

Theory and Practice of EC External Trade Law and Policy

By

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CHAPTER 1

INTRODUCTION TO EC INTERNATIONAL TRADE LAW: AN EU INTROSPECTIVE VIEW

I. Objectives and Central Argument

A. Objectives

The objective of this book is to study how the external trade relations of the European Community (EC)¹ are managed, specifically since the Nice Treaty. In particular, I will analyse the circumstances under which Member States confer the exercise of their national competences² on the European Commission, regarding the negotiation of international agreements. This is done to allow the EC to act with a single voice in its external trade relations in those areas where, according to the EC Treaty, there is the so-called shared competence between the Member States and the EC. Those areas have traditionally included the field of some services and intellectual property rights. In other words, we shall try to analyse situations where the aim is to ensure the sole representation of the EC and its Member States in those international trade negotiations whose scope touches upon both EC and Member States' competence.

Nonetheless, I would like to emphasise that the decision of European Union (EU) Member States to allow the Commission to negotiate on their behalf does not imply any legal transfer of competences. It is done merely for practical purposes to obtain greater bargaining power in international trade negotiations. In other words, the only transfer from Member States to the Commission is the right to negotiate mixed agreements. In fact, the locution 'shared competence' is perfectly

¹ The existence of the European Union (EU) came much later in time. The European Community (EC) was created by the Treaty of Rome 1957, whereas the EU was created by the Maastricht Treaty on European Union in 1992. Currently, the entities coexist. Although this book is mainly about EC law (given the nature of the topic), it is important to note that the EC is now part of the more encompassing EU and therefore I may use the term EU when referring to that more encompassing framework.

² The term 'competence' appears very often throughout this book. This Eurojargon originates from the French term *compétence* to refer to the authority, responsibility or power to do or develop something. It is often used in political discussions about what powers and responsibilities should be given to EU institutions and what should be left to national, regional and local authorities. Thus, EC competence, as opposed to national competence, is the authority conferred on the EC, as opposed to a national government, to be in charge of a certain policy or issue.

compatible with 'speaking with one voice'. The relationship between the two is that precisely because of the existence of shared competence – which is a legal fact in EC law – there is a procedural tendency in international trade negotiations toward speaking with one voice in order to obtain a stronger position.

The basic distinction in the EU between Community competence and national competence is complicated by the existence of shared competence between the EC and its Member States. Through Article 133 of the EC Treaty, the European Community has been given exclusive competence to create a common commercial policy (CCP) in the field of its external trade relations.³ However, the EC Treaty has also for a long time limited this competence since it is not exclusive to the EC in areas such as trade in some services and intellectual property rights, where Member States share competence with the EC.

Within this framework, there are various goals and objectives in this book. The main goal is to examine whether the EC can have, and would be better off with, a single voice in its external trade relations in areas of shared competence, thereby rendering international trade negotiations simpler and more transparent for the EC and third parties.⁴ The legal obstacles to achieving a single voice in the EC's external trade relations are analysed,⁵ as well as the consequences of Member States of the European Union⁶ authorising the European Commission, the executive power of the EU, to act on behalf of the Member States and the Community in bilateral or multilateral mixed agreements.⁷

This unique legal and political situation, in which the EC and its Member States participate, raises a number of *research questions*: is there

³ Treaty establishing the European Community [1992] OJ C224/1 (7 February 1992).

⁴ Third party simply means a non-EU country. The meaning is clearest when we are speaking about relations between two EU Member States (or between the EU institutions and a Member State) and another country – literally a third country – that is outside the European Union.

⁵ For further detail on this issue, see S Meunier and K Nicolaidis 'Who Speaks for Europe? The Delegation of Trade Authority in the EU' (1999), 37(3) *Journal of Common Market Studies* 477–501.

⁶ The six founding countries of the EU are France, (West) Germany, Belgium, the Netherlands, Luxembourg and Italy. The UK, Ireland and Denmark joined in 1973. Greece joined in 1981, whereas Spain and Portugal joined in 1986. East Germany reunited with West Germany in 1990 and consequently became part of the EU, although not as a separate Member State. Austria, Sweden and Finland joined in 1995. The penultimate group of countries that joined the EU was Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Malta and Cyprus, which joined in 2004. Bulgaria and Romania joined in 2007. More countries are expected to join in the future, and Turkey is an official candidate to join the EU.

⁷ For an analysis of mixed agreements, see Chapter 5.

more legal coherence by having exclusive EC competence⁸ on all issues of EC trade policy? Does Article 133 EC after the Nice Treaty suffice to reach the aim of the EC's common commercial policy? Is Article 133 EC an adequate legal instrument for the purposes of the EC's common commercial policy? If the EC acts together externally, might it help to join internally within the EU? Would deeper integration of the internal market for, say, services⁹ strengthen the negotiating position of the EC in the international trade arena?¹⁰ How does the political context shape this legal issue? How does it impact the thinking about the legal solution, taking into account the fact that the EU is legally federal¹¹ (ie it possesses a federal legal structure) but politically intergovernmental (ie it is an intergovernmental political structure)? What political consequences will the legal outcomes have? In Giuliano Amato's view, no member of the EU is powerful enough to be taken seriously on its own in the international arena. Thus, in order to play an effective role in the world, the EU must join together. In this sense, coordinating its

⁸ On the issue of coherence and external competences generally, see P Gauthier 'Horizontal Coherence and the External Competences of the European Union' (2004) 10 *European Law Journal* 23–41.

⁹ See in this respect the directive on services in the internal market (commonly referred to as the Bolkestein Directive), an initiative of the European Commission aimed at creating a single market for services within the EU, similar to the single market for goods already present. Drafted under the leadership of the former European Commissioner for the Internal Market Frits Bolkestein, it has been popularly referred to by his name. It is seen as an important kick-start to the Lisbon Agenda which, launched in 2000, is an agreed strategy to make the EU 'the world's most dynamic and competitive economy' by 2010. With the proposed legislation, the Commission wanted to reduce the barriers to cross-border trade, principally by doing away with the service-industry regulations of individual EU Member States, unless those regulations are: (1) non-discriminatory; (2) objectively justified on the grounds of public interest; and (3) proportionate. The Commission argued that regulations which do not meet these criteria are unnecessary and pose a barrier to service providers wanting to provide services in other EU Member States in addition to their country of establishment. The Bolkestein Directive was harshly criticised by the left wing, who stated that it would lead to competition among workers in different parts of Europe, resulting in social dumping. For an analysis of the Bolkestein Directive, see B De Witte 'Setting the Scene: How did Services get to Bolkestein and Why?' Mitchell Working Paper Series 3/2007.

¹⁰ For an analysis of the external dimension of trade in services, see J McMahon 'The WTO Dimension: The General Agreement on Trade in Services' Mitchell Working Paper Series 4/2007.

¹¹ The most striking federal feature of the EU is the direct and overriding effect of EC law over the national law of Member States. In the terminological confusion between federalism and confederalism, it is important to bear in mind that, whereas in the UK federalism is associated with centralisation, it was associated in other EU Member States with devolution from the centre to the regions. As a matter of fact, for some people, federalism means control by the centre; for others, the Germans for example, the emphasis is on the protection of the component parts. See letter written by Lord Mackenzie-Stuart to *The Times* on 23 June 1990.

foreign trade policies and streamlining the process was one of Amato's major ambitions during the Convention on the Future of Europe.¹²

In light of this discussion, Allan Rosas argues that only when the current 27 EU Member States 'speak with one voice,' can they aspire to have a powerful voice, and thus collaborate with the United States on equal terms.¹³ Further evidence of this is the fifth preambular paragraph of the Single European Act (1987),¹⁴ in which the (then 12) Member States declared that they were 'aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice ...'¹⁵ This all seems fairly self-evident. However, in the words of the Edinburgh European Council (December 1992),¹⁶ 'the EU involves independent and sovereign States'.¹⁷ Ever present is the notion of European identity that is not yet strong enough to enable the subordination of 27 national foreign trade policies to the common good in all areas of international trade relations.

An important example of the EC's potential as an international actor was the Uruguay Round.¹⁸ The EC's credibility as a meaningful player in the post-Uruguay Round system depends on its ability to overcome

¹² See conversation with Giuliano Amato in the framework of a seminar held at NYU Law School on 26 March 2002 under the title 'The Futures of Europe: Ideas, Ideals and Those Who Make Them Happen' available at http://www.jeanmonnetprogram.org/seminar/02/Amato_script.rtf (last visited 20 June 2005).

¹³ A Rosas 'The External Relations of the European Union: Problems and Challenges' in *The Forum for US-EU Legal-Economic Affairs*, The Mentor Group (1998) 59-71 at 59.

¹⁴ The Single European Act (SEA) was signed on 17 February 1986 in Luxembourg by representatives of the then 12 EC Member States. The Danish Parliament had rejected the project of institutional reform, but the Danish people approved it by referendum on 27 February 1986. Apart from minor modifications, this Treaty was the first profound and wide-ranging constitutional reform of the EU since the 1950s. The SEA introduced measures aimed at achieving an internal market (for instance, harmonisation) plus institutional changes related to these (such as a generalisation of qualified majority voting and a cooperation procedure involving the European Parliament). It also provided legal form for European Political Cooperation.

¹⁵ Single European Act 1987 OJ L169/1.

¹⁶ This is the meeting of heads of state and government (ie Presidents and/or Prime Ministers) of all the EU countries, plus the President of the European Commission. The European Council meets, in principle, four times a year to agree overall EU policy and to review progress. It is the highest-level policy-making body in the European Union, which is why its meetings are often called 'summits'.

¹⁷ Conclusion of the Presidency, Part B Annex 1 OJ C348/2 (31 December 1992).

¹⁸ The WTO's current agreements were the result of the 1986-1994 Uruguay Round of negotiations. Although the outcome meant a major reform of world trade rules and a substantial reduction in trade barriers, many participants wanted to see further improvements in the trading system. In particular, the agreements on services (the General Agreement on Trade in Services, GATS) and agriculture state that new negotiations would resume by the beginning of 2000. See http://www.ciaonet.org/olj/oo/oo_dec99j.html (last visited 30 September 2002).

the threat of fragmentation.¹⁹ The EC gained strength during the General Agreement on Tariffs and Trade (GATT) talks²⁰ because it was obliged to speak with one voice. If Member States present themselves in a non-unified way within a multilateral framework, their influence on world trade politics is likely to decrease. This is a concern as some of the international agreements concluded by the EC are also concluded by the Member States (the so-called mixed agreements), which complicates both their conclusion and administration.

B. Argument

The argument of this book is that shared competence exists between the national and supranational²¹ levels within the EU because EU Member States do not trust the European Commission in the external trade relations law of the EC.

A second contention is that the EC will have greater bargaining power in international trade negotiations if it speaks with a single voice. Within the EU-27, we have compatible values, overlapping interests, shared

¹⁹ S Meunier 'Talking with a Single Voice: European Integration and EC-US Trade Negotiations', Abstract, paper prepared for delivery at the 1997 Annual Meeting of the American Political Science Association, The Sheraton Washington Hotel 28-31 August 1997.

²⁰ The General Agreement on Tariffs and Trade (GATT) was first signed in 1947. The agreement was designed to provide an international forum that encouraged free trade between member states by regulating and reducing tariffs on traded goods and by providing a common mechanism for resolving trade disputes. GATT membership now includes more than 110 countries. See CIESIN Thematic Guides, 'General Agreement on Tariffs and Trade' available at <http://www.ciesin.org/TC/PI/TRADE/gatt.html> (last visited 18 June 2005).

²¹ Supranationalism is a method of decision-making in international organisations, where power is held by independent appointed officials or by representatives elected by the legislatures or people of the Member States. Member State governments still have power, but they must share this power with other actors. Furthermore, decisions tend to be made by majority votes, hence it is possible for a Member State to be forced by the other Member States to implement a decision against its will; however, unlike a federal State, Member States fully retain their sovereignty and participate voluntarily, being subject to the supranational government only so far as they decide to remain members. An alternative method of decision-making in international organisations is intergovernmentalism.

Few international organisations today operate on the basis of supranationalism; the main exceptions are the European Union and the South American Community of Nations – the latter one being a continent-wide free trade zone that will unite two existing free-trade organisations, ie Mercosur and the Andean Community, eliminating tariffs for non-sensitive products by 2014 and sensitive products by 2019 – often called supranational unions, as they incorporate both intergovernmental and supranational elements. Some degree of supranationalism may exist in some international organisations. Supporters of a Federal World Government, which refers to the concept of a political body that would make, interpret, and enforce international law, wish it to be extended. The UN holds a limited degree of supranational power insofar as governing important matters of global security through the binding decisions of the Security Council. See R Leal-Arcas 'Theories of Supranationalism in the EU' (2007) 8(1) *Journal of Law in Society* 88-113.

goals, as well as economic, social and political ties. Therefore, there is a presumption of collective action in the EC's external trade relations. However, EU Member States disagree on everything before they start negotiations, while trying to define a mission together as partners of the European project. The question arises: if the EC were given exclusive competence on all issues of the international trade agenda, would the EC as a whole have more factual bargaining power during the negotiations? How would this change the outcome of an international trade negotiation? Would this benefit the interests of EU Member States? Would EU Member States feel that their national interests will be safeguarded? Would the EC's objectives in trade policy be fulfilled if the EC had exclusive competence in all areas of trade policy? Who benefits from this alteration? Does this benefit the EU Member States?

A third argument is that Member States confer specific negotiating powers on the EC only when it is in their own national interest to have a common European position²² on international trade negotiations. Member States may confer negotiating powers on the European Commission in international agreements where there is shared competence, but coordination is requested of Member States during all negotiations.

The national interest of Member States is, in a strict sense, the will of the national governments. However, in a larger sense, it is the position adopted by civil society.²³ For example, a Greek citizen may not agree with the idea of a free airspace in Europe because he thinks that this might endanger his country's security vis-à-vis one of its neighbours, ie Turkey. In a broader sense, national interest implies a fight for the long-term well-being of a community within a society, or a fight for the maintenance and improvement of the wealth of that community. In the case of mixed agreements, national interest and EC interest coincide, so the EC and its Member States both sign the agreements in question.

Within the EU, national interests may vary based on the historical and geographical situation of the country in question, as well as the governing party. The United Kingdom's partial rejection of the Schengen

²² By common European position, or EC level, we mean supranational level: the EC is a supranational organisation, or 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 H Drost *What's What and Who's Who in Europe?* (Cassell, 1995) 207.

²³ Civil society comprises the totality of voluntary civic and social organisations and institutions that form the basis of a functioning society, as opposed to the force-backed structures of a state (regardless of that state's political system) and commercial institutions. Examples of civil society institutions are non-governmental organisations, private voluntary organisations, and non-profit organisations, to name a few.

Agreement²⁴ in May 2000 comes to mind, as does its reluctance to adopt the Euro. These are examples of conflicts between national interests and European interests. One can also envision that a right-wing British Government might be less amenable to social rights and benefits in the EU than a left-wing political party.

Regarding a common European interest and position, Sophie Meunier demonstrates that in the view of Karl Deutsch and his 'communitarian' followers,²⁵ successive stages of integration could be expected to gradually build a sense of community in the region, at the expense of outsiders.²⁶ By becoming socialised as 'Europeans', EC policy-makers, negotiators, and technical experts would develop ways of working that would increasingly isolate those who do not belong to the network. Therefore, the stronger the sense of European solidarity, the harder and better the EC would defend its position externally. Giving the EC and its Member States a single voice in international trade negotiations would, therefore, contribute to strengthening its bargaining position.²⁷

Recently, institutional steps have been taken towards greater coherence and common action. For example, the fact that the EC can conclude legally binding agreements in its own name with third parties, whether a state or international organisation, including trade agreements, is an achievement of the 1950s that has become particularly significant in the last two decades.²⁸ Many of these agreements have been concluded on legal grounds of a common commercial policy, ie Article 133 EC. International agreements today may also involve a number of other legal bases, for example, the procedures for conclusion of agreements

²⁴ In 1985, five EU countries (France, (West) Germany, Belgium, Luxembourg and the Netherlands) agreed to abolish all checks on people traveling among them. This created a territory without internal borders, which became known as the Schengen area. (Schengen is the town in Luxembourg where the agreement was signed.) The Schengen countries introduced a common visa policy for the whole area and agreed to establish effective controls at its *external* borders. Checks at the *internal* borders may be carried out for a limited period if public order or national security make this necessary. Little by little, the Schengen area has been extended to include every EU country plus Iceland and Norway, and the agreement has become an integral part of the EU treaties. However, Ireland and the United Kingdom do not take part in the arrangements relating to border controls and visas. No visa is required for travelling within the Schengen area for citizens of one of the Schengen countries. If you have a visa to enter any Schengen country, it automatically allows you to travel freely throughout the Schengen area, except Ireland and the United Kingdom.

²⁵ K Deutsch et al *Political Community and the North Atlantic Area* (Princeton University Press, 1957).

²⁶ S Meunier 'Talking with a Single Voice: European Integration and EC-US Trade Negotiations', p 3; paper prepared for delivery at the 1997 Annual Meeting of the American Political Science Association, The Sheraton Washington Hotel, 28-31 August 1997.

²⁷ *ibid.*

²⁸ E Wellenstein 'Twenty-Five Years of European Community External Relations' (1979) 16 *CMLRev* 407-23.

and the role of the Commission, Council and Parliament that appear in Article 300 EC.

II. An Overview of the Book and Structure

A. Overview

Since some questions of EC trade policy are shared between the national and supranational levels, the allocation of authority (or powers) between both levels is a crucial issue that has been a source of tension for a long time.²⁹ This tension became more pronounced as the EC trade agenda expanded with time to include issues such as trade in services, the commercial aspects of intellectual property rights and foreign direct investment. The EU Member States did not manage to agree unanimously upon these new trade issues until the Nice Treaty came into force.³⁰ The European Court of Justice established the doctrine of parallelism between the internal development of the EC and its exclusive external competence. The doctrine of implied powers (or parallelism) holds that where the EC has adopted common rules that would be affected adversely by an agreement between an EU Member State and a third party, exclusive external competence in that area transfers to the supranational level.³¹ In this respect, Weiler points out in his book *The Constitution of Europe* that EU Member States are less willing today to accept European Road Transport Agreement (ERTA)-type decisions³² by the European Court of Justice (ECJ).³³ In these decisions, EU Member States, by transferring sovereignty over a given issue to the EC, implicitly acknowledged that the EC can exercise sovereignty over the issue at an international level.³⁴

As we shall see in greater detail in Chapter 3, the Nice Treaty was a determining and decisive legal text for the EC's common commercial policy. It extended the scope of the common commercial policy to include trade in services, with a few exceptions, and the commercial aspects of intellectual property rights. The Commission and some EU

²⁹ See, in this respect, ch 6 on the EU institutions.

³⁰ For a chronological analysis of the evolution of the common commercial policy, see ch 3.

³¹ JHH Weiler 'The Transformation of Europe,' (1991) 100(8) *Yale Law Journal* 2403-83; A Dashwood 'Implied External Competence of the EC' in M Koskeniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, 1998) 113-23.

³² The ERTA decision of the ECJ, and similar decisions, will be thoroughly analysed in Chapter 5.

³³ JHH Weiler *The Constitution of Europe. 'Do the New Clothes have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, 1999).

³⁴ P Mavroidis 'Lexcalibur: The House that Joe Built' (2000) 38 (3) *Columbia Journal of Transnational Law* 671.

countries³⁵ were concerned about the potential inefficiency of the EC in the World Trade Organization (WTO)³⁶ negotiating forum on issues of shared competence, given the absence of a *modus operandi* within the EU for such situations.³⁷ Against this reality, the Commission, smaller EU Member States, and the traditionally more liberal among the smaller EU countries³⁸ advocated in favour of a stronger EU in trade policy to be more influential in international trade negotiations.

France, a key and active country during the Nice negotiations, opposed the full extension of EC competence because of the increasing penetration of trade policy in domestic policies³⁹ such as health, education and culture, on the grounds that culture is not tradable. The French Government feared that by giving exclusive competence to the EC in all areas of trade, the Hollywood film industry would eventually take over the French film industry market and consequently French culture would be severely damaged; thus, the need to protect⁴⁰ its own film industry.⁴¹ Other countries such as Greece, Spain and Portugal joined France to retain national authority on issues such as education, health, and audio-visual services. Finally, it must be remembered that the Nice compromise also tackled the issue of unilateral action of EU countries in relation to services trade and the commercial aspects of intellectual property rights, as long as such actions do not interfere with EU rules.

³⁵ These countries were Luxembourg, Sweden, Belgium, Finland, Italy and the Netherlands.

³⁶ The World Trade Organization (WTO) is the only global international organisation dealing with the rules of trade among nations. At its heart are the WTO Agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. See http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited 30 September 2002).

³⁷ S Meunier and K Nicolaidis 'Trade Competence in the Nice Treaty,' *ECSA Review* Spring 2001.

³⁸ Among these countries are Sweden, Finland and the Netherlands.

³⁹ For a debate on the penetration of trade policy in domestic competences, see ch 6 under the heading 'Tension in the Decision-Making Process in Trade Policy'.

⁴⁰ Protectionism, whether in goods or services trade, is the economic policy of restraining trade between jurisdictions, through methods such as high tariffs on imported goods or services, restrictive quotas, and anti-dumping measures, in an attempt to protect industries in a particular locale from competition. This contrasts with free trade, where no artificial barriers to entry are instituted to prevent competition. Protectionism has frequently been associated with economic theories such as mercantilism, the belief that it is beneficial to maintain a positive trade balance, and import substitution. Import substitution can be defined as a trade and economic policy based on the premise that a developing country should attempt to substitute locally produced substitutes for products which it imports (mostly finished goods). This usually involves government subsidies and high tariff barriers to protect local industries and hence import substitution policies are not favoured by advocates of absolute free trade. In addition, import substitution typically advocates an overvalued currency to allow easier purchase of foreign goods and capital controls.

⁴¹ P Holmes and J Rollo 'EU Commercial Policy After Nice' (2001) 19 *Euroscope* (Falmer: Sussex European Institute).

This is quite different from the treatment given to trade in goods, where EU countries are banned from acting unilaterally.

Another important point in this book is the recent politicisation of trade policy.⁴² This new phenomenon is vividly illustrated by the presence of 30,000 demonstrators on the streets of Seattle at the WTO Ministerial meeting in December 1999, who sought greater influence in the shaping of trade policy-making as a consequence of the broadening trade agenda. The European Commission decided to formalise consultations with civic interest groups as a consequence of their high demand for greater transparency in the shaping of EC trade policy. In 1998, the Civil Society Dialogue,⁴³ as well as an informal Contact Group,⁴⁴ were created. This new development has been providing much more transparency. This is linked with another important aspect of this book, namely the so-called democratic deficit of the EU.⁴⁵

From an institutional viewpoint, the book will analyse the role of the Commission as the negotiator of international trade agreements. The Commission regularly consults the Article 133 Committee during international trade negotiations.⁴⁶ The close negotiations of the tandem Commission-Article 133 Committee enable EU Member States to be updated on the status of international trade negotiations. The Commission is the politically independent institution that represents and upholds the interests of the European Union as a whole. It proposes legislation, policies and programs of action, and is responsible for implementing the decisions of Parliament and the EU Council.⁴⁷ The Commission has the power to negotiate these agreements (Article 300(1) EC as amended by the Nice Treaty), even if these are not exclusively *communautaire*. These agreements are eventually concluded by the EU Council (Article 300(3) EC as amended by the Nice Treaty). If the agreements are mixed, they are then ratified by the EU Member States according to their national constitutions. As for the European Parliament (EP), before the Maastricht Treaty entered into force, it merely had a consultative role in relation to international trade agreements. The Constitutional Treaty, however, rectifies this by giving a more active role to the EP in the approval of trade agreements.

⁴² Chapter 6 tackles this issue extensively.

⁴³ For future and past meetings of the Civil Society Dialogue, see the following website at <http://trade-info.cec.eu.int/civilsoc/index.cfm> (last visited 12 June 2005).

⁴⁴ The informal Contact Group of Civil Society Organisations provides guidance to the Directorate-General for Trade of the European Commission on the dialogue process with civil society. For a list of the Contact Group Members, see <http://trade.ec.europa.eu/civilsoc/contactgroup.cfm> (last visited 17 December 2006).

⁴⁵ For an analysis of the democratic deficit in the EU, see ch 6.

⁴⁶ For an analysis of the EU institutions in trade policy, see ch 6.

⁴⁷ For a general overview of the EU Council, see M Westlake and D Galloway *The Council Of The European Union* (3rd edn, John Harper Publishing, 2004).

The decision-making process within the Council is another matter of interest in this book. Unanimity⁴⁸ is a political weapon whose consequence is the veto power of any EU Member State, thereby strengthening the most reluctant and protectionist EU countries.⁴⁹ A practical advantage of unanimity is reflected in international trade negotiations, in the sense that the EU's hand is strengthened in such fora. That said, the need for unanimity may undermine the EU's capacity to play a proactive role in multilateral trade negotiations.⁵⁰ Other commentators, however, argue otherwise: Young claims that where the EU countries have previously agreed on an internal regime that is more ambitious than that under negotiation at the multilateral level,⁵¹ the issue of unanimity is no longer an obstacle.⁵² On the other hand, unanimity offers the advantage of providing protection to each EU Member State for its most favoured issue.⁵³

The book also tackles the complex issue of the prognosis of the EU in the world trading system. When the WTO Agreements (the GATT, the GATS and the TRIPs Agreement) were signed in 1994, the concern in the EU was whether the mere fact that the GATT was being extended to the areas of services (the GATS) and intellectual property (the TRIPs Agreement) meant that the WTO membership of EU Member States would come to an end by formally recognising the exclusive competence of the EC with regard to the conclusion of the WTO Agreements. The (in)famous Opinion 1/94 of the European Court of Justice on the WTO Agreements, the actual genesis of the whole competence-allocation confusion, proved otherwise, by arguing that both the EC and its Member States shared competence with respect to the GATS and the TRIPs Agreement.⁵⁴ Years later, the EU Constitutional Treaty tries to timidly improve the current situation on trade issues created by the Nice

⁴⁸ When taking decisions on some issues, the Council of the European Union has to be in unanimous agreement – ie all countries have to agree. Any disagreement, even by one single country, will block the decision. This would make progress very difficult in a Union of 27 countries, so the unanimity rule now applies only in particularly sensitive areas such as asylum, taxation, and the common foreign and security policy. In most fields, decisions are now taken by qualified majority voting.

⁴⁹ S Woolcock 'European Trade Policy: Global Pressures and Domestic Constraints' in H Wallace and W Wallace (eds) *Policy-Making in the European Union* (4th edn, Oxford University Press, 2000) 373–99.

⁵⁰ S Meunier 'Divided but United: European Trade Policy Integration and EU-US Agricultural Negotiations in the Uruguay Round' in C Rhodes (ed) *The European Union in the World Community* (Boulder, Colorado: Lynne Rienner, 1998) 193–211.

⁵¹ This is, by and large, the case of trade in services.

⁵² AR Young *Extending European Co-operation: The European Union and the 'New' International Trade Agenda* (Manchester University Press, 2002).

⁵³ LA Winters 'European Union Trade Policy: Actually or Just Nominally Liberal?' in H Wallace (ed) *Interlocking Dimensions of European Integration* (Basingstoke and New York: Palgrave Macmillan, 2001) 25–44.

⁵⁴ For a legal analysis of Opinion 1/94, see ch 3.

Treaty, with the designation of the EU's common commercial policy as an exclusive Union competence in *all* areas of trade policy (including services and trade-related aspects of intellectual property rights). This, however, as will be analysed in Chapter 3, does not insulate the system from external threats, and thus perpetuates the constitutional conflicts between the EC and its Member States in trade policy with regard to services trade and the commercial aspects of intellectual property rights.

Is it therefore correct to interpret that EU Member States will no longer participate in the WTO forum because the EU Constitutional and Reform Treaties give exclusive competence to the EU in all areas of trade policy? How do we reconcile the fact that the EC and its Member States are currently members of the WTO, but after the EU Constitutional Treaty or its successor, the Reform Treaty, the EU will have exclusive competence in all trade matters? Aren't EU Member States sovereign states? Once the EU Reform Treaty is in force, how will the current polycephalous physiognomy of the EU in the WTO change? Will it make a difference? Will the EU become monocephalous in international trade negotiations, ie a sole trade actor? What will its implications be? Will EU Member States disappear from international trade fora? Is the EU becoming a federation of States when it comes to trade policy?

The Brussels European Council of June 2007 on a Reform Treaty addressed some of these issues by confirming what the EU Constitutional Treaty had already guaranteed, ie that the EU will never be a centralised all-powerful superstate by laying down:

- (a) the obligation to 'respect the national identities of member states, inherent in their fundamental structures, political and constitutional';⁵⁵
- (b) the principle of conferred powers (whereby the Union has only those competences bestowed on it by the Member States);⁵⁶
- (c) the principles of subsidiarity and proportionality, limiting EU action to the minimum necessary to achieve the objectives agreed by EU Member States;⁵⁷
- (d) the participation of EU Member States themselves in the decision-taking system of the Union; and

⁵⁵ See Presidency Conclusions of the Brussels European Council, 21–22 June 2007, 11177/07, CONCL 2, Annex I at 25.

⁵⁶ *ibid* 22.

⁵⁷ *ibid* 17.

(e) the principle of 'unity in diversity'.⁵⁸

B. Structure

This book is divided into 10 chapters, including this introductory chapter. The second chapter provides an analysis of the role of the EU in international affairs. The third chapter analyses the history and evolution of the EC's external trade relations since its early days, whereas Chapter 4 analyses the allocation of competences between the EU and its Member States. The aim of Chapter 5 is to portray the legal problems raised by issues of shared competence and mixity.⁵⁹ Some of these problems, which do not exist within the context of exclusive EC competence, are related to the functioning of the EC. The chapter also intends to show what implications the so-called legal phenomenon of mixed agreements has for third parties. Chapter 6 deals with the institutional balance in the EC's external trade relations. It analyses the role of major EU institutions in the proposed field of study, following the various phases of an international trade agreement. We shall see how EU Member States have delegated to the supranational level their authority to negotiate international trade agreements. Of particular interest is the role of the ECJ in relation to EC exclusive and shared competence, which is analysed in Chapter 7. Chapter 8 analyses trade in services in the Doha Round. In Chapter 9, before the concluding Chapter 10, reference is made to the specific case of services trade in the Doha Round from an EC perspective.

III. Contribution of the Book and Research Methodology

A. Intended Contribution/Scientific Originality

In reviewing this research topic, I hope to have opened up for further research and discussion this complex issue of EC unity in external trade relations and the need for more legal coherence in international trade negotiations. It is my conviction that significant answers to legal questions can be found only in a wider political, economic, and social context. Thus, although a good deal of solid theoretical legal scholarship exists in this subject area,⁶⁰ what is distinctive about this project from

⁵⁸ *ibid* 5.

⁵⁹ The term mixity, which appears very frequently throughout this book, is a phonetic distortion of the French term *mixité* to refer to mixed (shared) competence and mixed agreements. This is because much EC law terminology derives directly from French and has been adapted to the English language by phonetic analogy.

⁶⁰ There is a very vast body of literature in the field of international relations law of the EU, EC international trade law, and EC external trade relations. This non-exhaustive list exemplifies some among many excellent and very pedagogic books and articles which I

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other publications is the fact that it has an empirical approach (ie the GATS in the Doha Round), and explains negotiations in the context of international trade law and international political economy within a broader social and political context, thereby moving away from the textual-formalistic reading of law. I have therefore focused on the Doha Round of multilateral trade negotiations, specifically on services trade, to make this work unique.

This book also provides an insight into the research questions mentioned earlier. Most research on mixed agreements emphasises theoretical problems without considering practical implications.

B. Relevance of the Project and Intellectual Context

The examination of this subject matter is of significant legal importance because there is not yet an article in the current EC treaties providing a straightforward answer to the research questions it raises.⁶¹ Nor are

...have come across and analysed: JHJ Bourgeois 'External Relations Powers of the European Community' (1999) 22 *Fordham International Law Journal* 149-73; JHJ Bourgeois, J Dewost and M Gaiffe *La Communauté européenne et les accords mixtes, Quelles perspectives?* (Presses Interuniversitaires Européennes, 1997); B Brandtner and A Rosas 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' in (1998) 9 *European Journal of International Law* 468-90; E Cannizzaro (ed) *The European Union as an Actor in International Relations* (Kluwer Law International, 2002); A Dashwood and C Hillion (eds) *The General Law of EC External Relations* (Sweet and Maxwell, 2000); G De Burca and J Scott (eds) *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, 2001); Editorial Comments 'The Aftermath of Opinion 1/94 or how to ensure Unity of Representation for Joint Competencies', (1995) 32 *CMLRev* 385-90; P Koutrakos *EU International Relations Law* (Hart Publishing, 2006); P Eeckhout *External Relations of the European Union. Legal and Constitutional Foundations* (Oxford University Press, 2004); P Eeckhout *The European Internal Market and International Trade: A Legal Analysis* (Oxford: Clarendon Press, 1994); N Emiliou and D O'Keefe *The European Union and World Trade Law: After the GATT Uruguay Round*, (Wiley, 1996); C Flaesch-Mouglin *Les Accords Externes de la CEE. Essai d'une Typologie* (Editions de l'Université de Bruxelles, 1980); C Flaesch-Mouglin 'Le Traité de Maastricht et les Compétences Externes de la Communauté Européenne: à la Recherche d'une Politique Externe de l'Union' (1993) 3-4 *Cahiers de Droit Européen* 351-98; R Frid *The Relations between the EC and International Organizations. Legal Theory and Practice* (Kluwer Law International, 1995); TC Hartley *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (5th edn, Oxford University Press, 2003); J Heliskoski *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International, 2001); M Koskenniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, 1998); I Macleod, I Hendry and S Hyett *The External Relations of the European Communities* (Oxford: Clarendon Press, 1996); M Maresceau (ed) *The European Community's Commercial Policy after 1992: The Legal Dimension* (Martinus Nijhoff Publishers, 1993); D McGoldrick *International Relations Law of the European Union* (Longman, 1997); D O'Keefe 'Community and Member State Competence in External Relations Agreements of the EU' (1999) 4 *European Foreign Affairs Review* 7-36; D O'Keefe and H Schermers *Mixed Agreements* (Kluwer Law and Taxation Publishers, 1983); H Paemen 'The European Union in International Affairs: Recent

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there provisions in the treaties describing the principles governing the allocation of competence between the EC and its Member States.⁶² There is, therefore, a serious legal vacuum on issues of mixity (shared competence) in the EU.⁶³ In the absence of any kind of formal treaty amendment, EU Member States and the Commission, as the negotiator of international trade agreements on behalf of the EC and its Member States, have agreed to cooperate. This is the so-called duty of cooperation doctrine, developed by the ECJ.⁶⁴ Member States are willing to cede the

...Developments' (1999) 22 *Fordham International Law Journal* 136-48; C Timmermans and E Völker (eds) *Division of Powers between the European Communities and their Member States in the Field of External Relations* (Kluwer, 1981); A Tizzano 'La Personalité Internationale de l'Union Européenne' (1998) 4 *Revue du Marché Unique Européen* 11-40; JHH Weiler *The Constitution of Europe: 'Do the New Clothes have an Emperor?'* and *Other Essays on European Integration* (Cambridge University Press, 1999); JHH Weiler (ed) *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?*, (Oxford University Press, 2000); E Wellenstein 'Twenty-Five Years of European Community External Relations' (1979) 16 *CMLRev* 407-23.

What follows is a non-exhaustive indication of readings I have come across in the field of EC external trade relations: JJ Allen *The European Common Market and the GATT* (The University Press of Washington DC, 1960); L Bekemans and L Tsoukalis (eds) *Europe and Global Economic Interdependence* (College of Europe and European University Press, 1993); JHJ Bourgeois 'The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession', *CMLRev* 32, 1995, pp. 763-787; A Dashwood 'External Relations Provisions of the Amsterdam Treaty' (1998) 35 *CMLRev* 1019-45; H Da Fonseca-Wollheim and H Krenzler 'Die Reichweite der gemeinsamen Handelspolitik nach dem Vertrag von Amsterdam-eine Debatte ohne Ende', *Europarecht* 1998 at 223ff; P Demaret *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (Story-Scientia, 1986); K Heidensohn *Europe and World Trade* (Pinter, 1995); S Henig *External Relations of the European Community. Associations and Trade Agreements* (Chatham House: PER, 1971); R Torrent *Droit et Pratique des Relations Economiques Exterieures dans l'Union Européenne* available at <http://www.ub.es/dpecp/ep/livreTorrent.html> (1998); P Pescatore 'Opinion 1/94 on 'Conclusion' of the WTO Agreement: is there an Escape from a programmed Disaster?', (1999) 36 *CMLRev* 387-405; E-U Petersmann 'Application of GATT by the Court of Justice of the European Communities' (1983) 20 *CMLRev* 397-437; J-C Piris 'La Capacité de l'Union Européenne de s'engager et d'agir en Matière de Relations Economiques Exérieures: l'exemple de l'OMC', Florence, Academy of European Law, Conference given by Jean-Claude Piris, Jurisconsult of the Council of the European Union, 15 July 1998; ELM Völker *Barriers to External and Internal Community Trade*, (Kluwer, 1993); ELM Völker (ed) *Protectionism and the European Community* (Kluwer Law and Taxation Publishers, 1987); S Woolcock *Market Access Issues in EC-US Relations. Trading Partners or Trading Blows?* (Royal Institute of International Affairs, 1991).

⁶¹ See, in this respect, J Heliskoski 'Should There Be a New Article on External Relations? Opinion 1/94, Duty of Cooperation in the Light of the Constitutive Treaties' in M Koskenniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, 1998) 273-87.

⁶² The European Convention, The Secretariat, Discussion Paper: 'Delimitation of Competence between the European Union and the Member States. Existing System, Problems and Avenues to be Explored' CON 47/02, kin/MM/ac, p 3.

⁶³ For further reading on this matter, see J Heliskoski 'Should there be a New Article on External Relations? Opinion 1/94, Duty of Cooperation in the Light of the Constitutive Treaties' in M Koskenniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, 1998) 273-87.

⁶⁴ For an analysis of the duty of cooperation, see ch 5.

negotiating role over the negotiations to the European Commission. The European Commission, therefore, attends negotiations on behalf of the EC and its Member States vis-à-vis a third party (for example, China or the United States), without prejudice to legal competence.

This ongoing debate takes place within the academic community interested in the EC's external trade relations as well as within the EU institutions and trade policy-makers. The primary discussion participants are professors interested in the topic (whether it is from law schools, International Relations, or related fields of knowledge), international economic lawyers, as well as trade officials from the WTO, the EU institutions and national institutions.

C. Field of Study

This book is a contribution to the EC's external trade relations, which is a sub-field of the broader field of the EU international relations law. This book is not about EC trade law as seen from the outside, nor is it a study of international trade law; rather, it is an introspective analysis of EC trade law and policy. In conducting this research, I have identified the EC external trade relations as the main field of study, and international trade law as a background field, with a specific interest in services trade in the Doha Round.

The field of EC external trade relations deals with the law and practice of the external trade relations of the European Community. The major point of analysis is to find ways to ensure the unitary character of the EC external trade relations. The evolution of the EC's common commercial policy is analysed, and through this I have examined the checks and balances at the micro, meso and macro levels. In order to do this, the major EU institutions have been examined: the Commission as the negotiator of international trade agreements, the EU Council's role to conclude agreements, the Court of Justice as the interpreter of agreements, and the European Parliament in its consultative role in relation to international trade agreements. The decision-making process of the EU and its relation with national institutions is also an important part of this book.

D. Research Methodology

In this study, although I have taken the approach of positive law in its context, ie the legal analysis of mixed agreements in its political

and sociological contexts, there are various ways to look at mixed agreements.⁶⁵

I have used both primary and secondary sources in this research in order to be as objective and precise as possible when reaching my conclusions. With respect to primary sources, I have examined relevant case law from the European Court of Justice, pertinent Articles of the EC treaties, as well as official documents. As for secondary sources, I have analysed the main literature in the field of external trade law of the EC. Finally, I have conducted interviews with trade officials.

D.1. Primary Sources

In conducting this research, I have analysed the pertinent provisions of the Treaties of the European Communities and pertinent case law of the European Court of Justice (mainly the analysis of Opinion 1/94 and Case C-53/96 *Hermès International v FHT Marketing*). Case law of the European Court of Justice, privileged material of legal analysis, was at first unusual and, now that it exists, it has become controversial. Opinions by the European Court of Justice will be of great value for the interpretation of the Treaties. These sources are important because they help us to interpret and clarify the gray areas of the law. Later in the book, we shall see how much power was given by the ECJ to the Member States in mixed agreements. We shall see how this was a surprise mainly to national administrations, who were not aware of the degree of their competences on these issues.

As for positive law, in the case of the Treaty of Rome, the main articles examined which deal with the external relations of the European Union are Article 111 EC (repealed), Article 133 EC, Article 300 EC and Article 310 EC. Political aspects, which were taken into consideration, were also of vital importance when dealing with these issues.⁶⁶ This analysis was important to understand the legal point of departure of the EC's external trade relations.

In addition, the consultation of official and working documents from EU national parliaments and EU institutions, such as the EU Council's General Secretariat and the European Commission, together with concluding remarks of various European Councils, speeches and

⁶⁵ JHJ Bourgeois 'Mixed Agreements: A New Approach?' in JHJ Bourgeois, J Dewost and M GAIFFE *La Communauté Européenne et les Accords Mixtes, Quelles Perspectives?* (Presses Interuniversitaires Européennes, 1997) 83-91.

⁶⁶ J-V Louis 'Preface' in C Flaesch-Mougin *Les Accords Externes de la CEE: Essai d'une Typologie* (Editions de l'Université de Bruxelles, 1980) 11.

statements by EU commissioners and national politicians, have also been taken into consideration. They are important to value and judge the democratisation of the European integration process.⁶⁷

D.2. Secondary Sources

Specialised legal and political science literature in the external trade relations of the European Community and international trade law, as well as articles from newspapers such as the *Financial Times*, *The New York Times* and *International Herald Tribune* have been analysed to support this book's conclusions.

D.3. Interviews

Three cities – Brussels, Madrid and Geneva – have been the venue of my empirical research. I have benefited immensely from interviews with desk officials (negotiators) from national delegations (COREPER and working groups at the EU Council), from the Spanish Ministry of Trade, from the EU Council legal service, from the European Commission (Directorate-General for Trade and from the Delegation of the European Commission to the WTO). These interviews have helped me understand the modus operandi of international trade negotiations, and how the position of national governments and EU institutions therein takes place.

⁶⁷ This term of art is used to refer to the act of building unity between European countries and peoples. Within the European Union, it means that countries pool their resources and take many decisions jointly. This joint decision-making takes place through interaction among the EU institutions.

CHAPTER 2

THE EU AND INTERNATIONAL AFFAIRS

I. Introduction

This chapter deals with the role of the European Union (EU) in international affairs. After making a terminological distinction among the players of the game in the EU's external relations, this chapter will analyse the current legal situation with respect to the EU legal personality, which has fundamentally changed since the enforcement of the Treaty of Amsterdam,¹ although Article 24 TEU refers to the conclusion of the common foreign and security policy (CFSP) agreements by the EU Council.² The last part of this chapter will provide some theories of supranationalism in the EU.

II. The Players of the Game

Throughout this book, terms such as European Union, European Communities, and European Community appear continuously. It is important to clarify the difference among them.³ Most people wrongly believe that the European Community (EC) has been replaced by the European Union (EU). This is inaccurate, since the entities coexist. The main difference between the two is that, technically speaking, only the EC has legal personality and therefore can conclude international agreements, buy or sell property, sue and be sued in court. All these are competences which the EC has, but the EU does not. The competence to act in the field of international trade relations rests specifically with the EC, and not with the EU.⁴

As Ramon Torrent indicates, the institutional system of the EU is perceived in a confusing way, not only by the citizens of the Union but

¹ A Rosas *The European Union and Mixed Agreements* in A Dashwood and C Hillion (eds) *The General Law of EC External Relations* (2000) 203.

² Paasivirta 'The European Union: From an Aggregate of States to a Legal Person?' (1997) 2 *Hofstra Law and Policy Symposium* 37–59.

³ See M Westlake *The Council of the European Union* (Cartermill, 1995) 5–7.

⁴ However, Article I-7 of the EU Constitutional Treaty gives legal personality to the EU. This concludes a process which started at the signature of the Treaty of Rome, ie the unification of the two remaining European Communities with separate legal personalities into a Union which technically did not possess legal personality prior to the EU Constitutional and Lisbon Treaties. For further information, see R Leal-Arcas 'EU Legal Personality in Foreign Policy?' (2006) 24(2) *Boston University International Law Journal* 165–212.