Polycephalous Anatomy of the EC in the WTO: An Analysis of Law and Practice

By

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Abstract

This article analyzes the unique legal position of the European Community (EC) in the world trading system. Its polycephalous anatomy derives from the fact that all 25 Member States of the EC are members of the World Trade Organization (WTO) along with the EC itself. This means that when referring to the EC, the whole as well as its parts are independent Members of the WTO. This has legal and political consequences related to the allocation of powers between the national and supranational levels that will be analyzed. The article explains what is meant by a “mixed agreement” and analyzes the various existing types of mixed agreements in the field of the European Community’s external relations. The effects of the EC’s international agreements vis-à-vis third parties are examined. EC Treaty practice has become increasingly dominated by mixed agreements for they reflect the legal and political reality that the EC is not a single State for the purposes of international law. Problems raised by mixed agreements do not exist within the context of exclusive EC competence, but instead relate to the EC’s functioning. Within the EC treaty-making, there is a tendency to sign mixed agreements rather than pure Community agreements in areas dealing with the EC external relations. This shows their importance for the European Community and for its position in the world. The article concludes with some suggestions on what might be the optimal way to move forward in the complex field of external relations law of the EC and the European Union (EU).

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I. Introduction

This article aims at providing insight to the European Community’s (EC) position within the General Agreement on Tariffs and Trade (GATT)\(^1\) and the World Trade Organization (WTO).\(^2\) We will see that

\(^1\) 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

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the EC’s specific problems and challenges for the European Court of Justice (ECJ) are partly related to the EC’s *sui generis* position in the WTO. In this sense, the opinion of Advocate General Tesauro with regard to Case *Hermès International v FHT Marketing Choice* is helpful for understanding the unitary character of the EC’s external trade relations: “The Community legal system is characterized by the simultaneous application of provisions of various origins, international, Community and national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system.”

We shall see more specifically the problem that the EC faces in its external trade relations by analyzing the so-called “duty of close cooperation” and unity in the Communities’ external relations. We will also deal with the difficult and old issue of allocation of competences between the EC and its Member States in EC trade policy.

As a result of the allocation of competences, mixed agreements shall be analyzed, in the latter part of the article. In this sense, we shall first explain what is meant by a mixed agreement and will see what Dominic McGoldrick has said in this respect. We shall see that the European Community appears to be a 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.

2 The World Trade Organization (WTO) is a global trade agency that was established through the GATT Uruguay Round Agreement signed in 1994. The WTO provides dispute resolution, administration, and continuing negotiations for the seventeen substantive agreements that it enforces. The WTO and its underlying agreements set a system of comprehensive governance that goes far beyond trade rules. It is argued by some commentators (Lori Wallach being one of the most relevant activists in the public domain) that the WTO system, rules, and procedures are undemocratic and non-transparent. The WTO’s substantive rules systematically prioritize trade over all other goals and values. Each WTO member is required to ensure “the conformity of its laws, regulations and administrative procedures” [WTO Agreement Article XVI (4)] to the WTO’s substantive rules. National policies and laws found to violate WTO rules must be eliminated or changed; otherwise, the violating country faces trade sanctions. The economic, social and environmental upheaval being suffered by many countries that have lived under the WTO regime since 1995 means that business-as-usual at the WTO is over. It remains to be seen whether the handful of powerful WTO members who have dictated WTO policy since 1995 will adapt to the new reality. By the same token, it is also unclear whether countries demanding changes to the WTO’s current system of rules that are damaging their national interests may begin to withdraw if those changes do not take place. Regarding withdrawal from the WTO Agreement, although Article XV (1) is clear and reads that “Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO,” the withdrawal from certain rules or agreements is not entirely clear.


unique creation from the perspective of international law.⁵ A brief note on the importance of attempting to reach a proper conception of the mixed procedure shall be made. We shall see the various types of mixed agreements⁶ that exist in the field of the external relations of the European Community. We shall then look into the conclusion and effects of the EC’s international agreements vis-à-vis third parties. Attention shall be paid to the fact that problems raised by mixed agreements do not exist within the context of exclusive European Community competence. Some of these problems have to do with the functioning of the European Community.⁷ We shall see how the Member States have delegated their authority to negotiate international trade agreements to the supranational level.⁸

We shall also see that within the European Community treaty-making, there is a tendency to sign mixed agreements rather than agreements of European Community exclusive competence in areas dealing with the external relations of the European Union (EU). This shows their importance for the European Community and for its position in the world.⁹ Although the EC increasingly wants to become an international actor and somehow assert its international personality and identity, it also has to accept that Member States and third parties have legitimate interests.¹⁰ EC Treaty¹¹ practice has become increasingly

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⁸ Supranational literally means 'at a level above national governments' – as opposed to 'intergovernmental,' which means 'between or among governments.' Many EU decisions are taken at the supranational level in the sense that they involve the EU institutions, to which EU Member States have delegated some decision-making powers.
¹⁰ The relationship between the EC and third States is a unique experience in international law and international relations.
¹¹ Treaties are usually composed of articles, Protocols and Declarations. As an example we have the Treaty of Amsterdam, composed of 15 articles, 13 Protocols and 58 Declarations. In the case of the EU, there are currently founding treaties, amending treaties, accession treaties and budgetary treaties. There is also an EU Constitutional Treaty, which seeks to consolidate, simplify and replace the existing set of overlapping treaties. It was signed in Rome on October 29, 2004 and is due to come into force in the near future, conditional on its ratification by all EU Member States. In the meantime, or if the EU Constitutional Treaty fails to be ratified by all EU Member States, the EU will continue to work on the basis of the current treaties. As for the founding treaties, there are four of them: the Treaty of Paris (1952), establishing the European Coal and Steel Community (ECSC), which expired in July 2002; the Treaty establishing the European Atomic Energy Community (Euratom); the Treaty establishing the European Economic Community (EEC); [these last two treaties are known as the Treaties of Rome (1958). However, when the term "Treaty of Rome" or the acronym "TEC" are used, it is to mean only the
dominated by mixed agreements for they reflect the legal and political reality that the EC is not a single State for the purposes of international law. We shall see how the EC’s membership and participation in international organizations is highly variable for an organization which pretends to act as a single actor.

This article does not deal with treaties that are entered into by the Member States alone (if that were the case, they would not be mixed agreements ), but treaties which in substance cover matters of exclusive EC competence. If it is not possible to have Community adherence to such treaties (because the treaty is only open to States), the EC competence may be exercised “through the medium of the Member States acting jointly in the Community’s interest.” Nor does this article deal with treaties concluded in the framework of the Common Foreign and Security Policy (CFSP), where the EU technically lacks legal personality. However, the situation with respect to the EU legal personality has fundamentally changed since the enforcement of the Treaty of Amsterdam, although Article 24 of the

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13 This is also the case for the EU, “it is difficult to see anything short of a major war provoking a transition to a statehood”, Hill, C., The Capability-Expectations Gap, or Conceptualising Europe’s International Role 31 JCMS, 305-28, p. 325 (1993).
18 Rosas, A. The European Union and mixed agreements, in Dashwood, A. & Hillion, C. (eds.) THE GENERAL LAW OF EC
Treaty on European Union (TEU)\textsuperscript{19} refers to the conclusion of CFSP agreements by the Council.\textsuperscript{20} The final subtitle will be devoted to concluding remarks on the issue of mixity in the EC external relations.

This unique legal and political situation, in which the EC and its Member States participate, raises a number of research questions: is there more legal coherence by having exclusive EC competence\textsuperscript{21} on all issues of EC trade policy? Does Article 133 EC after the Nice Treaty suffice to reach the aim of the EC’s common commercial policy? Is Article 133 EC an adequate legal instrument for the purposes of the EC’s common commercial policy? If the EC acts together externally, might it help to join internally within the EU? Would deeper integration of the internal market for, say, services strengthen the negotiating position of the EC in the international trade arena? How does the political context shape this legal issue? How does it impact the thinking about the legal solution, taking into account the fact that the EU is legally federal (i.e., it possesses a federal legal structure) but politically intergovernmental (i.e., it is an intergovernmental political structure)? What political consequences will the legal outcomes have? In Amato's view, no member of the EU is powerful enough to be taken seriously on its own in the international arena. Thus, in order to play an effective role in the world, Europe must join together. In this

\textsuperscript{19} Article 24 TEU reads:

1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.
2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.
3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2).
4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).
5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.
6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.


sense, coordinating its foreign trade policies and streamlining the process was one of Amato's major ambitions during the Convention on the future of Europe.22

II. The Problem of the EU in its External Relations

With two remaining Communities23 (currently there are only two Communities24 since the European Coal and Steel Community [ECSC] Treaty expired on July 23, 2002),25 one Union, and three different pillars of competences and decision-making, it is no wonder that third parties are often puzzled.26 In order to avoid this chaos, it was proposed at the Amsterdam Intergovernmental Conference of 1996-97 to create a single legal entity, the European Union, just like the United Nations (UN) or the World Trade


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

The EEC soon became the most important of these three communities, and was eventually renamed simply the “European Community” by the Maastricht Treaty in 1992, which at the same time effectively made the European Community the first of three pillars of the European Union, called the Community (or Communities) pillar. Subsequent treaties added further areas of competence that extended beyond the purely economic areas. The other two communities remained extremely limited: for that reason, often little distinction is made between the European Community and the European Communities as a whole. Furthermore, in 2002 the ECSC ceased to exist with the expiration of the Treaty of Paris which established it. Seen as redundant, no effort was made to retain it — its assets and liabilities were transferred to the EC, and coal and steel became subject to the EC Treaty.

24 In fact, the two remaining Communities work as one entity which functions in the framework of two Treaties, even if they are legally different. In this sense, legally binding agreements concluded by the EC are still signed on behalf of one or both of the existing Communities. It must be said clearly that the EC, and not the EU, is a member of the World Trade Organization or regional fisheries organizations, to give just two examples. In this respect, see Sack, J. “The European Community’s Membership of International Organizations”, Common Market Law Review, 32, 1995, pp. 1227-1256.


Organization (WTO). This proposal was perceived as a possible transfer of sovereignty in the field of Common Foreign and Security Policy (CFSP).\textsuperscript{27} Unfortunately, this discussion focused on the question of the exercise of competence, and the idea of the EU as a single actor (legal person) does not prejudice the powers of the EU in, say, the common foreign and security policy.

At Maastricht, it was not possible for Member States to accomplish a common foreign and security policy in the framework of the traditional mechanisms of Community institutions and Community law.\textsuperscript{28} The second pillar\textsuperscript{29} of the EU does not presently provide for a real supranational decision-making by majority voting. It utilizes unanimity as a decision-making system with the possibility of common positions\textsuperscript{30} (Article 12 TEU)\textsuperscript{31} and joint actions\textsuperscript{32} (Article 13 TEU)\textsuperscript{33}.

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\textsuperscript{28} These mechanisms are known in the Community institutions as those of the First Pillar.

\textsuperscript{29} The so-called “second pillar” refers to the Common Foreign and Security Policy in the EU.

\textsuperscript{30} The common position in the context of the common foreign and security policy (CFSP) is designed to make cooperation more systematic and improve its coordination. The EU Member States are required to comply with and uphold such positions which have been adopted unanimously at the Council.

For reasons of simplification, the EU Constitutional Treaty which is in the process of being ratified restricts CFSP instruments to European decisions and international agreements. Once the EU Constitutional Treaty enters into force, common positions and their implementation will be based on European decisions (non-legislative instruments) adopted by the Council of Ministers.

\textsuperscript{31} Article 12 TEU reads:

\begin{quote}
The Union shall pursue the objectives set out in Article 11 by:
- defining the principles of and general guidelines for the common foreign and security policy,
- deciding on common strategies,
- adopting joint actions,
- adopting common positions,
- strengthening systematic cooperation between Member States in the conduct of policy.
\end{quote}

\textsuperscript{32} Joint action, which is a legal instrument under Title V of the Treaty on European Union (common foreign and security policy, CFSP), means coordinated action by the EU Member States whereby all kinds of resources (human resources, know-how, financing, equipment, et cetera) are mobilized in order to attain specific objectives set by the Council, on the basis of general guidelines from the European Council.

For reasons of simplification, the EU Constitutional Treaty, which is in the process of being ratified, restricts CFSP instruments to European decisions and international agreements. Once the EU Constitutional Treaty enters into force, joint actions and the implementation of such action will therefore be based on European decisions (non-legislative instruments) adopted by the Council of Ministers.

\textsuperscript{33} Article 13 TEU reads:

\begin{enumerate}
\item The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.
\item The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.
\end{enumerate}

Common strategies shall set out their objectives, duration and the means to be made available by the Union and the Member
It is the Treaty of Amsterdam which attempts to strengthen these mechanisms without implying major changes in this respect. One major change is that the Council of the EU may adopt joint actions or common positions by qualified majority if they are based on a common strategy decided upon by the European Council. However, in adopting a common strategy, the European Council must be unanimous, which diminishes the practical importance of this innovation. In addition to that, any Member State can declare that for “important and sated qualified reasons of national policy” it will oppose the adoption of a decision to be taken by qualified majority, in which case such decision shall not be taken.

Another important change at Amsterdam is that the Secretary-General of the Council will assist the Presidency of the Council in matters dealing with the common foreign and security policy (Article 18.3 TEU). It is still unknown whether the High Representative for the common foreign and security policy will bring more coherence to the EU. One wonders how much coherence can be found in a system in which the Presidency will continue to assert its own role, the High Representative wishes to play an important role, and the Commission continues to be the representative of the EC in the first pillar, as well as fully associated with the second pillar, and therefore has its own voice.

The Amsterdam Treaty also implies that parts of the third pillar have been transferred to the first pillar. This means that Community competence and supranational Community law are growing. The

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3. The Council shall take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council. The Council shall recommend common strategies to the European Council and shall implement them, in particular by adopting joint actions and common positions. The Council shall ensure the unity, consistency and effectiveness of action by the Union.

34 See Monar, J. “The European Union's Foreign Affairs System after the Treaty of Amsterdam: A “Strengthened Capacity for External Action”?” 2 European Foreign Affairs Review 1997, pp. 413-436. In this article, on page 434 the author concludes that, for the EU’s foreign affairs system, the Treaty of Amsterdam “brings only fragments of a reform.”


36 Not to mix with the Council of the EU. The European Council consists of the Head of State and Government of the 25 EU Member States.

37 Article 18.3 TEU reads: The Presidency shall be assisted by the Secretary-General of the Council who shall exercise the function of High Representative for the common foreign and security policy.


39 This is the so-called Community pillar.

40 The so-called "third pillar" refers to matters of police and judicial cooperation in the EU.
matters transferred from the third to the first pillar cover the entry of third-country nationals (visas, asylum, and immigration policy). This shows that, although the transfer of the second pillar to the first may still seem remote, a gradual merger in one form or another of the two pillars seems inevitable for the construction of Europe.

Instead of being faced with two “international organizations” (the remaining two Communities), and the EU as an umbrella concept for these organizations as well as the second and third pillars, third States are now facing two organizations (the Communities) and a third legal (?) person (the EU), which appears as a different entity from the Communities. This situation hardly corresponds to the basic institutional principles of the TEU, such as Article 1.3 TEU\textsuperscript{42} or Article 3.2 TEU.\textsuperscript{43} From this, we can deduce that there is a need for clarification and for more coherence to the institutional image of the EU in the outside world.\textsuperscript{44}

\textsuperscript{41} The first pillar contains Title IV on “Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons.”

\textsuperscript{42} Article 1.3 TEU predicates that “The Union shall be founded on the European Communities”.

\textsuperscript{43} Article 3.2 TEU reads that “The Union shall in particular ensure the consistency of its external activities as a whole”.

A. On Foreign Policy

Under international law, international organizations can have international personality, that is, rights and duties under the Public International system of law. In this respect, the major international law precedent on the international personality of public international law institutions is the *Reparations for injuries suffered in the service of the United Nations case*. Since the EC is an “international organization,” it can be given explicit legal personality by a treaty which has created it. Concerning third States, what counts is the international practice of the organization and the links that such an organization creates with these third States. This practice and its links will (or will not) create the organization’s international legal personality.

In September 1948, Count Bernadotte was the Chief United Nations Truce Negotiator in Jerusalem. He was killed by a gang of private terrorists. The United Nations General Assembly asked for an advisory opinion from the International Court of Justice to bring an international claim concerning injuries suffered by its employees in circumstances involving the responsibility of a State. Although the UN Charter does not expressly confer legal personality on the United Nations Organization, the Court examined the Charter as a whole and concluded that the UN was an international entity holding international rights and obligations, and capable of maintaining its rights by bringing international claims. The Court pronounced itself as follows:

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Accordingly, the Court has come to the conclusion that the Organisation is an international person. That is not the same as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State…Whereas a State possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.\textsuperscript{50}

So the question is: what, then, is the European Union? For the time being, it is just the institutional and political framework in which all EC’s and certain (and only certain) Member States’ competences are exercised. In the near future, once the EU Constitutional Treaty is implemented – or a similar legal document, if the Constitutional Treaty will never see the light of day - the Union will be more than just a simple framework and, therefore, will become an actor with its own legal personality and competences. Let me try to explain this argument by giving the example of former Yugoslavia.

Firstly, if we think of sending military forces, then we are dealing with the 25 Member States of the Union acting outside the institutional system of the Union. However, one should not exclude the possibility that sending troops to former Yugoslavia may have a link with the common foreign and security policy. The borderline between Member States acting on their own, outside the institutional framework of the Union, and Member States acting within the political and institutional framework of the Union is not very clear. Secondly, if we refer to the "European Administration" of the town of Mostar, then we are dealing with Member States' competences in the framework of the EU. Thirdly, if we look at the commercial regime applicable to the republics of former Yugoslavia, then we are dealing with the EC's competences.

These examples should illustrate the danger of an indiscriminate use of the expression “the European Union does...” Such an expression does not let us know who really does what: what does the EC \textit{as such} do? What do the 25 Member States together do in the framework of the Union? What do both Member States and the Community \textit{together} do? Obviously it would be even worse to use the expression
“European Union” when making reference to the Member States outside the EU’s institutional framework. Again, knowing the precise answer to these questions is vital, since the nature, as well as the legal and political consequences of this action, is completely different, depending on who acts. To defend this argument, allow me to suggest two examples:

Example 1: "The European Union reacts to the Helms-Burton and d'Amato Acts." This statement could mean:

a.- that the Community and the Member States both react to these two legislations, each with their own legal and political means; or

b.- that Member States cede their responsibilities to appear behind a single action conducted by the Community. As a matter of fact, the Community has very limited competences regarding such issues as the Helms-Burton or d'Amato Acts. Therefore, its action has very little effect or repercussion.

Example 2: “Agreements between the European Union and Mercosur, and the European Union and the Andean Community.”

This expression does not reveal the main difference between both agreements. The agreement with Mercosur is an agreement signed between the EC and the Member States on the European side, and Mercosur and its Member States on the South American side, whereas the agreement with the Andean Pact and its Member States has been signed only by the European Community on the European side. In other words, EC Member States have not participated in this second agreement. Therefore, the first

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52 The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (better known as the Helms-Burton Act) is a United States law which strengthens and continues the United States embargo against Cuba.
53 The d'Amato Act refers to the economic embargo by the U.S. government against companies of third countries investing in gas or oil in Iran and Libya.
54 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.
55 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
agreement has a greater scope than the second one. The same difference exists between the Euromediterranean Agreements of the EC and its Member States with Tunisia, Morocco, Israel and other countries, as well as the Euromediterranean Agreement with the PLO (Palestinian Liberation Organization). The latter agreement was signed by only the EC (and not the EC and its Member States), and has a lesser scope than the former agreements, since the EU Member States do not participate in the agreement.

It is thus of vital importance to make certain linguistic clarifications which will ease the understanding of what we are trying to explain:

a.- the expression “The Union does humanitarian work” actually means “The Community and/or its Member States, acting together in the framework of the European Union, do humanitarian work;”

b.- the expression “The Union and its Member States” is rather confusing since the Union includes the Member States; however, we can speak of “the Community and its Member States.” Here we mean 26 different legal entities, each one of them having legal personality;

c.- we can use the expression “The Union and its Member States act individually;” by this we understand activities carried out within the framework of the Union (by the Community and/or the Member States acting together), and activities carried out by the Member States outside the framework of the Union.

That said, the success of the EU on unity in commercial policy seems to be inextricably linked to its success with a coherent foreign policy. In fact, as is evidenced in the famous bananas and hormones

1969. Its headquarters are located in Lima, Peru.
disputes, both the political and economic aspects of the EU’s external relations are inseparable. At what was called the European Summit\textsuperscript{59} in The Hague in December 1969, the heads of State and Government of the six original Member States asked their ministers of foreign affairs to study how progress could best be made in the area of political unification.\textsuperscript{60} Their report was a proposal for cooperation in the area of foreign policy, which became the basis of what, for 25 years, would be called European Political Cooperation (EPC).\textsuperscript{61} The procedure was purely intergovernmental and based on unanimity, a constraint reflecting a strong belief that foreign policy decisions remained under the sovereign competence of national governments.\textsuperscript{62}

John Peterson and Helene Sjursen argue that the move from European Political Cooperation (EPC) - in retrospect, a strikingly anodyne construction- to the Common Foreign and Security Policy (CFSP) was propelled by ambitions to create a “common” EU foreign policy analogous to, say, the common agricultural policy or common commercial policy.\textsuperscript{63} Yet, French national foreign policy decisions to test nuclear weapons in the Pacific, send troops to Bosnia, or propose a French candidate to head the European Central Bank could be viewed as far more momentous and consequential than anything agreed upon within the CFSP between 1995 and 1997. It is plausible to suggest, as David Allen does, that the EU simply does not have a “foreign policy”\textsuperscript{64} in the accepted sense of the term. Going one step further, the CFSP may be described, perhaps dismissed, as a “myth.”\textsuperscript{65} It does not, as the Maastricht

\textsuperscript{59} European (or EU) Summits are the meetings of heads of State and government (i.e., presidents and/or prime ministers, depending on what their national constitutions indicate) of all EU countries, plus the President of the European Commission. In today's EU politics, summits are embodied in the European Council, which meets, in principle, four times a year to agree upon overall EU policy and to review progress. The European Council is the highest-level policy-making body in the European Union, which is why its meetings are often called “summits.”

\textsuperscript{60} EUROPEAN FOREIGN POLICY: THE EUROPEAN COMMUNITY AND CHANGING PERSPECTIVES IN EUROPE (Walter Carlsnaes & Steve Smith eds., 1994).

\textsuperscript{61} For a description and analysis of such foreign policy co-ordination, see EUROPEAN POLITICAL COOPERATION IN THE 1980S: A COMMON FOREIGN POLICY FOR WESTERN EUROPE? (Alfred Pijpers et al. eds., 1988).

\textsuperscript{62} L’UNION EUROPEENNE ET LE MONDE APRES AMSTERDAM (Marianne Dony ed., 1999).


\textsuperscript{65} Id.
Treaty promises, cover “all areas of foreign and security policy.”66 Obviously, it is not always supported “actively and unreservedly by its Member States in a spirit of loyalty and mutual solidarity.”67

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

Following the same authors,68 the European Union has not yet reached its apogee in terms of its ability to act with power and unity in international affairs. However, some competences are exclusively of the European Community. Customs duties and protective non-tariff barriers (NTBs)69 such as quantitative limits, safety norms, health, and hygiene standards, were and are fixed by the Union as a whole, not by the individual Member States.

Although the Single European Act in 1987 established a legal basis for EPC, it remained largely unchanged and intergovernmental. Only when the EC faced the challenge of Central and Eastern Europe and the Iraqi crisis in 1990 and 1991 was more thought given to increasing cooperation in foreign policy. The result was the “implementation of a common foreign and security policy including eventual framing of a common defence policy . . .” (Article B TEU).70 The fact that Title V of the Treaty on the European Union brought foreign policy under the umbrella of the EU represents a step forward in clarity. Having more transparent instruments is the result of requiring Member States to conform to common positions of the Council of Ministers.71 Through joint actions, the Member States are committed to acting in support of these common positions. Finally, provisions of the Amsterdam Treaty give the CFSP a clearer

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66 Id.
67 Id.
68 John Peterson & Helene Sjursen.
69 NTBs are government measures or policies other than tariffs that restrict or distort international trade. Examples are import quotas, discriminatory government procurement practices, technical and scientific barriers related to plant health, environmental labelling, codes and standards, *inter alia*.
71 A Council common position is the provisional position agreed by the EU Council after the first reading stage of legislation, that is, after taking account of any amendments proposed or opinions offered by the European Parliament.
character by creating a High Representative of EU foreign policy (Title V of the consolidated version of the Treaty on European Union), assisted by a new policy planning and early warning unit in the Secretariat of the EU Council.72

The whole purpose of creating the CFSP was to enable the EU Member States to speak with one voice by creating a new entity which would do this on their behalf.73 The Amsterdam Treaty brought limited majority voting for implementing foreign policy once it has been agreed to in outline by unanimity (Title V of the consolidated version of the Treaty of Amsterdam),74 and the definition and implementation of a foreign policy position have been helped further along by the existence of EC policy instruments, in particular, the budget.75 For example, the EC instruments advanced external policy with respect to the Mediterranean and to the New Transatlantic Agenda76 between the EU and the U.S., and enhanced cooperation with Asia through the ASEAN Initiative (Association of Southeast Asian Nations Declaration, of August 8, 1967).77 In addition, the EU’s political relations with Central and Eastern Europe have been focused through Europe Agreements negotiated under the EC’s competence.78

72 Treaty of Amsterdam, declaration on the establishment of a policy planning and early warning unit, 1997 O.J. (C 340) 1, 132.
74 TEU Title V.
The EC’s achievements in assisting other nations have been significant. Under the CFSP in 1995, the EU gave Russia U.S.$ 1.5 billion to assist its transition to democracy. In 1996 European humanitarian aid totaled almost U.S.$ 2 billion. Because Member States have proved reluctant to contribute to CFSP action from national budgets, EC financing has become the norm, which means that de facto, there is an indirect communitarization of CFSP as the Commission presents the budget, and the European Parliament decides non-obligatory expenditures. In theory, CFSP has augmented the EU’s competence to act in external matters. In practice, without the political will necessary to adapt the decision-making machinery or to use it effectively, CFSP has done more to raise and to disappoint expectations, than it has to enhance the EU’s international role.79

However, unity in foreign policy is a dramatic step forward and has made it easier for the EC to unify on commercial issues. As mentioned earlier, there are several areas where this cohesion is likely to spill over and impact the international arena. One example is that of competition policy, an area in which the Commission has been active since the early 1960s. With increasing worldwide economic interdependency and the emergence of global markets for a large number of products, more competition cases involve actions that take place outside of the EU,80 like the Boeing and McDonnell Douglas merger. In this respect, the EC-U.S. Cooperation Agreement (which provides the background for the McDonnell Douglas case) is worth mentioning. Competition authorities on both sides of the Atlantic examined the issue, and came to different conclusions. This case shows that even in carrying out policies that have traditionally been domestic, the EU is increasingly influencing economic matters in other parts of the world.

In addition, nowhere is the effect of domestic policies likely to be as relevant as with the Economic and Monetary Union (EMU).\textsuperscript{81} The EMU is essentially a domestic issue. However, EC authorities hope that the Euro will benefit international trade, having a major impact both on international markets, and on the weight attributed to the EU as an international actor. That said, the variable geometry of the EMU with its ins and outs poses a challenge for the unity of external representation in the economic sphere.\textsuperscript{82} To better understand the implications of the unitary character of the EU (or lack thereof), we must look at the legal interpretation of its role and responsibility.

B.- The Case of External Economic Relations

It is also important to say a few words about what Torrent calls the "fourth pillar" of the EU's institutional structure. If the reader studies the Maastricht Treaty,\textsuperscript{83} he or she will perceive that the CFSP has a very large scope, and that it covers the actions of EU Member States in the areas of external economic relations.\textsuperscript{84} In fact,

1. Article 12 (ex-Article J.2) of the Maastricht Treaty refers to "any matter of foreign and security policy" and to "actions in international organisations and at international conferences" without exception (therefore, without excluding economic conferences);\textsuperscript{85}

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\textsuperscript{81} PAUL BRETON ET. AL., INTERNATIONAL TRADE: A EUROPEAN TEXT (1997).
\textsuperscript{83} The numbering of the Maastricht Treaty Articles is not the original one, but follows the changes made by the post-Maastricht Intergovernmental Conferences.
\textsuperscript{85} Article 12 (ex-Article J.2) of the Maastricht Treaty reads:

1. Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that their combined influence is exerted as effectively as possible by means of concerted and convergent action.
2. Whenever it deems it necessary, the Council shall define a common position. Member States shall ensure that their national policies conform to the common positions.
3. Member States shall coordinate their action in international organizations and at international conferences. They shall uphold the common positions in such fora.

In international organizations and at international conferences where not all the Member States participate, those which do take
2. Article 13 of the Maastricht Treaty also has a general scope;\textsuperscript{86} and finally,

3. Article 3 of the Maastricht Treaty establishes that "the Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies."\textsuperscript{87}

However, no one has given such a broad interpretation of the CFSP. Why is this so? An authentic interpretation of the CFSP is one that addresses in the best of all possible ways, the interests of those civil servants who had to put the CFSP in action:

1. from the point of view of the EU's national Ministries of Foreign Affairs, the idea was to "keep" the CFSP for them, even if they did not like it so much;

2. from the point of view of the Commission, there was only one strategy concerning the external economic relations, i.e., to extend the exclusive competence of the European Community as far as possible. This strategy was incompatible with an efficient co-ordination of the external economic policies of the Member States in the framework of the CFSP.

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\textsuperscript{86} Article 13 of the Consolidated Version of the Treaty on European Union reads:

1. The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.
2. The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common. Common strategies shall set out their objectives, duration and the means to be made available by the Union and the Member States.
3. The Council shall take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council. The Council shall recommend common strategies to the European Council and shall implement them, in particular by adopting joint actions and common positions. The Council shall ensure the unity, consistency and effectiveness of action by the Union.

\textsuperscript{87} Article 3 of the Consolidated Version of the Treaty on European Union reads: The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis communautaire.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such
It is this restrictive interpretation of the CFSP which necessarily provokes the development of what Torrent calls the "fourth pillar" of the EU. The term *restrictive* does not suggest a possible inclination of the CFSP toward the EC competences, but rather toward the side of the Member States acting outside the institutional framework of the EU. The so-called "fourth pillar" shows how within the institutional framework of the EU, the *de facto* common exercise of Member States' competences is mainly, but not exclusively, on issues of external economic relations. We may illustrate this with two very significant examples taken from multilateral and bilateral relations:

1. when dealing with the management of the World Trade Organization Agreements, it is the Council of Ministers of the European Union which acts not only on behalf of the EC, but also on behalf of the Member States in the matters in which they are competent;
2. the Association Agreements with the republics of the former Soviet Union deal mainly with the agreed treatment to the enterprises. This issue reveals Member States' competences. Proof of it lies in Opinion 2/92 of the European Court of Justice of 24 March 1995, which deals with the competence of the Community or of one of its institutions to participate in the third revised decision of the Council of the OECD concerning national treatment. These agreements have been negotiated and are integrally managed after their conclusion by the Council of the European Union and the European Commission.

Torrent justifies the existence of a fourth pillar by saying that the exercise of Member States' external economic competences within the institutional framework of the EU does not show signs of consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

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88 One interesting point by Professor Torrent is the fact that making reference to the "fourth pillar" of the Union shows how the language of "three pillars" does not let us comprehend correctly the nature of the European Union.
89 ECR I-521.
90 The Organization for Economic Co-operation and Development (OECD) is a forum of 30 countries for discussion of economic policies between industrialized market economies, sharing a commitment to democratic government and the market economy.
being part of the "third pillar," "second pillar," or "first pillar." Therefore, we must speak of a fourth pillar, if we wish to continue the linguistic usage of pillars.

However, there are at least three comments to make regarding what has been said so far:

- first comment: a clear distinction between the scope of EC competences and the range of application of the EC Treaty must be made. Let us make use of two examples in order to explain this distinction.

Example one: Articles 149, 150 (education, vocational training, and youth), 151 (culture), and 152 EC (public health) limit the Community's competence. Any kind of harmonization of legal provisions of the Member States is excluded from the scope of these Articles. However, this limitation does not mean that the national legislations in culture, education or health exceed the range of application of the treaties. They must respect the general principle of non-discrimination based on nationality, and its specific translation in the field of the four freedoms in EU law.

Example two: concerning the criminal legislation of Member States, the European Court of Justice (ECJ) has established that Member States must respect the general principles of EC law. If, for example, an infraction to customs regulations, before 1st January 1993 –date of completion of the internal market- was liable to a fine applicable to intra-Community trade, it should respect the principle of

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91 Even less so in the second pillar if we take into account the restrictive interpretation which has been given to the CFSP, which is the second pillar.
92 It could not be part of this pillar since we are dealing precisely with the exercise of Member States' competences, and not with that of the Community's.
93 In cultural policy, the EC must contribute to the flowering of the cultures of the EU Member States, while respecting their national and regional diversity and bringing the common cultural heritage to the fore.
94 The EC action, which complements national policies, must be directed toward improving public health, preventing human illness and diseases, as well as obviating sources of danger to human health.
95 Let us remember for the non-specialized reader that the four freedoms are the free movement of goods, the free movement of persons, the free movement of capital and the freedom to provide services. This is certainly one of the great achievements of the EU, which has been able to create a frontier-free area within which people, goods, services and money can all move around freely.
proportionality. The conclusions by the Advocate-General Van Gerven in the case 212/88\textsuperscript{96} have a general appreciation for the Court's decisions over this issue.

The distinction made by these two examples shows that Community treaties have two different functions. On the one hand, the typical function of an international treaty, i.e., to limit the exercise of the competences of the contracting parties (in other words, of the Member States when they are competent). On the other hand, the specific function of transferring a competence to the Community. This function of transferring competences to the Community is very specific, but not exclusive of Community treaties. The fact of not making this distinction has generated very generalized mistakes in the analysis of the distribution of external competences between the Community and its Member States. There was no distinction between the range of application of the treaties and the scope of EC competences. This mistake had terrible consequences when combined with the also mistaken thesis by which non-exclusive EC competences become exclusive competences when there is a need to act at the international level. The combination of these two mistakes was the genesis of the thesis by which all the Agreements of the Uruguay Round were exclusive EC competence.

- second comment: it should be underlined that there is a fine line between what EU Member States do outside and inside the institutional system of the EU. The earlier example of former Yugoslavia is helpful here. Certain EU Member States decided to send troops outside the institutional system of the Union. But to what extent have the diplomatic initiatives from the various EU Member States been inside or outside the framework of the CFSP? And who pays for what in this same example? The same case would apply \textit{mutatis mutandis} to participation in the Middle Eastern peace process. The best example of Member States' activities which are borderline with the Union's institutional system is the EU's participation in the UN.

- third comment: when analyzing the Schengen Agreement, we can observe how this agreement used to be based outside the institutional framework of the EU. Nowadays, it is inside the institutional

\textsuperscript{96} Ruling of the ECJ of 26 October 1989, ECR p. 3523.
framework of the EU. The issues dealt with in the Schengen Agreement are, therefore, treated inside the institutional framework of the EU, as Member States’ competences. Some of these issues are also treated as Community competence. This is a very important point when it comes to external relations: very often a specific problem of international politics can be treated in various ways. The fact of being treated in one way or another has not only legal but also political consequences. The means taken and the foreseeable results are different.

Experience has proven that one of the bigger mistakes of the usage of pillars is that it prevents the same issue from being used in different ways. With the system of pillars in mind, people tend to ask to which pillar a specific issue belongs. Since a good number of national administrations (and certain services of the EU institutions) is organized by pillars instead of by issues, it is no surprise that this question causes internal conflicts of power and jealousy. This is why it is almost evident for national and Community civil servants that the political dialogue with third States belongs to the second pillar. However, joint declarations, which create this political dialogue, do not limit their scope to questions which, inside the Union, are treated within the framework of the CFSP. How can we then pretend to avoid third States form raising questions which relate to EC exclusive competence in the framework of this dialogue?

It should not be necessary to underline that the right approach is precisely the opposite of the one that comes from asking the question to what pillar a certain issue belongs. The issue must be analyzed from all possible angles in order to obtain the best solution. When various possible angles give different ways of action, then this approach implies a difficulty, namely that it has to guarantee coherence among the various ways of action. But politicians, senior civil servants, and jurists are paid by taxpayers to resolve these kinds of difficulties and not to find the way (intellectually easy but the wrong way) of putting each issue in only one of the potential ways of action.

B.1.- The European Community In The World Trade Organization: An Overview

Let us start with a historical introduction of the WTO and its evolution. “At times it seemed doomed to fail. But in the end, the Uruguay Round brought about the biggest reform of the world’s trading system since GATT was created at the end of World War II. And yet, despite its troubled progress, the Uruguay Round did see some early results. Within only two years, participants had agreed on a package of cuts in import duties on tropical products — which are mainly exported by developing countries. They had also revised the rules for settling disputes, with some measures implemented on the spot. And they called for regular reports on GATT members’ trade policies, a move considered important for making trade regimes transparent around the world.”

There are three main purposes to the WTO: “the system’s overriding purpose is (i) to help trade flow as freely as possible — so long as there are no undesirable side-effects. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be “transparent” and predictable.” Because the agreements are drafted and signed by the community of trading nations, often after considerable debate and controversy, one of the WTO’s most important functions is (ii) to serve as a forum for trade negotiations. A third important side to the WTO’s work is (iii) dispute settlement. It is a fact that in international trade negotiations there

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is unequal balance of power between smaller states and bigger states. Trade relations often involve conflicting interests. Contracts and agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO Agreements.”

“The WTO began life on 1 January 1995, but its trading system is half a century older. Since 1948, the General Agreement on Tariffs and Trade (GATT) had provided the rules for the system. Before long it gave birth to an unofficial, de facto international organization, also known informally as GATT, and over the years GATT evolved through several rounds of negotiations. The latest and largest round, was the Uruguay Round which lasted from 1986 to 1994 and led to the WTO’s creation. Whereas GATT had mainly dealt with trade in goods, the WTO and its Agreements now cover trade in services, and in traded inventions, creations and designs (intellectual property).”

As for the EC in the world trading system, it suffices to say that the EC was one of the signatories to the Uruguay Round trade Agreement. Thus the EC was committed to make certain changes to the policies operating in the EC. The text of the Uruguay Round Agreement, which in itself relates to tightening up the rules on preferential trade agreements, offers more scope for conflict between the

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101 Id.
102 This unequal balance of power is rectified in the WTO Dispute Settlement Understanding, where both parties have equal wait before the WTO Panel or Appellate Body and the party with stronger legal arguments (regardless of its negotiating capacity) will win the case. For a detailed analysis on the matter, see Andrew T. Guzman and Beth A. Simmons, "POWER PLAYS & CAPACITY CONSTRAINTS: THE SELECTION OF DEFENDANTS IN WTO DISPUTES" (February 7, 2005). International Legal Studies Program. International Legal Studies Working Papers Series. Paper 6. http://repositories.cdlib.org/ils/wp/6 (last visited December 13, 2005).
104 Id.
WTO and the EC than do any other areas for the agreement bearing more directly on individual EC policies, since it challenges the essence of the EU.¹⁰⁶

When looking at the history of the EC external trade relations, one sees that the EC was not a contracting party to the General Agreement on Tariffs and Trade 1947 (GATT). European countries such as France, Belgium, Luxembourg, the Netherlands and the United Kingdom (but not Italy and Germany) were founding contracting parties to GATT 1947. Subsequently, all EC Member States became full members of such an institution. Over the years, the EC has become a full member and a contracting party to the GATT/WTO. Accession protocols and trade agreements negotiated in the GATT framework provided in their final provisions that the agreements were open for acceptance by contracting parties to the GATT and by the EC. In addition, the substantive and procedural provisions of these agreements treat the EC like a GATT contracting party.

Furthermore, since 1970, most agreements negotiated in the framework of GATT were accepted by the EC alone, without acceptance by EC Member States. The only exceptions are two agreements at the end of the Tokyo Round of multilateral trade negotiations and the part of the Tariff Protocol relating to European Coal and Steel Community (ECSC) products.¹⁰⁷ The EC exercised all rights and fulfilled almost all obligations under GATT law in its own name like a GATT contracting party. Since the 1960s all GATT contracting parties had accepted such exercise of rights and fulfillment of obligations by the EC and had asserted their own GATT rights, even in dispute settlement proceedings relating to measures of

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individual EC Member States, almost always against the EC. The EC has replaced, with the consent of other GATT contracting parties, its Member States as bearers of rights and obligations under the GATT.

Years later came the Agreement establishing the WTO, which recognizes the EC's membership alongside the EU Member States. Under Article XI of the WTO Agreement, the EC and its Member States became original members to the WTO of their own right. The EC is, without a doubt, a major actor in the WTO, thanks to speaking with a single voice in the world trading system and in the WTO. Facts speak for themselves: the EC of 15 represented the world’s largest trading bloc. In 2002, it amounted to 37.3% of exports and 34.9% of imports in world merchandise trade. With respect to services trade, the EC accounted for 43.2% of exports and 41.6% of imports. With the 2004 EU enlargement to 25 members, these figures have increased.

In relation to voting rights inside the WTO – voting \textit{de facto} never happens, since decisions in the WTO are taken by consensus - the EC has a number of votes equal to the number of its Member States. The vote in areas of exclusive EC competence should not pose a problem in principle, whereas difficulties may arise in areas of shared competence, especially in the absence of a common position among the EU Member States together with the EC.

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109 Article XI of the WTO Agreement reads:

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.


111 Article IX of the Agreement Establishing the WTO reads: “[W]here the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO.”
B.2.- The Diagnosis: Polycephalous (and Polyphonic?) Anatomy of the EC in the WTO

During the Uruguay Round of multilateral trade negotiations, the EC was faced with the issue of the scope of its authority under the EC Treaty in the field of international economic relations, particularly with respect to trade in services\textsuperscript{112} and intellectual property rights\textsuperscript{113}. Negotiations were conducted according to the normal procedures for GATT negotiations, albeit that the European Commission negotiated on behalf of both the EC and its Member States.\textsuperscript{114} By creating the WTO as an international organization, formal international consequences emerged in several respects: first of all, the fact that the EC would become a member of the WTO; second of all, the EC would replace the EU Member States.

With regard to the latter point, two constraints of a political nature led the European Commission not to stand up. The first constraint was the fact that the matter was discussed in a meeting of the EU Council in November 1993, after the Maastricht Treaty had entered into effect with some difficulty and it was thought wise not to push this issue at that stage. The second political constraint was that around this time, the Council had not yet approved the Uruguay Round and Sir Leon Brittan thought it was preferable not to put on the table another contentious issue. A result was the creation of Article XI of the Marrakesh Agreement establishing the WTO, which states that the contracting parties to GATT 1947 and the European Communities shall become original Members of the WTO.\textsuperscript{115}

This dual membership of the EC and its Member States in the WTO (which creates a European polycephalous approach to the WTO, i.e., 25 EU Member States and the European Communities, but not polyphonic, since by the time they reach the WTO, European nations have found a common position to speak with a single voice) may be an open door for abuse by other WTO members, and a handicap for

both the EC and its Member States.\textsuperscript{116} The fact that the EC Member States are WTO Members together with the EC poses questions in relation to the position of the European Court of Justice to the WTO law. As far as GATT 1947 was concerned, and as a result of the substitution of the EC for the Member States in relation to commitments under GATT, the European Court of Justice would have the final word on the interpretation of the GATT provisions, even in relation to the compatibility of Member States legislation with GATT.\textsuperscript{117} However, this argument is no longer possible. In accordance with Article XI of the Agreement establishing the WTO, both the EC and its Member States signed the Final Act.

The European Court of Justice has stated that the division of powers between the EC and its Member States is a domestic question in which third parties have no need to intervene.\textsuperscript{118} In the minutes of the Council meeting 7/8 March 1994, the Commission relied on this argument by saying that: “The Final Act...and the Agreements thereto fall exclusively within the competence of the European Community.”\textsuperscript{119} This argument does not allow the \textit{a sensu contrario} inference that because the Member States and the EC are formally WTO Members, it is irrelevant for the division of powers within the EC legal system. On the contrary, the Agreement establishing the WTO and the agreements that form part of it were approved by the Council on behalf of the EC expressly “as regards matters within its competence.”\textsuperscript{120} Therefore, the need for a useful \textit{raison d’etre} regarding the joint WTO membership of the EC and the Member States is inevitable. It must have something to do with the division of powers within the EC.

Certain trade agreements deal with matters in respect of which both the Community and its Member States have competence. In these cases, the Court of Justice has stressed the duty of cooperation

\textsuperscript{115} World Trade Organization, \textit{The Uruguay Round Results. The Legal Texts}. (Geneva,1995), 6.
\textsuperscript{117} \textit{Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana} (SPI) and SpA Michelin Italiana (SAMI) 1983 E.C.R. 801, paras 15 and 17.
\textsuperscript{118} Ruling 1/78, 1978 E.C.R. 2151, para. 35.
\textsuperscript{119} Cited in the ECJ Opinion 1/94, 1994 E.C.R. I-5267, para. 5.
that exists between the Community and the Member States. I shall explore some of the problems that this raises in practice.

III. Allocation of Competences between the EC and its Member States

The issue of allocation of competences is an internal question for the EC. Leaving aside trade policy (where the EC competences should be co-extensive with the WTO) and human rights (where the EC should be given a general competence to adopt any measure which would increase the protection of human rights within the sphere of application of EC law), the EC does not require any increase in its substantive jurisdiction. The issue of allocation of competences is nevertheless a central concern and

121 For a general overview on division of powers, see Simeon, R. Division of Powers and Public Policy, University of Toronto Press, 1985.
enflames high emotion among the general public, who fear the encroachment of supranational action into areas of national heritage, power, and tradition. As suggested by Griller and Weidel, it is “another manifestation of the struggle for power between the EC and its Member States.” Third States should not mind, but practice demonstrates that they do: it is more difficult to speak with 26 voices (25 EU Member States) than with one single voice (the EC). Additionally, as argued by Lukaschek and Weidel, the “complicated system [of allocation of competences in the EU] is hardly ascertainable for the outside world and might entail uncertainty and confusion for third countries about the identity and authority of their negotiation partner.” Furthermore, being divided but united can give the EC an edge in international bargaining. It is well-known that foreign trade policy and internal market policies require close coordination. However, in the case of the EC, its nature makes this obviousness more challenging.

124 Authors such as Joseph Weiler believe that the issue of competences in the EU remains highly sensitive. The post-Maastricht public debate demonstrated a clear public distrust in the ability of the EU institutions to guarantee the limits to EU influence on public life. Many people have tried to nail down EC competences. At the same time, efforts have been made to increase public confidence in the jurisdictional limits of the EC and EU. See Weiler, J.H.H. “The Division of Competences in the European Union,” European Parliament, Directorate General for Research, Working Paper, Political Series, W-26, 1997, p. i.

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

Joseph Weiler and Franz Mayer have also proposed a similar idea: the creation of a Constitutional Council for the EU, modeled on its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted, but before coming into force. It could be seized by any EU institution, any EU Member State or by the European Parliament acting on a majority of its members. Its President would be the President of the European Court of Justice and its members would be sitting members of the constitutional courts or their equivalents in the EU Member States. Within the Constitutional Council, no single EU Member State would have a veto power. The composition would also underscore that the question of competences is fundamentally one of national constitutional norms, but still subject to a Union solution by a Union institution. Although this idea of creating a Constitutional Council for the EU may seem as an attack on the ECJ, Weiler claims that such a view is myopic and fails to appreciate that the issue of competences is already bringing a shift in the position of the ECJ. See Weiler, J.H.H. “The Division of Competences in the European Union,” European Parliament, Directorate General for Research, Working Paper, Political Series, W-26, 1997, pp. iii and 62.


from a constitutional viewpoint.\textsuperscript{128} The separation of powers between the EC and its Member States, and among the EU institutions, remains an unsolved issue in external trade regulation. Oftentimes, the EU’s institutional and structural peculiarities are more of a constraint than a strategic advantage.

\textbf{A.- Principal-Agent Theory and International Negotiations}

The delegation of competences in the EC can be explained through the Principal-Agent theory. This theory has only recently been applied to the context of negotiations.\textsuperscript{129} According to this theory, agency costs can be due, \textit{inter alia}, to information asymmetries. In other words, agents know more about their duties than their principals do. In the context of negotiations, we would speak of agency costs because the negotiator knows more than the principal about the constraints of external negotiations.\textsuperscript{130} Often, agency costs also may occur because the agent’s interests may not be the same as those of her or his principals. The challenge is to create institutional arrangements to minimize such agency costs.\textsuperscript{131}

The question to analyze is who should speak for the EC in international trade negotiations. According to Meunier and Nicolaïdis, the answer depends on the kind of relationship which has been established between the spokesperson (European Commission) and its principals (EU Member States) as well as on the phase at which the negotiation is.\textsuperscript{132} For the study of the allocation of EC competences in trade policy-making, we will first make a brief note on the evolution of EC trade policy, and then apply

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\end{footnotesize}
the principal-agent theory to understand the modes of control and the difference between exclusive and shared competence in the EU.

There is no definition in the Treaties as to the areas that do lie within exclusive EC competence. Defining the respective boundaries of competence is compounded by the fact that in a number of areas the EC shares competence with its Member States. This difficulty of allocating competences is further compounded by the presence of the implied powers provision which appears in Article 308 EC\textsuperscript{133} and the liberal construction given to this by the European Court of Justice.\textsuperscript{134} Also when one considers the division of competence between the EC and its Member States from an explicitly normative perspective, the difficulty becomes even more marked.\textsuperscript{135} The criteria which ought to govern this issue,\textsuperscript{136} and its institutional ramifications,\textsuperscript{137} are controversial.

B.- Legislative Competence

If it had been ratified by the EU Member States, the EU Constitutional Treaty would have brought significant changes to the system of competences in the EU. It would have looked like a competence catalogue, with the main advantage of being less vague than the current situation of not knowing clearly who does what. This catalogue approach would have resembled the German Constitution system.\textsuperscript{138} The


\textsuperscript{138} In Germany, Article 73 of the Constitution enumerates the competences of the federal legislator. In addition, there is a
EC enjoys only those powers conferred on it by the Treaties (Article 5 EC). Four types of legislative competence are conferred upon the EC: exclusive, shared, complementary, and national competence. Since the EC Treaty does not provide a definition, these may be defined as follows:

B.1.- Exclusive EC Competence

The EC enjoys exclusive competence when it alone is able to adopt rules in an area. Any intervention by the Member States is excluded unless it has the authorization of the EU institutions or where there is a lacuna needing to be filled. The areas where the EC has exclusive competence are the following: common commercial policy (to the extent existing prior to the entry into force of the Treaty of Nice); living marine resources in the zones covered by the Treaty; establishment of the common customs tariff; monetary policy for the twelve Member States in the euro area; in addition, those areas which become areas of catalogue of concurring competences and frame competences. Furthermore, there is a structural principle laid down in Article 72 of the Constitution. Concurring competences in the German model means that the Laender have competence so long as the federal legislator has not taken action. The catalogue of concurring competences is combined with a structural principle: the federal power is only allowed to take action in order to enhance economic and legal unity, as well as uniformity of social conditions (Article 72 of the German Constitution). The catalogue of concurring competences has to be read in conjunction with the rule that federal law overrules state law.

139 Article 5 EC reads:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

140 Legislative competence refers to the adoption of legislative texts in the literal sense or the creation of legal obligations by the EU institutions (“secondary legislation”) based directly on the Treaties of the European Communities (“primary legislation”).

139 Article 5 EC reads:


exclusive competence because the EC legislates extensively in the area concerned on the basis of its shared competence.143

Although the EC competence is in principle allocated to it explicitly by the Treaties, the European Court of Justice (ECJ) has taken the view that in some cases competence flows implicitly from the EC Treaty texts or their general structure.144 These tend to be cases in which competence is necessary to implement aims set by the Treaties, especially in the field of external relations.145 The EC only has the powers accorded to it under the Treaties.146 All other powers thus reside with the Member States. A clause to this effect, redolent of that to be found in the U.S. Constitution,147 could then be included within a European Constitution. This could undoubtedly be done. It would however only serve to mask, or push further back, the issues that really serve to define the powers of the EU and the Member States.148

The idea of giving certain competences exclusively to the EC was a creation of the ECJ’s case-law.149 The Court has specified that EU Member States were no longer allowed to adopt legislative measures or to independently conclude treaties with third countries since the EC power was exclusive. However, in other cases, the ECJ held that certain competences were not exclusive EC competences, which means that it did not prevent EU Member States from acting.150 This said, it is fair to acknowledge

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146 A. Dashwood, The Limits of European Community Powers (Cambridge Centre for European Legal Studies, 1995).
147 United States Constitution, 10th Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by to the States, are reserved to the States respectively, or to the people.”
that the list of exclusive EC competence is very limited. In any case, the debate in the legal literature over the meaning of exclusive EC competence seems to be inconclusive to date.

Since the then European Economic Community (EEC) founding fathers chose a customs union as the way to proceed towards a unified Europe, a common trade policy vis-à-vis the rest of the world was inevitable. The Community has retained exclusive competence in almost all issues in this field, and the European Commission acts on behalf of the EC with a qualified majority vote from the Council. However, on some trade issues, Member States have competence (despite the “exclusive” EC competence in commercial policy). For example, in the concluding phases of the Uruguay Round (General Agreement on Tariffs and Trade, of October 30, 1947), the full stature of the EC in global trade affairs was displayed for the first time as the world spotlight fell on the EC and the U.S. hammering out the final deal.

It was at that moment that an internal debate arose between the EU Member States and the European Commission about the coverage of the existing commercial policy provisions of Article 133 EC in the areas of intellectual property and services. The Commission negotiated the Uruguay Round and the competence issue between the EC and its Member States had been bracketed. As we will see later

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In the years following World War II, people like Jean Monnet and Robert Schuman dreamed of uniting the peoples of Europe in lasting peace and friendship. Over the following fifty years, as the EU was built, their dream became reality. That is why they are called the “founding fathers” of the European Union.

A customs union, or CU, can be defined as full trade liberalization between two countries/regions, plus a single external tariff. The customs union is one of the key components of the European Union, whereby non-EU countries exporting products to the EU are charged the same tariff regardless of which EU country is importing the goods. This made life simpler for traders and cut down their paperwork. The EU also concluded a customs union with Turkey in 1995, aiming at the free circulation of manufactured goods between the EU and Turkey.

NEIL MACCORMICK, BEYOND THE SOVEREIGN STATE, 56 Mod. L. Rev. 1 (1993).


TEC Article 133, as amended by the TEU.
in greater detail, when the European Court of Justice was consulted, it stated in Opinion 1/94 that only certain aspects of the two sectors could be considered as falling under Article 133 EC, and thereby under the EC’s exclusive competence. During the Intergovernmental Conference (IGC) that produced the Treaty of Amsterdam, the Commission, reacting against Opinion 1/94, made a proposal to enlarge the scope of the relevant treaty provisions to explicitly include services and intellectual property. The Member States refused because they still wanted their participation in international trade agreements. In this respect, one can argue that Opinion 1/94 represents a step backwards in what had been, until then, the successful development of the EC common commercial policy.

The Community as a whole is greater than the sum of its parts. According to Mavroidis, even Germany, the EC’s leading economy, has much more weight as part of the EC than it would by itself in international economic relations. The general assumption seems to be that the EC combined as a single voice would be more powerful than divided into 26 voices (one from the European Commission acting on behalf of the EU institutions and 25 other voices from each of the EU Member States). A sensu contrario, the old and successful military strategy “divide and conquer” should be a sign for the EU to

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160 The Treaty of Amsterdam is the result of the Intergovernmental Conference launched at the Turin European Council on 29 March 1996. It was adopted at the Amsterdam European Council on 16 and 17 June 1997 and signed on 2 October 1997 by the Foreign Ministers of the then fifteen EU Member States. It entered into force on 1 May 1999 (the first day of the second month following ratification by the last Member State) after ratification by all the Member States in accordance with their respective constitutional requirements.
164 President Lincoln’s injunction “United we stand, divided we fall” can be extrapolated for the case of the EC’s external trade relations to illustrate my argument. Abraham Lincoln used this idea in a speech before the American Civil War, when he referred to a Biblical statement that a house divided against itself cannot stand. Pascal Lamy often used this injunction when he was EU trade commissioner to justify a larger delegation of trade competence by the EU Member States to the EU supranational level. It implies that institutional rules, which allow the EU Member States to make decisions more quickly and the Commission to represent Member States internationally in a united manner, give the collective entity an edge in international bargaining.
166 Derived from the Latin saying divide et impera, it can mean in politics a strategy to gain or maintain power by breaking up larger concentrations of power into chunks that individually have less power than the one implementing the strategy. In reality, it often refers to a strategy where small power groups are prevented from linking up and becoming more powerful, since it is
avoid disunity. The tendency in trade policy seems to be toward exclusive EC (“EU” after the Constitutional Treaty) competence with the changes brought by the EU Constitutional Treaty.

One important mechanism for coordinating a single voice is the creation of European “policy units.” Tony Blair, Prime Minister of the United Kingdom, initiated this idea. Academics from various European countries including Germany, France and Spain have been asked to participate in this initiative. This shows that Britain is still committed to Europe. Authors such as Peter Mandelson and Bodo Hombach believe that collaboration will increase the likelihood of a European federal superstate. In the same line, Mark Leonard believes that the EU needs to have a single debate in the European Union rather than 25 separate national debates, one for each Member State.

That said, the progressive centralization of European Community trade policy and its generally effective pursuit in international negotiations has not disguised vigorous differences of policy and priorities among the Member States. These differences do not make the European Community an easy partner in negotiations.168

B.2.- Shared Competence

Shared competence covers areas where Member States may legislate until such time and insofar as the EC has not yet exercised its powers by adopting rules. Once the EC has legislated in such an area, Member States may no longer legislate in the field covered by this legislation, except to the extent necessary to implement it, and the legislative rules adopted have priority over those of the Member States. EC competence thus becomes exclusive through its exercise.169 With respect to shared competence, Meny
argues that “since the signing of the Treaty of Rome, the number of shared competencies—often benefiting the Union—has increased considerably, to the point that this is often seen as a creeping expropriation of the Member States’ powers.”

The EC’s legislative action in those areas is subject to compliance with the principles of subsidiarity and proportionality. Most EC powers fall within this category: citizenship of the EU; agriculture and fisheries (except for the part under exclusive EC competence); the four freedoms (free movement of goods, persons, services and capital); visas, asylum and immigration; transport;

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171 The principle of subsidiarity regulates the exercise of powers. It is intended to determine whether, in an area where there is shared competence, the EC can take action or should leave the matter to the Member States. The principle of subsidiarity hence means that EC decisions must be taken as closely as possible to the citizen, and argues, as can be seen in Article 5 EC, that the EC should take action only if, and insofar as, the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved at the EC level. In other words, the EC does not take action (except on matters for which it alone is responsible), unless EC action is more effective than action taken at national, regional or local level. The subsidiarity principle hence limits Community interventions. The implementation of this principle is subject to *ex ante* control through the assent procedure of national parliaments, but also *ex post* through the judicial remedy (paragraph 7 of the Protocol on the application of the principles of subsidiarity and proportionality). A protocol annexed to the Treaty of Amsterdam sets the conditions and application criteria of the subsidiarity and proportionality principles. This protocol specially provides for:

- the obligation to justify and legislative proposal by proving its compliance with the subsidiary principles;
- guidelines;
- the obligation to present an annual report; and
- a procedure of verification by the Council and European Parliament.

In order to take better account of the subsidiarity principle, the Commission set out several rules it its annual reports “To Better Legislate” (1997-1999), in particular regarding consultation of interested parties, improvement in the drafting quality of texts, and simplification of existing legislation. The report “To Better Legislate 2000” introduced the implementation of principles on subsidiarity.

172 The principle of proportionality implies that any action by the EC should not go beyond what is necessary to achieve the objectives of the EC Treaty. It should not be confused with the principles of subsidiarity, which enables the resolution of the considered action’s level (national of Community level), while the principle of proportionality concerns the size of the action. This principle has appeared in Court decisions since 1956, for example Coal Federation of Belgium—judgment of November 26, 1956.

173 The extent of the powers conferred on the EC by the relevant chapters of the EC Treaty varies depending on the area.


competition; taxation; social policy; the environment; consumer protection; trans-European networks (interoperability and standards); economic and social cohesion; energy, civil protection and tourism.

Regarding the Treaty on European Union, its Title V which deals with the common foreign and security policy, with the exception of defense, also falls within this category. Lastly, Title VI of the TEU (police and judicial cooperation in criminal matters) falls within this category as well, apart from the provisions relating to the setting up of joint bodies.

In fact, authors such as Alfonso Mattera claim that there is only one type of competence, that of shared competence, with different degrees of interference, depending on the policy. In this sense, Member States might interfere actively in cultural policy, but only minimally in common commercial policy.

The fundamental principles of democratic and political accountability cannot be achieved if the constitutional order is fragmented and requires the use of metaphors to describe the interrelations of its


178 The EC Treaty does not contain a specific legal basis covering the fields of energy, civil protection and tourism. The EC can therefore act only on the basis of Article 308 EC.

179 Title V of the TEU provides for consultation, cooperation or coordination of Member States’ action in certain areas, as well as adoption by the EU Council of common actions and common positions.

180 Mr Mattera was Special Advisor to former President of the European Commission Romano Prodi, and Professor at the College of Europe, Brugges.

181 Information gathered from a conference at the Europaeische Rechtsakademie, Trier (Germany), on 10-11 April 2003.
parts. Could one then argue that non-exclusive EC competence (i.e., shared competence) is translated as *de iure* and *de facto* EC fragmentation? From a national perspective, Schuppert argues that unity of administration is based on the unity of democratic origin of all sovereign power. Hesse claims that all public authority originates with the people. With the enactment, continuation, and development of the constitution, this authority is passed on to the various organs within the constitutional framework. All bodies exercising sovereign power continue to be dependent on the unifying origin of that power. Can these arguments be made from a supranational perspective? Would they be valid for the purposes of the EC’s common commercial policy?

Shared competence between the EC and its Member States implies the fragmentation of unity in the international representation of the European Community and translates into less power for the EC in the international arena. On the other hand, EC exclusive competence facilitates international negotiations, since the European Commission is the only competent actor in any given matter. Experience has shown that mixed agreements can and do cause delays, which can actually worsen negotiating situations. However, at present the implementation and conclusion of mixed trade agreements is done at the national level. Therefore, a system in which both the EC and its Member States are involved seems to be an optimal situation in terms of efficiency.

With the new balance between Brussels and national institutions and, to some extent, between national institutions and regional and local authorities, some kind of rebellion has started in Europe. As Meny rightly points out, “any attribution of powers is arbitrary and therefore political; in fact, even if some criteria of efficiency and rationality are taken into account, it is mainly on the basis of political

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184 Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, (19th ed. 1993), note 27.
185 Information gathered from an interview in June 2001 with Richard Wyatt, First Minister of the Delegation of the European Commission to the UN.
criteria that powers are distributed among the various decision-making […] levels.”¹⁸⁶ Even if there are expectations for eliminating overlap in competences between the EC and its Member States, one should not forget that economic and social reality is so complex that the hope of reaching a clear separation of powers is an illusion.¹⁸⁷ It is therefore important to establish the methods and instruments for exercising those competences. In all existing constitutional texts, even in those based on a catalogue of powers, gray areas exist and constitutional courts are called to resolve questions relating to the resultant conflicts of competence.¹⁸⁸

Trade is one of the areas where EU Member States have politically agreed to delegate representation. However, EU Member States have started to question the transfer of sovereignty to the EC level, especially on issues such as services, investment, and intellectual property rights.¹⁸⁹ The famous Opinion 1/94¹⁹⁰ of the ECJ clearly acknowledged that the EC and the EU Member States actually share competence in these areas. A few years later, the Amsterdam Treaty reinforced restrictions to transfers of sovereignty to the EC level in the area of trade by allowing EU Member States to decide what competence to delegate on a case-by-case basis at the end of a negotiation.

As mentioned before, in the field of external trade relations of the European Community, there are many examples where the Community’s and the Member States’ competence is shared; for instance, in

¹⁸⁷ Id.
¹⁸⁹ Intellectual property is a special example of shared competence. Schermers, in International Institutional Law, 2nd edition, para. 1557, comments of international organizations in general: “The competence of international organizations to make agreements is related to the competence of their members to do so. Both may be competent at the same time. The best example is the case of a copyright convention to which an international organization accedes solely to protect its own publications. It then acts for the specific interests of the organization which are not at the same time covered by any legal provisions of the members.” This category of shared competence may also extend to agreements establishing rules of international law, such as UNCLOS III or the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations. The rules in such law-making agreements should be equally applicable to the Member States and the Communities as subjects of international law; the competence of one does not displace or undermine the competence of the other. In theory, the EC and its Member States sould all be able to become parties to such agreements.
the Food and Agriculture Organization, where Case 25/94,191 Commission v Council, can be used as evidence. In this case, the ECJ made its most significant input on the duty of cooperation.192 Competences in the EC are joint because Member States prefer not to allow Community competence and, instead, preserve their national competence.193 This approach, which became apparent in the Court’s Opinion 2/91 on the International Labor Organization (ILO),194 weakens the constitutional position of the Community in the field of external relations. On the other hand, shared competence increases the leverage of the most protectionist EU countries. Shared competence also would imply a strong voice if the polyphonic “choir” (all the EU Member States and the Commission) sings. This will give the choir strength and independence.

With respect to shared competence, the second subparagraph of paragraph 6 of Article 133 of the Nice Treaty removes certain sectors from the scope of the first subparagraph of paragraph 5 of Article 133 of the Nice Treaty.195 The areas included are cultural and audiovisual services, educational services,

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195 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 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.
and social and human health services. According to Krenzler and Pitschas, “as the Community may not adopt any measures under Articles 150 IV, 151 IV c) and 152 EC that result in the harmonization of national laws or regulations in these services sectors, the Community does not have exclusive competence.” 196 This means that the competence is shared between the EC and its Member States. The second subparagraph of paragraph 6 of Article 133 of the Nice Treaty refers to it by using the locution “shared competence.” This is the first time that this locution appears in the Treaty text. However, the concept of shared competence has existed for a very long time. Agreements in these services sectors must be concluded as mixed agreements, and only enter into force after ratification by all EU national parliaments. 197 The legal ramification of shared competence explains the efforts made by the Commission and scholars to bring about exclusive EC competence to avoid the potential risk of Europaralysis. Yet, many trade agreements are signed as mixed agreements.

In mixed agreements, if there is more than one negotiator other than the European Commission, then the EC’s negotiating position is being weakened, though not necessarily that of the Member

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197 Id.
States.\textsuperscript{198} This is because as long as the external competence has not become exclusively EC competence, Member States, even acting collectively, remain free to enter into multilateral treaty relations.\textsuperscript{199} The tensions created by the mixture of competences between the EC and its Member States are seen as an obstacle to the achievement of Community interests as a whole, and are a problem for Europe’s trade partners. Even though Article 133 EC gives exclusive competence in commercial policy to the EC, the treaty also limits this competence.\textsuperscript{200}

According to Jean Groux, for third States it is preferable to have a mixed procedure because they are not familiar with dealing with the European Community, the competences and responsibilities of which they know but imperfectly.\textsuperscript{201} For example, in the case of a third party like the U.S., if it has complete information about the Member States’ position, then it is easier to accept that the EC act with a single voice. In this sense, there are, at least, three variables to take into consideration:

1) secrecy;

2) physical difficulty for a third party to obtain information; and

3) institutional processes.

In the case of the first variable, this would mean that having a single representation of the EC in international agreements obscures information about the Member States’ actual position. Therefore, there is less transparency and, consequently, it might be more difficult to reach an agreement. With regard to the second variable, it is very much linked to the first one in the sense that having a single voice in the EC makes it harder to negotiate for a third party, since there is less transparency. As for institutional processes, it refers to the fact that sometimes exclusive EC competence involves various Directorates-General of the European Commission.

\textsuperscript{198} Information gathered from an interview with John Richardson in June 2001, Head of the Delegation of the European Commission to the UN.

\textsuperscript{199} Even if \textit{de iure} this is a plausible situation, \textit{de facto} it has never happened.


However, what has been the attitude of third States when the European Community has entirely taken over the responsibilities of the Member States in certain areas? It is only in the last case that third States overtly put pressure on the Community to use the mixed negotiation technique. Here one may cite the example of the negotiations begun in 1975 between the EEC and the Council for Mutual Economic Assistance (CMEA, or commonly known as Comecon) with a view to normalizing the relations of the Community with the East European countries. These countries, which were in fact somewhat reluctant to envisage an official recognition of the Community, had much difficulty in accepting the decision of the Council of the Communities that the negotiations would be conducted by the Commission alone, and they tried in vain to ensure the participation also of the Member States. As a matter of fact, the EC was not recognized as an international organization by Comecon until 1988. This position adopted by Comecon was rectified shortly before Comecon was dissolved.

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

B.3.- Complementary Competence

It covers areas where EC competence is limited to supplementing or supporting Member States’ action, or coordinating Member States’ action. The power to adopt legislative rules in these areas remains part of

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202 Comecon was an economic organization from 1949 to 1991, linking the USSR with Bulgaria, Czechoslovakia, Hungary, Poland, Romania, East Germany (1950–1990), Mongolia (from 1962), Cuba (from 1972), and Vietnam (from 1978), with Yugoslavia as an associated member. Albania also belonged between 1949 and 1961. Its establishment was prompted by the Marshall Plan. Comecon was formally disbanded in June 1991. It was agreed in 1987 that official relations should be established with the European Community, and a free-market approach to trading was adopted in 1990. In January 1991 it was agreed that Comecon should be effectively disbanded. See http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0006083.html (last visited June 30, 2005).

the Member States and intervention by the EC cannot have the effect of excluding intervention by the Member States.\textsuperscript{205}

The fields where the Member States have exclusive competence to legislate, and the EC has no power to interfere upon their work are: economic policy; employment; customs cooperation; education, vocational training and youth; culture; public health; trans-European networks (excluding the interoperability of networks and technical standards); industry; research and technological development, defence policy (Title V of the TEU),\textsuperscript{206} and development cooperation.\textsuperscript{207}

B.4.- Exclusive EU Member States’ Competence


This covers areas not referred to in the EC Treaty and therefore not within the competence of the EC. It remains within the Member States’ areas, where the Treaties expressly exclude EC competence, or expressly recognize the competence of Member States, as well as areas where the EC Treaty forbids the EC to legislate.208

The areas within the EU Member States’ competence are: 1) those that are not within the EC competence and therefore remain Member States’ competence, such as the internal organization of States, national identity, national military structure *inter alia*; 2) areas expressly reserved to the Member States by the EC Treaty,209 such as public order and public security, the enforcement of criminal law and the administration of justice,210 the right to strike and the right of association, the supply of health services and medical care, rules dealing with the system of property ownership; 3) areas where the EC Treaty forbids the EC to legislate: education, vocational training, culture, employment and health.211

The hypothesis of exclusive EU Member States’ competence is somehow difficult to conceive in the framework of the EC external trade relations, at least from a conceptual viewpoint. The fact that we are dealing with the EC external trade relations explicitly implies the participation and inclusion of a supranational entity, i.e., the EC. Therefore, this hypothesis has very little or no foundation at all on which to base the question whether there will be more legal coherence by having exclusive EC competence on all issues of EC trade policy. One could foresee, though, a situation where there is no polyphonic choir among the EU Member States. They would therefore be in danger of losing their sovereignty but they would still keep their independence.


208 In some cases, the EC Treaty limits the exercise of Member States’ competence by imposing obligations upon them. For example, the prohibition of discrimination on grounds of nationality or the prohibition on granting State aids incompatible with the common market.

209 The EC Treaty grants Member States various derogations from the four freedoms of movement on grounds of public order, public safety or other considerations of general interest.


C.- Non-legislative or Executive Competence

Competence to implement and apply legislation in accordance with their respective constitutional rules rests with the Member States, subject to monitoring by the Commission, national courts and the ECJ. The EC exercises such competence in a subsidiarity capacity only.

C.1.- Implementation of Legislative Acts

This concerns the drafting of normative rules. Its purpose is to apply legislative acts. It will only be necessary for the EC to adopt regulations if the aims of the planned action cannot be adequately achieved by the MS. Should it be the case for the EC to adopt regulations, then the power of implementation by the EC of its legislative acts is conferred on the Commission by the European Parliament and the Council in the case of codecision and by the Council in other cases.

C.2.- Administrative, Material or Budgetary Implementation of Community Acts

This concerns administrative implementing measures, sanctions to ensure compliance with EC law, etc. The adoption of such measures is a matter for EU Member States, which determine the proper bodies, procedures and conditions for ensuring the correct implementation of EC law. The EC may nevertheless...

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213 Article 10 EC; Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam (see Selected Instruments, Book I, Col. I, p. 567) and Declaration No. 43 annexed to the Final Act of the Amsterdam Intergovernmental Conference relating to that Protocol.
214 Articles 202 & 211 EC.
216 See Article 202 EC.
intervene in the implementation of EC acts where the Treaty or the EC legislator give the EC the power to do so.

D.- Criteria for Evaluating the Distribution of Powers and its Compliance

Delimitation of competences is absolutely necessary in a federal\textsuperscript{217} or a quasi federal set-up nature, which I think is the case of the EU, depending on what policy we are analyzing – and that is certainly the case of trade policy - for the simple reason that if there were no such delimitation, there would be chaos within the system, with no clarity among citizens as to who does what. That said, I do not think that the rationale of traditional States can be applied directly to the Union, as the Union is itself a Union of sovereign States. A clear example of this is the fact that defence and foreign policy have not been clearly stated by the EU Constitutional Treaty to be within the Union’s exclusive competence, which would be necessary in the traditional federal set-up.

Below is an analysis of the four main and non-exhaustive criteria for evaluating the distribution of powers: 1) efficiency; 2) transparency and clarity; 3) coherence/consistency; and 4) accountability.

1.- Efficiency in international trade negotiations

One criterion is that of effective functioning. Power should be exercised by an authority at a level where it can be exercised most effectively. Since the distribution of powers is vague, it leaves immense scope

\textsuperscript{217} Broadly speaking, European federalism means any system of government where several states form a unity and yet remain independent in their internal affairs. People who are in favor of this system are often called “federalists.” A number of countries around the world –such as Australia, Canada, Germany, Switzerland, and the United States– have federal models of government, in which some matters (such as foreign policy) are decided at the federal level, while others are decided by the individual states. However, the model differs from one country to another. The European Union is not based on any of these models: it is not a federation but a unique form of union in which the Member States remain independent and sovereign nations while pooling their sovereignty in many areas of common interest. This gives them a collective strength and influence on the world stage that none of them could have on their own. Part of the debate about the future of Europe is the question of whether the EU should or should not become more ‘federal.’
for disputes between the Union and its Member States, which cannot but hamper an efficient Union. The
EC has become a more important and difficult trading partner. It started with six homogeneous Member
States, and then was enlarged to 9, 10, 12, 15, and finally 25 countries. Soon it is expected to have 27+
Member States. When demands are presented in the WTO by the EC as a common front, these inevitably
carry more weight within the WTO than would be the case if an individual country were making the
case.218 As an example we have the EC’s mandate for the Services Agreement negotiations prepared for
the Seattle Ministerial Conference in October 1999. This mandate included various cultural exceptions for
individual EU Member States, which originated from the French delegation. The French had concerns
about their audio-visual services area. They wanted the EC to defend their national interests in the WTO.

The reverse situation could also happen: demands from small EU Member States without much
trade clout may not be heard in the WTO forum. These demands can be lost as a result of the functioning
of the EC and thereby never emerge in the WTO arena. An example would be the lack of action on the
part of the EC on behalf of Member States in relation to agriculture.

After negotiating the agreement, it must be ratified. Any EU Member State can prevent an
agreement from being finalized. WTO Agreements are subject to adoption by the EU Council of
Ministers and, sometimes also by the European Parliament, as well as ratification by national parliaments.
This means that it is quite possible to have a delay in presenting ratification to parliament.

2.-Transparency and Clarity

Another criterion is transparency.219 In the Trade Policy Review of the WTO, it was impossible to discern
who in the EC was responsible for negotiations, who made the actual decisions and with whom

218 R. Senti, “The Role of the EU as an Economic Actor within the WTO,” in EUROPEAN FOREIGN AFFAIRS REVIEW;7,
pp. 111-117 at 113.
219 The term 'transparency' is often used in a broad sense to mean openness in the way the Member States’ and EU institutions
work. The EU institutions are committed to greater openness. They are taking steps to improve public access to information,
negotiations had to be conducted. With EU enlargement, the current situation will deteriorate.\textsuperscript{220} Thus, from the point of view of the WTO, the EC has become both a powerful but also a difficult negotiating partner.\textsuperscript{221}

Given the lack of transparency of the current democratic system, accountability of the governing forces depends on their respective competences. In a proper democratic forum, it is therefore imperative for the populace to know the competences of the governments. There is a difference of competences in the national and the transnational level. There needs to be a clear transparent mechanism whereby the people are in a position to understand which government to hold accountable for which action.

As for clarity, any set-up which involves an exercise of power at two levels –national and supranational - by numerous bodies requires clarity and precision with which the powers have been delineated. By this I do not mean that all overlap be avoided at all times, which is hardly possible, but that all efforts be made to avoid clashes which can be foreseen. In my opinion, the division as it stands in the Nice Treaty fails on this criterion miserably. There are no provisions in the treaties describing the principles governing the allocation of competence between the EC and its Member States. Furthermore, the treaties are drafted in a complex manner, as a result of political compromises. Moreover, there is misunderstanding and false ideas about the extent of the EU’s legislative competence because of lack of clarity. Along these lines, the French Government has initiated an internet campaign to explain in a clear manner what the EU process of integration is about.\textsuperscript{222}


\textsuperscript{221} Senti, R. “The Role of the EU as an Economic Actor within the WTO,” EUROPEAN FOREIGN AFFAIRS REVIEW; 7, pp. 111-117, at 114.

\textsuperscript{222} For more detailed information on the French proposal, see Euractiv, “France to launch internet site dedicated to Europe,”
The steady evolution of the EU has resulted in a complex organization of competences in the treaties. The legal provisions covering the distribution of EC competences are dispersed over the EC Treaty. This renders the system opaque and difficult to understand. In turn, this lack of clarity hampers democratic control, as it is unclear where political responsibility lies. This is perhaps due to lack of political will. Political responsibility and democratic control would be made easier if power were not so dispersed.

The Nice and Laeken European Councils requested that the delimitation of competence between the EC and its Member States be examined in order to respond to criticism that the EC should take less action in certain areas and more in others. The EC has a tendency to legislate in areas in which it is not competent or in which it is not appropriate for the EC to do so. At the moment, the system of delimitation of competences between the EC and its Member States lacks clarity for various reasons: a) amendments to the EU Treaties of provisions drafted in a complex manner, as a result of political compromises; b) the fact that neither the system for delimiting powers, nor the principles governing such a delimitation, nor the types of competence available to the EU and the areas covered by each type of competence are clearly defined by the EC Treaty; and finally, c) the new methods of coordination, which set objectives without taking into account the allocation of powers.

All these reasons contribute to the lack of clarity and give the impression that the EC’s powers are very broad, when in fact this is not the case. Thus, misunderstandings and false ideas about the extent of the EC’s legislative competence often exist.223 The competences today appear in the EU Constitutional Treaty in a vague form. The concepts of exclusive and concurrent competences could be more clearly defined. This would clarify the fields for which the principle of subsidiarity applies (i.e., only concurrent


It can be envisaged to combine this exercise with a re-ordering of the treaties along logical lines. This could increase the clarity of the text, making it easier to locate responsibility. In this respect, another main problem is the failure to comply with the principle of subsidiarity and proportionality. One should conceive the principle of subsidiarity as a mechanism to regulate the implementation of the EC’s non-exclusive powers. Interestingly, the principle of loyal cooperation was not taken into account during the distribution of competences between the Union and its Member States at the time of the drafting of the EU Constitutional Treaty. However, the principles of subsidiarity, proportionality and the attribution principle do appear in the Constitutional Treaty (Article I-9).225

3.- Coherence/Consistency

There is lack of precision of certain provisions of the EC Treaty: a minority has requested that the existing system be replaced by a “catalogue” of competences.226 A large majority, however, argues for keeping the evolution of competences flexible and dynamic. Also, a transfer of activities from the national to the supranational level would increase the coherence/consistency of the EC’s position in world trade negotiations. Another way to explain the lack of coherence is the fact that the EC’s powers do not match citizens’ expectations: citizens want the EC to play a greater role in certain areas, but also find that the EC intervenes too much in other areas.

224 For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by the EU Member States’ action in the framework of their national constitutional system, and these objectives can therefore be better achieved by action on the part of the European Community. The following guidelines can be used when examining whether these two conditions are fulfilled: 1) the issue under consideration has transnational aspects that cannot be satisfactorily regulated by Member States’ actions; 2) actions by Member States alone would significantly damage Member States’ interests; and 3) action at the supranational level would produce clear benefits by reason of its scale or effects compared with action at the national level. Of course, when speaking of benefits, one wonders: benefits for whom? The supranational elites? Or the national citizens? And how to prove this benefit objectively?

225 “The limits of Union competences are governed by the principle of conferral.” This means that Union competences are strictly conferral, they are laid down in the Constitutional Treaty, or they are established according to a specified procedure. Without this principle, “competences not conferred upon the Union in the Constitution remain with the Member States.” (Article I-9 [2]).

4.- Accountability

Legitimacy (or accountability) and efficiency tend to go hand-in-hand. Ideally, each government should be able to make its policies in its own spheres of activity, without referring too much to other governments’ activities. Each government would be accountable to its own electorate, and each voter would know precisely which government deserves the credit or blame for a particular output of public policy. However, and unfortunately, many practical reasons prevent this ideal from being achieved. This means, for practical purposes, that in certain circumstances accountability must be sacrificed for the sake of other criteria. A high request of accountability would reduce the margin of maneuver of EC trade negotiators and complicate their ability to conclude complex international agreements. So is there a political and institutional mechanism whereby efficiency and accountability, two sides of the same coin, are complementary of each other?

In relation to checking the delimitation of competences, there is a poor system of ensuring compliance with the delimitation of competences: at present, political monitoring of compliance with the delimitation of competences is exercised mainly by the EU institutions. Legislative bodies at the national level (national parliaments) exercise that monitoring to a lesser degree. We offer two types of checks to ensure compliance with the delimitation of competences:

1. Political control: it rests with the EU institutions which participate in the legislative process. Each institution must act in accordance with the powers allocated to it. National governments, national parliaments, and public opinion also exercise such a control to the extent that they control the positions adopted by their government representatives in the Council; and

2. Judicial control: by appeal to the ECJ or national courts.
After analyzing the criteria for the evaluation of the distribution of powers and its compliance, we ask why we have a delimitation of competences. In the current system of EU foreign policy, we find several constitutional problems.\(^{227}\)

1. Inadequate parliamentary control: The EU has constitutionally weak governance structures. The EC’s integration policy raises problems of democratic legitimacy to the extent that it is not effectively controlled by parliaments (for example, in the foreign trade policy area), and focuses more on the protection of powerful interest groups than on the general interests and equal rights of EU citizens (for example, consumers and tax-payers). So the question arises: is it in the interest of the EU citizens to have a common commercial policy without a parliamentary control?

2. Constitutional limitations of government powers by rule of law, fundamental rights, separation of powers and democratic participation are not effectively applied in foreign policy powers. Therefore, the rights of domestic citizens are less effectively protected against abuses of foreign policy powers of governments (for instance, Article 133 EC) than vis-à-vis their domestic policy powers. Certainly, these power-oriented EU foreign policies can undermine the rule of law within the EU. It is relevant to mention in this respect the limited role of the European Parliament in the EC’s common commercial policy. Hence the importance of EU institutional reforms.\(^{228}\)

3. The division between private powers of EU citizens and government powers seems to be more important than the division between national and EU government powers.

IV. Definition of Mixed Agreements\(^{229}\)


\(^{228}\) It was at the Nice IGC that the then 15 EU Member States established framework guidelines in order to pursue EU institutional reforms. The European Council of Stockholm in March 2001 already reaffirmed this objective, and the various modalities were established in Laeken in December 2001 with the Declaration on the Future of Europe, and the decision to call for a Convention.

\(^{229}\) In 1961, Pierre Pescatore spoke of “accords mixtes, mi-gouvernementaux, mi-communautaires, conclus conjointement par
Mixed agreements are agreements where both the EC and its Member States are contracting parties, on the European side, to an international agreement with a third party. The notion of mixed agreement is not normally understood to cover a situation where an agreement falls within the competence of the EC and partly within that of the Member States, but rather a situation where Member States are in a position to become parties to it.\(^{230}\) In such a case, the EC competence may be exercised through the medium of the Member States acting jointly in the interest of the EC.\(^{231}\) While it may be largely unknown to the general public, mixity (or mixed agreements) has become part of the daily life of the EC external relations. Mixity has also been a very complex topic for scholarly debate.\(^{232}\)

Interestingly enough, mixed agreements, important as they are, were not foreseen in the Treaty of Rome. However, the concept does appear in the Treaty establishing the European Atomic Energy Community,\(^{233}\) and is incidentally inscribed in the Nice Treaty in Article 133 (6). As Granvik correctly


\(^{231}\) See Opinion 2/91 [1993] E.C.R. I-1061, para. 5 on the ILO Convention No. 170 on Safety in the Use of Chemicals at Work, which is only open to Members of the ILO (Art. 21).


\(^{233}\) It is precisely in Article 102, which reads: “Agreements or contracts concluded with a third State...to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws”.

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asserts, “the very same article [Article 102 of the Treaty establishing the European Atomic Energy Community] has later been accepted [by EC law-makers] as a suitable model for the EC.”234 In this same line of thought, Macleod et al. point out that there is no doubt about the existence and legal validity of the concept of "mixed agreement". Proof of this is Article 102 of the Euratom Treaty,235 where “a form of mixed agreement is recognized and which [Art 102] makes explicit provisions for treaties which are to be concluded by the Community and one or more Member States.”236 It is, nevertheless, unfortunate that the Constitutional Treaty did not take into account the express recognition of mixed agreements in the legal text.

The legal phenomenon of mixed agreements poses various complex issues, such as the fact that these agreements must be ratified by all the EU national parliaments of the countries which are contracting parties to that given mixed agreement. Consequently, this creates uncertainty as to the liability of the EC and its Member States to third parties,237 as well as the limits of the ECJ’s competence to interpret such agreements. In addition to what has been said above, there are various important clarifications to be mentioned in this subtitle in order to facilitate the understanding of the issue. Here are some of them:

1. Since the early 1960s, the mixed procedure as a legal phenomenon has been used in a wide field of policy areas ranging from commercial policy to environmental policy,238 from cooperation to

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235 Article 102 Euratom reads:

Agreements or contracts concluded with a third State, an international organisation or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws.


237 See heading *infra* “Implications of Mixed Agreements for Third Parties.”

the management and conservation of the resources of the sea. The general trend towards the use of
the mixed formula both in the multilateral and bilateral contexts seems to be continuing.

2. There should be no doubt about the general validity or actual practical significance of the mixed
procedure since important EC and Member States’ policy areas of international relations are
organized based on the mixed agreements technique. This, as a matter of principle, is not
contested on any legal grounds any more.

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

of Trade-Related Environmental Measures (TREMS) in the External Relations of the European Community,” in Maresceau.
Geradin, “Trade and Environmental Protection in the context of World Trade Rules: A View from the EU,” 2 *European
Foreign Affairs Review* 33 (1997); Scott, J. “On Kith and Kin (and Crustaceans): Trade and Environment in the EU and
Continuing Search for Reconciliation,” 91 *American Journal of International Law* 268 (1997); Qureshi, “Extraterritorial
Shrimps, NGO’s and the WTO Appellate Body,” 3 *Journal of International Economic Law* 525 (2000); Krenzler &
MacGregor, “GM Food: The Next Major Transatlantic Trade War?” 5 *European Foreign Affairs Review* 287 (2000);

Almost all the EC’s association agreements under article 310 EC have been concluded as mixed agreements, being the only
(Malta).

Heliskoski, J. Mixed Agreements as a Technique for Organizing the International Relations of the European Community

143-144. For previous criticism, see Testa, G. “L’intervention des Etats membres dans la procedure de conclusion des accords

1/94 [1995].

See Opinion 2/91 [1993] E.C.R. I-1061, para. 5 on the ILO Convention No. 170 on Safety in the Use of Chemicals at Work,
which is only open to Members of the ILO (Art. 21).

MACLEOD, I., HENDRY, I. & HYETT, S. *The External Relations of the European Communities*, Claredon Press Oxford,
1996, at 144.
this is Case 12/86, *Demirel v. Stadt Schwaebisch Gmuend*,245 in which the European Court of Justice used the term "mixed agreement" to describe the Association Agreement between the Community and the Member States on the one hand and Turkey on the other.

4. It is a fact of life that mixed agreements raise difficult and interesting legal and political issues about the role of the Communities and the Member States in the international arena. Despite the legal uncertainties, in practice the Community and the Member States participate together effectively in various international agreements.246 It is precisely in the field of international treaty law that mixed agreements show the changes that international law has undergone through the establishment of entities such as the EC.247

5. In this same line of thought, Allan Rosas argues that:

> “the European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organization, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements [...] offers a telling illustration of the complex nature of the EU and the Communities as an international actor”.248

We speak of complex nature since the circumstance which has to occur is to have an agreement which is a Community and a national agreement at the same time. This means that Europe has 25 voices (one for each Member State) plus one more voice coming from any of the European Communities.

6. The phenomenon of mixed agreements is, therefore, not only deeply interrelated to EC law and its division of powers doctrine but it is also interrelated to public international law. As for the division of powers, McGoldrick points out that “each international agreement will require consideration of its subject matter to determine the allocation of competence between the EC and

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the Member States, and the nature of that competence.” This allocation of competence can evolve over the lifetime of an agreement [this is so even during the drafting of an agreement, being an example of it Case C-24/95, Commission v UK (FAO Fisheries Agreement)] or series of agreements. This has been the case with the GATT. According to public international law, the rights and obligations which derive from an agreement form an undivided entity. This, however, does not necessarily mean that the EC and its Member States cannot respect the internal division of competence according to EC law.

V. Inadequate Explanation of Mixed Agreements

In his book *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, Heliskoski rightly points out the lack of adequate contextual legal principles among legal scholars who pursue legal analyses of mixed agreements.

If the EC and its Member States both participate in international agreements, it is due to the limited scope of the EC’s competence in international relations. The international rights and obligations

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of an institution such as the EC depend on its functions and purposes. The EC is based on general and limited attribution of legal authority laid down by the EC Treaty. Often times, a particular international agreement goes beyond the EC’s competence or legal authority to act. In such cases, Member States assume the remainder of treaty commitments. This is the legal reason for having recourse to the mixed procedure.

Quite frequently, the justification for the conclusion of an agreement as mixed relates to the nature of the EC’s competence. The ECJ recognizes that EC competence does not necessarily exclude that of Member States’ and it may be up to Member States to take part in the agreement together with the EC. Most legal scholars tend to rely on non-contextual general principles when dealing with mixed agreements. This means that the criterion for the division of powers between the EC and its Member States has turned into a scheme of interpretation by which the different legal questions arising in relation to mixed agreements such as implementation, responsibility,..., could be addressed. This means that the practice of mixed agreements is not analyzed since the conception is purely non-contextual.

When giving a legal analysis of mixed agreements, one should also incorporate the EC’s and Member States’ treaty partners. Legal scholars have admitted that the various rules and principles to be applied do not only emanate from EC and national law but also from international law. Why is it so important to include third parties when trying to reach a proper conception of the mixed procedure? Simply because without them there would be no international agreement. Any conception of mixed

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260 The international law aspect clearly appears in the contributions by Phillip Allott (p. 97), Christina Tomuschat (p. 125), Giorgio Gaja (p. 133) and Albert Bleckmann (p. 155) in O’Keefe, D. & Schermers, H. Mixed Agreements, Kluwer Law and
agreements without taking into account third parties would be a partial approach and, therefore, an inadequate explanation of this legal phenomenon.

On the international law front, we perceive that neither the EC Treaties, nor Community legislation, nor the ECJ’s case-law is binding on the other contracting parties. If the practice of mixed agreements is neglected, then one could argue that the general principles of international law seem to be transplanted to the specific context of the EC and Member States’ external relations in general and mixed agreements in particular. In this line of thought, we can quote Albert Bleckmann: “in order to find a solution to [the] problem [of judicial positions of the different parties to a mixed agreement], we have necessarily to refer to the general principles of interpretation of public international law.” That said, the scope of such principles tends to be unclear and controversial. Quoting again Bleckmann, “[the] general principles to which we refer have not, as yet, been clearly established by public international law.” The general principles might “...be excluded if an analysis of interests of the parties regulated by the treaty indicates a different solution.”

When dealing with legal analyses of mixed agreements, this is the current state of the art. It is, therefore, important to clarify the unlimited number of questions concerning the legal implications of the mixed procedure which constantly arise in the actual practice of the EC’s external relations.

VI. Typology of Mixed Agreements

Taxation Publishers, 1983. However, there is no international law treatise on the topic.

261 Be them, effet utile, good faith, equality among others.


263 Id.

264 Id., p. 160.

Since there are many different types of mixed agreements, depending on how they are categorized, the answer to the question they raise may vary dramatically. Let us, then, see some ways of classification.

Allan Rosas makes a basic distinction between parallel and shared competences:

A. Type of Competence

The terminology used in the doctrine is very unclear: non-exclusive, shared, parallel, joint, concurrent, and divided competence of the EC. These terms are used here to describe the same phenomenon, i.e. the potential powers which the EC may exercise if the Council so decides and which, when exercised, may turn into exclusive EC competence. However, as we will see later, it is inappropriate to use the locution “parallel competence” to refer to a situation where non-exclusive EC competence turns out to be exclusive EC competence. Again, the doctrine is imprecise in its terminology.

A.1. Parallel Competences

Parallel competences implies that the Community may adhere to a treaty, with full rights and obligations as any other Contracting Party, this having no direct effect on the rights and obligations of Member States being parties to the same treaty. However, this situation might have indirect effect on the rights and obligations of Member States.

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267 The fundamental principle of EC law is the principle that the EC’s powers are attributed to the EC by the Member States. On this, see Kapteyn, P.J.G. & VerLoren van Themaat, P. Introduction to the Law of the European Communities, 2nd edition, 1989, chapter IV, 1.3; For a discussion on the principle, see Barents, R. “The Internal Market Unlimited: some observations on the legal basis of Community legislation,” 30 Common Market Law Review, p. 85, 1993.


269 As far as parallel competence is concerned, Schermers, H. G. notes in “A Typology of Mixed Agreements” IN O’KEEFFE,
obligations of the Member States. For example, the Agreement establishing the European Bank for Reconstruction and Development (EBRD), which is open to States and the EC alike, obliges “each Contracting Party to provide financial resources as a loan or grant to a third State or international fund (assuming that the participation of the EC would be covered by the Community budget).” The given situation can be more complex if financial assistance does not come from the Community budget but from a separate fund, consisting of Member States’ contributions and based on a separate internal agreement between or among the Member States. An example of it could be Case C-316/91 Parliament v Council as well as Opinion 1/78 (Re Draft International Agreement on Natural Rubber).

Another example could well be the adherence to the 1989 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, prompted by the need to protect the Community trademark. According to Article 10 of the Madrid Protocol, each Contracting Party,

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271 Founded in 1991, the European Bank for Reconstruction and Development (EBRD) uses the tools of investment to help build market economies and democracies in 27 countries from central Europe to central Asia. The EBRD is owned by 60 countries and two intergovernmental institutions. Despite its public sector shareholders, it invests mainly in private enterprises, usually together with commercial partners. The EBRD provides project financing for banks, industries, and businesses, both new ventures and investments in existing companies. It also works with publicly-owned companies to support privatization, restructuring state-owned firms, and improvement of municipal services. The EBRD’s mandate stipulates that it must only work in countries that are committed to democratic principles. The EBRD is directed by its founding agreement to promote, in the full range of its activities, environmentally sound and sustainable development. For more information on the EBRD, see MACLEOD, I., HENDRY, I. & HYETT, S. The External Relations of the European Communities, Claredon Press Oxford, 1996, at 187-89.


275 1979 E.C.R. 2871.

including the EC, has one vote.\footnote{277} This implies that the EC and its Member States may have altogether 26 votes, a principle contested by the United States, which has so far refused to adhere to the Protocol.\footnote{278}

A.2.- Shared Competences

As for shared competences, they imply some division of the rights and obligations in the agreement between the Community and the Member States. According to Dolmans, one can distinguish between

\footnote{277} Article 10 of the 1989 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks reads:

(1)
(a) The Contracting Parties shall be members of the same Assembly as the countries party to the Madrid (Stockholm) Agreement.
(b) Each Contracting Party shall be represented in that Assembly by one delegate, who may be assisted by alternate delegates, advisors, and experts.
(c) The expenses of each delegation shall be borne by the Contracting Party which has appointed it, except for the travel expenses and the subsistence allowance of one delegate for each Contracting Party, which shall be paid from the funds of the Union.
(2) The Assembly shall, in addition to the functions which it has under the Madrid (Stockholm) Agreement, also
(i) deal with all matters concerning the implementation of this Protocol;
(ii) give directions to the International Bureau concerning the preparation for conferences of revision of this Protocol, due account being taken of any comments made by those countries of the Union which are not party to this Protocol;
(iii) adopt and modify the provisions of the Regulations concerning the implementation of this Protocol;
(iv) perform such other functions as are appropriate under this Protocol.
(3)
(a) Each Contracting Party shall have one vote in the Assembly. On matters concerning only countries that are party to the Madrid (Stockholm) Agreement, Contracting Parties that are not party to the said Agreement shall not have the right to vote, whereas, on matters concerning only Contracting Parties, only the latter shall have the right to vote.
(b) One–half of the members of the Assembly which have the right to vote on a given matter shall constitute the quorum for the purposes of the vote on that matter.
(c) Notwithstanding the provisions of subparagraph (b), if, in any session, the number of the members of the Assembly having the right to vote on a given matter which are represented is less than one–half but equal to or more than one–third of the members of the Assembly having the right to vote on that matter, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the conditions set forth hereinafter are fulfilled. The International Bureau shall communicate the said decisions to the members of the Assembly having the right to vote on the said matter which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiry of this period, the number of such members having thus expressed their vote or abstention attains the number of the members which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.
(d) Subject to the provisions of Articles 5(2)(e), 9sexies(2), 12 and 13(2), the decisions of the Assembly shall require two-thirds of the votes cast.
(e) Abstentions shall not be considered as votes.
(f) A delegate may represent, and vote in the name of, one member of the Assembly only.
(4) In addition to meeting in ordinary sessions and extraordinary sessions as provided for by the Madrid (Stockholm) Agreement, the Assembly shall meet in extraordinary session upon convocation by the Director General, at the request of one–fourth of the members of the Assembly having the right to vote on the matters proposed to be included in the agenda of the session. The agenda of such an extraordinary session shall be prepared by the Director General.
mixed agreements with coexistent competence and mixed agreements with concurrent competence. Let us start with the latter case.

A.2.a.- Concurrent Competences

A mixed agreement with concurrent competences implies that the agreement in question forms a certain whole or totality which is indivisible or cannot be separated into two parts. P. Allot, when referring to concurrent competence, speaks of mixed agreements “in the strong sense”, meaning that the Community and Member States participation is “inextricably confused”. Such a truly shared-competences situation may arise principally if there is a non-exclusive Community competence covering the whole and entire agreement. Articles 111, paragraph 5 (agreements relating to economic and monetary policy), 174, paragraph 4 (environmental agreements) and 181 paragraph 2 (agreements relating to development cooperation) of the EC Treaty provide that not only the Community, but also the Member States, may negotiate in international bodies and conclude international agreements. Nevertheless, according to a Declaration on Articles 111, 174 and 181 EC contained in the Final Act of the TEU, this (non-exclusive) competence is subject to the European Road Transport Agreement (ERTA) judgment of the European Court of Justice, that is to say, the principle by which the adoption of common rules by the Community may create exclusive Community competences also on the fields covered by the said Articles.

There are also other areas where the Community may have a non-exclusive competence to conclude agreements if it has a corresponding competence to establish internal rules and this specific competence has not yet been used. In this respect, we have as examples the joined Cases 3, 4 and 6/76

Kramer,281 as well as Opinion 2/91 (ILO Convention No. 170)282 and Opinion 2/92 (OECD National Treatment Instrument).283 According to A. Rosas, even if this specific competence has been used, "the external competence may rest at least partly non-exclusive if the common internal rules are considered as minimum rules only"284 ...[as an example we have Opinion 2/91 (ILO Convention No. 170)285]... or [if the common internal rules] do not cover the whole area regulated in the international agreement.286n287 An example of the latter case is Opinion 1/94 (WTO Agreement).

A.2.b.- Coexistent Competences

As for mixed agreements with coexistent competence, since the agreements contain provisions which fall under the exclusive competence of the Community and/or the Member States, respectively,288 it is “in principle possible to divide it into two separate parts, for which either the Community or the Member States are responsible.”289 Rosas suggests, as an example of this, a treaty containing one chapter on trade in goods and another on military defence. This situation could be seen as if we were dealing with two different treaties presented in one document.290 In this respect, P. Allot notes that for such mixed agreements “in the weak sense” it should not be possible to separate completely the Community and

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Member States parts of the agreement. In the book by Macleod, I., Hendry, I. & Hyett, S. *The External Relations of the European Communities*, (1996), the authors mention as an example the Physical Protection of Nuclear Material Convention discussed in Ruling 1/78 (See Ruling 1/78, *Re the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports*).

If there are real national competences involved which "coexist" with EC competences, then the nature of the agreement may make it difficult to separate the agreement into two parts. In this respect, the ECJ has said that the Community and the Member States share competence where an agreement covers both matters within the exclusive competences of the Member States and matters within the exclusive competence of the EC. An example which gives evidence of this is the Natural Rubber Opinion 1/78, which addressed a scheme where, under a commodity agreement, Member States would have directly financed the agreement, with the pertinent implications for its decision-making procedures, even if the essential policy of such an agreement came within the Community's exclusive competence under Article 133 EC. On the relevance of Member State financing of the agreement, see Opinion 1/94 (*Re WTO Agreement*) and Case C-316/91, *Parliament v. Council* and Opinion of Advocate-General Jacobs, paragraphs 55-59. This Natural Rubber case is related to Community participation in commodities agreements in pursuance of the common commercial policy.

In the case of coexistent competence, there is what Rosas calls a presumed "horizontal" (sectorial) distribution of competences (commercial policy, due to trade in goods, and defence policy, due to military

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policy). One can also imagine a more "vertical" distribution of competences. By this, we mean a situation in which "the Community would be competent to conclude the main substantive parts of the agreement, while Member State participation would be deemed necessary because of the nature of its obligations relating to the implementation and enforcement of those substantive parts." As an example we can take into account the agreement considered in Ruling 1/78 (Re the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports), in which, as far as its provisions on penal sanctions and extradition were concerned, Member State participation was required.

One more example could be that of the 1995 UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. This agreement, mainly because of its provisions on compliance and enforcement (Part VI), has been defined by the Council of the EU as a mixed agreement. Following this line of argument, in an EC Declaration submitted upon signature in accordance with Article 47, it is noted that, while the Community has exclusive

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1. In cases where an international organization referred to in article 1 of Annex IX to the Convention does not have competence over all the matters governed by this Agreement, Annex IX to the Convention shall apply mutatis mutandis to participation by such international organization in this Agreement, except that the following provisions of that Annex shall not apply:

(a) article 2, first sentence; and
(b) article 3, paragraph 1.

2. In cases where an international organization referred to in article 1 of Annex IX to the Convention has competence over all the matters governed by this Agreement, the following provisions shall apply to participation by such international organization in this Agreement:

(a) at the time of signature or accession, such international organization shall make a declaration stating:

(i) that it has competence over all the matters governed by this Agreement;
(ii) that, for this reason, its member States shall not become States Parties, except in respect of their territories for which the international organization has no responsibility; and
competence with respect to the conservation and management of living marine resources, including the
regulatory competence granted under international law to the flag State in this respect, measures such as
refusal, withdrawal or suspension of authorization to serve as masters and other officers of fishing
vessels, as well as certain enforcement measures relating to the exercise of jurisdiction by the flag State
over its vessels on the high seas, are within the competence of the Member States.\textsuperscript{302}

However, in many cases the provisions relating to possible "coexistent" Member States
competences may be of such a limited relevance that they should be seen as ancillary (subsidiary) to the
essential objectives of the agreement.\textsuperscript{303} The ECJ has cases on subsidiary provisions, which are often
related to Article 133 EC on common commercial policy. I would like to illustrate one case and two
opinions from the ECJ as examples of what has been previously said: Opinion 1/78 (\textit{Re Draft
International Agreement on Natural Rubber}),\textsuperscript{304} Opinion 1/94 (\textit{Re WTO Agreement})\textsuperscript{305} and Case C-
268/94 \textit{Portugal v. Council}.\textsuperscript{306} In this last case, the ECJ concludes in its paragraph 77 as follows:

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

(iii) that it accepts the rights and obligations of States under this Agreement;

(b) participation of such an international organization shall in no case confer any rights under this Agreement on member states
of the international organization;

(c) in the event of a conflict between the obligations of an international organization under this Agreement and its obligations
under the agreement establishing the international organization or any acts relating to it, the obligations under this Agreement
shall prevail.

\textsuperscript{303} Rosas, A. “Mixed Union-Mixed Agreements” in KOSKENNIEMI, M. (ed.) INTERNATIONAL LAW ASPECTS OF THE
\textsuperscript{304} 1979 E.C.R. 2871 at 1917 (paragraph 56).
\textsuperscript{305} 1994 E.C.R. I-5278, at I-5408 (paragraphs 66-68).
\textsuperscript{306} Judgment of 3 December 1996, paragraphs 75, 77. For an academic comment on the case, see Peers, S. “Fragmentation or
Evasion in the Community’s Development Policy? The Impact of Portugal v. Council,” in Dashwood, A. & Hillion, C. (eds.)
MacLeod et al. assert that

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

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

B.- Type of Mixity

Mixity can also be classified as facultative (non-compulsory) and obligatory, i.e. legally necessary. Where the competence of the EC is non-exclusive but there are no competences specifically reserved for Member States either, then as a matter of EC law this mixity becomes facultative, optional, non-compulsory. For example, the environmental agreements or development cooperation agreements. This means that you may have pure Community agreements with shared competence. The language of the EC Treaty makes it very clear that development cooperation is not exclusive EC competence, and yet the EC

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307 This is mainly the case in the World Intellectual Property Organization.
310 1975 E.C.R. 1361 at 1364.
311 1993 E.C.R. I-1061 at 1082 (paragraph 34).
concludes international agreements on its own. Thus, one must have a mixed agreement only when part of the agreement covers matters outside EC competence altogether, but EU Member States are free to insist on a mixed agreement whenever there is shared competence.

As Rosas argues, in cases of concurrent competences, mixity is facultative ab initio. However, if the Council and the Member States insist on mixity for political reasons, the question arises as to whether parts of the agreement become reserved for the Member States, in which case they should all become Contracting Parties.312 We should also illustrate, in this same line of argument, the example of an Opinion (No. 20/1995) given on 30 November 1995 by the Constitutional Committee to the Foreign Affairs Committee of the Finnish Parliament. This Opinion discusses problems concerning the ratification of the 1995 Europe Agreement establishing an association between the European Communities and their Member States, on the one part, and the Republic of Estonia before it was a member of the EU, on the other.313

As far as obligatory mixity is concerned, it is understood that it is necessary to have the participation of both the Member States and the EC on a particular issue. A classical example of obligatory mixity is the Law of the Sea Convention, where it is highly difficult to have one voice representing the EU. In such a case, we deal with what is called “subordination clauses,”314 which provide that the EC can become a party only if one or more of the Member States have become parties. As an example we have Article 3 of the Annex IX to the Law of the Sea Convention (1982),315 which advocates that the EC may become a party only if a majority of the Member States ratifies or accedes.316

313 Id. at p. 143.
315 Article 3 of the Annex IX to the Law of the Sea Convention reads:

1. An international organization may deposit its instrument of formal confirmation or of accession if a majority of its member States deposit or have deposited their instruments of ratification or accession.
2. The instruments deposited by the international organization shall contain the undertakings and declarations required by articles 4 and 5 of this Annex.
316 Simmonds, K. R. The Communities Declaration Upon Signature of the UN Convention of the Law of the Sea (1986) 23 COMMON MKT. L. REV., 521-44. The LOSC entered into force on 16 November 1994. However, an agreement on Part IX
This distinction between obligatory and facultative mixity is not always recognized in practice. Proof of it are the discussions in the framework of the Council of the EU (including COREPER and the Working Groups) on the European Community versus mixed character of a given agreement, where it is almost always taken for granted that the lack of exclusive Community competences requires mixity out of necessity.317

However, it may sometimes be difficult to apply to certain cases, as can be deduced from uncertainties such as whether Opinion 1/94 implies that Member States participation in the WTO Agreements on services (GATS)318 and intellectual property rights (TRIPS) was legally necessary or simply legally possible. The Commission asked the Court to rule that the Community had exclusive competence to adhere to the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), either under Article 133 EC, the ERTA doctrine, implied powers in accordance with Opinion 1/76,319 or Articles 95 EC320 and 235 EC.321 In denying their...
existence of exclusive competences for the whole subject areas covered by these two treaties, the Court concluded that the GATS and TRIPS Agreement are mixed agreements. Some of the Member States had argued that those provisions of the TRIPS Agreement fall within their competence. The Court replied that "if that argument is to be understood as meaning that all those matters are within some sort of domain reserved to the Member States, it cannot be accepted. The Community is certainly competent to harmonize national rules on those matters..."322

What has been said so far concerning the types of competences in the external relations of the EU can be graphically shown as follows:

<table>
<thead>
<tr>
<th>A.- Type of competence</th>
<th>B.- Type of mixity</th>
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<tr>
<td>A.1.- parallel competences</td>
<td>facultative mixity</td>
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</table>

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.

321 Article 235 EC reads: The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288 [EC].
A.2.- Shared competences

a.- Concurrent competences facultative mixity

b.- Coexistent competences obligatory mixity

b.1.- Horizontally

b.2.- Vertically

Lena Granvik denotes that "mixed agreements are concluded especially in the field of the environment, entailing that both the European Community and some or even all of its Member States individually become parties to the international environmental agreement." According to this author there are two types of mixed agreements: complete and incomplete mixed agreements. Complete mixed agreements means that both the EC and all its Member States are treaty-parties, whereas the concept of incomplete mixed agreements implies that only some of the EC Member States have acceded to the agreement in question along with the EC. However, it must be said that incomplete mixed agreements bind all the Member States of the Community. What the case-law and primary legislation indicate is that Member States, whether they are parties or not, “have the obligation to co-operate with the EC in the implementation of the Community’s international obligations.” In addition to that, a mixed agreement, which does not distinguish between the rights and obligations of the EC and the Member States, gives obligations to both the EC and its Member States under all its provisions.

\[322\] 1994 E.C.R. I-5418-5419, paragraph 104.
It should be mentioned that the above given typology should only and merely be seen as a tool to assist in the structuring of the discussion on the legal nature an implications of mixed agreements. Some agreements may fall under several of these categories, as can be seen from the ILO Convention No. 170 as interpreted by the Court of Justice in its Opinion 2/91. In this Opinion, the Court seemed to hold that Part III of the Convention belonged to exclusive EC competence and the other parts to non-exclusive EC competence because the relevant Community directives set minimum standards. The representation of certain dependent territories belonged to the competence of some Member States. However, this right of representation is, strictly speaking, not a question of mixity, as the Member States involved do not act in their capacity as EU Member States.

VII. Conclusion of Mixed Agreements

There seems to be uncertainty about the nature and legal implications of joint participation by the EC and its Member States in the conclusion of international agreements. Rosas argues in this respect that “the phenomenon of mixed agreements is still surrounded by a host of question marks, both of a theoretical and practical nature.” In this sense, within the legal scholarship, three main and divergent positions can be presented: 1) one part of the doctrine has tried to reduce the mixed procedure to only exceptional cases of some compelling legal reasons; 2) another part of the doctrine has focused on the practical and theoretical problems of mixed procedure, limiting EU Member States’ participation in the EC’s

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international agreements to a minimum; a third group of scholars has a more dogmatic approach to obtain normative propositions by interpreting the various provisions of international agreements or by extrapolation from the general schemes of EC law and international law.

VIII. Implications of Mixed Agreements for Third Parties

In this section, we shall evaluate the validity and the effects that the EC’s international agreements have on non-Member States of the EU. As we know, mixed agreements are, together with the exclusive Community agreements, one of the two methods by which the Community undertakes contractual international obligations. In fact, although no specific provision is made in the EC Treaty for joint participation of the EC and its Member States in international agreements, the practice of concluding mixed agreements is well established in the law of the European Community. This has been recognized by the ECJ on several occasions. The recognition of the practice by the Court was first implied in cases concerning the early agreements of association. The first express reference which the Court made to the concept of mixed agreement is in Case 12/86 Demirel v. Stadt Schweibisch Gmuend. Another example is the dicta in Opinion 1/78 on the International Natural Rubber Agreement.


The answer to specific legal problems arising from the issue of mixity may vary depending on the subject-matter, in other words, the jurisdiction of the Court of Justice in the field of mixed agreements and the responsibility and liability of the EC and its Member States vis-à-vis third States, *inter alia.* This, then, leads me to the next section.

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

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

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

Generally, each party to an international agreement is responsible for performance of its own obligations, and joint liability under an agreement is not usually to be presumed. However, the special circumstances of the EC and the Member States may lead to an exception to this rule. The EC and the Member States generally work together in pursuit of a common policy. Since it is very difficult to determine where legal powers lie between the EC and the Member States, for the third party the most convenient conclusion is that the EC and the Member States assume joint obligations and that they are

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required to assure these joint obligations. The ECJ, with its emphasis on the “requirement of unity” in the external representation of the Community, concurs. The ECJ also emphasizes this view in cases such as Ruling 1/78 (Re Draft Convention on the Physical Protection of Nuclear Materials)\(^{343}\) and Case 104/81 \textit{Hauptzollamt Mainz v. Kupferberg}.\(^{344}\)

In agreements where the rights and obligations of the EC and the Member States are inter-linked, the problem of the respective liabilities of the Community and the Member States will arise quite clearly. In other words, we are dealing here with cases where the nature of the agreement is such that a third party is entitled to respond to Community or Member State action in one area covered by the agreement by retaliation of another area. The main example is the WTO Agreement and those agreements associated with it, but in principle the issue could arise in any international agreement to which the Community and the Member States were parties. Macleod \textit{et al.} go further in the explanation by saying that:

\begin{quote}
“if the action and retaliation take place in respect of matters entirely within the competence of the Community or entirely within the competence of the Member States, the problems are less intractable. If, however, the third party responds to action in an area of Member State competence by retaliation in an area within the competence of the Community, the need for close cooperation between the Community and the Member States is evident.”\(^{345}\)
\end{quote}

When an agreement is covered by a general rule of the law of treaties, by which a party is responsible for all obligations of the treaty unless it makes a reservation, we are dealing with an agreement which is not mixed under a formal or under a substantive definition of mixed agreements. In extreme cases, as Schermers mentions, the position might be defended that, in such a case, adherence by the Community implies a tacit reservation in the sense that the EC cannot be held liable for matters which are outside its competence.\(^{346}\) In these cases, Article 46 of the 1986 Vienna Convention on the Law of

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\begin{footnotes}
\footnotetext{343}{1978 E.C.R. 2151, at para. 35.}
\footnotetext{344}{1982 E.C.R. 3641, at paras. 13 and 14.}
\footnotetext{345}{MACLEOD, I., HENDRY, I. & HYETT, S. \textit{The External Relations of the European Communities}, Claredon Press Oxford, 1996, at 159-60.}
\end{footnotes}
\end{flushleft}
Treaties\textsuperscript{347} between States and International Organizations or between International Organizations (VCLTIO)\textsuperscript{348} will apply. It reads:

1.- A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

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

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

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

Despite the fact that the internal legal competence of the Communities and the Communities’ procedures for concluding agreements are matters of EC law, both the validity and the effects of agreements, in relation to third countries, concluded in the framework of any rules of EC law must be taken into consideration in terms of international law, and not EC law.\textsuperscript{349} As Brownlie points out, the rules of customary law on these issues are not easy to state with certainty.\textsuperscript{350}

Within the doctrine, some argue that international law leaves the matter to the internal rules of the international organization to determine the procedures by which its consent to be bound has to be expressed. Therefore, any violation of the internal rules of the organization “vitiates the expression of

\begin{footnotesize}
347 The 1986 Vienna Convention on the Law of Treaties articulates the basic rules applied to the interpretation of treaties. These rules are increasingly important due in large measure to the growth in treaties that directly affect non-State actors, such as corporations and individuals. For example, there has been a proliferation of treaties that govern international economic relations, trade and investment, enable the enforcement of foreign awards and judgments, protect human rights and regulate European integration.

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


\end{footnotesize}
such consent, and renders the agreement which has been concluded void or voidable." 351 Others believe that the acts of a representative of an organization acting within his authority bind the organization in international law, “even if the internal rules of the organization have not been complied with.”352 As a matter of fact, the principles which appear in Article 46 of the 1986 VCLTIO fall somewhere between the two previously cited schools and represent the views of the majority of jurists.

When looking carefully at Article 46 of the 1986 VCLTIO, it will be noted that agreements concluded in the framework of an organization’s internal rules are not ipso facto void. As Macleod et al. (1996) argue, the rule in Article 46 applies in principle in favor of the State or international organization which has acted in violation of its own internal rules and amounts to a defence against a claim for performance of the agreement by the “innocent” party. Therefore, the rule in Article 46 would not apply to a State or organization which has concluded an agreement with the EC to claim that such an agreement was void because it had been concluded against a rule of the EC’s internal legal order. The rest of Article 46 reinforces this presumption in favor of the validity of agreements which have been duly concluded. One of the parties in the agreement must show that the violation of its internal rules was “manifest” in order to invoke an expression of consent to be bound by that agreement. In order to determine whether a violation is “manifest”, Article 46(3) clarifies the situation: the violation must have been “objectively evident” to a party acting in accordance with normal practice and in good faith. In addition to that, the internal rule involved must have been “of fundamental importance.”

Determining the extent to which the powers of the Communities relate to a given agreement is not always easy. Sometimes the particular roles and competences of each of the Community institutions in the process of concluding agreements may not be so obvious. In this regard, irregularities when concluding an agreement may not be “manifest” to third parties. This is so because if an agreement which has been irregularly concluded is voided, it could be a problem for third parties.

The ECJ supports this view in Case C-327/91 *France v. Commission*. This case concerned the Commission’s power to conclude an agreement between the Community and the United States in relation to competition. The Court’s opinion was that the Commission had no such power, but this did not affect the validity of the agreement in international law: “there is no doubt… that the [Competition] Agreement is binding on the European Communities…In the event of non-performance of the Agreement by the Commission, therefore, the Community could incur liability at international level.” Thus, an agreement concluded by, or in the name of, one of the Communities will almost always be binding on that Community as a matter of international law. In the light of this argument, Schermers comments that:

“[Foreign States] cannot be expected to know the extent of the competence of the Community. Whenever the Community concludes a treaty, foreign States may presume that it has power to do so. If the Community acted beyond its powers, it will nonetheless be bound unless it or its Member States can prove both its lack of competence and its manifest character. The latter will be especially complicated because of the complicated nature of EC Law.”

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

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352 *Id.*
354 *Id.*, at para. 25.
356 Article 230 EC reads:
The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.
It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.
The Court of Justice shall have jurisdiction under the same conditions in actions bought by the European Parliament, by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.
Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decisions addressed to another person, is of direct and individual concern to the former.
The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its
where the European Commission concluded an agreement vis-à-vis the USA on behalf of the EC on competition (Case C-327/91 France v Commission). The French Republic argued that the Commission had no power to conclude agreements for it is only the Council of the European Union the institution which has competence to conclude international agreements on behalf of the EC. In this particular case-law, in its paragraph 7, the Court literally arguments as follows (I cite the position of the ECJ):

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

Concerning the European Community institutions and the Member States, it is not easy to see how they could be obliged as a matter of EC law to give effect to an agreement which was out of the demarcation of the EC’s powers or which had been concluded in the framework of constitutional principles of EC law. However, as Macleod et al. mention, if agreements concluded in violation of internal rules of EC law usually remain valid within international law and, therefore, bind on the Community vis-à-vis third States, then the institutions and the Member States must make sure that the rights of the third State or international organization under the agreement are respected. According to Macleod et al. (1996), there are three ways by which the EU institutions and the Member States would have to take steps to align both the internal and external effects of the agreement: 1) by withdrawing from the agreement, supposing this is possible, 2) by rectifying the defect of EC law or practice which has made that agreement invalid or 3) by securing the participation of the Member States in the agreement notification of the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

358 See most recently, the judgment in Case C-325/91 France v Commission, 1993 E.C.R. I-3283, at paragraph 9.
361 MACLEOD, I., HENDRY, I. & HYETT, S. The External Relations of the European Communities, Claredon Press Oxford,
along with the Community. A good example of the second way is the Commission’s proposal for a Council decision concluding the Competition Agreement with the U.S. which was the subject of annulment proceedings in Case C-327/91 *France v. Commission.*

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

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

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

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possibly given (1) before the fact, i.e. before the determination of the rights and obligations by the Treaty concluded with the international organization, and (2) given collectively." 365 In addition, Member States are usually very involved in the performance of the treaty. 366

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

IX.- The Panacea: The “Duty Of Close Cooperation”

The origins of the duty of close cooperation may be tracked back to the Treaties themselves, 367 particularly to the duty of loyal cooperation 368 derived by the Court from Articles 86 ECSC, 369

\[\text{Yearbook of International Law Commission 1982, Vol. II (part 2), p. 43.} \]
\[\text{For further discussion on the duty of loyal cooperation, see KAPTEYN, P. J. G. & VERLOREN VAN THEMAAKT, P. INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES, Kluwer, 1982, chapter III, 5.2.} \]
\[\text{The principle of loyal cooperation concerns relations between the supranational and national levels. According to Article I-5 (2) of the Constitutional Treaty, it means that “[t]he Member States shall facilitate the achievement of the Union’s tasks and refrain from any measures which jeopardize the attainment of the objectives set out in the Constitution.”} \]
\[\text{Article 86 of the former ECSC reads:} \]

Member States undertake to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community's tasks.

Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4.

They shall make all appropriate arrangements, as far as lies within their powers, for the settlement of international accounts arising out of trade in coal and steel within the common market and shall afford each other mutual assistance to facilitate such settlements.

Officials of the Commission entrusted by it with tasks of inspection shall enjoy in the territories of Member States, to the full extent required for the performance of their duties, such rights and powers as are granted by the laws of these States to their own revenue officials. Forthcoming visits of inspection and the status of the officials shall be duly notified to the State concerned. Officials of that State may, at its request or at that of the Commission, assist the Commission's officials in the performance of their task.

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Euratom and 10 EC. A similar duty is contained in Article 3 TEU, where the Council and the Commission are responsible for ensuring the consistency of the external activities of the Union as a whole in the context of its external relations, security, economic and development policies. This duty applies as much to mixed agreements as to any other area of the Union’s activity. The European Community and the Member States are under a legal duty to cooperate on the negotiation, conclusion and implementation of mixed agreements. This duty results from the requirement of unity in the international representation of the Community. Such cooperation is “all the more necessary” if the European Community cannot become party to the agreement.

This duty to co-operate is an obligation imposed on Member States and EU institutions under Community law as a consequence of the competence situation for EC participation in the WTO. Formerly, the repealed Article 116 EEC was available for that purpose. It obliged Member States to proceed within the framework of international organizations of an economic character on matters of particular interest to the common market only by common action. However, ex-Article 116 EEC Treaty was regrettably deleted at Maastricht. It had proven to be a useful legal basis for coordination of actions

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370 Article 192 Euratom reads:
Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.
They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

371 Article 10 EC reads:
Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

372 Article 3 TEU reads:
The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis communautaire.
The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.


374 Examples of the ECJ are Ruling 1/78 (Natural Rubber), paragraphs 34-6, 1978 E.C.R. 2151; Opinion 2/91 (ILO), paragraph 36, 1993 E.C.R. I-1061; Opinion 1/94 (WTO), paragraph 108, 1994 E.C.R. I-5267. On cooperation obligations, see Article 5 European Community and Article C of the TEU.
of Member States and the Community in the no-man’s-land of dubious demarcation between Community and national competences, or where the exercise of these competences was inextricably linked (for instance, the international commodities agreements in application of the so-called Proba 20\textsuperscript{375}). Yet, in the view of EU Commissioner for trade, Mr Mandelson, this coordination may need to go further still.\textsuperscript{376}

Nonetheless, ex-Article 116 EEC Treaty was not one of the most transparent provisions of the Treaty. Where the Community was not able to act because it was not a member of the relevant organization, Member States would have to act on its behalf, and the necessary Community action was decided on the basis of Article 133 EC, not ex-Article 116 EEC Treaty. There is a similar issue in Article 12 TEU in relation to matters falling within the scope of the Common Foreign and Security Policy and Article 33 TEU\textsuperscript{377} in relation to common positions in international organizations and at international conferences in various fields covered by Title VI (Provisions on Police and Judicial Cooperation in Criminal Matters) of the TEU.\textsuperscript{378} It is thanks to the duty of cooperation between the EC and its Member States that consensus can be found. With regard to cooperation obligations, Article 5 EC and Article 3 of the TEU deal in the treaties directly with it.

With regard to mixed agreements, the duty of close cooperation first emerged in Ruling 1/78,\textsuperscript{379} on a European Atomic Energy Community (EAEC) case.\textsuperscript{380} The Court had to adjudicate on the division of powers between Euratom and the Member States with regard to a draft Convention on the Physical

\textsuperscript{375} The informal administrative arrangement known as PROBA 20 is how Community coordination takes place in all commodities agreements covered by the UNCTAD’s integrated program, except those under a common organization of the agricultural market. PROBA 20 was agreed between the Commission and its Member States in 1981, and intended to improve the EC’s external image and to strengthen its internal cohesion and solitarity. PROBA 20 is based on the understanding that all legal and institutional considerations which refer to the respective competences of the EC and its Member States are set aside, and is important for formalizing an understanding shared with the EU Council that the EC should speak with a single voice.


\textsuperscript{377} Article 33 TEU reads: This title [Provisions on Police and Judicial Cooperation in Criminal Matters] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.


\textsuperscript{379} Ruling 1/78, 1978 E.C.R. 2151.

Protection of Nuclear Materials. The Court said that “the draft convention...can be implemented as regards the Community only by means of a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into”.381 Regarding the implementation of the convention, the Court said that the Community would implement measures falling within its competence, the Member States would implement measures falling within their competence, and the Council would arrange for coordination of the actions of each.382

Since the essence of mixed agreements383 is that some of their provisions fall within the competence of the Community, while others fall within the competence of the Member States, it is hard to precisely divide powers between the Member States and the Communities within an agreement. The European Court of Justice has discouraged attempts to allocate competence between the Member States and the Community.384 Instead, when considering issues dealing with mixed agreements, the Court has emphasized the need for common action, or close cooperation, between the Community and its Member States “in close association” with each other in the negotiation and implementation of mixed agreements.385 The duty of cooperation, which follows from what the Court calls the “requirement of unity in the international representation of the Community,”386 is one of the fundamental principles of the external relations of the Communities.

In Opinion 2/91 (Re ILO Convention 170),387 the Court had to deal with an agreement that covered matters falling within the exclusive competence of the Community, matters where both the Community and its Member States shared competence, and matters within the competence of the Member States.
States. The Court said:

“[A]t paragraphs 34 to 36 in Ruling 1/78, the Court pointed out that when it appears that the subject matter of an agreement falls in part within the competence of the Community and in part within the competence of the Member States, it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community.

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

(38) It is therefore for the Community institutions and the Member States to take all the measures necessary so as best to ensure such cooperation both in the procedure of submission to the competent authority and ratification of Convention 170 and in the implementation of commitments resulting from that Convention.

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

As we have already analyzed, the issue of cooperation between the Member States and the Community institutions was raised even more acutely in Opinion 1/94. The context of the WTO also shows that in areas of non-exclusive EC competence, it is necessary to have coordinated action in an EC framework. It is important to note that non-exclusive EC competence does not mean non-existent EC competence. In areas of non-exclusive EC competence, the EC can, if the EU Council of Ministers so decides, enter into agreements with third countries without formal adherence of EU Member States to these agreements, thereby having a so-called pure Community agreement. However, Member States

388 (footnote original) i.e. in the ILO.
normally insist on the mixity of international agreements, even if mixity would not be legally necessary. Speaking with one voice, in many domains, has to be ensured through cooperation between the EC and its Member States, with the idea of achieving unity of representation.392

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

A.- Community Coordination

When engaged in proceedings involving a mixed agreement, both Member States and the EU institutions are obliged to inform each other of their positions, to seek to reach a common view on matters that fall within the scope of a mixed agreement, and to proceed by common action within the framework of international bodies.393 This involves meetings between the representatives of the Member States and the institutions (usually the Commission) to seek a common position. These meetings are called Community co-ordination and take place within the framework of the Council, either in Brussels or in an international forum in which the Community and the Member States are participants.394 Community co-ordination in the negotiation of international agreements is well established in practice. There are informal understandings between the Commission and the Council. For example, there are co-ordination

393 O’Keeffe, D. “Community and Member State Competence in External Relations Agreements of the EU”, EUROPEAN FOREIGN AFFAIRS REVIEW 4, 1999, pp. 7-36.
394 When meetings between representatives of the EU institutions and its Member States take place within the framework of an international forum to seek a common position, they are known as sur place coordination.
arrangements in international commodity agreements and in international organizations, particularly in the FAO and the UN.\textsuperscript{395}

B.- Close Cooperation And Unity of Representation Principle

Trying to reach an agreement on a common position will inevitably lead to difficulties and disagreements. For example, a Member State may wish to take a position different from that of the Community and its partners during the negotiation of an agreement. An agreement also may not be of equal relevance among all the Member States. Therefore, the question arises whether the duty of cooperation requires all the Member States to reach a common position or just to use their best effort to reach such a position. In the end, each Member State will have to defend its own interests.

It is important to distinguish between failure to agree on a position on matters falling within the exclusive competence of the EC, and failure to agree on a common position on matters where the Community and Member States share competences. With regard to matters exclusively within the Member State competence, the EC Treaties have in principle nothing to say (although the provisions of Titles V and VI TEU may be relevant).\textsuperscript{396}

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

\textsuperscript{395} A legal analysis that proves the difficulty in finding a coordinated action between the EC and its Member States can be found at Heliskoski, J. “Internal Struggle for International Presence: the Exercise of Voting Rights Within the FAO,” in Dashwood, A. & Hillion, Ch. (eds.) \textit{The General Law of EC External Relations}, Sweet & Maxwell, 2000, pp. 79-99.

C.- Some Preliminary Conclusions

The legal position governing the participation of the EC and its Member States in international trade agreements/negotiations is flexible and allows arrangements to be agreed which can suit the circumstances of the particular international organization in question while recognizing the position of the EC and its Member States. With good political will and common sense on all sides such arrangements can work.\footnote{Stephen Hyett, ‘The Duty of Co-operation: A Flexible Concept,’ in Dashwood, A. & Hillion, C. (eds.) THE GENERAL LAW OF EC EXTERNAL RELATIONS, Sweet & Maxwell, 2000, p. 253.} Proof of this is the successful outcome of the Uruguay Round and the conclusion of the financial services negotiations in the framework of the WTO in the summer of 1995. In this last case, the EC took the lead during the negotiations as a result of combined efforts of the European Commission and the Member States: the United Kingdom, given its position as the EU country with the major financial services industry within the EU, was better placed to lobby in some parts of the world than the European Commission.\footnote{Id.} Finally, I would like to argue that it is in the interest of the EC and its Member States to use their combined weight to the best effect. The practical application of the duty of co-operation must recognize that it is to their advantage to do so.

To better understand the Member States’ perspective on mixed competences, we will look at one national court’s interpretation of the EC’s role.

X. Conclusion

To sum up this article, and following the line of thought of Timmermans and Völker (1981), mixed agreements are one of the most distinctive features of the external relations law and practice of the
Communities as well as one of the most difficult. Three types of competence are covered by an international agreement: 1) competence exclusively with the Community; 2) competence shared between the Community and the Member States; 3) competence exclusively with the Member States. In the case where the Community is the only one competent for matters covered by an international agreement, then the Community alone should become party to that agreement. However, there are some cases where even if the substance of the agreement is of exclusive Community competence, the participation of Member States may also be necessary. In such cases it is important to distinguish between the theoretical situation and how it is in practice. Theoretically speaking, in these cases Member States do not participate in the table of negotiations alongside the European Community. Nevertheless, in practical terms the agreement itself may require the participation of Member States in the agreement so that the Community can exercise its competences and participate effectively.

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

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401 Id.
402 This is so because Member States have transferred their competences to the Communities.
"where competence for the subject matter of an agreement is shared between the Community and the Member States, the full implementation of the obligations in the agreement will usually require the participation in the agreement of the Communities and the Member States together, each in respect of their powers and interests."405

In the view of Allan Rosas, “pure Community agreements may be preferred not only by the Commission but sometimes also by some or all of the Member States, mainly in order to speed up the process and avoid complications of various sorts. There have been situations where third States, out of similar considerations, have expressed a preference for a pure Community agreement."406 A practical alternative seems to be the adoption of soft law instruments in the form of a declaration plan, which may be adopted by the Council and in some cases also signed by the Council Presidency and/or the Commission, but without the need of 25 national ratifications. Examples are the Barcelona Declaration adopted at the Euro-Mediterranean Conference of 27-28 November 1995 and the New Transatlantic Agenda signed by President Clinton, Prime Minister González of Spain (representing the then Spanish Council Presidency) and President Santer of the European Commission.407 It is important to note, though, that what I describe here are soft alternatives to treaty-making as a whole, not to the mixed form of treaty-making.

With regard to treaties, and notably bilateral agreements, one could try to devise the negotiation directives to be adopted by the Council,408 and to conduct the actual negotiations in order to avoid areas of national competence. Member States are often unwilling to authorize the Community alone to

404 Id.
408 Article 300 (1) EC.
conclude bilateral agreements containing concurrent competences.® An example would be the existence of substantive provisions relating to intellectual property rights (as well as in services and direct investment). Such provisions in a bilateral agreement would almost inevitably lead to mixity, as some Member States seem to interpret Opinion 1/94 as establishing exclusive national competence in this field. On the potential competence of the Community to conclude international agreements in the field of intellectual property rights, it is pertinent to see Case C-53/96 Hermes International.® The Commission may try to avoid provisions on questions such as intellectual property rights, services, investment or monetary policy in order to avoid assertions of mixity.

Development cooperation agreements and environmental agreements often belong to the category of concurrent competences above mentioned, as concurrent competences are spelled out in the EC Treaty,® but a potential competence may exist in many other areas such as intellectual property rights, investment or services, covered by the EC Treaty as well. It remains to be seen to what extent the EU Council will agree to the Community becoming a party to such agreements and conventions, without insisting on Member States’ participation. In most cases, this will probably not be the case and mixity will continue to exist.® The fact that the Nice Intergovernmental Conference in December 2000 did not want to broaden Article 133 EC so as to cover all questions of services, intellectual property rights, and investment is a clear sign of the unwillingness of Member States to give up mixity even in areas of commercial policy. Another example is that of a trade and cooperation agreement negotiated with South Africa that Member States refused to accept in the spring of 1999 as a pure Community agreement, even if it was obvious that there was no legal need to conclude the agreement as a mixed agreement.

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® Article 174 EC, para. 4, and Article 181 EC.
agreement was signed on October 11, 1999.413 While the Commission preferred a Community agreement, the great majority of Member States wanted the agreement to become mixed.

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