democratic legitimacy as insufficient and inadequate parliamentary control.\(^\text{306}\) Nonetheless, the Treaty of Nice\(^\text{307}\) would amend Article 300 (6) EC in order to allow the European Parliament, the Council, the Commission or a Member State to request an Opinion from the Court of Justice on the compatibility of a given agreement with the Treaty.

**B.2.- Changes made to Article 133 EC at Nice**

During the Nice IGC, the European Commission had proposed to include in Article 133 (1)


EC trade in goods, as well as services, investment and intellectual property rights.\textsuperscript{308} By doing so, the pre-Nice Article 133 EC would extend to these areas. This proposal, however, never saw the light, and instead Article 133 (5) of the Nice Treaty came into existence. As a consequence, we can observe significant differences between Article 133 (1-4) EC and Article 133 (5) EC.

What are, then, the implications of rejecting the European Commission’s proposal? There are mainly two implications: 1) investments are excluded from Article 133 EC; and 2) only the negotiation and conclusion (but not the implementation) of international agreements is covered by the amended Article 133 EC. Furthermore, Article 133 (6.3) of the Nice Treaty provides that the negotiation and conclusion of international agreements in the field of transport remains being governed by the provisions of the EC Treaty on transport policy and Article 300 EC. This is most likely due to some bureaucratic instance of various EU Member States to leave transport out.

In a nutshell, the content of the new Article 133 EC post-Nice can be summarized as follows:

1. reiteration of current provisions of Article 133 (1-4) EC. For example, there is a need to ensure the compatibility of external agreements with internal policies and rules, under joint responsibility of the Council and the Commission. Another example is the fact that the Commission has the duty to consult the Article 133 Committee and to report to the same Committee on the progress of negotiations;

2. extension of qualified-majority vote (QMV) for the negotiation and conclusion of international agreements on trade in services and trade aspects of intellectual property, except for agreements which include provisions for which unanimity is required for the adoption of internal rules or which relate to a field in which the EC has not yet exercised the powers conferred upon it by the Treaty by adopting internal rules. Arguably, and I certainly believe it is the case, there has been progress in EC trade policy-making by going from unanimity to QMV in the so-called shared competence issues, thereby creating greater flexibility, as well as a trend toward an EU federation, at least in the case of trade policy. Therefore, the Nice Intergovernmental Conference (IGC) has taken into account the important changes made to the world trading system and, consequently, is in line with the WTO’s idea of including the GATS and the TRIPS Agreement as part of the WTO substantive law;

3. joint conclusion by the EU Council (based on Article 300 EC) and the Member States for agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services;

4. application of the existing procedure for agreements on transport. This corroborates the European Court of Justice’s Opinion that transport services are not governed by the provisions on the common commercial policy; and

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310 See eight most recent ECJ judgments on transport on 5 November 2002: C-466/98 Commission v United Kingdom; C-467/98 Commission v Denmark; C-468/98 Commission v Sweden; C-469/98 Commission v Finland; C-471/98 Commission v Belgium; C-472/98 Commission v Luxembourg; C-475/98 Commission v Austria; C-476/98 Commission v Germany.

311 Opinion 1/94, paras. 48-53.
5. possibility of extending qualified-majority voting, by a unanimous EU Council
decision (after consultation of the European Parliament), to agreements on intellectual
property, except in certain derogations.

\[ B.3.- \textit{What remains unchanged of Article 133 EC at Nice} \]

Three main issues remained the same at Nice:

1. the European Parliament is formally excluded from decision-making under Article
133 EC. However, as Herrmann claims, since the Nice IGC failed to strengthen the
rights of the EP in relation to the common commercial policy, “at least the EP will
now be empowered to obtain an opinion by the ECJ under Article 3000 (6) EC, a
change that enhances the ability of the EP to protect its rights concerning
international agreements without having to wait for the Council to take a formal
decision about the conclusion of an agreement which could then be challenged under
Article 230 EC,”\(^{312}\)

2. it is not entirely clear whether investment continues to be excluded from Article 133
EC, although some aspects of investment are covered by the locution “trade in
services.” In this sense, the uncertainty on the scope of Article 133 EC is created by
the fact that in the Nice negotiations all proposals to include an express mention of
“direct investment” alongside “trade in services” to paragraph 5 were rejected.\(^{313}\)


Against this view is the position of Torrent, who argues that in the GATS, investment is deliberately camouflaged as “commercial presence;”\textsuperscript{314} and

3. the proposed Protocol on WTO participation was associated with a decision not to transfer any competence to the EC under Article 133 EC.

\textit{B.4- The New Article 133 EC: More Unnecessary Confusion and Complication?}

To understand the changes made to Article 133 in Nice, I shall focus on the so-called “logic of parallelism.”\textsuperscript{315} One valid definition of the “logic of parallelism” is the idea that the EC’s external powers with respect to trade in services and commercial aspects of intellectual property need to correspond to the division of powers between the EC and its Member States and to the voting procedures in the internal sphere. An example of the so-called “logic of parallelism” is the grant of powers in paragraph 5, subparagraph 1, of Article 133 of the Nice Treaty without prejudice to its paragraph 6, which provides that “an agreement may not be concluded by the Council if it includes provisions which would go beyond the Community’s internal powers.”\textsuperscript{316}

Speaking of the text adopted by the European Council in Nice, the Commission argues that,

\begin{quote}
“by focusing on the principle of parallelism on which it is based, it [the text] becomes easier to understand. The guiding principle of the new Article 133 is to align the decision-making mechanism for trade negotiations on internal decision-making rules: in the area of services for
\end{quote}

\textsuperscript{316} Article 133 (6) (1) of the Nice Treaty.
example, it is illogical that decisions are taken by qualified majority on internal Market directives, but trade negotiations on the very same subject fall under a rule of consensus (effectively requiring unanimity).”317

Within the EU, there is a parallelism between external and internal powers: from paragraph 3 of Article 133 of the Nice Treaty, we see that the Commission and the Council are responsible for ensuring that “agreements negotiated are compatible with internal Community policies and rules.”318 Similarly, Article 300 (6) EC makes reference to Treaty-compatibility and argues that agreements found to be incompatible with the Treaty would only enter into force if and after there has been a Treaty amendment. This means that the EC can actually negotiate and conclude agreements under Article 133 EC which requires amendment of secondary legislation. Thus, as Cremona rightly points out, it would make little sense to believe that “the Community could not negotiate any agreement that was not compatible with Community law as it then stands (i.e. requiring no amendment of Community law)”319 since this would imply a paralysis of external trade policy.

The internal policy objectives are relevant in determining trade policy positions. We see this in the new paragraph 3 of Article 133 of the Nice Treaty. The new wording of paragraph 3 of Article 133, which requires compatibility between the agreements negotiated and internal Community policies and rules, is done to avoid the fear that the Community will negotiate in sensitive internal policy sectors.

Parallelism is also dealt with in Article 133 (6) of the Nice Treaty, which prevents the Council from concluding agreements with provisions which might go beyond the

318 Article 133 (3) EC.
Community’s internal powers. Article 133 (5) (2) of the Nice Treaty shows examples of decision-making parallelism.

**B.5- Article 133 EC after Nice**

B.5.a.- Form and Substance

Although the common commercial policy has traditionally been regarded as one of the areas of exclusive external EC competence, the new subparagraph 4 of paragraph 5 of Article 133 of the Nice Treaty makes an exception to this principle by preserving the Member States’ right to maintain and conclude bilateral agreements with non-member countries or international organizations on issues where there is no common interest to justify action by the European Community.

A second characteristic to Article 133 of the Nice Treaty that has to do with the relationship between the Community’s powers and those of the Member States is its second subparagraph of paragraph 6, which uses for the first time the locution “shared competence” to refer to a situation where EC competence in respect of a given matter exists but is not exclusive. The negotiation of agreements on issues such as trade in cultural and audiovisual services, educational services, and social and human health services will require both a Community decision and the Member States’ consensus. Those agreements on issues

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mentioned in Article 133 (6) (2) EC will be concluded jointly by the EC and its Member States as mixed agreements.\footnote{Heliskoski, J. \textit{Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States}, Kluwer Law International, 2001.}

From a substance viewpoint, Article 133 (6) of the Nice Treaty alludes to the locution “shared competence.” With regard to situations of shared competence, it might be decided by the Council to exercise the Community’s non-exclusive competence over a given agreement, leaving no room for Member States’ participation. Alternatively, if there is no Community legislation in the field covered by the agreement, the Member States alone could conclude the agreement without the Community. Both of these hypotheses are examples where the agreement would be concluded only by the EC or by its Member States alone. A totally different matter is the fact that, as Heliskoski argues, “in every field of Community policy there is likely to be at least some Community legislation in place and, consequently, the Community’s participation in the agreement alongside the Member States might become necessary under the AETR principle.”\footnote{Heliskoski, J. “The Nice Reform of Article 133 EC on the Common Commercial Policy,” \textit{Journal of International Commercial Law}, 2002, 1(1): 1-13, at p. 12, footnote 18.} That is why Heliskoski speaks of “unfortunate”\footnote{Heliskoski, J. “The Nice Reform of Article 133 EC on the Common Commercial Policy,” \textit{Journal of International Commercial Law}, 2002, 1(1): 1-13, at p. 12.} when referring to the way in which Article 133 of the Nice Treaty uses the locution “shared competence.”

With respect to trade in services, the scope has been enlarged so that the EC’s competence to negotiate and conclude trade agreements related to Article 133 EC is not restricted to the so-called “cross-border” supply of services but covers all types of supply. The exceptions would be agreements in the field of transport, as has been explained above,\footnote{See headline \textit{supra} “Changes made to Article 133 EC at Nice”.
\textsuperscript{327} See headline \textit{supra} “Changes made to Article 133 EC at Nice”.} and those agreements which lead to the harmonization of the laws or regulations of the
Member States in an area which the Treaty rules out such harmonization, i.e., education, vocational training, culture, and public health. So services other than cultural, audiovisual, educational, social and health services, have been brought under the scope of Article 133 EC with the Nice Treaty.

As for intellectual property, paragraph (5) (1) is restrained to commercial aspects of intellectual property. It is thus more restricted than Article 133 (5) of the Amsterdam Treaty. This new provision would not enable the EC to negotiate and conclude international trade agreements on intellectual property rights within organizations such as WIPO. During the Nice negotiations, the spirit was to create a paragraph 5 with a scope similar to that of the TRIPS Agreement; however, such proposals were later rejected.

B.5.b.- Decision-making Procedures

Qualified-majority voting has been a major characteristic of the EC common commercial policy’s decision-making process as much as has been the absence of European Parliament’s involvement in the common commercial policy *stricto sensu*. Before Nice, the conclusion of an agreement on issues of shared competence had to be done by unanimity, whereas decision-making of internal legislation was by qualified-majority vote. After Nice, and with EU enlargement in mind, the use of unanimity is only required in four situations:

1. where it is required for the adoption of internal rules;

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328 Article 149 (4) EC.  
329 Article 150 (4) EC.  
330 Article 151 (5) EC.  
331 Article 152 (4) EC.  
2. where powers have not yet been exercised by adoption of internal rules (Article 133 (5)(2) of the Nice Treaty);
3. agreements under the “cultural exception” clause of Article 133 (6) of the Nice Treaty must be concluded by common accord between the EC and its Member States; and
4. horizontal agreements.

Thus, the whole point of Nice with respect to decision-making was to simplify the current situation. Already in an EU of twenty-five Member States it is difficult to have unanimity, so in an enlarged EU of over 25 it is virtually impossible to reach unanimity, despite the sensitivities some Member States may have in certain fields. Leaving unanimity aside is a political sacrifice that may need to be made in EU decision-making in the near future.

B.5.c.- Expansion of Exclusive EC Competence?

Although the scope of the common commercial policy was broadened in previous IGCs, with agreements relating to trade in services and the commercial aspects of intellectual property there has been no expansion to exclusive EC competence by the Nice Treaty; instead, there has been the preservation of “shared competence.” In that same line of argument, Article 133 (5)(4) of the Nice Treaty gives Member States the right to “maintain and conclude agreements with third countries or international organizations insofar as such agreements comply with Community law and other relevant international agreements.” Thus, EC competence does not stop the continuation of Member States competence in these fields. Although this new competence will be shared, the Community will be able to act alone in international trade negotiations.
As for a different category of agreements on trade in services, a specific form of shared competence will continue, where joint negotiation and conclusion of agreements by the Community and its Member States in specific areas will be the normal praxis, as can be seen in Article 133 (6) (2) of the Nice Treaty. According to the Treaty of Nice, the Community alone will not be able to conclude agreements in these sectors: “Agreements thus negotiated shall be concluded jointly by the Community and the Member States.” This also applies to Member States’ inability to conclude such agreements alone. This means that Member States will not lose their competence within the WTO forum.

That said, where external competence is implied, the scope of exclusive external powers may change. The ECJ, in its Opinion 1/94, held that exclusive implied powers in trade in services might arise in two situations: 1) where internal harmonization is complete, or 2) where legislation gives a specific competence to negotiate with third countries: “the [exclusive competence] applies […] even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity […]”.

This means that the current situation could change if new secondary legislation gives the EC exclusive powers in the common commercial policy or if harmonization is complete. On the other hand, and contrary to this approach, the new paragraph 5 of Article 133 of the Nice Treaty preserves Member State competence in the conclusion of mixed trade agreements.

333 Article 133 (6) (2) of the Nice Treaty.
334 See, in contrast, the position under GATT after the transfer of common commercial policy competence to the EC in Cases 22-24/72 International Fruit Company [1972] ECR 1219.
335 Opinion 1/94 at paras. 96-98.
agreements. This can be summarized as a duty of close cooperation in the external relations of the Communities in cases of shared competence.336

C.- The Outcome of Nice: Comments and Criticism

C.1.- Greater Transparency and Simplicity?

The common denominator to all IGC negotiations until Nice was the lack of transparency and information. At Nice, the increasing demands for greater transparency and simplicity337 were not met by the new version of Article 133 EC. This new Article is a bad example of simplification. Why is it not possible to simplify the Treaties so easily? One plausible answer is because at the IGCs the political compromise is far too strong. In the case of Nice, most EU Member States did not bring the scope of the EC’s commercial policy in line with the scope of international economic law as it evolved from the conclusion of the WTO Agreement.

Most commentators have pronounced their disappointment toward the amendment of Article 133 envisaged by the Nice Treaty. The least pessimistic has been the Commission by admitting that “the progress made in improving the operation of EU’s trade policy is modest.”338 Pescatore calls it a “legal bricolage” and alerts us of the inevitable and imminent

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338 European Commission, “The reform of Article 133 by the Nice Treaty. The logic of parallelism.” in
paralysis of the Community’s decisional processes which will hamper an effective defence of
the Community’s trade interests.\textsuperscript{339} The import of unanimity into the common commercial
policy risks the decisional paralysis announced by Pescatore; however, the import of shared
competence threatens the uniform principles of the common commercial policy expressed in
Article 133 (1) of the Nice Treaty.

If the criterion for measuring the success of the Nice Treaty has been, following
Piris’s words, an obvious and understandable need for “clear, simple, transparent, effective
legal rules,”\textsuperscript{340} then one could argue that Nice has failed to do its homework properly.
Despite the interest of the Commission to extend as much as possible qualified-majority
voting in the decision-making process for issues such as trade in services and intellectual
property rights, Member States have attempted to reflect as much as possible the current
situation with regard to distribution of competence in order to preserve the existing EU’s
decision-making \textit{modus operandi}.

Many commentators\textsuperscript{341} argue that the Nice Treaty has accepted the outcome of
Opinion 1/94 of the ECJ: the new Article 133 after Nice preserves the same outcome as the
Opinion in the sense that there continues to be shared competence in the GATS and the
TRIPS Agreement.\textsuperscript{342} The enigma of EC trade policy on issues of trade in services and
intellectual property rights continues to stand up: Cremona argues in this sense that a
rethinking of the locution “uniform principles” as the basis of the EC common commercial

\textit{Frequently Asked Questions. Intergovernmental Conference discusses Article 133, December 2000,
http://europa.eu.int/comm/trade/faqs/rev133_en.htm.}
\textsuperscript{339} Pescatore, P. “Guest Editorial: Nice –Aftermath” (2001) 38 \textit{CMLRev} 265.
\textsuperscript{340} Legal Adviser to the IGC, Note for the Member State Government Representatives Group on External
Economic Relations, 10 May 2000, SN 2705/00.
\textsuperscript{341} See, among others, Pescatore, P. “Guest Editorial: Nice –Aftermath” (2001) 38 \textit{CMLRev} 265; Krenzler, H.G.
& Pitschas, C. ‘Progress or Stagnation?: The Common Commercial Policy After Nice,’ \textit{European Foreign
\textsuperscript{342} Article 133 (5) of the Nice Treaty.
policy will have to be done given the non-exclusive competence nature of services and intellectual property rights. To have a common definition of common interest may be more important and efficient in EC trade relations than uniform rules.\(^343\)

In the words of the Nice European Council, Nice was about “how to establish and monitor a more precise delimitation of powers between the EU and its Member States reflecting the principle of subsidiarity.”\(^344\) The prevailing principle of Nice was that of *quid pro quo*. In the case of the common commercial policy, France had to give concessions to ensure parity with Germany in the decision-making process. The main issue at stake in Nice was the division of responsibilities between the EU and its Member States, i.e., who does what, the arrangements for the exercise of those responsibilities, and the balance of power between Germany and France.\(^345\)

The struggles over national representation in the EC institutions are, according to Yataganas, “a sign of Member States’ mistrust of supranational decision-making procedures in general.”\(^346\) There continues to be a clear democratic deficit in EC trade policy-making: the European Parliament hardly plays a role. Despite the extension of its legislative competences, the famous democratic deficit is still present. There is a need to democratize the EU institutional framework. Or as it was said at the Nice Declaration on the future of the Union, there is a “need to improve and monitor the democratic legitimacy and transparency of the Union and its institutions, to bring them closer to the citizens of the Member States.”


\(^344\) http://ue.eu.int/cigdocs/en/cig2000-EN.pdf


\(^346\) *Id.*
The European Parliament was the big loser in the new Article 133 EC. It was not given any new rights at the Nice Summit, not even a formal right of consultation, even if Article 133 (7) EC provides that the EP be consulted concerning the negotiation and conclusion of international agreements on intellectual property rights. So an informal information procedure remains. However, Herrmann argues that the EP must be consulted if an agreement within the meaning of Article 133 (6.2) EC is to be concluded. It seems contradictory to grant a right of consultation to the EP in an area where the treaty-making power is shared between the EC and its Member States whereas such a right to be consulted does not exist in an area that comes under the EC’s exclusive competence. That said, it must also be mentioned that the EP will be entitled to ask the ECJ to render an Opinion on the compatibility of an international agreement with the EC Treaty, according to Article 133 (6) EC.

As for the Council, the proposal that it would have a greater say in negotiations along with the Commission was not supported. This would have meant a double EC representation in international agreements, against one of the great advantages of Article 133 EC, i.e., that the EC speaks with a single voice. Had this happened, it would have enabled the EC’s negotiating partners to play off the EC negotiators against each other with all negative consequences for the EC’s capacity as an international actor. A clear example of this is the EU’s Common Foreign and Security Policy (CFSP), which is bicephalous in nature: it is represented by the High Representative of the Common Foreign and Security Policy and by the EC commissioner responsible for external relations in cross-pillar matters.

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C.2.- The Extension of qualified-majority voting and co-decision procedures

Majority voting seems to be a fair rule when aggregating the diverse interests among the EU Member States into a coherent common position for trade negotiations. However, anti-globalization activists before and during the December 2000 Nice summit claimed that majority voting was not legitimate because, viewed from the perspective of the outcome, it tends to produce more liberal and less protectionist policies. That explains why many non-governmental organizations (NGOs) were so insistent at the Nice summit that France did not lose its veto right on trade in cultural goods, but instead preserve in the Nice Treaty the so-called cultural exception clause. Some decisions made by majority vote may affect a minority so negatively that the outcome may seem illegitimate. This justifies the preservation of the veto right or consensus in some areas of EC trade policy, such as agriculture, even when the default formal rules laid out in the treaties may state otherwise, in order to protect the right of minorities. However, the need to achieve consensus or unanimity may lead to unfair results. With the EU as an ongoing process, unanimity might pose more problems in terms of political legitimacy since the degree of heterogeneity among the EU Member States is expected to increase as future enlargements take place. This is true for agriculture (consensus vote) or cultural services (unanimity requirement): finding a consensus will be harder with an increased number of potential vetoes resulting from an enlarged EU.

With this background in mind, the new Article 133 EC enables the EC to conclude international agreements on trade in services and intellectual property rights by qualified-majority voting and without ratification by the Member States.348 Nonetheless, there is a need

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for unanimity if only one of the services sectors or intellectual property rights covered by the agreement comes under Article 133 (5.2) EC. Moreover, ratification by the EU Member States is required if one of the services sectors in question comes under Article 133 (6.2) EC. Consequently, only agreements on specific services sectors, such as the GATS protocols on telecommunications or financial services, can be concluded in accordance with the rules of Article 133 (1-4) EC.

The scope of agreements on the commercial aspects of intellectual property rights is rather far reaching due to the dynamic relationship with the TRIPS Agreement. However, since the EC has not yet enacted internal rules in several areas of intellectual property rights, agreements on intellectual property rights where there are not yet internal EC rules, they must be concluded by unanimous decision within the EU Council. With respect to foreign direct investment, the Commission did not succeed in including it in the scope of the EC’s common commercial policy.

After Nice, all EU Member States agreed that, out of the 75 cases where the EC Treaty still required unanimity, consensus must continue to be the rule in only 25 of those cases; for the remaining 50 cases, it was considered by the Portuguese and French presidencies that unanimity should be replaced by qualified-majority voting. In the end, qualified-majority voting was introduced in only 27 Articles out of the original 50 proposed by the Commission.

349 In this sense, the Constitutional Treaty went further by creating the so-called “transition clause,” which has two main objectives: firstly, it enables the EU Council to act by qualified majority, instead of unanimity, in the areas of Part III of the EU Constitutional Treaty. The Council can adopt, on its own initiative and unanimously, a European decision authorizing the EU Council to act unanimously in a specific field. When applying this clause, national parliaments must be informed more than four months prior to the decision’s initial implementation; secondly, the transition clause enables the EU Council, acting unanimously, to extend the co-decision procedure to new areas. This clause is one of the provisions which enable the long-term adaptation of the Constitutional Treaty, in the same way as the flexibility clause, or the review procedure.

350 For a list of the 27 Articles where unanimity has been changed by qualified-majority voting, see Commission
There were five sensitive areas in which transition to qualified-majority voting was important for an enlarged EU. Without intending to enter into the details of any single one of them, these were:

1. the coordination of social security schemes for cross-border workers and minimum requirements in social policy (Articles 42 & 137 EC; opposition from the British government);
2. visas, asylum and immigration issues (Article 67 EC);
3. taxation (Article 93 EC; opposition from the British government);
4. the services and industrial property aspects of the common commercial policy (Article 133 EC; strong opposition from the French government); and
5. the financing of economic and social cohesion policy (Article 161 EC).

With regard to EC trade policy, France showed its eternal problem with culture in the sense that the French government refused the idea of getting rid of commercial policy exemptions for cultural issues (the so-called *specificite culturelle*). The final deal was to allow trade in services to be decided by qualified-majority voting, but only after accepting exemptions for France in culture and audiovisual services. The French and other delegations of EU Member States negotiated long hours to come up with the new Article 133 of the Nice Treaty. The European Commission had campaigned over 10 years to obtain more freedom to lead international trade in services negotiations for the EU at the GATT/WTO. The final compromise was the inclusion of the negotiation and conclusion of international agreements on trade in services and commercial aspects of intellectual property. These agreements are

of the European Communities, Secretary-General, “List of provisions to which the qualified majority rules will apply,” CONFER 4706/1/00 REV 1.
concluded by qualified-majority voting, except when they include “provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.”351 Furthermore, “agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services shall fall within the shared competence of the Community and its Member States.”352

The interests of an EU Member State can be subordinated to the national interests that may be vital to another EU Member State. Most national policy-makers recognize that, one day, they could be in the difficult position of their colleagues, and are therefore happy to keep the veto power. It is therefore no surprise to see the current trend by a majority of EU Member States to expand the rule of unanimity in decision-making in the new areas of trade policy. This trend, however, can question democratically speaking the fairness of an arrangement according to which the blocking minority always gets its way (tyranny of the minority, following by analogy Tocqueville’s famous sentence). The alternative situation to unanimity is qualified majority vote. Given that the voting weight is far from proportional to the country’s population, it favors smaller EU countries. This brings serious doubts as to the qualified majority vote option. So both options show problems of democratic deficit, damaging thereby the legitimacy of the EU.

It is pertinent to mention that the draft Treaty presented at the beginning of the Nice Summit in December 2000 included a Protocol on the participation of the EC and its Member States in the framework of the WTO under Article 133(4).353 This text made an effort at

351 Article 133.5.2 of the Nice Treaty.
352 Article 133.6.2 of the Nice Treaty.
better defining the roles of the EC and its Member States in areas of shared competence. Yet, this useful text was unfortunately not included in the final draft.\textsuperscript{354}

Co-decision will only be applicable in seven Articles\textsuperscript{355} that have changed from unanimity to qualified-majority voting. Unfortunately, the Nice IGC was not capable of extending the co-decision procedure to measures that already exist under the qualified-majority rule, such as trade or agriculture.

In conclusion, the Treaty of Nice only represents a small step forward in strengthening the EC’s capacity to act on the international sphere. Many negative aspects of the ECJ’s Opinion 1/94 have been codified by the new Article 133 EC. The negotiation and conclusion of significant international agreements, be they bilateral or multilateral, is subject to unanimous decision within the Council and ratification by the Member States. There was no solution towards obtaining a more extensive EC’s exclusive competence to reach trade in services, intellectual property rights and investment.

With respect to the unanimity requirement, it enables third countries to exert influence on single Member States. This, in an enlarged EC of over 25 members in the future, could be detrimental for its capacity to act internationally. It is then clear that national sovereignty has gained over efficiency in foreign trade.\textsuperscript{356} The EC’s negotiating power, in comparison to that of the U.S. or Japan, has therefore been reduced, or at least not strengthened in a meaningful manner. This will not enable the EC to properly respond to the challenges of globalization and the world trading system.

\textsuperscript{354} Provisional text of Treaty of Nice, doc. SN 533/00, of 12 December 2000. Final text SN 1247/01, of 30 January 2001. See also the Nice Treaty web site at www.europa.eu.int/comm/nice_treaty/index_en.htm
\textsuperscript{355} These seven Articles are Art. 13, 62, 63, 65, 157, 159 and 191 EC.
VI.- The Constitutional Treaty’s Proposals for External Trade Policy\textsuperscript{357}

In relation to challenges ahead, as the EC has started this new millennium, it has been facing institutional and policy changes in accordance with today’s international relations reality. The 1997 Amsterdam Treaty postponed major EC institutional reforms so a change is inevitable in the near future in order for the EC to survive and maintain credibility as an international actor.\textsuperscript{358} This is also the case of trade policy, even if it is one of the most integrated policies within the EC. Policy-makers in the EC will soon have to face an expanded Union of 27 to 30 Members, which will not be homogeneous since they will not have the same macroeconomic level and yet a way must be found to make the EU institutions work productively.

After the adoption of the Nice Treaty, EU Member States felt the need to call a Convention on the Future of Europe, \emph{inter alia}, to further extend voting by qualified majority in the EU Council. One of the main motivations to resume the work done at the Nice IGC was the risk of blocking the EU institutions. The Convention on the Future of Europe tried to reduce a maximum of areas where EU Member States retain their veto power in the sectors which concern them, such as taxation in the case of the UK or education in France.

The first attempt to ratification of the EU Constitutional Treaty has failed. It is somewhat paradoxical that in the period since the collapse of the Berlin Wall, at precisely the

time in which there were few credible alternatives to liberal democracy, there have been
growing doubts about the capacity of the structures and institutions of liberal democracy to
respond to contemporary problems.\textsuperscript{359} Although the EU Constitutional Treaty will most
likely not enter into force\textsuperscript{360} before the conclusion of the Doha Development Agenda,\textsuperscript{361} it
seems nevertheless relevant to analyze the impact of the Constitutional Treaty on the EC’s
external trade policy.\textsuperscript{362} With respect to the input given by the Convention on the Future of
Europe\textsuperscript{363} and, consequently, the EU Constitutional Treaty, they both try to timidly improve

\begin{footnotesize}
\begin{enumerate}
\item Sophie Meunier & Kalypso Nicolaïdis, “EU Trade Policy: The Exclusive versus Shared Competence
        326 (Maria Green Cowles & Michael Smith eds., 2000).
\item Laursen, F. “The Post-Nice Agenda: Towards a New ‘Constitutional’ Treaty?,” in Laursen, F. (ed.)
        \textit{The Treaty of Nice: Actor Preferences, Bargaining and Institutional Choice}, Martinus
\item When the EU Constitutional Treaty enters into force –if it ever does- it is foreseen that the EC Treaty, the
        EU Treaty, as well as acts and Treaties which have supplemented or amended them, be repealed, as laid down
        in the general and final provisions at the end of Part III of the EU Constitutional Treaty. The EU Constitutional
        Treaty is supposed to enter into force after ratification by all EU Member States. It is also provided for that the
        Union will succeed to all the rights and obligations, whether internal or resulting from international agreements,
        which arose before the entry into force of the EU Constitutional Treaty. The case-law of the ECJ will be
        maintained as a source of Union law interpretation. As stated in Article I-6 of the EU Constitutional Treaty, the
        Constitution and law adopted by the Union’s institutions in exercising competences conferred on it will have
        primacy over the law of the Member States.
\item Predictions are that the Doha Round negotiations will be completed by the end of 2006 in the best case
        scenario.
\item Early analyses thereof can be found at Cremona, M. “The Draft Constitutional Treaty: External Relations
        In Search of Europe's International Identity," Walter van Gerven lecture, Leuven, November 2004, where de
        Burca argues that the external relations provisions of the EU Constitutional Treaty are the most innovative and
        important parts of the constitutional reform; de Witte, B. "The Constitutional Law of External Relations," in
        Pernice, I. & Poiares Maduro, M. (eds.) \textit{A Constitution for the European Union: First Comments on the 2003-
\item The European Convention (also known as the Convention on the future of Europe) was set up in December
        2001. It had 105 members, representing the presidents or prime ministers of the EU Member States and
candidate countries, their national parliaments, the European Parliament and the European Commission. Its
        Chairman was former French President Valéry Giscard d'Estaing. The Convention's job was to draw up a new
        Treaty that would set out clear rules for running the European Union after enlargement. It was, in effect, to be
        the Constitution of the EU. The Convention completed its work on 10 July 2003.

        In order to reach a compromise for all parties present, the Convention consulted diverse groups of civil
        society (citizens, social partners, NGOs, economic sectors,…) in various ways, of which the Forum on the
        Future of the Union was one. The Forum on the Future of the Union was created by the Convention Secretariat,
        with the technical assistance of the Commission, and received contributions from interested national and
        supranational organizations. Eight contact groups were set up to prepare auditions for the academic world, study
        groups, the social sector, the environment, human rights, development, regions and local authorities, culture,
        and citizens and the EU institutions. The Convention also created an online forum on the future of Europe to
\end{enumerate}
\end{footnotesize}
the current situation on trade issues created by the Nice IGC. The main innovation introduced by the EU Constitutional Treaty is to specify the various types of competence that exist in the EU, which has never done in any of the previous Treaties.\textsuperscript{364} Thus, the Union's external trade policy will become more federal,\textsuperscript{365} but not necessarily more democratic, even if the European Parliament will have more powers in relation to the conclusion of international trade agreements. The empowerment of the European Parliament is overweighed by the fact that national parliaments will not partake in the ratification of trade agreements. Therefore, the Constitutional Treaty improves some aspects of the current EC’s common commercial policy, but creates new (unnecessary) problems.

A.- The Constitutional Treaty and International Services Trade

The EU Constitutional Treaty has given more competences in trade policy to the supranational level, which causes problems for national governments. In practice, the problems arise because there is no definition or scope of the common commercial policy in the EU Constitutional Treaty. Therefore, if a given agreement is on a subject of national regulation, then it will have to be signed as a mixed agreement, even under the EU Constitutional Treaty.

\textsuperscript{364} The ECJ, however, had already prefigured such a categorization in that it defines three types of competences: exclusive, shared, and complementary.

\textsuperscript{365} The general rule laid down in Article I-13 of the Constitutional Treaty is that the Union has exclusive competence for the conclusion of an international agreement in areas defined by European legislative acts, when the competence is necessary to enable the Union to exercise its internal competence, or affects an internal Union act. This \textit{praxis} gives a federal approach to the Union in trade agreements.
Part III of the Constitutional Treaty (The Policies and Functioning of the Union) deals in its Title V (The Union’s External Action) with the common commercial policy (Chapter III). With respect to the common commercial policy, Articles III-314\(^\text{366}\) and 315\(^\text{367}\) of the EU Constitutional Treaty deal with the common commercial policy and state that the common commercial policy includes “the conclusion of tariff and trade agreements relating to trade in

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\(^{366}\) Article III-314 of the Constitutional Treaty reads: By establishing a customs union in accordance with Article III-151, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

\(^{367}\) Article III-315 of the Constitutional Treaty reads:

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.

2. European laws shall establish the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article III-325 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements:
   (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
   (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Section 7 of Chapter III of Title III and to Article III-325.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Constitution excludes
goods and services and the commercial aspects of intellectual property, foreign direct investment” (paragraph 1). The text in italics was added to the text of the first paragraph of the current version of Article 133 of the Nice Treaty. This makes it very clear that goods, services, intellectual property rights and investment would be covered by the common commercial policy and would therefore fall within the exclusive competence of the EU. The transfer of areas of decision-making to the supranational level weakens the national interests in the various EU Member States. Compared to the Nice Treaty, the scope would be increased in two aspects: firstly, the exception concerning cultural and audiovisual services, educational services, and social and human health services would be removed; and secondly, investment would be included in the scope of the common commercial policy.

Although the Union will gain a comprehensive external competence, covering thereby all fields of the world trading system, Article III-315 of the Constitutional Treaty does not provide the Union with full internal competence to adopt legislation to implement trade agreements. This means that the Union would need to coordinate with EU Member States before trade agreements can be concluded. Furthermore, the implementation of an international agreement by the Union will put political pressure on EU Member States to adopt that piece of legislation. Since EU Member States will only have a formal competence to implement international agreements, it will not leave them a large margin of discretion, though. Given that Article III-315 of the Constitution, as it stands, would remove any shared competence in EC trade policy (services and commercial aspects of intellectual property rights), it would exclude national parliaments from ratifying any future WTO agreements. Therefore, EU national parliaments would see their influence on trade policy minimized.

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368 Article III-315 (1) of the Constitutional Treaty.
However, as we will see below, the cultural exception in services trade will remain, but in a different form, giving a veto power to EU Member States in specific circumstances (Article III-315-4(a) of the EU Constitutional Treaty).

When analyzing the EU Constitutional Treaty, we note that there are areas where the Union may take coordinating, complementary or supporting action, i.e., public health, culture or education. This seems to be in direct confrontation with the commitments of the Constitutional Treaty in international trade policy (Articles III-314 and 315).

In trade policy, the distinction between qualified majority and unanimity in the Council remains in the Constitutional Treaty, depending on the area of trade policy. The voting requirements of decision-making in the EU Council appear in Article III-315 (4) of

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370 See Article I-17 of the Constitutional Treaty, which reads:

The Union shall have competence to carry out supporting, coordinating or complementary action. The areas of such action shall, at European level, be:
- protection and improvement of human health;
- industry;
- culture;
- tourism;
- education, youth, sport and vocational training;
- civil protection;
- administrative cooperation.

See also Article III-278 (1) of the Constitutional Treaty, which reads:

1. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

Action by the Union, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover:
- the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education;
- monitoring, early warning of and combating serious cross-border threats to health.

The Union shall complement the Member States' action in reducing drug-related health damage, including information and prevention.

371 Article I-25 (1) of the Constitutional Treaty defines qualified majority:
1. A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.
A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.
the Constitutional Treaty.372 The idea of the Convention was to provide for the use of qualified majority voting as a rule. However, the Convention version of Article III-315 did not specifically mention it. This was rectified by adding a subparagraph in Article III-315 (4): “for the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by qualified majority.” This seems to suggest that only the negotiation and conclusion of international agreements shall be subject to the majority rule, but not the adoption of unilateral actions and the implementation of agreements. Nevertheless, majority voting is already in the Nice Treaty the general rule for the exercise of powers in the field of commercial policy.373 Thus, the proposed provision should be interpreted in such a way that majority voting applies as a general rule, subject to the exceptions provided for in subparagraphs 2 and 3 of Article III-315 (4). That said, a trade agreement which includes issues that require unanimity and qualified majority will be concluded by unanimous vote in the EU Council according to the pastis374 principle.375

372 Article III-315 (4) of the Constitutional Treaty reads:
For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.
For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.
The Council shall also act unanimously for the negotiation and conclusion of agreements:
(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.
373 Article 133 (4) EC: “in exercising the powers conferred upon it by this Article, the Council shall act by qualified majority.”
374 Pastis is an anise-flavored liqueur and aperitif from France, typically containing 40-45% alcohol by volume, although there exist alcohol-free varieties. Pastis is normally diluted with water before drinking (generally 5 volumes of water for 1 volume of pastis). The resulting decrease in alcohol percentage causes some of the constituents to become insoluble, which changes the liqueur's appearance from dark transparent yellow to milky soft yellow.
More competences have been given to the EU in trade matters with the EU Constitutional Treaty. So does the EU Constitutional Treaty provide protection against liberalization when national interests are at stake? When analyzing the EU Constitutional Treaty, it might be argued that the following Articles protect the rights of the Member States to determine policy on health, education, and cultural/audiovisual services: Articles I-17, III-278 on public health, III-280 on culture, III-282 on education, III-315-4 of the common commercial policy on cultural and audiovisual services, and III-315-5 of the common commercial policy on the delineation of the competences of Member States as against those of the EU. However, these Articles offer little legal protection against the provisions of Article I-13-1(e),\(^{376}\) which gives the Union the exclusive right to determine the EU’s common commercial policy, and Article III-315-1 of the common commercial policy, which includes the right to make “trade agreements relating to trade in goods and services.”

This element of the common commercial policy allows the Commission, after a qualified majority vote in the Council of Ministers, to make deals in the GATS and the WTO Agreement on what the Commission itself defines as the commercial aspects of these services. The commercial aspects of these services are not defined in the EU Constitutional Treaty or elsewhere. The implication of this is that an EU Member State would have to go to the European Court of Justice to challenge the Commission, arguing a defense that would

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\(^{376}\) Article I-13 of the Constitutional Treaty reads:

1. The Union shall have exclusive competence in the following areas:
   (a) customs union;
   (b) the establishing of the competition rules necessary for the functioning of the internal market;
   (c) monetary policy for the Member States whose currency is the euro;
   (d) the conservation of marine biological resources under the common fisheries policy;
   (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its
have to show that the Commission was opening trade in non-commercial aspects of these services. This would be a very difficult legal argument to make, since many parts of these services can be broken into individual functions and contracted out. Examples of this can be seen in Ireland and the UK. In practice, the above-mentioned protection Articles are but a fig-leaf covering the overriding drive toward uniform liberalization of trade in services contained in the common commercial policy. If those who cite these Articles are serious about protecting health, education, and cultural/audiovisual services from commercialization, they should at least press for the retention of the unanimity requirement in the Council of Ministers on decisions to open trade in these services.

With regard to culture and audiovisual services, Article III-315-4(a) of the EU Constitutional Treaty gives a veto on changes in the common commercial policy only in the “conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union’s cultural and linguistic diversity.” How such risk is defined, when it is defined, and by whom it is defined, is open to interpretation. Would a general opening up of the University sector, or of the primary school sector (as is happening in the UK), to unlimited competition pose a threat to cultural and linguistic diversity? For instance, in the case of Ireland, would the same levels of support to linguistically specific radio and TV –like TG4\(^{377}\) and projects it supports– also have to be given to private commercial channels like TV3\(^{378}\)? How would defenders of linguistic diversity establish, in advance -rather than when deals have been made and the damage is already done- that certain trade agreements pose risks to culture? Who decides what

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\(^{377}\) TG4 is an Irish television channel aimed at Irish language speakers and established as a wholly owned subsidiary by Radio Telefís Eireann on October 31, 1996. It was known as Teilifís na Gaeilge or TnaG before a rebranding campaign in 1999.
constitutes a risk is not defined in the EU Constitutional Treaty, so those who might see their culture as being at risk will not have veto powers. Certainly, EU Member States will continue to participate in the EU’s trade policy whenever there is a national regulation sector that the European Commission neither controls nor knows about when it comes to national preoccupations. In practice, the European Court of Justice will determine which services should be protected and which should be commercialized.

B.- The Union’s Exclusive Competence in Trade Policy

Part I, Title III (Articles I-11 to I-18) of the Constitutional Treaty \(^{379}\) deals with the division of competences between the Union and the Member States. It presents a threefold classification: exclusive competence/shared competence/supporting action. \(^{380}\) However, Title III does not seek to allocate competences in the way that a federal constitution might. \(^{381}\)

It is debatable how far Title III fulfils the demands of the Laeken European Council. The

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\(^{378}\) TV3 Ireland is the sole commercial terrestrial television channel in the Republic of Ireland.


\(^{380}\) In relation to the exclusive competences of the Union, the EU can legislate alone and adopt legally binding acts in areas of exclusive competence (or authorize the Member States to do so). In areas of competences shared between the EU and its Member States, both can intervene. The areas of support, coordination or complimentary action open to the Union’s competence are: industry; protection and improvement of human health; education, vocational training, youth and sport; tourism; administrative cooperation; culture; and civil protection. In these areas, the legally binding acts adopted by the Union (law, framework law, regulation and decision) on the basis of provisions specific to these areas, may not entail harmonization of Member States’ laws or regulations. The Constitutional Treaty also recognizes the Union’s competence for the definition and establishment of a common foreign and security policy, including the progressive definition of a common defense policy. However, the Constitutional Treaty does not give details about Member States’ competences, in other words, areas in which the Union cannot intervene. That said, however, it is clear that “the rest” of competences which are omitted is Member States’ competences.

\(^{381}\) See the German experience of a clear division of competences between the Federal level and the Laender level in Title VII of the Fundamental Law for the Federal Republic of Germany of May 23\(^{rd}\) 1949, especially Articles 70-75.
basic threefold classification may be controversial, not the least the definition of exclusive competence.\textsuperscript{382}

Part I, Title III of the Constitutional Treaty (The Union’s competences) accepts the fact that it would be futile to attempt to compile an exhaustive catalogue of Union competences. Rather it adopts a two-sided approach: firstly, it entails the restatement and strengthening of the fundamental principles that organize the relationship between Union and Member State powers; and, secondly, defining with greater precision than at present the different kinds of competence available to the Union. Since external trade policy is an exclusive competence in the eyes of the EU Constitutional Treaty, let us focus on exclusive competence, which is defined in Article I-13 of the Constitutional Treaty.

- Article I-13

Article I-13 seeks to describe and define those areas where the Union has exclusive competence. This new Article may be controversial, especially for the relationship between the Union and the Member States, but also for the involvement of national parliaments in the control of Union legislation.\textsuperscript{383} It deals with internal competence\textsuperscript{384} and external

\textsuperscript{382} Article I-13 of the Constitutional Treaty.

\textsuperscript{383} In fact, the Protocol on the role of the EU’s national parliaments attempts to clarify relations between national representatives and the EU institutions. The protocol states that, when the European Council uses the procedure laid down in Article I-24 (4)(2) –meaning that when a Council Decision opens a new area to vote at qualified majority- the national parliaments must be notified at least four months prior to the first vote in that area. The Constitutional Treaty also clarifies and organizes the national parliament’s information mechanisms, which for a long time were informal or falling under the Amsterdam Protocol. The EU institutions are obliged to forward documents. For example, the Commission sends all its consultation documents, its annual legislative program or legislative proposals. It also contains a constitutional recognition of the Conference of bodies specialized in EC affairs, which is the link between national parliaments and the European Parliament.

\textsuperscript{384} Article I-13 (1).
competence. These are two separate but related subjects: it is possible for the Union to have exclusive external competence in an area where the Union and its Member States have shared internal competence under the Treaty. In other words, issues of shared competence may potentially become exclusive EU competence.

The Union is said to have exclusive competence to establish “the competition rules necessary for the functioning of the internal market,” as well as in the areas of customs union, common commercial policy, monetary policy for the Member States which have adopted the Euro, and fisheries conservation. The list in paragraph 1 of the areas of the Constitution in which the Union has exclusive competence goes beyond the present situation, as it includes the entire common commercial policy. Since Article I-13 does not define the scope of the common commercial policy, it is only by reading the relevant Article in Part III of the Constitutional Treaty that one discovers that the EU’s exclusive competence is being extended compared to the Nice Treaty. This means that Article 133 (6), subparagraph (2) of the Nice Treaty should be deleted, unless we give a different definition to the common

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385 Article I-13 (2).
386 According to Article I-14 of the Constitutional Treaty, the Union has shared competence with the Member States on issues of common safety concerns in public health matters, as well as in the following issues: the internal market; areas of freedom, security and justice; agriculture and fisheries, excluding the conservation of marine biological resources; transport and trans-European networks; energy; social policy for aspects defined in Part III of the Constitutional Treaty; economic, social and territorial cohesion; common safety concerns in public health matters, for the aspects defined in Part III; the environment; and consumer protection. The Constitutional Treaty also includes two other areas: 1) research, technological development and space, for which the Union can coordinate a common policy. However, the Union can only support, coordinate or complement Member States’ action in the area of civil defense. Taxation remains one of the Member States’ competences, even though the VAT rate and base are harmonized at the European level. Also, administrative cooperation is recognized as a common interest question in Article III-285 of the Constitutional Treaty, for which the Union can support efforts made by Member States to improve their administrative capacity to establish Union law. No Member State is obliged to use this support. 387 House of Lords, Select Committee on the European Union, “The Future of Europe: Constitutional Treaty–Draft Articles 1-16,” Session 2002-03, 9th Report, 25 February 2003, p. 19.
388 Article I-13 (1) of the Constitutional Treaty.
commercial policy, far from the current one.\textsuperscript{389} The EU Constitutional Treaty will repeal the existing treaties entirely, if it enters into force, and therefore will deal with this problem.

Antoniadis, however, has a more skeptical approach on the Constitutional Convention’s proposals in this matter. According to him, the designation of the common commercial policy as an exclusive Union competence does not insulate the system from external threats, and thus perpetuates the constitutional conflicts between the EC and its Member States in trade policy with regard to services trade and the commercial aspects of intellectual property rights.\textsuperscript{390} Why is this the case? Because EU Member States still retain competence to legislate over matters pertaining to the internal market. These measures are destined to have a trade impact and, more importantly, may be incompatible with the WTO Agreements. For example, let us think of a case involving national patent law which offers limited protection, thereby violating the TRIPS Agreement. Or a situation in which the law provides restrictions to the establishment of third country service providers, violating thereby the GATS.

Another reason that explains why the designation of the common commercial policy as an exclusive Union competence only perpetuates the constitutional conflicts between the

\textsuperscript{389} Article 133 (6) of the Nice Treaty reads:

An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community’s internal powers, in particular by leading to harmonization of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonization.

In this regard, by way of derogation form the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.

EC and its Member States in trade policy with regard to services trade and the commercial aspects of intellectual property rights is the fact that EU Member States remain members of the WTO of their own right. This means that any other WTO member may request the establishment of a WTO Panel against any given EU Member State, and not against the EC (despite the exclusivity of the Union in the common commercial policy). If that particular EU Member State is found in violation of WTO law, it must repeal its legislation. In some cases, it may then not have the competence to do so domestically; in other cases, in doing so, it may violate EC law, and be found between conflicting legal obligations.

The Convention on the Future of Europe gave birth to the Constitutional Treaty. The tasks of the Convention were set by the Laeken Declaration, which asked the Convention to consider “how the division of competence can be made more transparent,” “whether there needs to be any reorganization of competence” as well as “how to ensure a redefined division of competence” and to ensure European dynamism at the same time. After analyzing the new definition of the scope of EU trade policy by the Constitutional Treaty, more work may be needed to secure an adequate level of transparency required by the Laeken Declaration. As for the right balance between the maintenance of any “redefined division of competence” and ensuring that “the European dynamic does not come to a halt,” one has to look at Article I-18 of the Constitutional Treaty, entitled “Flexibility clause.”

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391 However, dispute settlement body practice in the WTO dictates that WTO Member States tend to bring actions against the EC, not against individual EU countries, even in areas of shared competence.


393 Article I-18 of the Constitutional Treaty reads:

1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. 2. Using the procedure
VII. Conclusions

With the EU Constitutional Treaty, major changes will arrive. However, one could say that, before the EU Constitutional Treaty, the more it all changed with Article 133 EC, the more it continued to be the same thing. Changes have been made but one wonders whether these suffice in qualitative and quantitative terms. On the other hand, stagnation continues to be present: there is somehow a revival of the ERTA principle and France does not want to give exclusive competence to the EC in cultural services, just to mention a few examples. Even with Article I-13 (1)(e) of the Constitutional Treaty, by which the common commercial policy will become exclusive Union competence, experience tells us that France, among some countries, will reject it on grounds of audiovisual services, health and the so-called *specificite culturelle*.

Much of the confusion in the common commercial policy has to do with the fact that there is no clear policy framework in the EC Treaty itself. If the EC puts its acts together externally, it might help it toward joining internally. If the EU wishes to achieve a main role in global governance, changes need to be made. Following Lamy’s ideas,

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for monitoring the subsidiarity principle referred to in Article I-11(3), the European Commission shall draw national Parliaments’ attention to proposals based on this Article.3. Measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Constitution excludes such harmonisation.

394 Flexibility clause (Article I-18 of the Constitutional Treaty) is the procedure which gives the Union new competences in areas unspecified by the Constitutional Treaty. If the Commission deems it necessary to conduct a new action in order to reach the Union’s objectives, it makes a proposal to that effect to the EU Council, which acts unanimously after obtaining the approval of the Parliament. With respect to the control procedure of the subsidiarity principle, the EU Council may assign the necessary competences to the Union. The new competences cannot, however, entail harmonization of Member States’ laws or regulations in cases where the EU Constitutional Treaty excludes such harmonization.
“the EU needs to speak at global level not just with a single voice, but through a single mouth: the Commission should have competence, as in trade, to negotiate on all matters pertaining to the management of globalization (e.g., environment, transport, energy negotiations, commodity organizations, OECD, FATF, WHO, FAO, etc.), and this under the full control as well as scrutiny of both the European Parliament and Member States.

[...] Qualified majority voting in the Council should apply to questions of global economic governance.

[...] We need to enshrine, in the Treaties, a method for a gradual integration of the three pillars of the EU and a gradual transfer of intergovernmentally managed subject matters to the Community method.”

Full Community competence in almost all trade matters has enabled the EC to develop a higher profile in international trade questions. Perhaps this can be a lesson to take into account for the remaining trade matters under non-exclusive Community competence.

The role of the Member States’ national Parliaments and the European Parliament has to grow: they need to be consulted, given that there continues to be a democratic deficit in the negotiation and conclusion of EC international trade agreements.

Going from unanimity to qualified-majority voting for the negotiation and conclusion of international agreements on services and commercial aspects of intellectual property (with exceptions) has already been identified as a reduction of sovereignty. On the other hand, in an enlarged EU of over 25 countries, any proposal requiring unanimity will be dead by definition since it will be almost impossible to find consensus. Statistically, enlargement will increase the risk of a Member State using its veto to prevent the Community from adopting a common position. This collective weakness may work to the advantage of the Community's trading partners.

There are today many situations in which national interests can be pursued only through the EU level. The main exercise of the first fathers of Europe until Giscard and Schmidt was to discern whether there is a national interest, no national solution and the only solution that can reasonably satisfy the national interest is a common solution. As for the future, I believe that there is no solid European architecture if the Commission is not at its center. Perhaps one compromising alternative to the current situation might be to have exclusive EC competence in trade matters, with clear exceptions of when and how these should apply, given that the current status quo does not seem to be a good option.