

The EC in the WTO: The three-level game of decision-making. What multilateralism can learn from regionalism

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Keywords

competences, international agreements, transparency, international trade, common commercial policy, trade policy, accountability, institutions, European Commission, European Parliament, Council of Ministers, WTO, political science, law

Abstract

This paper is a comparative institutional analysis of the EC's decision-making process in trade policy by focusing on three variables, i.e., competence (whether national or EC competence in EC trade policy), control (who controls the EC's position in international trade negotiations: the Commission or the EU Member States?) and efficiency *versus* accountability (technocratic versus democratic trade policy) at the national and supranational levels. The empirical background is the World Trade Organization, to which the EC and its Member States are members and, more precisely, the Doha Development Agenda, where the position of the EC is analyzed. The EC institutions and their interaction with EU Member States' institutions and trade policy is the core of this paper. The problems that the enlarged EU will face in its internal decision-making process (such as transparency, efficiency, accountability) can be paralleled to the WTO's decision-making process, and thus the European experience can be used as a role or guidance in the WTO forum so that we can learn from the EC's benefits and, more importantly, avoid the mistakes of the European experience in the decision-making process of international trade *fora*. The paper concludes that EC trade policy, as well as WTO rules and policies, need to change to become more efficient and accountable at the same time as they address the issue of lack of transparency and legitimacy of the current system of governance, denounced by the Laeken European Council. Thus, more leadership is needed.

Kurzfassung

Dieses Papier ist eine vergleichende institutionelle Analyse des Entscheidungsprozesses der EG in der Handelspolitik, die sich auf drei Variablen konzentriert, nämlich Kompetenz (ob nationale oder EG-Kompetenz in der europäischen Handelspolitik gegeben ist), Kontrolle (wer kontrolliert die EG-Position in internationalen Verhandlungen zur Handelspolitik: die Europäische Kommission oder die EU-Mitgliedstaaten?) und Effizienz versus Verantwortlichkeit (technokratische versus demokratische Handelspolitik) auf nationaler und supranationaler Ebene. Den empirischen Hintergrund stellt die Welthandelsorganisation dar, deren Mitglieder die EG und ihre Mitgliedstaaten sind, bzw. genauer gesagt, die Doha Entwicklungs-Agenda, wobei die Position der EG analysiert wird. Die EG-Institutionen und ihre Interaktion mit den Institutionen der EU-Mitgliedstaaten sowie die Handelspolitik bilden den Kern dieses Papiers. Die Probleme, welchen die erweiterte EU in ihrem internen Entscheidungsprozess gegenüber stehen wird (wie Transparenz, Effizienz, Verantwortlichkeit), können dem Entscheidungsprozess der WTO gegenübergestellt werden; demnach kann die europäische Erfahrung als Modell oder Richtschnur im WTO-Forum genützt werden, sodass wir von den Leistungen der EG lernen und, noch bedeutender, die Fehler der europäischen Erfahrungen im Entscheidungsprozess internationaler Handels-Foren vermeiden können. Das Papier kommt zum Schluss, dass die EG-Handelspolitik, ebenso wie WTO-Regeln und Politiken, sich zu mehr Effizienz und Verantwortlichkeit hin verändern müssen, und zwar zur gleichen Zeit wie die Thematik der fehlenden Transparenz und

Legitimität des gegenwärtigen Herrschaftssystems, wie durch den Europäischen Rat von Laeken aufgeworfen, angegangen werden muss. Es ist also mehr Leadership gefordert.

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I. Introduction [↑]

This paper is meant to raise a problem which has been inherent in the construction of the European Union (EU), i.e., the logical disagreement over the division of powers between the European Community (EC) and its Member States.⁽¹⁾ This provokes internal tensions in European policy-making. An example of the division of powers between the EC and its Member States is the EC commercial policy, which is carried out by technocrats from national and European administrations, since both the EC and its Member States are members to the WTO. The focus of this paper, however, is not about a thorough analysis of major parameters such as efficiency, accountability and transparency in the external relations powers of the EC and the implications thereof, all of which goes well beyond the scope of this paper.

The thesis of this paper, therefore, is that EU Member States do not fully trust the supranational level (EC level) to defend their national interests in all areas of trade policy given the lack of transparency and legitimacy of the current system of governance and thus they wish to retain their right to participate and veto in international trade negotiations. To view this argument, the paper has been divided into three main parts, from the more general one to the specific one: 1) a general overview of the EC's position in the WTO and in the Doha Round ([Section III](#)); 2) an analysis of the main institutions dealing with EC trade policy ([Sections IV to VII](#)); and 3) an analysis of three tensions in the decision-making process with respect to EC trade policy ([Section VIII](#)).

After a terminological clarification between often (mis)used concepts such as the European Union (EU), the European Community (EC) and the European Communities ([Section II](#)), the paper explores in [Section III](#) the position of the EC in the World Trade Organization (WTO) generally, and in the Doha Development Agenda more specifically.

The major actors dealing with the external relations of the European Community will also be analyzed in the current paper and the role they play in the European commercial policy-making. This paper, therefore, intends to go actor by actor and see their influence in the EC trade policy-making process.⁽²⁾ We shall see that as far as actors (by actors we understand Contracting Parties) are concerned,

“third States may face [in mixed agreements] one or more of the Communities, one or more of the Communities together with one or more of the (by now 15) Member States, the Member States acting jointly, for instance, under the Common Foreign and Security Policy (CFSP) spelled out in Title V of the Treaty on European Union (TEU),⁽³⁾ and the Member States acting in a more individual capacity.”⁽⁴⁾

To this can be added that, “while Community treaties should normally be concluded by the Council, the Commission, too, has certain powers to enter into international agreements (albeit on behalf of the Communities),⁽⁵⁾ and a general right to represent the Union in its external relations.⁽⁶⁾ Even some quasi-independent Community agencies have been given certain external functions.”⁽⁷⁾

[Section IV](#) analyzes the role of national ministers in the EC's external trade relations. A thorough analysis of certain European institutions such as the Commission ([Section V](#)) shall also be taken into account. We shall see, *inter alia*, how the Commission, the negotiator of international agreements, is limited by the Council in its initiatives and in its negotiation autonomy.⁽⁸⁾ Many of these issues deal with the division of roles between the Commission and the Presidency of the EU in the field of international trade.⁽⁹⁾ The Council, i.e., the Union's intergovernmental body and consultator of international agreements, shall be analyzed as the responsible authority for conclusion of agreements ([Section VI](#)). The Community's competence to adhere to a certain international agreement and what is left to the Member States' competence shall also be explored.⁽¹⁰⁾ [Section VII](#) is devoted to the role and competence of the European Parliament (EP) on these issues.

Lastly, before the conclusions, [section VIII](#) is devoted to an analysis of three tensions in the decision making processes in EC commercial policy, and the analysis of why the EU has been criticised for its commercial policy, for being unable to negotiate without internal agreement and incapable of negotiating with one voice, due to a constraining mandate.⁽¹¹⁾

II. Some background [↑]

Most people wrongly believe that the EC has been replaced by the European Union (EU). This is inaccurate since both entities co-exist. The competence to act in the field of international trade relations rests specifically with the EC and not with the EU. As Ramon Torrent⁽¹²⁾ indicates, the institutional system of the EU is perceived in a confusing way, not only by the citizens of the Union but also by those who direct the Union, those politically responsible for it, and by the civil servants of the European Institutions.⁽¹³⁾ In such a case, we must approach the institutional system of the EU with a double perspective, a double side: a *legal* side and a *political* side. A legal side, because one cannot direct or guide a system without knowing the rules of the game; a political side, because one must know the reasons for the malfunctioning of a system.⁽¹⁴⁾

Throughout this paper, terms such as *European Union*, *European Community* and *European Communities* appear continuously. The European Parliament, as well as other institutions, uses the term *European Union* to make reference to external trade relations. However, lawyers should know that it is the European Community, and not the European Union, the one which has competence in the field of international trade relations. Clearly, the European Community is part of the European Union, but the latter does not have international legal personality *stricto sensu*.⁽¹⁵⁾ The European Union is, therefore, not a member of international organisations.⁽¹⁶⁾ That is why it is said that the EU does not negotiate in the World Trade Organisation's agreements and is not a member of such an organisation. It may be politically convenient to refer to the European Union rather than to the European Community as an international economic actor, but it is incorrect.⁽¹⁷⁾

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

III. The Doha round and the EC [↑]

After this clarification, let us see in Section III an overview of the EC in the WTO in general terms, and more specifically in the Doha Round, by analyzing the principles of the Doha Development Agenda, i.e., the new WTO round. This section corresponds with the first of the three main parts of this paper. We will see how the duty to cooperate between the EC and its Member States is a constant in this first part.

III.I. The EC in the WTO

With respect to the EC and its 25 Member States in the WTO, it is the largest and most comprehensive entity in this member-driven organization (i.e., the WTO) with decisions mainly taken on a consensus basis. While the 25 Member States coordinate their positions in Brussels and Geneva, the European Commission alone speaks for the EC and its Member States at almost all WTO meetings.⁽¹⁸⁾

III.II. Principles for the Doha Development Agenda

A WTO Ministerial Conference takes place once every two years, bringing together trade ministers from all WTO Members. As the highest decision-making body in the WTO, the Ministerial Conference offers trade ministers from WTO Members the opportunity to meet and discuss important developments in the multilateral trading system and the global economy. Doha was the forum for the fourth WTO Ministerial Conference in November 2001, giving birth to the Doha Development Agenda, as the result of the world population's needs. The previous three WTO Ministerial Conferences were in Singapore, Geneva, and Seattle respectively. The last and most recent Ministerial Conference took place in September 2003 in Cancun, which failed for substantial and organizational reasons. The next one will be in Hong Kong in 2005.

Countries tend to negotiate over several years on new agreements for a group of subjects. These series of negotiations are called "rounds." Examples are the Uruguay Round (1986-1994), and the Doha Development Agenda (DDA), which started in 2001. The main points of discussion of the Doha Ministerial Conference are to review and advance the ongoing work of the WTO, especially

“addressing developing countries' concerns regarding implementation of Uruguay Round commitments; considering ways to facilitate the accession process for least developed countries; clarifying WTO rules and disciplines, where necessary; determining ways to provide more and better coordinated assistance to help improve the capacity of poorer countries to trade; making the WTO more open and transparent; and strengthening the dispute settlement system.”⁽¹⁹⁾

Among the various far-reaching conclusions, the WTO members reached the following *inter alia*:

- Launch a new WTO round, i.e., the Doha Development Agenda (DDA), comprising both further trade liberalization and new rule-making with commitments to strengthen substantially assistance to developing countries,
- Help developing countries implement the existing WTO agreements, and
- Approval of the waiver from WTO rules of the Cotonou preferential trade agreement between the EC and African, Caribbean and Pacific countries.⁽²⁰⁾

III.III. The EC in the Doha Development Agenda (DDA)

Since the DDA is the EC's most important trade policy priority,⁽²¹⁾ there is a European interest toward the conclusion of the DDA to boost global economic growth and development opportunities. The EC advocates a declaration where all parts of the negotiation need to continue to move forward together. The EC's priorities in the DDA are the following:

- Better access to markets. In as much as further market access negotiations on services should bring considerable market opportunities for business as well as benefits to consumers worldwide, the EC has no intention to aim at general deregulation or privatization of sectors where principles of public interest are at stake, i.e., education or healthcare.
- The EC is determined to further liberalize agriculture and give developing countries a better deal.
- Protection of the environment.
- Update the world trade rulebook in order to obtain a fair, predictable and transparent rules-based system to govern trade and investment. In other words, better international governance and the promotion of sustainable development is the ambitious agenda in Doha.⁽²²⁾

To achieve meaningful progress in the DDA, negotiations were a key objective for Cancun. Cancun has been the first key test of progress in the negotiations.

This takes me to the second major part of this paper (Sections IV to VII), where we will examine the main institutions dealing with the external trade relations of the European Community, analyzing their influence in the EC trade policy-making process. A close look will be taken at the fact that, within the EU, the sum is far less democratic than its parts, since many Europeans feel quite far from the Brussels-based institutions.

IV. Role of national ministers responsible. What member states have to say [↑] (23)

At the national level, while trying to reach a national position on trade matters, we find two types of layers: 1) national competence, where affected ministries have to come up with a national position. Thus, inter-ministerial discussions take place at a technical level among the various ministries involved in the matter; 2) sub-national competence, where inter-territorial coordination is necessary. This complicates the process of obtaining a national position since the various regions of any given EU Member State do not necessarily have to have the same political sign. There is also discussion with NGOs, which ask for documentation on the state of the art of the matter.(24)

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.(25) Yet, French *national* foreign policy decisions to test nuclear weapons in the Pacific, send troops to Bosnia, or propose a French candidate to head the European Central Bank could be viewed as far more momentous and consequential than anything agreed within the CFSP between 1995 and 1997. It is plausible to suggest, as David Allen does, that the EU simply does not have a “foreign policy”(26) in the accepted sense of the term. Going one step further, the CFSP may be described, perhaps dismissed, as a “myth.”(27) It does not, as the Maastricht Treaty promises, cover “all areas of foreign and security policy.”(28) Obviously, it is not always supported “actively and unreservedly by its Member States in a spirit of loyalty and mutual solidarity.”(29)

Having said that, 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 Members States have enough proximity in their national interests to act with one voice in the international sphere?

Following the same authors,(30) 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 NTBs (quantitative limits, safety norms, health and hygiene standards, etc.) were and are fixed by the Union as a whole, not by the individual Member States.

The first pillar of the EU (i.e., European Communities)(31) makes use of the legal instruments set out in the Treaty of Rome, unlike the second and third pillars,(32) which have an intergovernmental character. This means that in the first pillar Member States have permanently transferred some of their powers to the EC, limiting their sovereignty. Evidence of it is Case 6/64 *Costa v ENEL*.(33) As a consequence,

"certain competencies (or powers) are now held by the EC -they have been conferred on it, or attributed to it by the Member States. Ex Article 5 (new Article 10) of the EC Treaty refers to the powers 'conferred' upon the EC by the Treaty. The EC has only those specific powers which have been conferred upon it. Thus, the presumption of competence lies with the Member States."⁽³⁴⁾

It can, then, be said that in the first pillar of the European Union, Member States **have to** operate with one voice and they have accepted that the Commission should act on their behalf.

As Weiler points out, will Member States lose their right to engage in international relations in those areas where the Community has competence?⁽³⁵⁾ This is an obvious question to ask on issues dealing directly with the first pillar of the EU, where Member States are willing to cede the negotiating role over the negotiations to the EC. Furthermore, this aspect of Member States losing their right to engage in international relations in those areas where the Community has competence

"is usually the most problematic, as it is this which most directly affects their autonomy and results in their being increasingly dependant upon EC Institutions to further their national interests.

From an EC perspective, however, exclusive competencies have many benefits. They result in an increased autonomy for the EC by forcing third States to deal exclusively with the Community; contribute to a Community identity by making the EC the external representative of internal interests, and strengthen the EC Institutions' negotiating position *vis-à-vis* Member States on internal matters by giving the former an additional source of power which they can wield. "⁽³⁶⁾

Perhaps this table might clarify in a visual way what has been said so far:

Table 1

V. The Commission as a negotiator [↑]

In this subtitle, attention shall be paid, *inter alia*, to the Commission's competence in commercial policy as defined by the treaties and the European Court of Justice (ECJ). According to Articles 300 (1) EC⁽³⁷⁾ and 101 Euratom, international treaty negotiations in respect of matters involving an element of Community competence should be conducted *a priori* by the Commission. Therefore, a clear distinction needs to be drawn between the negotiation and the conclusion of an agreement: the negotiating powers are transferred to the Commission but not the powers to conclude an international agreement by the EC and its Member States.⁽³⁸⁾

Let us now turn to an analysis of the three-level system of decision-making in international trade policy matters from an EC perspective.

V.I. The negotiating procedure: a three-level game

The procedure for a negotiation from its initial phase is based on an EC Council mandate called ‘negotiating guidelines.’ These are the broad indicators by the EU Member States to the Commission about what issues should be on the negotiating table and how far EU Member States are willing to go. An example is the mandate for the Doha Development Agenda, where the Commission has much freedom but makes sure that EU Member States are on board.⁽³⁹⁾ This room for maneuver given to the Commission has to be corresponded by a compromise among the different EU Member States in the negotiations, where they are being informed by the Commission during the negotiating process about the state of play of the negotiations. Finding an intra-EC common position between the EC and its Member States is not always an easy task, not only in trade in services or TRIPs⁽⁴⁰⁾ but also in trade in agriculture. Thus, the idea of no fragmentation of the EC position is always present in multilateral negotiations. To avoid a fragmented EC position, the Commission meets with the EU Member States regularly until a strong and solid EC and Member States position emerges by consensus⁽⁴¹⁾ through transparent discussions and permanent consultations.⁽⁴²⁾ The European public opinion such as the industry or NGOs is also taken into account through the so-called “civil society dialogue.”⁽⁴³⁾

The national position of each EU Member State on trade in services or intellectual property rights for multilateral trade negotiations is obtained in the various EU national capitals. This position is then presented and defended in the framework of the Article 133 Committee⁽⁴⁴⁾ for Services (in the case of trade in services),⁽⁴⁵⁾ which consists of high-level Member States civil servants at the EC Council of Ministers in Brussels, before a final common position is found among all the EU Member States and EC institutions. Only issues where an EC common position has been found are taken to Geneva. This final common position is then taken to the WTO in Geneva for negotiation in international trade negotiations. We have thus a three-level system of decision-making: national (in the EU national capitals), supranational (in the Article 133 Committee in Brussels), and international (in the WTO in Geneva).

In order for the EC to be in a real position of strength in multilateral trade negotiations, it is a necessity to speak with one voice. This is so even in the case of services, where Member States sit along side the Commission in the WTO and have the right to speak in negotiations. Whenever the EC deals with the WTO on issues concerning goods (Article 133 EC), the Commission negotiates itself, according to Article 300 EC. EU Member States “sit” behind the Commission during the negotiations. In other words, EU Member States are physically present but it is the European Commission that carries the negotiations on behalf of the EC and the Member States.⁽⁴⁶⁾ However, there is coordination between the Commission and the Member States in Brussels (the Article 133 Committee) and in Geneva (delegation of the European Commission to the WTO) before negotiating in the WTO.

There are occasions when Member States do not agree with the Commission’s proposals. They try to reach a common position. So far there has not been a strong resistance from Member States to the Commission’s proposals. Interestingly enough, although the Commission is the negotiator, the EC does not vote in the WTO, whereas the EU Member States do have the right to vote (although voting in the WTO is by consensus) but do not negotiate in international trade agreements.⁽⁴⁷⁾

The Article 133 Committee is the real power behind and decision-making centre for the EU’s commercial policy. It takes its name from Article 133 of the Treaty of Amsterdam. This article provides for the establishment of a special committee appointed by the Council to assist the European Commission. The 133 Committee constitutes the link between the European Commission

and the EC Council.(48)

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Depending on what EU Member States signal to the Commission, the Commission will take one position over another. These discussions take place in the Article 133 Committee in Brussels. By the time EC negotiators reach Geneva, almost all the intra-EC negotiation is complete. Once the EC negotiators are in Geneva, they meet at the EC Commission delegation to the WTO only to refine the EC common position before the actual negotiation breaks out and to find the necessary negotiating tactics. Then, the multilateral trade negotiation takes place at the WTO.(49)

In theory, the Member States and the Community could each negotiate independently their respective competences. However, in practice it is unusual for the Member States and the Community to negotiate independently.(50) This system *de facto* obliges the creation of an intra-EC common position since it is the only viable way for the EC in multilateral trade negotiations when there is no convergence of interests between the EC and its Member States.(51) This puts the Commission in a position in which it is the natural representative, the spokesman and the only negotiator of the Community,(52) mainly because it has greater experience in international trade negotiations.(53) "The basic rule under the EC Treaty has always been that the Commission negotiates agreements on behalf of the Community".(54) That being said, it is worth mentioning that the negotiation of the Commission on behalf of the EU Member States is done in consultation with the so-called the Article 133 Committee, which is technically a working group of the EC Council in order to ensure consistency of trade policy.(55) Also, it should be mentioned that the EC Council has been in multilateral trade negotiations since the Uruguay Round (article 133 EC).(56)

The current state of the art in EC international trade negotiations on issues of shared competence is that the Commission is the sole spokesman for the EC and its Member States. Member States would speak only if they are specifically authorized to do so. The Commission's argument is that this is necessary to secure effective implementation of international agreements such as the WTO agreements. According to the Commission, there would be problems if Member States were to express their own views where a lack of consensus existed. Why so? Because there would be interminable discussions on whether a matter fell within EC or Member State competence. The Commission's argument is that its unity of action *vis-à-vis* the rest of the world would be undermined and its negotiating power greatly weakened.(57)

V.II. The management of the EC's international trade relations ↑

With regard to the management of the EC's external relations, there are two types of international agreements to take into account, bilateral and multilateral agreements. According to Macleod *et al*, in bilateral agreements the Treaty of Rome imposes through Article 300 (1) EC a duty on the Commission to "negotiate in consultation with any committees established for the purpose by the Council. Secondly, the Treaty requires the Commission to respect the Council's instructions regarding the conduct of the negotiations, as such instructions may from time to time be given in directives of the Council."(58) The participation of a Community representative in the negotiation of the agreement must be based on an authorization obtained by the Commission in accordance with the appropriate procedure pursuant to the relevant Treaty provision.(59) In the context of Article 300 (1) EC, a negotiating directive constitutes an instruction to the Commission on the content of the negotiation.(60) It must be said, though, that negotiations under Article 300 EC are not affected by the bilateral or multilateral nature of the agreements.

In the eyes of Macleod *et al* (1996), negotiating directives are generally attached to the authorization given to the Commission by the Council at the beginning of the negotiation.⁽⁶¹⁾ This mandate of negotiation must be discussed by the EC Council. In certain cases, it is evident that the bulk of the agreement relates to matters within the competence of the Member States but that certain incidental aspects involve the competence of the EC.⁽⁶²⁾ For example, the 1998 Vienna Convention on Illicit Trafficking in Drugs related for the most part to matters that fell under the competence of the Member States, such as penalizing certain conduct and arrangements for extradition, *inter alia*. However, one part of what would become Article 12 of the Convention related to trade in precursors, and the Commission sought and obtained from the Council authorization to participate in the negotiations with respect of that Article. It is these cases in which the Commission seeks to participate to safeguard the interests of the Community.⁽⁶³⁾

In bilateral agreements, the European Commission ‘shall make recommendations.’⁽⁶⁴⁾ The right to initiate proposals for Community action rests with the Commission:

“In the first instance, therefore, it is for the Commission to consider whether it would be appropriate for the Community to enter into agreements in a particular area or with a particular State, and to make the necessary recommendations to the Council. In practice, such recommendations take the form of a communication from the Commission to the Council, explaining why it is thought that conclusion of an agreement would be desirable, and proposing that the Council should authorize the Commission to negotiate such an agreement in accordance with a set of negotiating directives suggested by the Commission, and annexed to the recommendation.”⁽⁶⁵⁾

In the case of multilateral agreements like the GATT Agreements, on certain issues such as services or intellectual property rights, Member States have competence to decide whether they want to be a party to the proposed agreement, such as the WTO Agreement where Member States play a secondary role and the Community negotiates.

Macleod *et al*. comment that the EC should be able to participate and take action internationally in areas in which it has competence to legislate for itself internally.⁽⁶⁶⁾ To decide what the correct legal basis should be in a case of conclusion of an agreement in the process of being negotiated is not always possible.⁽⁶⁷⁾ Within the Council of Ministers, or between the Council and the Commission, there was argument as to know the correct legal basis for Community action. This issue was solved by saying that only after the agreement had been negotiated did the Council have a view on the legal basis for conclusion of an agreement.

In the case of the European Commission, as is stipulated in the Treaty of Rome, it will negotiate on behalf of the European Community in issues dealing with the first pillar. The intention to have the Commission as the organ in charge of exercising the role of representative of the external relations of the Community appears as well in Article 302 EC, which says that the Commission shall “ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies.”⁽⁶⁸⁾ When there is exclusive Community competence, the international representation of the EC should only be assured by the Commission.⁽⁶⁹⁾ The Commission is engaged in negotiations with the authorization of the Council.

However,

“the Commission cannot act as the sole negotiator [in mixed agreements]. The [European] Court [of Justice] has established a practice of emphasizing “the duty of close cooperation” in order to ensure consistency of the external activities of the EU as a whole. This “duty of close cooperation” is a fundamental feature of the legal basis of EC external relations. It is intended to ensure some degree of democratic legitimization in the external trade policy process.”⁽⁷⁰⁾

Since we are dealing with the EC’s external trade relations, we must examine the special role of the European Commission which, according to Article 133 EC, has the exclusive competence in the field of European commercial policy, leading the negotiations with third parties under a mandate of the Council.⁽⁷¹⁾ In order to oversee the Commission in negotiating, the Article 133 Committee was set up. This proves that even in “exclusive” areas, such as parts of Article 133, negotiations are still held jointly through the Article 133 Committee, which means that Member States do not fully renounce control.⁽⁷²⁾

VI. The Council as a consultator and concluder [↑] ⁽⁷³⁾

In this section, we will see the need for the EC Council to have a more transparent role as an important body for holding EC trade policy accountable. The EC Council represents the will of the EU Member States, as opposed to the will of the people, represented by the EP.

VI.I. The Council’s working structure

The Council consists of representatives of the Member States. Its composition may vary according to the subjects discussed. It is assisted by a General Secretariat under the responsibility of a Secretary-General, High Representative for the Common Foreign and Security Policy, assisted by a Deputy Secretary-General. The General Secretariat carries out all the necessary work for the activities of the Council, the Permanent Representatives Committee (COREPER)⁽⁷⁴⁾ and all the committees and working parties set up within the Council.

The Council is assisted by a Committee consisting of Permanent Representatives of the Member States, COREPER, which is the French abbreviation for *Comité des Représentants Permanents*. It is an institution of the European Union composed of the Member States’ ambassadors to the Community, and is responsible for preparing meetings of the Council (composed of ministers from the national governments) and following up its decisions. It interacts closely with the European Commission, the organization’s administrative and executive arm, and is assisted by a large number of working parties. The ambassadors are assisted by committees of national civil servants. The Permanent Representatives Committee’s task is to prepare the Council’s work and to carry out any instructions given to it by the Council. In order to deal with all the tasks entrusted to it, the Permanent Representatives Committee meets in two parts: Part 1 (Deputy Permanent Representatives) and Part 2 (Ambassadors). Items for examination are divided between the agendas for each part of the Committee.

VI.II. Role to conclude agreements

As it is mentioned in this subtitle, the Council remains as the institution whose role is to conclude (mixed) agreements,⁽⁷⁵⁾ acting on a proposal from the Commission. The Council takes its decision of signing the agreement by the Community and decides upon one or more people for this purpose. In most cases, it is a Commissioner and a member of the President of the Council. It is, therefore, the Council who, in commercial policy, concludes and ratifies international agreements. The conclusion of these agreements is according to a procedure which follows the different phases of revision of Treaties. First of all, the Commission negotiates, with or without the participation of Member States. The European Parliament is called for its opinion (this is certainly the case since the entry into force of the Single European Act) when we are dealing with an association agreement or a cooperation agreement based on Article 310 EC. The Council concludes the agreement on behalf of the EC. The concluding stage may be difficult if EU Member States disagree with the final negotiating decision. Member States ratify the agreement according to their respective constitutional procedures.⁽⁷⁶⁾ Ratification of agreements by Member States is only necessary where agreements are mixed.⁽⁷⁷⁾

In EC practice, “conclusion” within the meaning of the relevant EC Treaty provisions (Articles 114 [now repealed], 300 and 310), thus simultaneously covers two different measures: (1) the measure whereby the internal procedure to conclude an agreement is completed and (2) the measure whereby the EC binds itself internationally. This final act of the Council takes the form of a decision or a regulation. This decision or regulation is published in the Official Journal of the EC.⁽⁷⁸⁾

Here one could ask whether the accomplishment of this procedure does not annul any possibility of control of legality *a posteriori* in all these agreements. The possibility of judicial control remains untouched for those provisions which deal with EC competence.⁽⁷⁹⁾ These provisions can be interpreted by the ECJ: in a judgment of 30 September 1987, Case 12/86, *Demirel*,⁽⁸⁰⁾ the Court affirmed its competence to interpret provisions of mixed agreements (for example, the association agreement with Turkey and the additional protocol).

Trade agreements concerning goods can be concluded on the basis of Article 133 EC, which provides for the Council to act by qualified majority. However, if an agreement (also or solely) concerns concessions relating to services, intellectual property or investments, the general rules of the Treaty apply. Under those rules, agreements are concluded by qualified majority or unanimously depending on whether the Community’s internal decisions in that area are made by qualified majority or unanimously. In addition, Member States often wish to exercise their residual powers in those fields in which no internal Community rules apply or do not yet apply.⁽⁸¹⁾

Mixed agreements “require a number of different procedures, including consultation procedures with the European Parliament and unanimous decision-making in the Council.”⁽⁸²⁾ Acts of the Council dealing with the conclusion of agreements could require the Council to follow the cooperation procedure.⁽⁸³⁾ The decision-making process leading to Community conclusions does not depend on whether the agreement is mixed (except for the fact that as a matter of practice, the Council will not formally conclude a mixed agreement until all Member States have ratified it). It is a function of the legal base chosen. An example of this is the Council decision relating to the conclusion of the Framework Agreement on Science and Technology with Iceland.⁽⁸⁴⁾

VI.III. The Article 133 Committee

The Article 133 Committee, which is provided for in Article 133 EC, is a Council committee chaired by the Council Presidency and consists of high-level Member States civil servants at the EC Council of Ministers in Brussels. It is responsible for assisting the Commission in the negotiations on trade and tariff matters⁽⁸⁵⁾ which the latter conducts on behalf of the Community.⁽⁸⁶⁾ It has a key role in ensuring that the Council accepts the final results of negotiations, and therefore in the formation of unity. From a formal view point, it is the Council Presidency that leads the negotiations in the Article 133 Committee, but *de facto* and from a substantial point of view, it is the Commission that leads the negotiations to find a common position in trade matters.⁽⁸⁷⁾ From a procedural view point, the Article 133 Committee is not a voting committee, just a consultant.

In order to have a close cooperation between the national and the European levels on issues of exclusive and mixed competence, there are continuous informal negotiations between the Article 133 Committee and the Commission. For example, in the case of trade in services, there are bilateral or multilateral negotiations every two weeks. The Commission tries to follow the decision of the majority in these negotiations. However, when there is no convergence between national and supranational interests, the Commission may impose its position. Here, one should make a clear distinction between “big” and “small” issues: culture, education, public services and health policy are such delicate issues at the national level (considered as “big” issues) that, if the main EU Member States (i.e., France, Germany, the UK or Italy) say “no” in the negotiation when trying to find an EC common position, there is automatically a deadlock. However, when negotiating “small” issues, EU national governments are willing to give in.⁽⁸⁸⁾

Different commercial issues are discussed at the Article 133 Committee before being sent to the WTO for negotiation. Since most issues are, therefore, treated in the Article 133 Committee, in principle there is no need to go into the political level (COREPER or General Affairs Council⁽⁸⁹⁾) for solving problems,⁽⁹⁰⁾ unless no consensus is found at the technical level.⁽⁹¹⁾

With regard to the EC Council of Ministers, some national experts have proposed to have a trade ministers Council instead of the General Affairs Council.⁽⁹²⁾ The reason behind this is to have a more efficient European commercial policy. It is said that ministers of Foreign Affairs are more concerned with political issues than technical issues. They usually do not show much interest in trade issues, which makes commercial policy-making less efficient. This issue of trade-off between efficiency and accountability will be analyzed in further detail in this paper.

IV.IV. The Council of the EU *versus* the 25 Member States ⁽⁹³⁾

In this subsection, I argue that the EC Council could be viewed not simply as an intergovernmental institution which gathers a group of Member States’ representatives on a regular basis through its various committees, but rather as an accountable legislative body, analogous to the U.S. Senate.

It is important to explain the difference between the Council of the European Union and the 25 Member States. Journalists have made fashionable to write statements such as this one: “The Commission proposes the 15” [now 25] a directive on accepted added values on food products. At this point, we do not know whether it is the 25 who adopt the new directive or whether the 25 agree that the Commission adopt it (the above statement tends to transmit this second idea). What is alarming is not so much that journalists use this kind of statements but that the public opinion perceives the functioning of the Community in such a way: to the eyes of the public opinion, EC

regulations are the work of eurocrats in Brussels. What is even more alarming is that civil servants perceive what they do in such a way. Let us examine this mistaken perception a bit closer:

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1. A national civil servant who participates in a meeting of a working group at the Council of the European Union often goes to Brussels as the football player who plays a match away from home, without knowing the match field. His main aim is not to produce a good Community legislation but to prevent this legislation from being uncomfortable for his country and from obliging him to modify national legislations. His attitude is not one of deciding but one of trying to control (without much hope) what “Brussels does”.
2. When an official from the Commission that represents this institution in a working group at the Council of the European Union addresses himself to his interlocutors, he never uses the expression “you, the Council” or “you, members of the Council”. The expression used in a more systematic way is “you, the Member States”, that is to say, “you, the 25”, as the journalists from before.
3. The most common Freudian slip among national civil servants is to speak of the Commission’s competences instead of the Community’s competences.
4. Representatives from national Administrations at meetings in the framework of the CFSP talk to each other using the term *partners* (there are 16 *partners*, i.e., the 25 Member States and the Commission). However, when an issue from the first pillar appears during the negotiation at these meetings, national representatives no longer use the term *partner* to refer to the Commission. This is clear proof of the exclusive competences of the EC in the so-called first pillar. In the CFSP, both the European Commission and the 25 Member States are *inter pares*.

So what do all these attitudes and expressions have in common? Well, the answer is the disappearing of the Council of the European Union as an institution. The 25 are there but the Council does not exist anymore. The Council is the access key to any institutional building of the European Union since only the Council can coherently integrate all the subdivisions between the national and supranational levels.⁽⁹⁴⁾ The Council has a horizontal decision power in the framework of Community treaties, as it is also an institution which has exclusive decision power in the framework of the Common Foreign and Security Policy, and police and judicial cooperation in criminal matters. However, the Council, by the fact that it is composed of representatives from the 25 national governments, could always get these 25 countries together, allowing the right permeability of the borderline between Member States’ competences inside and outside the EU’s institutional framework. On the other hand, if the Council plays a minimal role on the European integration process, then “the Community” will be wrongly interchanged with “the Commission” and the Union will only become an intergovernmental group of 25 Member States, with a six-month rotation presidency.⁽⁹⁵⁾

However, since it is obvious that there is something else apart from the 15 Member States, this “something else” is identified with the 16th *partner*, i.e., with the Commission. In the eyes of certain people, the term *Commission* becomes not only synonymous with *European Community* but also with *European Union*.⁽⁹⁶⁾ One should also point out that the Council integrates the 25 Member States but it is not limited to just being “the 25”. According to Torrent, “the Council is the only institution capable of guaranteeing coherence in the single external action of the EU.”⁽⁹⁷⁾ The question that the reader should think about is how the Council can exercise in a proper way its role if the Council and the people who compose it are not conscious of its existence or believe that the Council is just the place where 25 Ministers get together with the Commission. How can a self-proclaimed “Presidency of the European Union” properly fulfil its functions if it does not understand that it only has powers by the fact of being the Presidency of the Council of the EU and to the extent to which the powers of the Council are respected, being the rest just empty protocol?

VII. The European Parliament as a consultator[↑] (98)

With respect to the European Parliament's role in the EC's external trade relations, this section deals with the need to enhance the role of the EP in the context of its current roles in light of the confusion between the different Nice Treaty provisions. The European Parliament is formally excluded from decision-making under Article 133 EC. However, since the Nice Treaty, the EP is entitled to ask the ECJ to render an Opinion on the compatibility of an international agreement with the EC Treaty, according to Article 133 (6) EC. The Commission nevertheless gives briefings to the European Parliament to have legitimacy in trade policy.(99) The European Parliament can also give its approval in trade agreements, but does not need to, under the Treaty rules. In this sense, in the case of the WTO agreement, the EP has the power to assent. Hence, the WTO agreement is ratified by the EP and the EU national parliaments.

The conclusion of most EC's (mixed) agreements has taken place with the formal involvement of the European Parliament. The only exceptions have been the "agreements based on the Treaty's provisions on commercial policy (ex. Arts. 111 and 114 (in the transitional period) and Art. 133 (ex Art. 113))"(100) and "some of the agreements concluded without a reference to any specific Treaty provision.(101) In most cases, however, the Treaty only grants the Parliament a right to be *consulted*, that is to say, no legal means to reject an agreement (Art. 300(3), first subpara.).(102)"(103)

In the EC Treaty's current version, there are four categories of agreements where the Parliament's assent(104) is required. The assent requirement was first introduced as an amendment to Article 310 EC by Article 9 of the Single European Act (SEA).(105) Prior to the SEA, the Parliament only had to be consulted. The four categories of agreements where the Parliament's assent is required are as follows:(106)

- association agreements concluded under Article 310 EC,
- "agreements establishing a specific institutional framework by organizing cooperation procedures"(107) whose effects might be similar to those created by association agreements. Examples of this category, where the Council has requested the Parliament's assent, are the Partnership and Cooperation Agreements concluded with countries of the former Soviet Union,(108) the Agreement establishing the World Trade Organization,(109) the Energy Charter Treaty,(110) the UN Convention on the Law of the Sea(111) and the ECE "parallel" agreement concerning the establishment of global technical regulations for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles,(112)
- the 1958 ECE Agreement concerning the adoption of uniform technical prescriptions, which made necessary the amendment of acts adopted under Article 251 EC and required the Parliament's assent under Article 300(3)(2),(113) and lastly
- agreements with important budgetary implications for the EC.

For the conclusion of international agreements, the European Parliament is consulted generally speaking by *avis simple*. An exception to this rule are those agreements based on Article 133 EC, in which in theory the European Parliament does not have to be consulted at all. Certain agreements can only be concluded if the Parliament takes a favorable *avis conforme*. This form of consultation gives the Parliament a real right to veto. It is used in the conclusion of association agreements, agreements with a specific institutional framework, agreements having obvious budgetary implications as well as agreements which imply modifications of an act adopted for a co-decision procedure.(114) These international agreements are also ratified or approved by the Member States following the usual national constitutional requirements, such as the approval of or ratification by their respective national parliaments.(115)

With regard to the WTO Ministerial Conference in Cancun, the European Parliament adopted on 3 July 2003 a resolution setting out its views on the Ministerial Conference in Mexico.(116) The EC Trade Commissioner welcomed the Parliament's move when seeing that European Parliament "has endorsed the Commission's negotiating positions for Cancun across the board, on both market access and rule-making [...]."(117)

VIII. Decision making process in trade policy: The three internal tensions [↑]

In the final part of this paper (Section VIII), and after seeing the role of the relevant institutions with respect to EC trade policy, I will focus on the challenges for having a coherent and accountable EC trade policy. EC trade policy would be more coherent if more power were to be given to the European Commission. Thus, the three main tensions in the EC trade policy decision-making process (competence, control and efficiency *versus* accountability) will be analyzed. We will see that being more transparent and more internally accountable implies less efficiency in decision-making. I will focus on the difficulties of having unanimity in the EC Council in an enlarged EU of over 30 Member States; thus, the need to have qualified majority vote in the EC Council to avoid a Europaralysis in EC trade policy-making for services trade and the commercial aspects of intellectual property.

There has been much criticism on the European Community's (EC) commercial policy, mainly for being unable to negotiate without internal agreement within the EC and for being incapable of negotiating with one voice in international trade negotiations, due to a constraining mandate.(118) Such criticism has come from the EC's trading partners and in particular from the U.S. and has been largely focused on the EC's position on agriculture. Work since the Uruguay Round suggests, however, that although some of what has been stated above may be true, the EC has in general performed as well as most of its trading partners in developing and articulating common positions in international trade negotiations.(119) The EC's policy making processes have worked remarkably well given the diversity of interests within the EC, even if, inevitably, the policies it has produced have not been to everyone's liking.(120) The EC's decision making process is coming under pressure as a result of the deepening of the multilateral trading system. After a close observation of trade negotiations, a diagnosis can be spilled out: the pressure is creating tensions in EC's decision making on the following three issues, not necessarily interlinked:

- the *competence* issue: EC or national competence in commercial policy
- the *control* issue: who controls the EC's position in international negotiations
- the tension between *efficiency and accountability*.

Out of the three tensions, it is the second one (the issue of who controls the EC's negotiating position) which has created the most difficulties for the EU.(121) However, it is likely that the dilemma of efficiency *versus* accountability will be of greater importance in the near future. As commercial policy participates more and more in areas of domestic competence, there will be a necessity for transparency and accountability in policy-making.(122) In this sense, Komesar argues that

"simple rules promote transactions by reducing transaction costs. Transaction costs are reduced because parties can understand more easily the consequences of their behavior and the behavior of the bargaining party. [T]he clearer the consequences, the lower the transaction costs, and the lower the transaction costs the more likely we are to have

value-enhancing transactions.”(123)

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Before getting into more details about these three tensions, let us see and clarify some aspects of the EC (commercial) policy-making process. The EC's decision-making system has evolved over half a century. It was originally designed for a community of just six rather homogeneous European nations. By increasing its membership from 15 to 25, and eventually to 27 or more Member States, the EU's decision-making system needs modernizing in order to avoid paralysis.(124) The approach towards EC commercial policy decision making is somehow technocratic, which is obvious since the EC treaties did not give competence to the European Parliament in commercial policy issues.(125)

Moreover, the difficulty in co-ordinating 25 different national parliaments excluded them from getting into the details of commercial diplomacy. Until recently, the trade policy community in Europe has been composed of officials and very few experts from the private sector. This leads us to a lack of democratic action in the process of policy making. However, it is evident that the technocratic approach in the EU has been more efficient than the approach based on parliamentary control. If it is already difficult to reach an agreement between 25 trade ministries, then trying the approval of an agreement by each of the 25 EU national legislatures would have been a tremendous amount of time-consuming and not very effective.(126)

On the other hand, such a technocratic approach of policy making makes it incompatible with it being democratic. There have been critiques in this respect by interest groups, which have questioned the legitimacy and accountability of common commercial policy decisions. The real problem is that to reach an agreement between 25 different Member States makes it far more complicated than when there is just one single voice. If the EU wants to be heard differently and be more efficient and coherent in its actions, it needs to speak with a single voice, i.e., to have one single executive power. Therefore, it is obvious that by reacting separately European countries can do little to influence events. If Member States are to act together more effectively and to make themselves heard, they urgently need to establish mutual trust. This takes me to the first of the three issues which I pointed out, i.e., the issue of competence.

VIII.I. Competence

The issue of competence is not always clearly defined and therefore creates tension between the Member States of the European Union and the European Institutions, especially the Commission (the negotiator of international agreements). A considerable part of this tension would be minimized should the EU become a sovereign state, for the principal actors in international law are states.(127) As McGoldrick says, “once an entity satisfies the international law requirements for being a state, it is, in normal circumstances, accepted as a member of the international community of states and entitled to sovereign equality with other states.”(128) It is accepted as having various rights and being subject to various obligations.(129) As a state, it also has certain powers. This combination of rights, obligations and associated powers is described by McGoldrick as expressions of the sovereignty of the state. “If the European Union underwent a sufficient metamorphosis and became a single, federal state, it would then be treated as a State rather than a *sui generis* international organization.”(130)

Since the beginning of the then EEC, there has been a constant development of the EC competences.(131) However, only in certain sectors such as the common commercial policy (with some restrictions, as we will see later), the common agricultural policy, fisheries,..., are the Community competences exclusive. In other words, Member States are *a priori* barred from acting in their own name.

There is shared competence between the EC and its Member States in other areas, the disadvantage being the time-consuming factor for the coordination and achievement of a common position between the EC and its Member States on a given matter. Needless to say, under shared competence it is more difficult to get a deal done.⁽¹³²⁾ Thus, in the EU policy-making there seems to be a trend toward the creation of exclusive EC competence for efficiency reasons.⁽¹³³⁾

With the Uruguay Round agreements, the Commission had requested the ECJ to confirm the exclusive EC competence with regard to the conclusion of the WTO agreement. The ECJ held in its (in)famous Opinion 1/94⁽¹³⁴⁾ on the conclusion of the Uruguay Round Agreements that EC competences are exclusive as far as trade in goods is concerned (GATT) but they are non-exclusive (i.e., shared competence between the EC and its Member States) with respect to trade in services (GATS)⁽¹³⁵⁾ and intellectual property rights (TRIPs).⁽¹³⁶⁾ However, it must be said that, in practical terms of the everyday activity of the WTO, it is the Commission which intervenes in multilateral negotiations. In other words, the shared competence issue does not cause a problem at all.

An expansion of the EU goes together with a desired gradual increase of its competences. The issue of *national sovereignty* is of course very delicate when it comes to ceding powers and competences to the European level. However, the EU Member States have accepted the fact that the Commission of the EC will act on behalf of the European Community and of all the Member States in order to defend their commercial interests. The Amsterdam Treaty intended to extend the competence of the common commercial policy to the key issues of intellectual property and services -Article 133(5) of the Amsterdam Treaty-. This is a sensible acceptance by the Member States since they have recognized that a divided Europe is less likely to defend its interests in international negotiations. Unfortunately, Article 133 of the Amsterdam Treaty makes no definition of “commercial policy.” That said, authors such as Shaffer believe that more competence to EU Member States in the fields covered by GATS and TRIPs does not mean that EU Member States will be more accountable to their citizens.⁽¹³⁷⁾

The originality of the European integration tends to the fact that for certain objectives that have been assigned to it, EU Member States have transferred to the EC their original sovereign competences. By the principle of “attribution of competences,” EC law is conceived and built upon terms of “issues,” which are often called “common policies.” The division of roles and competences should be done on the basis of issues. In the field of the common commercial policy, the international representation is exercised by the Commission.⁽¹³⁸⁾ Only in the fields of the Common Foreign and Security Policy (CFSP) and police and judicial cooperation in criminal matters (the so-called second and third pillars) is the EU represented by the Presidency of the Council.⁽¹³⁹⁾ This means that the European Community can be a member of an international organization or a contracting party to an agreement. However, as far as the EU is concerned, it constitutes the common institutional framework for the “three pillars” of the European integration. In other words, the EU covers the Community policies from the first pillar, but also CFSP and police and judicial cooperation in criminal matters.

Both the EC and the Member States are members of the World Trade Organization (WTO). During the GATT (General Agreement on Tariffs and Trade), the EC was not a member although it acted as if it were one. Since the Uruguay Round, there has been a tendency to give the EC the right to act on behalf of all the Member States. On multilateral trade agreements, it is the Commission which speaks for the EC and its Member States.

VIII.I.I. Duty to cooperate and unity of representation principle

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.”⁽¹⁴⁰⁾ Proof of it are the ECJ’s Ruling 1/78 (*Natural Rubber*), paragraphs 34-6,⁽¹⁴¹⁾ Opinion 2/91 (*ILO*), paragraph 36⁽¹⁴²⁾ and Opinion 1/94 (*WTO*), paragraph 108.⁽¹⁴³⁾ Such cooperation is “all the more necessary” if the European Community cannot become party to the agreement. 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.

The context of the WTO shows that also in areas of non-exclusive EC competence it is necessary to have coordinated action in an EC framework.⁽¹⁴⁴⁾ 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 EC 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 normally insist on the mixity of international agreements even if mixity would not be legally necessary. Speaking with one voice has in many domains to be ensured through cooperation between the EC and its Member States, with the idea of achieving unity of representation.⁽¹⁴⁵⁾

VIII.I.II. The EC as a defendant

In the context of the WTO, it has been largely possible to have the Commission as the spokesman for the entire EC and its Member States, acting of behalf of the EU, even on cases of shared competence. An example is the case where the U.S. initiated consultations with some EU Member States rather than the European Commission on issues dealing with TRIPs and GATS. Proof of this are Cases Nos. 80⁽¹⁴⁶⁾ (against Belgium concerning commercial telephone directory services), 82⁽¹⁴⁷⁾ (against Ireland concerning copyright and neighbouring rights), 83⁽¹⁴⁸⁾ and 86⁽¹⁴⁹⁾ (against Denmark and Sweden, respectively, concerning the enforcement of intellectual property rights). The U.S. also started a Panel case against two Member States in an area of exclusive EC competence: *European Communities-Customs Classification of certain Computer Equipment*, Report of the Panel of 5 February 1998.⁽¹⁵⁰⁾ In all previous consultations and cases, the Commission has shown its interest in being involved.

The Commission believes that the EC should be a co-defendant in cases dealing with the GATS and TRIPs, given the fact that both the EC and its Member States are jointly responsible for their implementation. In this respect, a judgment by the Court of Justice (*Hermès*)⁽¹⁵¹⁾ shows a new tendency in this direction. The Court, in refuting the argument of three Member States that a certain provision of the TRIPs agreement is outside the scope of Community law, noted that “the WTO agreement was concluded by the EC and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties.”⁽¹⁵²⁾

With regard to trade in goods, the WTO Appellate Body has confirmed in the Case *European Communities-Customs Classification of Certain Computer Equipment*⁽¹⁵³⁾ that in this area (let us remember that trade in goods is an area of exclusive EC competence) the export market for third countries “is the European Communities, not an individual Member State.”⁽¹⁵⁴⁾

VIII.I.III. The EC as an applicant

Following the same logic, offensive GATS and TRIPs cases initiated by the EC against third countries should be taken jointly between the EC and its Member States as has been the case until now. As examples we have *United States-The Cuban Liberty and Democratic Solidarity Act* (155) (Panel established but case suspended until 21 April 1998; Panel mandate lapsed on that date), *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, (156) *Canada-Patent Protection of Pharmaceutical Products*, (157) and lastly *Canada-Measures Affecting Film Distribution Services*. (158) These are clear cases of *the duty of cooperation and unity of representation* between the EC and its Member States, which is articulated, *inter alia*, by the European Court of Justice in its Opinion 1/94 and in its Case C-25/94 *Commission v Council*. (159)

VIII.II. Control ↑

The issue of who controls the EC's negotiating strategy or policy has caused serious problems in the past. Treaty provisions and established practice give the Commission the right of initiative in areas of EC competence. So the Commission makes proposals on negotiations and policy positions. These proposals are then discussed in the Article 133 Committee, which is the real power behind and decision-making center for the European Community's commercial policy. These proposals can also be discussed in the framework of COREPER and finally adopted by the General Affairs Council.

The EC Council decision, formally on a qualified majority, authorizes the European Commission to negotiate in consultation with the Article 133 Committee. This authorization is sometimes called a mandate. This Commission's mandate to negotiate on behalf of the Member States in the WTO does not imply a transfer of competences, which remain with the Member States.

VIII.II.I. Issuing directives to the Commission

Article 133 also provides for the Council to issue directives at any time to the Commission on the substance of negotiations. In other words, the Commission is the sole negotiator but the Member States have plenty of opportunity to intervene in negotiations as they progress. There is also scope for differing interpretations of mandates. This has led to tensions over negotiating tactics, and differences between Commission and Council have emerged at critical times inflicting considerable damage on the credibility of the EC's negotiating position. (160) An example of such a conflict over negotiating tactics is the EC's position in the critical agricultural negotiations at the Ministerial Meeting of the GATT in 1990 which was due to complete the Uruguay Round. (161) The Commission, seeking to break a deadlock in negotiations, engaged in informal talks with its leading negotiating partners. In the course of these talks, the Commission discussed EC concessions which went beyond the restricting mandate laid down by EU agricultural ministers. When national ministers learned of the move, they called the Commission to task, denounced any such concession and thus undermined the credibility of the EC's negotiating position. (162)

The following question can, then, be raised: what if a Member State does not agree with the Commission's view or its interests are not the same as the Commission's in the international trade arena? Since the Nice Treaty, shared competence issues must be decided on the basis of qualified majority vote except for some exceptions where unanimity is still required. There is a process of coordination before. (163) Meetings take place between the Commission and the Member States, where the lines of the Commission in the WTO are explained. This is discussed with the EU Member States.

There is a close relationship between the Member States and the EC when dealing with shared competence issues. EU countries accept a single voice in multilateral negotiations in areas of shared competence, on the condition that there is coordination with the Article 133 Committee, since it is considered to be more effective.⁽¹⁶⁴⁾ That being said, it is crystal clear that trying to obtain a common position through coordination between the EC and its Member States is a time-consuming task. Yet, in cases where there is more EU Member States' control (services trade and intellectual property rights), there is less contestation.

VIII.II.II. Adoption of agreements by consensus

Another issue which affects relations between the Commission and the Council is the *de facto* practice of only adopting agreements by consensus. The EC Treaty provides for a qualified majority vote on the adoption of commercial agreements under Article 133. However, in practice the Council has felt obliged to seek consensus on all major commercial policy issues. The expectation that consensus will be required has a clear impact on the EC's negotiating position, since the Commission must ensure that all Member States are in agreement with any position. If the Council applied the Treaty and voted by qualified majority on the adoption of commercial agreements, there would be much more flexibility in negotiations.

As an example we have the Uruguay Round, where the Commission, with the backing of a qualified majority of the Member States, negotiated the so-called Blair House agreement with the United States on the inclusion of agriculture in GATT disciplines.⁽¹⁶⁵⁾ This agreement would have formed the key element in conclusion of the Uruguay Round at the end of 1992.⁽¹⁶⁶⁾ France rejected the Blair House agreement and insisted on further modification. This meant that a further 18 months were needed before the round could be concluded. An agreement could only be reached when both the Belgian Presidency of the Council and the Commission accepted that the results of the round would only be adopted by unanimity.⁽¹⁶⁷⁾ This example proves the lack of coherence in the EC position at the Uruguay Round in agriculture negotiations, even if it is supposed to be a field of "exclusive" EC competence.

VIII.II.III. Tensions over control of the EC commercial policy

Having a close look at the Coase Theorem and following Komesar's argument in *Law's Limits*, one could perceive the following:

“ at zero transaction costs, systems of formal governance or law are largely irrelevant. Everything can be worked out instantly, frictionlessly, and costlessly [...]. Although, in a world of low numbers and low complexity, we are not at zero transaction costs (an unachievable world), we are in the world of low transaction costs. If, at zero transaction costs, law and systems of property are irrelevant, then at low transaction costs they are not very important. The real problems for [...] centralized arrangements occur as we increase numbers and complexity, and, thereby, increase transaction and other governance costs. ”⁽¹⁶⁸⁾

Therefore, the tensions over the control of the EC commercial policy can only increase with the EU's enlargement. A fear for political malfunction can only become more obvious.⁽¹⁶⁹⁾ A number of suggestions have been made to ease the management of such tensions. For example, various Member States have suggested that the Presidency of the Council should be present in the room when the Commission negotiates in order to ensure that the Council be involved in any negotiating stance that the Commission adopts during meetings. The EC's position is agreed before negotiations.

However, the Commission has opposed this reduction in its power and argued that it would result in the removal of any negotiating flexibility for the Commission and thus the EU.⁽¹⁷⁰⁾ As Komesar argues, in any given system, “the concepts of majoritarian and minoritarian bias capture the pervasive sense that both counting noses without considering the degree or extent of impacts and ministering to the desires of the active few can create injustice.”⁽¹⁷¹⁾ In this particular case, we are facing the reverse situation of the common locution used by Tocqueville “tyranny of the majority,” where the antipathy to the underrepresentation (power concentration at the EC level) might be more obvious than that to the overrepresentation.

An alternative approach would be for the Council to desist from intervening in negotiations and give the Commission scope to negotiate. The EC Council still retains ultimate authority to accept or reject the outcome, but the Commission would have scope to negotiate a package. This approach is rejected by the Council because it would reduce the ability of the EC Council and the Member States to shape negotiations. In the absence of any reform, the only means to avoid damaging conflicts between the Commission and the EC Council is for continuous efforts by both institutions to ensure that communication is effective.

VIII.III. Efficiency v. accountability

In this subsection, we will see whether being more transparent and more internally accountable implies less efficiency in a decision-making process.

VIII.III.I. Efficiency at the cost of democratic accountability

Komesar rightly argues that “an allocation decision is inefficient if an impact on someone is not represented in the transaction. [T]he world of zero transaction costs defines efficiency precisely because all costs and benefits are represented through frictionless transactions.”⁽¹⁷²⁾ In the case of the EU, it has been relatively efficient in its commercial policy-making despite the difficulties reaching a common position among the sometimes diverging interests of the then 15 Member States in topics such as education, health, culture or audiovisual. This has come at the price of democratic accountability.⁽¹⁷³⁾ Decision making in EC commercial policy is predominantly technocratic in nature, even if the voice of NGOs is taken into account. EC commercial policy is created by a technocratic core comprising the officials in the European Commission’s Directorate-General for Trade and national trade officials who compose the Article 133 Committee.⁽¹⁷⁴⁾ So, whose voices are being heard at the supranational level? And at the national level, is there a dormant majority? Is there a lack of interest in EC trade policy in national parliaments and EU trade ministries? Is there a strong minoritarian bias,⁽¹⁷⁵⁾ given that in a democracy not everyone is represented? This lacks a democratic approach to policy-making although it has the advantage of being considerably efficient.⁽¹⁷⁶⁾

The General Affairs Council provides nominal political and democratic legitimacy to the process. However, given the technical nature of commercial policy and the wider interests of foreign ministers, it is not surprising that the full General Affairs Council seldom debates detailed technical issues. In other words, EU Foreign ministers are more concerned with developments in Bosnia, Iraq or Kosovo, for example, than on the permissible level of BST (hormones) in beef and whether science can be used to determine this level.⁽¹⁷⁷⁾

VIII.III.II. Four possible scenarios

When combining the variables “efficiency” and “accountability,” we can foresee four possible scenarios: 1) the ideal policy situation would be an EU federal/constitutional system, where it is at its highest level of accountability and efficiency. *A sensu contrario*, 2) a situation to avoid is one in which we are at the lowest level of accountability and efficiency of any given policy because of non-cooperation between the EC and its Member States. In between, and in the case of trade policy, we would have 3) a practice of a federal idealization of Europe with an exclusive EC competence and where there would be a top-down approach, far from the citizens, provoking thereby an accountability deficit, but a rather high level of efficiency. An example of this scenario would be a semi federal EU with a stronger but still imperfect European Parliament. On the other hand, we would have 4) an intergovernmental system of shared competence between the national and supranational levels, where the level of accountability would be high since the EU is not a federal state, but that of efficiency rather low for being legally complex and time-consuming in its *modus operandi*. This argument can be easily visualized in the following diagram:

Figure 1

A minoritarian bias argument can be made in a virtual representation at the EC level, where the EC would represent the interest of all EU citizens. However, does the supranational level well defend the Greek or German interest?

VIII.III.III. Democratic deficit

The concept of *democratic deficit* in EU decision making is well known and some efforts have been made to address the problem. In the area of commercial policy, difficulties are accentuated by the technical nature of the negotiations. From a substantive view point, since trade policy is technical by nature, the argument is that it is left to the executive branch (European Commission) and not to the legislative branch (European Parliament and EC Council), provoking thereby a democratic deficit. In my opinion, this is an invalid and unjustified argument. Trade agreements which have gone through the acceptance of the legislative branch are more accountable to the citizens. The fact that a trade agreement is technical in substance is not an excuse for not going through the legislative branch. The rationale behind it is that if the executive signs trade agreements that one as a citizen does not agree with, there is nothing one can do to avoid the agreed (or rather imposed) executive agreement. However, when trade agreements go through the legislative, there is more accountability to the citizens.

However, the next question is inevitable: accountable to whom? It should be noted that national governments do not always take the interest of all their citizens, but rather leave out those citizens who do not live in the country and thus are not represented.

National ministers reporting back to national legislatures tend to limit their comments to the objectives of policy. By doing so, effective scrutiny of the negotiations is lost. National parliaments also have difficulties following the detail of negotiations, and the fact that negotiations take place at two steps removed from national parliamentary control (one in Brussels in the framework of the Article 133 Committee, and the second in Geneva in the framework of the WTO) means that national politicians do not believe they can influence the outcome of negotiations. The result is that national legislatures tend not to undertake any effective scrutiny of EC commercial policy.(178)

At a European level, the European Parliament does its best to provide some scrutiny of EC commercial policy. However, since it has very limited powers, this is not always an easy task. The European Parliament might give its assent to bilateral agreements under Article 300 EC, such as between the EC and South Africa or the Europe Agreements but it has no power under Article 133 EC, which is the main multilateral instrument of the European Community. Nor does the European Parliament have a say in changes to EC commercial instruments such as anti-dumping measures. (179)

The EC Council and the Commission have reached informal agreements with the European Parliament on consultation. However, the views of the Parliament are not sought until the Commission has reached a deal with the EU's trading partners and it has been endorsed by the Article 133 Committee, if not the EC Council. Having said that, the chances of the EP having any impact on the substance of the agreement is almost non-existent. The assent of the EP is required when a commercial policy agreement has budgetary implications, when there are institutional implications for the EU and when policy areas are concerned in which the EP has co-decision rights with the EC Council. As co-decision making is slowly increasing, (180) this suggests that the EP may have to give its assent to more international commercial agreements.

In this sense, the Luns-Westerterp Procedures were developed for association agreements (Luns) in 1964 and international commercial agreements (Westerterp) in 1973. These provide for the Council and Commission to provide information to the relevant committees of the European Parliament on the content of an agreement and for a debate to be held in the European Parliament (EP) before the negotiations begin. For example, during the Uruguay Round, the then Commissioner with responsibility for commercial policy, Sir Leon Brittan, made special efforts to inform the European Parliament of developments in commercial policy. The Council is also to provide information to the relevant EP committees after an agreement is signed but before it is concluded.

Although the European Parliament is continuously informed of the EC's external trade relations, it has little influence over multilateral trade negotiations, and national parliaments have even less. We can, then, talk of a lack of effective scrutiny by the European or national parliaments. In addition to that, although there are no formal procedures for consultation with non-governmental organizations, the Commission does have informal contacts with them. In this sense, there has been criticism about the endogamous, technocratic nature of EU policy.

In addition to accountability via public representative bodies such as the national and European Parliaments, accountability and legitimacy can be achieved through contacts with representative interest groups, such as producer groups, environmental and consumer NGOs, trade unions and other such organizations. In this respect, we see that active NGOs such as environmental NGOs see the Article 133 Committee as closed and undemocratic. National and Commission trade officials resist the "politicization" of EC commercial policy. On the other hand, the Economic and Social Committee (181) is consulted on important policy initiatives by the Commission and feeds its opinion, along with that of the European Parliament, into the policy debate.

Trade policy is probably the most important tool of foreign policy. Hence a division between trade and politics should not be made radically since they relate. There is a risk of losing some accountability since the everyday work in commercial policy is driven by different Directorate-Generals (DG) in the Commission, although the main responsible one is DG Trade, concerned with the EC's external trade relations. The Commission keeps the Member States informed of what they are doing. Before any major decision is taken the Commission notifies the Member States.

VIII.III.IV. Concluding remarks on efficiency v. accountability

To sum up on efficiency *versus* accountability, the EC policy process may have been relatively efficient to date, but has not been especially open. In the current state of play, it seems as if efficiency came before other parameters such as accountability, democracy and legitimacy. There is also no scrutiny of decision making outside the nominal structures of accountability through the Council, which is less effective.

As the WTO agenda deepens and gets more and more into domestic policy-making, the number of parties expands. For example, linking trade and environment means that the environmental policy communities in the EU will have an active interest in trade policy in order to ensure that their policy preferences are not undermined by EC commercial diplomacy. Given the trends in international commercial diplomacy, this tension between efficiency and accountability can be expected to increase.⁽¹⁸²⁾ This trade-off between efficiency and accountability should not be seen as a dichotomy. The above dichotomy can be avoided through greater cooperation and coordination between the national and supranational levels of the EU.

IX. Conclusion [↑]

Trade is no longer just about negotiations on tariffs on goods between industrialized economies. Trade policy has become complicated on both sides of the matrix –new actors and new issues-. Trade policy needs to change to become more efficient and more accountable. At the same time, it is important to address the issue of lack of transparency and legitimacy of the current system of governance, including trade policy matters handled in the WTO in order to be closer to the citizens' needs. "The European Union has long suffered from a sense that the sum is far less democratic than its parts. Though they have benefited from their union, many Europeans feel alienated from the Brussels-based entity that mysteriously wrests more power from their nations each year."⁽¹⁸³⁾ However, Weiler argues that the EC institutions are more transparent than EU Member States.⁽¹⁸⁴⁾ Thus, the new forms of governance on the European level continue to limit the sovereignty of the nation-state and the ongoing transfer of competences from the national to the supranational levels may lead to an accountability deficit.

With regard to transparency, it means ensuring that a given organization is more internally accountable to its members. The well-known formula that "more transparency implies less efficiency" is rather simplistic and, thus, does not suffice to answer these questions.

As for efficiency and accountability, the world has moved on, and so must the Treaty of Rome. It is necessary to ensure that negotiations on trade in services, intellectual property rights and investment are handled the same way as negotiations on trade in goods by qualified majority voting in the framework of the EC Council of Ministers. Unanimity, especially in an enlarged EU of over 30 Member States, makes no sense and is unrealistic in policy-making. That being said, the Commission's compromise proposal allows for an EU Member State to call for unanimity on a point of real national sensitivity. It also calls for the European Parliament to be fully involved in EC trade policy-making. Also, there needs to be a change in the EC's negotiating methods. On the other hand, having the Commission as the trade negotiator on behalf of the EU Member States implies a more efficient but less democratic system of EC trade policy-making.⁽¹⁸⁶⁾ Despite that, one can argue that the overall balance is positive, even taking into account the price Europeans pay for loss of sovereignty.

The legal recognition by the European Court of Justice in its Opinion 1/94⁽¹⁸⁷⁾ of mixed competences departs from the founding principle that the EC has a single voice in international trade negotiations and from previous case law on external relations. The Court's encouragement of a return to intergovernmentalism in the field of external trade is clearly setting the stage for future disputes over competences and may affect the future character of the EC as an international trade actor.⁽¹⁸⁸⁾

Proof of this are the words of Rod Eddington, chief executive of British Airways, who believes that, with regard to bilateral air services agreements with foreign governments, "Brussels should aim to replace national ownership rules in present agreements with a European ownership regulation to open the way for the consolidation of the European airline industry."⁽¹⁸⁹⁾ In addition, he warned that "a continued fragmentation would cause the European industry to lag behind the U.S."⁽¹⁹⁰⁾ More clearly, he expresses that the EU "cannot compete globally with North American carriers if we [the EU] have 14 to 15 network carriers in Europe."⁽¹⁹¹⁾ In this same line of thought is an argument by Louis Uchitelle, who claims that Mercosur's Member States, and particularly Brazil and Argentina, would benefit from a strong common position in Mercosur, which has given the two countries a more powerful voice when negotiating with the U.S. and Europe.⁽¹⁹²⁾

As Keith Richardson⁽¹⁹³⁾ argues, "the need to negotiate as one, to speak with one voice in all international economic negotiations, is about competitiveness, jobs and economic survival and it is being trivialized by national administrations which treat it as a petty bureaucratic turf battle."⁽¹⁹⁴⁾ He argues that our living standards (in the European Union) are increasingly determined by global flows, "not only trade in goods but also services, intellectual property and investment. Europe is the world's largest trading unit, and European industry is strong enough to hold its own. But these flows take place within a framework of globally agreed rules, and except in the specific case of trade in goods European negotiators cannot hold their own because they negotiate not as one but as 15."⁽¹⁹⁵⁾ The European Community only has exclusive competence with respect to trade in goods. With respect to trade in services, intellectual property and investment, there is no exclusive European Community competence.⁽¹⁹⁶⁾

Richardson supports his thesis about the importance of a single voice in the European Union by comparing the European Union's and the United States' power in negotiating multilateral trade agreements: "But where would some of our dynamic American friends stand in world markets if their interests were represented by 50 separate state-level negotiating teams?"⁽¹⁹⁷⁾ This question shows the important role that the United States plays in multilateral trade negotiations by negotiating on behalf of all fifty states with one voice. The comparison is not perfect since the fifty American states are not sovereign States (they have no international legal personality) and, therefore, cannot sign any international treaties. However, in the case of the European Community, its Member States are sovereign states and can therefore sign international agreements. The idea behind this transatlantic parallelism is that, although the European Union is composed of 25 sovereign Member States, it is in their national interest to give up their national sovereignty to the European level in order to have a stronger negotiating position, provided that the EU common position defends that national interest. This would only be legally possible by amending the Treaties.

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Endnotes [↑]

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(1) Timmermans, C. & Völker, E. (eds.) 1981.

(2) See generally Macleod, I., Hendry, I. & Hyett, S. 1996.

(3) The European Union, acting under Title V (or Title VI) of the TEU, is not a legal person in its own right (but the three Communities, constituting the foundation of the Union [see Article 1, paragraph 3, of the Treaty on European Union, according to which the Union “shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty”] remain distinct legal persons). Thus, when the EU Administration for the City of Mostar was set up in September 1994 by a Memorandum of Understanding between the EU and the Western European Union, on the one hand, and various ex-Yugoslavia actors, on the other, the EU side was defined as “the Member States of the European Union acting within the framework of the Union in full association with the European Commission.” At the Intergovernmental Conference [in Amsterdam], the question [of] whether the Union should be endowed with legal personality in its own right [was] raised (possibly implying at the same time a merger of the then three existing legal persons –the Communities). [Currently, there are only two Communities remaining since the European Coal and Steel Community expired on July 23, 2002.]

(4) Rosas, A. “Mixed Agreements” in Koskenniemi, M. (ed.) 1998, p. 126.

(5) This is, in a general fashion, acknowledged in Article 300, paragraph 2, which states that agreements shall be concluded by the Council “subject to the powers vested in the Commission in this field.” Thus, the Commission can conclude, *inter alia*, technical cooperation agreements with international organizations under Article 302 of the EC Treaty and financing agreements under Article 106 of the Financial Regulation of 21 December 1977 (OJ No. L 356, 31 December 1977, p. 1). The Commission not being a legal person, these agreements, too, are concluded on behalf of the Communities. The financing agreements, which in practice are hybrids between treaties and private contracts, are, according to Article 106, paragraph 1, of the Financial Regulation, “drawn up between the Commission, acting for the Community” and the Government of the recipient State. On Article 229 see, e.g., Frid, R. 1995, p. 126.

(6) According to Article 3, paragraph 2, Treaty on European Union (TEU), it is not only the Council, but also the Commission, which is responsible for ensuring the consistency of external activities of the Union. The Commission negotiates international agreements to be concluded by the EC (Article 300, para. 1, EC Treaty) and is responsible for representations, according to Article 16 TEU, (called Commission delegations) in about 130 countries. See http://europa.eu.int/comm/external_relations/delegations/intro/index.htm (last visited, October 05, 2003).

(7) Rosas, A. “Mixed Agreements” in Koskenniemi, M. (ed.) 1998, p. 126.

(8) Louis, J.-V. “Preface” in Flaesch-Mougin, C. 1980, at p. 12.

(9) Beseler, H. F. “The representation of the European Community on issues of international trade,” in a note to the attention of the Heads of Delegations of the EU, 12 April 1999.

(10) Grosses, S. I. H. “Contribution to the Discussion” in Timmermans, C. & Völker, E. (eds.) 1981, at p. 127 ss.

(11) Woolcock, S. “The European Union’s Role in International Commercial Diplomacy”, p. 9. (Unpublished Article).

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(13) Torrent, R. 1998, introduction.

(14) *Id.*

(15) This is a very debatable issue among scholars and practitioners. Some argue that the EU does have legal personality through Article 24 TEU.

(16) Paemen, H. 1999, pp. 136-48.

(17) See Van den Bossche, P. L. H., "The European Community and the Uruguay Round Agreements" in Jackson, J. & Sykes, A. *Implementing the Uruguay Round*, 1997, footnote 1, p. 23.

(18) See heading "The Commission As A Negotiator" in this paper.

(19) Canadian Department of Foreign Affairs and International Trade, "Ministerial Conferences. Fourth Ministerial Conference in Doha, Qatar (November 9-13, 2001), in http://www.dfait-maeci.gc.ca/tna-nac/bul_1-en.asp (last visited, 18 July 2003).

(20) European Commission, "The Doha Development Agenda. Principles for the Doha Development Agenda," in http://europa.eu.int/comm/trade/issues/newround/doha_da/index_en.htm (last visited 16 July 2003).

(21) European Commission, "Cancun Special: Advancing the Doha Development Agenda," in http://www.europa.eu.int/comm/trade/issues/newround/doha_da/cancun/index_en.htm (last visited 18 July 2003).

(22) European Commission, "The Doha Development Agenda. Principles for the Doha Development Agenda," in http://europa.eu.int/comm/trade/issues/newround/doha_da/index_en.htm

(23) Goldstein, J. & Keohane, R. (eds.) 1993.

(24) Information gathered from an interview with Mr Jose Alberto Plaza, Sub-director General of International Trade in Services at the Spanish Ministry of Industry, Trade and Tourism, on May 5, 2004.

(25) Peterson, J. & Sjursen, H. "Conclusion. The Myth of the CFSP?" in Peterson, J. & Sjursen, H. (eds.) 1998, p. 169.

(26) Allen, D, 'Who speaks for Europe? The search for an effective and coherent foreign policy' in Peterson, J. and Sjursen, H. (eds), 1998.

(27) *Id.*

(28) *Id.*

(29) *Id.*

(30) John Peterson & Helene Sjursen.

(31) The European Communities are composed of the former European Coal and Steel Community, by the Treaty of Paris, 1952, the European Economic Community, by the Treaty of Rome, 1957 and the European Atomic Energy Community-Euratom, also by the Treaty of Rome of 1957.

(32) The second pillar of the EU deals with the Common Foreign and Security Policy. The third pillar, however, deals with police and judicial cooperation in criminal matters. See

<http://europa.eu.int/scadplus/leg/en/cig/g4000p.htm#p3> (last visited, September 6, 2004).

(33) 1964 E.C.R. 585 at 593-4.

(34) McGoldrick, D. 1997, p.42.

(35) Weiler, J. "The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle" in O'keeffe, D. & Schermers, H. (eds.) 1983.

(36) Chalmers, D. & Szyszczak, E. 1998, p. 178.

(37) Article 300 (1) EC reads as follows:

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

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

(38) Interview with Miguel Valle, Advisor of the Spanish Delegation to the WTO in Geneva, July 22, 2003.

(39) Interview with Anders Jessen, European Commission official in DG Trade, on April 20, 2004.

(40) TRIPs stands for Agreement on Trade-Related Aspects of Intellectual Property Rights.

(41) Interview with Javier Burgos, negotiator for the Spanish Government in the Article 133 Committee at the time of the interview on April 21, 2004.

(42) Interview with officials from the Delegation of the European Commission to the WTO in Geneva, July 25, 2003.

(43) For more insight information on the Civil Society Dialogue, see European Commission website at http://trade-info.cec.eu.int/civil_soc/intro1.php (last visited, July 9, 2004).

(44) For more detailed information on the Article 133 Committee, see *infra* subtitle "The Article 133 Committee."

(45) Information gathered from an interview with Mr Jose Alberto Plaza, Sub-director General of International Trade in Services at the Spanish Ministry of Industry, Trade and Tourism, on May 5, 2004.

(46) This clarification has been gathered from an interview with Mr Alain Van Solinge, Legal Adviser in the Legal Service of the European Commission, held in Brussels on May 24, 2000.

(47) Interview with Mr. Bernier Abad, European Commission official in DG Trade, on April 21, 2004.

(48) See Staes, B. (Verts/ALE) To the EC Council, *Written Questions E-4036/00*, OJ 2001/C261

E/020, in <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/ce261/ce26120010918en00210021.pdf> (last visited, July 4, 2004).

(49) Interview with Servatius Van Thiel, Advisor of the Delegation of the EC Council to the WTO in Geneva, July 24, 2003.

(50) Macleod, I., Hendry, I. & Hyett, S. 1996, p. 152.

(51) Interview with Miguel Valle, Advisor of the Spanish Delegation to the WTO in Geneva, July 22, 2003.

(52) Beseler, H. F. "The representation of the European Community on issues of international trade," in a note to the attention of the Heads of Delegations of the EU, 12 April 1999, p. 2.

(53) Interview with Mr. Schonberg, European Commission official in DG Trade, on April 20, 2004.

(54) Macleod, I., Hendry, I. & Hyett, S. 1996, p. 85.

(55) European Commission, "The EU and the WTO" in http://europa.eu.int/comm/trade/issues/newround/eu_wto/index_en.htm (last visited 16 July 2003).

(56) For further information on the EC Council and the Article 133 Committee, see *infra* under "The Council As A Consultator And Concluder."

(57) Stephen Hyett, 'The Duty of Co-operation: A Flexible Concept,' in Dashwood, A. & Hillion, C. (eds.) 2000, pp. 249-250.

(58) See Macleod, I., Hendry, I. & Hyett, S. 1996, p. 88.

(59) See Macleod, I., Hendry, I. & Hyett, S. 1996, p. 151.

(60) *Id.*

(61) *Id.*

(62) [1990] OJ 326/56.

(63) *Id.*

(64) See article 300(1) EC.

(65) See Macleod, I., Hendry, I. & Hyett, S. 1996, pp. 86-7.

(66) Macleod, I., Hendry, I. & Hyett, S. 1996, p. 51.

(67) Macleod, I., Hendry, I. & Hyett, S. 1996, p. 89.

(68) Beseler, H.-F. "La représentation de la Communauté européenne pour les questions du commerce international," note to the attention of the Heads of Delegation of the European Commission, 12 April 1999.

(69) Kaniel, M. 1996, p. 141 and chapter III more generally.

(70) Mortensen, J. L. "The institutional challenges and paradoxes of EU governance in external trade: coping with the post-hegemonic trading system and the global economy" in Cafruny, A & Peters, P. (eds.) 1998, p. 217.

(71) This information has been gathered from a paper written by students from the Political and Administrative Studies Department, 1998-99, College of Europe, Brugges, Belgium, with the title *EU-US Relations*.

(72) Johnson, M. 1998.

(73) For a general overview of the EU Council, see Westlake, M. 1995.

(74) COPERER stands for COmité des REprésentants PERmanents, which means Permanent Representatives Committee. The members of COREPER are national civil servants appointed to the European Union. For a precise definition of COREPER, see Cassel, *What's what and who's who in Europe* (1995) p. 102.

(75) According to standard formula, the Council's decision authorizes the President of the Council to perform the international act which expresses the Community's consent to be bound by the agreement (or to designate the person empowered to perform the act concerned). See Heliskoski, J. 2001, p. 87, note 58.

(76) Beseler, H.-F. "La representation de la Communauté européenne pour les questions du commerce international," note to the attention of the Heads of Delegation of the European Commission, 12 April 1999, p. 3. Unpublished document.

(77) For an overview of mixed agreements, see Leal-Arcas, R. (e) 2001.

(78) Bourgeois, J.H.J. "The European Court of Justice and the WTO: Problems and Challenges" in Weiler, J.H.H. (ed.) 2000, p. 77.

(79) Louis, J.-V. 1993, pp. 117-18.

(80) Judgment of 30.09.1987, Case 12/86, *Demirel*, 1987 E.C.R., pp. 3719 et seq.

(81) European Commission, "Qualified-Majority Voting: Common Commercial Policy," Factsheets in http://europa.eu.int/comm/archives/igc2000/geninfo/fact-sheets/fact-sheet6/index_en.htm (last visited, September 6, 2004).

(82) Macleod, I., Hendry, I. & Hyett, S. 1996.

(83) Macleod, I., Hendry, I. & Hyett, S. 1996, p. 83.

(84) (1990) Official Journal L 14/18.

(85) <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/ce261/ce26120010918en00210021.pdf>. (last visited, 20 November 2003).

(86) Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p.11.

(87) Interview with Mr. Bernier Abad, European Commission official in DG Trade, on April 21, 2004.

(88) Interview with Miguel Valle, Advisor of the Spanish Delegation to the WTO in Geneva, July 22, 2003.

(89) The General Affairs Council is composed of the Foreign Ministers from each Member State of the European Union. Council members are politically accountable to their national parliaments. The frequency of Council meetings varies according to the urgency of the subjects dealt with; the General Affairs Council meets once a month. See in this respect BIMUN, "EU General Affairs Council," in <http://www.bimun.org/index2.html?gac.html> (last visited, 20 November 2003).

(90) Interview with Miguel Valle, Advisor of the Spanish Delegation to the WTO in Geneva, July 22, 2003.

(91) Interview with Javier Burgos, negotiator for the Spanish Government in the Article 133 Committee at the time of the interview on April 21, 2004.

(92) I have personally gathered this information at a round table held at the Royal Institute of International Affairs in February 1998 during the discussion of a paper written by Johnson, M. 1998.

(93) Hartley, T. C. 2003.

(94) Torrent, R. 1998, at chapter 1.

(95) Torrent, R. 1998, at chapter 1.

(96) For further clarification, see Torrent, R. 1998, at chapter 1.

(97) *Id.*

(98) Beseler, H.-F. "La representation de la Communauté européenne pour les questions du commerce international," note to the attention of the Heads of Delegation of the European Commission, 12 April 1999, p. 3. Unpublished document.

(99) Interview with Anders Jessen, European Commission official in DG Trade, on April 20, 2004.

(100) Heliskoski, J. 2001, p. 87.

(101) Council Regulation (EEC) No 2112/78 of 25 July 1978 concerning the conclusion of Customs Conventions on the International Transport of Goods under Cover of TIR Carnets (Geneva, 14 November 1975), OJ 252 [1978] p. 1.

(102) Prior to the Single European Act, whereby Art. 175 (ex Art. 130s) was inserted, the relevant provisions for the purposes of the mixed agreement practice had been Arts. 308 (ex Art. 235) and 310 (ex Art. 238).

(103) Heliskoski, J. 2001, p. 87.

(104) Let us remember that there are three main procedures for enacting new EU laws: 1) co-decision; 2) consultation; and 3) assent. See European Commission, "Decision-Making in the European Union" in http://europa.eu.int/institutions/decision-making/index_en.htm (last visited December 2, 2003).

(105) OJ 169 [1987] p. 6.

(106) Article 300(3) EC.

(107) Article 300(3) para. 2 EC.

(108) Proposal for a Council and Commission Decision on the conclusion of the Agreement on Partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [(Corfu, 24 June 1994), OJ L 327 [1997] p. 3] in COM (94) 257 final (15 June 1994) p. 1a, which refers to the institutional framework set out by the Agreement.

(109) Report by the External Economic Relations Committee of the European Parliament on the proposal for a Council Decision concerning the conclusion of the results of the Uruguay Round (by C. Randzio-Plath), doc. A4-0093/94 (1 December 1994), para. 5.

(110) See the communication from the Commission and the proposal for a Council and Commission Decision on the conclusion of the Treaty, COM (95) 440 final (20 September 1995) p. 2.

(111) Commission's Proposal for a Council Decision concerning the conclusion of the Convention, COM (99) 27 final, (26 February 1997) p. 3.

(112) Proposal for a Council Decision for approval on behalf of the Community of the ECE "parallel" Agreement, COM (99) 27 final (27 January 1999) p. 7.

(113) Proposal for a Council Decision with a view to the accession by the Community to the Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions (Geneva, 20 March 1958), OJ 346 [1997] p. 81 in COM (95) 723 final (12 January 1996) p. 9.

(114) Article 300(3) paras 1 & 2 EC.

(115) Heliskoski, J. 2001, p. 89.

(116) For an overview of the role of parliaments and the WTO, see Shaffer, G. "How Can Parliamentary Participation in WTO Rule-Making Be Made more Effective? The US Context," in Petersmann, E.-U. (ed.) 2004, pp. 57-82; Skaggs, D. "How Can Parliamentary Participation in WTO Rule-Making and Democratic Control Be Made more Effective in the WTO?, A United States Congressional Perspective" in *op. cit.*, pp. 83-87; Hilf, M. "How Can Parliamentary Participation in WTO Rule-Making Democratic Control Be Made more Effective in the WTO? The European Context," in *op. cit.*, pp. 88-98; and Mann, E. "A Parliamentary Dimension to the WTO. More than Just a Vision?!", in *op. cit.*, pp. 99-108.

(117) European Commission, "The EU and the WTO. EU-WTO: Pascal Lamy welcomes European Parliament resolution on the Road to Cancun," http://europa.eu.int/comm/trade/issues/newround/eu_wto/pr040703_en.htm (last visited 16 July 2003).

(118) Woolcock, S. "The European Union's Role in International Commercial Diplomacy", p. 9. (Unpublished Article).

(119) Hodges, M. & Woolcock, S. "The European Union in the Uruguay Round: the Story behind the Headlines", in Wallace, H. & Wallace, W. 1996; Leal-Arcas, R. (d) 2001.

(120) Woolcock, S. "The European Union's Role in International Commercial Diplomacy", p. 9. Unpublished paper.

(121) See paper by Stephen Woolcock, presented at the American Political Science Association Conference in San Francisco, August/September 1996, under the title “The European Union as an International Actor in Commercial Policy”, p. 11. See also Leal-Arcas, R. (f) 2003.

(122) *Leal-Arcas, R. (c) 2003.*

(123) Neil K. Komesar, 2001, at p. 138.

(124) European Commission, “Decision-Making in the European Union” in http://europa.eu.int/institutions/decision-making/index_en.htm (last visited, December 1, 2003).

(125) Leal-Arcas, R. (b) 2003, pp. 537-559, at 540.

(126) For a counterargument in favour of national parliamentary control, see Petersmann, E.-U. “The Foreign Policy Constitution of the European Union: A Kantian Perspective,” in Immenga/Moeschel/Reuter (eds.) 1996, pp. 433-447.

(127) Jennings, R.Y. & Watts, A. (eds) 1992, pp. 117-329.

(128) McGoldrick, D., 1997, p. 40.

(129) Jennings, R.Y. & Watts, A. (eds), 1992, pp. 330-554.

(130) McGoldrick, D., 1997, p. 40.

(131) Leal-Arcas, R. (b) 2003.

(132) Interview with Servatius Van Thiel, Advisor of the Delegation of the EC Council to the WTO in Geneva, July 24, 2003.

(133) Interview with officials from the Delegation of the European Commission to the WTO in Geneva, July 25, 2003.

(134) Opinion 1/94, 1994 E.C.R. I-5267.

(135) GATS stands for General Agreement on Trade in Services.

(136) *For an overview of the European Court of Justice’s problems with regard to international agreements, see Leal-Arcas, R. (a) 2003.*

(137) Telephone interview with Gregory Shaffer on November 21, 2003.

(138) Kaniel, M. 1996, pp. 140-44.

(139) Beseler, H. F. “The representation of the European Community on issues of international trade,” in a note to the attention of the Heads of Delegations of the EU, 12 April 1999, p. 1.

(140) McGoldrick, D., 1997.

(141) 1978 E.C.R. 2151.

(142) 1993 E.C.R. I-1061.

(143) 1994 E.C.R. I-5267.

(144) In this sense, Professor Torrent speaks of a fourth pillar, meaning by that the use of national competences in a European Union framework. See Torrent, R. “Le quatrième pilier de l’Union Européenne”, in Bourgeois, J. Dewost, J.-L. & Gaiffe, M.-A. (eds.) 1997, pp. 49-63.

(145) Rosas, A. “The External Relations of the European Union: Problems and Challenges” in The Forum for US-EU Legal-Economic Affairs, The Mentor Group, 1998, p. 66.

(146) SL/L/36, WT/DS80/1, of 13 May 1997.

(147) IP/D/12/Add. 1, IP/D/8/Add.1, WT/DS115/3, WT/DS82, 3, of 13 September 2002.

(148) IP/D/9/Add. 1, WT/DS83/2, of 13 June 2001.

(149) IP/D/10/Add. 1, WT/DS86/2, of 11 December 1998.

(150) Report of the Appellate Body AB-1998-2, of 19 May 1998.

(151) Case C-53/96 *Hermès International*, Judgment of 16 June 1998, 1998 E.C.R. I-3603.

(152) *Id.*

(153) WT/DS62/11, WT/DS67/9, WT/DS68/8, of 1 July 1998.

(154) Report of the Appellate Body AB-1998-2 of 19 May 1998 in the Case *European Communities-Customs Classification of Certain Computer Equipment*, p. 39, paragraph 96.

(155) WT/DS38/6, of 24 April 1998.

(156) WT/DS50/12, of 4 February 1999.

(157) WT/DS114/13, of 18 August 2000.

(158) WT/DS117/1, of 22 January 1998.

(159) 1996 E.C.R. I-1469.

(160) Woolcock, S. “The European Union’s Role in International Commercial Diplomacy”, unpublished paper, p.11.

(161) Le Heron, R. 1993.

(162) Woolcock, S. “The European Union’s Role in International Commercial Diplomacy”, unpublished paper, endnote n. 16, p.17.

(163) Bridge, J. W. & Lasok, D. 1987 .

(164) Lopes, G. (ed.) 1993.

(165) Wallace, H. & Wallace, W. 1996.

(166) Latter, R. 1993.

(167) Devuyst, Y. "The European Community and the Conclusion of the Uruguay Round" in Rhodes, C. & Mazey, S (eds.) 1995.

(168) Neil K. Komesar, 2001, at p. 130.

(169) Telephone interview with Neil Komesar on December 2, 2003.

(170) Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p. 12.

(171) Neil K. Komesar, 2001, at p. 65.

(172) Neil K. Komesar, 2001, at pp. 65 and 66.

(173) Authors such as de Witte believe that being more efficient does not necessarily imply less accountability. There is no trade-off between efficiency and accountability.

(174) Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p. 12.

(175) The locution "minoritarian bias" has been borrowed from Neil Komesar to refer to an underrepresentation of the majority.

(176) See paper by Stephen Woolcock, presented at the American Political Science Association Conference in San Francisco, August/September 1996, under the title "The European Union as an International Actor in Commercial Policy", at p. 18.

(177) Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p. 12.

(178) *Id.*, at p. 13.

(179) Woolcock, S. "The European Union's Role in International Commercial Diplomacy", unpublished paper, p. 13.

(180) Thus far, the co-decision procedure does not cover international agreements.

(181) The European Economic and Social Committee (EESC) is a forum where the various socio-economic organisations in the Member States of the European Union are represented. The EESC is a consultative assembly which is part of the European Union's institutional system and so provides a link between Europe and civil society. See more generally the web site of the European Economic and Social Committee in <http://www.ces.eu.int/pages/en/home.asp> (last visited, December 2, 2003).

(182) Woolcock, S. "The European Union's Role in International Commercial Diplomacy", (Unpublished Article).

(183) See article "Tony Blair's European Ambition," in *The New York Times*, Editorials/Op-Ed, published on April 22, 2004 in <http://www.nytimes.com/2004/04/22/opinion/22THU3.html?th> (last visited, April 22, 2004).

(184) Joseph Weiler at the Inaugural Conference of the European Society of International Law, "International Law in Europe: New Horizons," Florence, May 13, 2004.

(186) Information gathered from an interview in June of 2001 with Mr. Richardson, Head of the Delegation of the European Commission to the UN.

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

(188) See Sophie Meunier, *Divided but United: European Trade Policy Integration and EU-U.S. Agricultural Negotiations in the Uruguay Round*, in Carolyn Rhodes (ed.), (1998).

(189) Kevin Done, Aerospace correspondent in London, "Airlines press bigger role for Brussels" in *Financial Times*, p. 5, March 13, 2002.

(190) *Id.*

(191) *Id.*

(192) Louise Uchitelle, *Argentina's Woes May Strengthen Its Ties to Brazil*, *The New York Times*, Business Day, January 10, 2002, p. C1.

(193) Keith Richardson is Secretary General of the European Round Table of Industrialists.

(194) Richardson, K. "Speak with one voice in trade negotiations" Letters to the Editors in *Financial Times*, 17 March 1997.

(195) *Id.*

(196) *Id.*

(197) *Id.*

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Table I

Scope	Actors	Competence
Inside the European Union's ¹ institutional framework	European Community ² (European Institutions and EU Member States) ³	Exclusive EC Competence ⁴
		Non-exclusive (shared) Competence ⁵
	Member States ⁶ (Government, national Parliament and interest groups)	CFSP ⁷ , police and judicial cooperation in criminal matters ⁸ 4 th Pillar ⁹
Outside the European Union's institutional framework	Member States act independently from the EU ¹⁰	Exclusive Member States' competence ¹¹

¹ This new entity embraces both the Treaty of Rome and the two pillars of intergovernmental activity – Common Foreign and Security Policy and Justice/Home Affairs.

² As mentioned above, the EC is a supranational organisation, i.e., one to which the Member States have transferred specific legislative and executive powers and whose decisions are binding on them and their citizens. For further details, see Drost, H. What's what and Who's who in Europe, Cassell, 1995, p. 207.

³ By European Institutions, we understand those institutions which deal with European issues and which are not national institutions. In the Community terminology, the first pillar deals with the European Communities (I should like to remind that throughout this paper the term European Community shall be used to refer to the 2 remaining European Communities), whereas the second and third pillars have an intergovernmental character and, therefore, Member States deal with them.

⁴ See, in this respect, Leal-Arcas, R. (c) 2003, as well as Leal-Arcas, R. (e) 2001.

⁵ Id.

⁶ Member States, as actors in EC legislation, deal with CFSP and police and judicial cooperation in criminal matters, which are forms of intergovernmental co-operation. They retain full sovereign rights, and hence, decision making is by unanimity. See, for further details, Drost, H. What's what and Who's who in Europe, Cassell, 1995, p. 207.

⁷ CFSP stands for Common Foreign and Security Policy, which appears on Title V of the Treaty on European Union.

⁸ It appears on Title VI of the Treaty on European Union.

⁹ The idea of the "fourth pillar" is a creation of Professor Torrent.

¹⁰ However, formally speaking, Member States have to follow the EC legal order. Even if Member States act bilaterally, they will be affected by the EC legal order.

¹¹ This covers areas in which the EC Treaty forbids the EC to legislate.

