

**EUROPEAN INTEGRATION AND INTERNATIONAL
POLITICS:**

**COMMISSION – MEMBER STATE RELATIONS IN
THE WORLD TRADE ORGANISATION AND
SELECTED MULTILATERAL ENVIRONMENTAL
AGREEMENTS**

STIJN BILLIET

Thesis submitted for obtaining the degree of PhD
European Institute
London School of Economics and Political Science



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DECLARATION

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ABSTRACT

Traditionally, theories of European integration have focussed on the internal dynamics of this unique form of international cooperation. This also holds for the principal-agent approach, a newer and more sophisticated methodology. This thesis argues that this approach's frame of reference needs to be broadened in order to offer a more coherent framework since the European Community is becoming an increasingly active player on the international stage. Consequently, the inward-looking bias in integration theory needs to be overcome to come to a better understanding of the development of the external role and position of the Commission. Through the analysis of case studies, the study of primary and secondary sources and interviews with policy-makers, this thesis shows that the external institutional framework impacts on Commission-Member States relations, and thus on the process of European integration.

Within the strong institutional framework of the World Trade Organisation, the Commission has more leeway vis-à-vis the Member States to gain influence and competences. Through its central role in the WTO's dispute settlement system, the Commission has managed to gain broader competences concerning trade-related aspects of intellectual property rights. Furthermore, the Commission is a firm proponent of the strengthening of the dispute settlement system. It is actively trying to incorporate new issues of mixed competence, like investment, within this strong institutional framework in the hope of improving its position. This is not restricted to trade-issues either. Also in international environmental agreements, the Commission tries to strengthen its position by pushing for stronger institutional provisions and for the incorporation of environmental concerns within the WTO framework. The interaction between the European and the international level, and its impact on Commission-Member State relations necessitate complementing the principal-agent approach to make it more outward-looking so that it can also be used to study the *external* aspects of European integration.

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LIST OF ABBREVIATIONS

BIAC – Business and Industry Advisory Committee to the OECD

BISD – Basic Instruments and Selected Documents

BITs – Bilateral Investment Treaties

CAP – Common Agricultural Policy

CCP – Common Commercial Policy

CFCs – Chlorofluoro Compounds

CFSP – Common Foreign and Security Policy

CITES – Convention on International Trade in Endangered Species of Wild

Fauna and Flora

COREPER – Committee of Permanent Representatives

DDA – Doha Development Agenda

DG – Directorate General

DISC – Domestic International Sales Corporation

DSU – Dispute Settlement Understanding

EC – European Communities

ECJ – European Court of Justice

ECOSOC – Economic and Social Committee

EEC – European Economic Community

EFTA – European Free Trade Association

ERI – European Roundtable of Industrialists

ESCS – European Community of Steel and Coal

EU – European Union

FAO – Food and Agricultural Organisation

FDI – Foreign Direct Investment

FSC – Foreign Sales Corporation

GATS – General Agreement on Trade in Services

GATT – General Agreement on Tariffs and Trade

Greens EFA Group – European Greens and European Free Alliance

IC – Implementation Committee

IGC – Intergovernmental conference
IMF – International Monetary Fund
IR – International Relations
ITLOS – International Tribunal for the Law of the Sea
ITO – International Trade Organisation
LRTAP – Convention on Long-Range Transboundary Air Pollution
MAI – Multilateral Agreement on Investment
MEAs – Multilateral Environmental Agreements
MoP – Meeting of the Parties
MS – Member States
MTO – Multilateral Trade Organisation
NGOs – Non-Governmental Organisations
NTBs – Non-Tariff Barriers
ODS – Ozone Depleting Substances
OECD – Organisation for Economic Co-operation and Development
PES Group – Party of European Socialists
QMV – Qualified Majority Voting
SARS – Severe Acute Respiratory Syndrome
SEA – Single European Act
SPD – Sozialdemokratische Partei Deutschlands
TBR – Trade Barriers Regulation
TEC – Treaty Establishing the European Communities
TEU – Treaty on European Union
TRIMS – Trade-Related Investment Measures
TRIPS – Trade-Related Aspects of Intellectual Property Rights
UK – United Kingdom
UN – United Nations
UNCHE – United Nations Conference on the Human Environment
UNCLOS – United Nation Convention on the Law of the Sea
UNCTAD – United Nations Conference on Trade and Development
UNEP – United Nations Environment Programme
UNFCCC – United Nations Framework Convention on Climate Change

UNICE – Union of Industrial and Employers’ Confederations of Europe

US – United States

USSR – Union of Soviet Socialist Republics

WHO – World Health Organisation

WTO – World Trade Organisation

WWF – World Wildlife Fund

PREFACE AND ACKNOWLEDGEMENTS

During the first 20 years of my life, the European Union was not something that I learned much about. The complicated political construction of Belgium and the ensuing constant stream of political squabbles and crises was enough to keep even the most diligent political commentators busy, so I guess there was just not much time left to discuss other complex constructions as well in the media. In any case, the EU was pretty much taken for granted. This was particularly so in my birthplace, a small Belgian border town where, for cultural and historical reasons, affinities with the wider transnational region are often still stronger than those with the national level.

So it would be somewhat disingenuous to pretend that my interest for the EU and the European project was kindled by this ‘transnational’ context, where EU policies such as the abolition of border controls or the introduction of the Euro had a particularly strong impact. In fact, the regular trips to the Netherlands for outdoor swimming or to Germany for Christmas-shopping, for example, were pretty much considered as a normal part of life. It was not until later, during my studies in Leuven, that this was specifically linked to the EU and that the process eventually leading to this PhD was set in motion. In the meantime, the PhD has become an integral part of my life, involving many people. Here, I would like to take the opportunity to thank many of those people who prepared me for, or helped me go through the PhD-process.

I vividly remember the first reaction of my grandmother when Sarah and myself told her we were going to the UK, where I was about to start a PhD in European Studies. She was perfectly happy for us to take that step, but could not help asking herself (and me) why on earth I had to go overseas to write a study on something that was

going on right there in our own capital. Should she now ask the same question, I would tell her that there are certain things that were just not on offer in Belgium. I am greatly indebted to my Alma Mater, the University of Leuven, and without the enthusiasm and support of several inspiring academics from the political science, law and economics departments I would not have made some of the choices I have. But for postgraduate studies, the LSE offers an extremely inspiring and motivating environment that few universities are able to match. It all starts with the academic staff, of course. I am indebted to my supervisors, Kevin Featherstone and Stephen Woolcock, for guiding me through the PhD-process. But what the European Institute at LSE truly excels in is the quality, dynamism and enthusiasm of its young academics. While they have all played an important role in the genesis of my PhD, I particularly owe thanks to Bob, Abby and Waltraud, who taught me that methodology is about asking the right questions, and then trying to keep things as transparent and simple as possible, rather than putting up smoke screens.

Equally important, however, was the close-knit friendship I was privileged to have encountered in J14, the PhD room. In this room I first met some of my best friends as well as some of my most severe critics. Usually they were the same people. The comments of my peers in this room have greatly helped to improve the thesis, while the multicultural 'Jean Monnet'-pubcrawls we frequent held throughout London have definitely improved my appreciation for the European project, though not necessarily for foamless pints of lukewarm English lager... I will make it a point of honour to mention everyone individually at my Hyde Park Corner-viva, but I would nonetheless like to take this opportunity to thank a couple of fellow-students in particular. Marco, for doing everything he could to keep me from working on the PhD: from playing numerous games of squash to discussing the relevance of the Federalist Papers for the EU today over a pint. Lauren, one of the brightest women I have ever met, for her kindness as a person and her ruthlessness as a reviewer. Maria, whom I share the experience with of having a first child while trying to finish

a PhD at the same time, although I have to admit the feeding times during the first couple of months were probably more relaxed for me than for her. Manolo, for those early morning chats that got me started and for those late evening drinks to switch off. Emma, of course, whose thesis I helped bring to the printer's in the hope that one day I would do the same with mine. And, last but certainly not least, Dermot, who never ceases to push people to their intellectual barriers. He has undoubtedly been the single most important influence on the development of my academic work in general and the form and shape of the PhD in particular. To all of you: thanks.

I also expressly want to thank Dee, Simon and Róisín for all their help and support after we moved to Brussels. Having unwittingly rented a flat a block away from where they lived was probably one of the smarter moves we've made since coming back to Belgium.

Then there are also the people who made it possible for me to start with this project in the first place. First on the list here are of course my parents, Vake en Moeke, who have always supported me throughout all those years of study. They taught me the value of a good education and have consequently never hesitated to invest in the education of their children. I should extend this word of thanks to the rest of my family as well for their role in shaping me and – hence – this PhD. My brother Bart and his family, Petra and Sofie, and my sister Lien with her partner Niall have never missed an opportunity to tease me with still being a student while the rest of the family already had a 'real' job. Coming back to Belgium to visit them and be able to laugh off the predicaments of doing research always provided a useful counterweight to the closed academic environment most PhD students are in. In a similar vein, I should mention my parents-in-law, Christine and Dominique, as well as my brothers-in-law with their partners for always giving their support and, most importantly, for sometimes *not* asking about the progress of the PhD.

This finally brings me to the person who has probably been most involved in this whole project. My wife, Sarah, will undoubtedly be very happy to be able to close the PhD-chapter in our lives, and understandably so. She is the one who suffered when I was going through one of those inevitable periods of self-doubt or of questioning the whole project. She is the one that had to put up with the accompanying mood swings and she is the one that felt the frustration most when I was in 'reflection mode', sometimes not writing a single letter in months. She has been the best coach I could have wished for: constructive, supportive and understanding when I was in a blind alley; severe and prodding when I needed to be more (pro-)active. In spirit, she is co-author of this thesis. And should she later think back to these past four years, she will surely remember that two beautiful children, Thomas and Annabelle, were born while I was struggling with the niceties of European trade policy. Their middle names are a direct consequence of this PhD-project because of the peer pressure to establish my European credentials. Thomas Benjamin is named after Benjamin Franklin; Annabelle Marie after Mary Robinson. Surely there is no better evidence that the PhD has become an inextricable part of our lives.

Stijn Billiet

London and Brussels, Summer 2006

1

CREEPING COMPETENCES? THE EUROPEAN COMMISSION IN INTERNATIONAL REGIMES

INTRODUCTION

The division of competences between the European Union (EU) and its Member States has always been at the core of the study of this strange, state-like international organisation. Indeed, in its essence, the process of European integration could be seen as a continuing stock-taking exercise, mapping out who is responsible for what. Some competences have been completely transferred to the EU level, making the European institutions exclusively responsible. Agriculture and competition policy are probably among the best-known examples of such competences. On the contrary, other policy areas, such as health care or taxation, remain under the exclusive power of the Member States. As usual, the most interesting category is the third one, which comprises issues that fall under the ‘shared’ or ‘mixed’ competence of the EU and its Member States. Here, the dynamic nature of the interaction between the different levels of government of the EU, which makes it such a unique entity, is most clearly revealed. For this reason, many studies of the EU and the European integration process have focussed on this category of competences, in the hope of discovering (some of)

the driving forces behind the functioning of the EU, or sometimes even hoping to uncover the final destination and goal of the integration process.

With the steady emergence of the European Communities (EC) as an international actor, and against the background of an increasing body of case law of the European Court of Justice (henceforth ‘the Court’ or ‘the ECJ’) on the position and competences of the EC in the international system, ‘mixture’ also became an important element in the study of the EC’s external relations.¹ It were mainly lawyers that were taking the lead in this debate, spurred on by the publication of an influential volume on ‘mixed agreements’ in the early 1980s, which made ‘mixture’ and its consequences into an integral part of any legal study of the EC’s external relations (O’Keeffe and Schermers, 1983). This is understandable given the many repercussions and questions flowing from the joint participation of both the European Communities and its Member States in international agreements. These are not restricted to issues of representation or voting, but they also relate to questions about the external recognition of the EC, about the position of the EC in the international system, and about who should execute a particular agreement or who is liable in case of non-compliance. Many of these questions touch upon the internal division of power between the EC and its Member States. It is therefore somewhat surprising that the full repercussions of ‘mixture’ are often overlooked or ignored in political science studies of the EC’s external relations. All the more so because the interaction between the EC and its Member States on issues of shared or mixed competence, as noted earlier, can be fertile ground for studying some of the factors influencing or driving the European integration process – and maybe even uncovering new ones.

This thesis provides a contribution in tackling this hiatus. What can political scientists studying the EC’s international relations learn from the rich legal literature on mixed agreements? How, if at all, can this help us to understand the

¹ Given that only the EC (and not the EU) has legal personality, the EC will be referred to in the context of international agreements throughout this thesis. For general reference, the term EU is still used.

dynamics of the European integration process better? The focus of this thesis will thus be on specific aspects of the EC's international relations, which are characterised by 'mixity'. Is there anything in these settings that can shed light on the driving forces of the interaction between the EC and its Member States? Or, in other words, is it possible to distinguish some factors that can influence the balance of power between the EC and its Member States in mixed settings? In short, the ultimate study object of this thesis is the process of European integration. More specifically, the focus is on the EC's external relations in mixed settings. This forms the main frame of reference for this thesis and this is the background for the more specific research questions that will be introduced in this chapter and the next.

This chapter is further divided into five sections. In the first section, the difficulties that are associated with the position of the EC in the international system are discussed, with particular attention being paid to the topic of mixed agreements. Then the external role of the Commission will briefly be touched upon, before the core puzzle is introduced and the main research questions are operationalised in the second section. The last three sections explore the integration literature, identify some shortcomings in these approaches, and indicate how this research project aims to contribute to this literature. Each section deals with one major school in the integration literature.

1.1. The role of the EC in the international system

The role of the EC in the international system has long been (and often still is) controversial. The USSR, for example, consistently refused to recognise the EC throughout most of the Cold War-period, although it could not prevent the EC from becoming party to, for example, the International Wheat Agreement in 1971. Nonetheless, the Soviet Union declared in a letter to the agreement's secretariat that "its [i.e. the EEC's] accession did not imply recognition of the EEC and

created no obligations for the USSR with regard to the Community” (quoted in Denza, 1996: p. 5). In more recent times, it is the US that has often had (and is still having) difficulties in accepting the EC as an international actor. Good examples of this are to be found in the context of international environmental agreements, where the US blocked the EC’s accession to CITES and (unsuccessfully) resisted the EC’s efforts to become a party to the Vienna Convention and its Montreal Protocol (see for example Sbragia, 1998: p. 293-303; Jachtenfuchs, 1990: p. 264).² Among the main reasons for this US reticence to deal with the EC is the uncertainty that is generated by the complex structure of the EC. For outsiders, it is often very difficult to know who is responsible for what in the EU. But also insiders are often lost and the fact that the question over who is competent to sign an international agreement regularly is a point of controversy between the EC and its Member States does not exactly help in convincing third countries that it is worth dealing with the EC rather than with the individual Member States. The EC has nonetheless become party to an increasing number of international agreements since the 1980s. And while it still faces plenty of obstacles and difficulties in establishing itself as an international actor, over the course of time “[T]hird parties as well as the UN system have gradually acknowledged the Community’s unique status (...) and are in the process of adapting international institutions to accommodate its unusual demands” (Sbragia, 1998: p. 302).

As mentioned earlier, the division of competences between the EC and its Member States is an important (even crucial) issue when it comes to the signing of international agreements. When the agreement deals with issues that fall under the (explicit or implicit) exclusive competence of the EC, it alone can sign, i.e. without the Member States. Conversely, the Member States can sign international agreements regarding issues that fall outside the scope of the EC’s responsibilities. However, the division of competences between the Community

² CITES is the Convention on International Trade in Endangered Species, the Vienna Convention refers to the Vienna Convention for the Protection of the Ozone Layer, and the Montreal Protocol is the Montreal Protocol on Substances that Deplete the Ozone Layer.

level and the Member States is seldom as clear-cut as in the above cases, particularly when it comes to external powers. Usually there will be some aspects of an agreement that are Community responsibilities while others will require Member State participation. The result of this is a 'mixed agreement': an agreement that is signed jointly by the EC and one, some or all of its Member States (see O'Keefe and Schermers, 1983 for an excellent overview). Mixed agreements have become the norm rather than the exception in EC Treaty practice, even in areas like international trade where there is a good degree of exclusive Community competence (see O'Keefe and Schermers, 1983: p. ix; Leal-Arcas, 2001: pp. 483-484). One of the reasons why mixity is so prevalent is that the European Court of Justice is of the opinion, expressed in Opinion 1/78, that Member States can co-sign an agreement with the Community even if there are only minor provisions that fall under their responsibility (Court of Justice, 1979). While mixed agreements do indeed have useful functions (such as reflecting the political compromise in the EC, or avoiding turf wars between Member States and EC over exclusive competence), they can also cause many problems (for a tentative list, see Ehlerman, 1983). The most pressing or visible of these have to do with representation, implementation, and liability. In the context of this research, the issue of representation is probably the most interesting and important element.

Mixity does not only have repercussions for the participation of the Community – and the extent of this participation – in certain agreements and regimes, but it also touches upon the position of the Commission as the external representative of the EC. With regard to issues that fall under the exclusive competence of the Community, the Commission negotiates for the whole Community with third parties. In mixed negotiations, however, the Commission often has to share the stage with representatives from the Member States. There is no fixed format for the composition of the Community delegation or even for Community representation. Groux (1983) distinguishes between four different formulas for Community representation. The first one is that there are separate delegations for the Community (composed of Commission and Council officials) and the

Member States. A second option is a similar constellation, but with the difference that the Community delegation also includes representatives from the Member State presiding over the Council. In a third formula, the Community delegation is composed of Commission and Council officials and civil servants from all the Member States. The last formula provides only for one Community delegation (so no separate Member State delegations any more), again composed of Commission and Council officials together with representatives from the Member States. But while the negotiating position of the Commission is often weaker in mixed settings, its representation function is usually not directly affected by mixity. Within the functioning of agreements or institutions, the Commission represents the EC in line with its general representation function (see Nugent, 2001: pp.320-321; 2003: pp. 236-440; Smith, 1995). The thing with mixity, of course, is that both the EC and its Member States will normally be represented in the organisation concerned, so in that sense the Commission certainly does not have *carte blanche* as the EC representative and there is still plenty of scope for the Member States to exert control over what the Commission is doing. What is important, however, is that in representing the EC, the Commission has more options and more leeway compared to the negotiation phase in many mixed settings.

The large amount of specialist legal literature on mixed agreements is an indication of the core position that the 'competence question' occupies within the study of EU law. Simplified, there are two main issues of concern from this legal point of view. On the one hand, there is the question which role the ECJ plays or should play in determining the division of competences between the Member States and the EC. On the other hand, there is the issue of how the EC can participate in international agreements despite the complex and often uncertain legal situation on the 'domestic' (i.e. European) level. These issues are well documented in the ever-increasing legal literature on mixed agreements, but also in the more recent legal and political literature on ECJ agency (see for example Garrett, 1995; Chalmers, 2000; Pollack, 2003).

From a political studies point of view, there are some other interesting angles to look at the external representation of the EC, and the Commission's role therein. After all, if Weiler's adage that "the foreign policy domain is notoriously the most jealously guarded area of national sovereignty" (Weiler, 1980: p. 156) still holds, then focussing on external relations must be very instructive for studying the European integration process and its dynamics. The competence question thus becomes particularly interesting in the international representation of the EC when seen in the light of the integration literature (and practice), and Commission-Council or Commission-Member States relations. Or, again in Weiler's words,

"in broad terms of European integration, the evolution of truly meaningful external relations with an effective shift of powers to Community organs, principally the Commission, would represent a marked step forward, for this very reason, i.e., the traditionally nationalistic colour of anything to do with foreign relations" (*ibid.*)

This thesis will take up this line from a slightly different angle in that it approaches EC participation in international regimes from an 'integration' perspective. The focus will be on the Commission's behaviour in international regimes or organisations. The main question will then be if (and if so: under which circumstances) it succeeds in using its position as EC spokesperson to gain influence and thus strengthen its position vis-à-vis the Council and the Member States. This raises two immediate questions that need to be addressed, both of which have to do, one way or another, with measurement. First of all, an increase in Commission influence (at the expense of the Member States) can only be identified against a benchmark, in this case the preferences of the Member States. This benchmark therefore needs to be conceptualised and operationalised, something which is made rather more difficult because of the complex structure of delegation in the EC (see next paragraph). Secondly, the concept of influence needs to be clarified and defined more substantially. The next sections will take up these two issues.

a) Member States, the Council and preferences

Throughout this thesis, the preferences of the Council are interpreted as a proxy for those of the Member States. This is not to say that a Council position necessarily reflects the uniform preferences of the Member States. More often than not there will be many differences, some more serious than others, between the preferences of different Member States. Previous publications studying the principal-agent framework have already drawn attention to this phenomenon and some have started to explore the consequences and implications of the presence of multiple principals or a collective principal as opposed to the more straightforward – but also more theoretical – instance of there being one, unitary principal (see McCubbins, Noll and Weingast, 1989; Nielson and Tierney, 2003; specifically regarding principals in the EC see Pollack, 1997; 2003). Within the EC, the delegation from the Member States to the European Commission (and the control mechanisms the Member States put in place) will vary in mixed settings and this will have an effect both on the possibilities for the Commission to drift from the preferences of the Member States and on the power of the Member States – as principals – to sanction the Commission and rein it in.

In the case when there are multiple principals, the agent can exploit conflicting interests between the principals in order to maintain a larger degree of autonomy than would be feasible when there was a unitary principal (or when the interests of the Member States are aligned). The reason is that these conflicting interests or preferences might make it harder for the principals to sanction the agent when it drifts too far from the principal's preferences. To put it in Pollack's words: "the model draws our attention to the conflicting preferences among multiple principals and the ability of an agent to exploit these conflicts, as long as the agent's activities remain within the set of Pareto-optimal outcomes" (Pollack, 1997: p. 112). A crucial factor in this respect is of course the voting rule in place, since this determines the agent's "win-set", i.e. it outlines the limits of what the

agent can rationally anticipate to be acceptable to the ‘key’ principal.³ Here, attention should be drawn to earlier studies on voting and voting behaviour in the Council. Mattila and Lane, for example, point out that voting is a surprisingly rare occurrence in the Council, even after the switch from unanimity voting to qualified majority voting in many issue areas (Mattila and Lane, 2001; this is also confirmed in a study by Hayes-Renshaw, van Aken and Wallace, 2006). Whatever the explanation – whether the Member States are socialised through the negotiating process or whether they are just acquiring bargaining chips and negotiating coinage for future negotiations – this does suggest that Member States are only going to be outvoted in very close votes or in votes where an issue of fundamental interest is at stake for them. Apart from these cases, Member States’ preferences are often malleable enough to be ‘changed’ and put into the corset of revealed preferences in the form of a Council decision, declaration, or the like.

The decision-rule that is in force determines which size the ‘winning coalition’ required for a Council position or decision should minimally be. In the case where unanimity is required, equating Council preferences with those of the Member States is rather intuitive. But also in the case of decision-making by qualified majority voting, the revealed preferences of the Council should capture the – broad – preferences of a critical mass of Member States. In short, on the basis of these two elements (the pervasiveness of decision-making by consensus in the Council and the broad coalition needed for a qualified majority), this thesis interprets Council positions as a useful proxy for reflecting Member States’ preferences. This is a pragmatic choice because it enables us to operationalise a benchmark against which to measure if the Commission drifts from the preferences of the Member States. Furthermore, this benchmark is relatively easily accessible and readily available without having to do difficult and extensive field work in several Member States. While the latter would certainly be the preferred option, unfortunately the limited resources of this PhD project made it

³ ‘Key principal’, refers to the principal that holds the key to the decision. For example, under unanimity this is the lowest common denominator, under simple or qualified majority this is the principal that can deliver the necessary majority.

impossible to pursue this in a rigorous and methodologically correct manner. However, as an acknowledgement of the effects of the presence of multiple principals, the position of individual Member States will be examined within the context of specific case studies whenever possible. While this is not exactly the same as elaborately analysing the preferences of the individual Member States, it should nonetheless mitigate the main concerns linked to using revealed Council preferences as an initial benchmark for determining whether the Commission drifts from the preferences of the Member States.

As additional support for choosing this approach, it can be noted that the Member States themselves have sometimes blurred the line between their individual choices and those of the Council. One of the defences of the Council in Case 22-70, better known as the AETR-case, was that the Council decision that was challenged by the Commission was, according to the Council, “really nothing more than a coordination of policies amongst member states” (Court, 1970: para. 36), who happened to be together in the framework of a Council meeting. While the Court struck this argument down, it nonetheless shows that – at least on a political level – it is often difficult to distinguish clearly between the preferences of the Member States and those of the Council.

In conclusion, within the EC decision-making process the Commission usually faces multiple principals or a collective principal. Because the preferences and interests of these multiple principals will usually diverge to a certain degree, this can play to the advantage of the Commission by potentially making the imposition of sanctions less likely (depending on the voting rules in place and on the default condition), thus cutting the Commission, as agent, more slack. The preferences of individual Member States will therefore be taken into account when examining the relationship between the Commission and the Member States in particular cases. On a more general level, however, we need a benchmark against which to assess whether or not the Commission has been able to increase its influence and whether the preferences of the Commission diverge from the decision-making aggregate of Member States in the first place. For this aim, the

revealed preferences of the Council are being used as a proxy for the preferences of the Member States. The reasons for doing this are threefold: first, decision-making by consensus is still the rule rather than the exception in the Council; second, in the context of this thesis it would not have been feasible to engage in an in-depth study of the preferences of the individual Member States; and third, the Member States themselves have sometimes blurred the picture between their own preferences and the Council's. For these reasons, Council preferences will be used as an initial, general benchmark against which to measure whether the Commission drifts from the preferences of the Member States.

b) Shaping outcomes by formal and informal means: Commission influence

While a lot of attention has been paid to the notion of 'competence' earlier in this chapter, this is certainly not the only – nor always the best – measure of the Commission's ability to pursue its preferences in international settings. Strictly speaking, competence belongs to the EC. The Member States delegate competence to the EC and within the EC a further delegation takes place. The negotiating can be entrusted to the Commission, the Council (Presidency) or a combination of the two. Regarding the representation of the EC within international organisations, this is delegated to the Commission in accordance with its function as external representative (see for example Nugent, 2003). In other words, because of its position in the political system of the EC, the Commission benefits from the fact that certain competences have been attributed to the EC. The competence issue is very important, because it has serious repercussions for the Commission's position in international settings. This holds for the negotiation phase as well as for the representation phase. Without the presence of at least some EC competences in a particular issue area, the Commission cannot negotiate for the EC or represent the EC. However, the division of competences is not the only element that allows the Commission to pursue its preferences (to various degrees) and to try and have an impact on policy outcomes. A more general, overarching concept is 'influence'. And having the

legal competences is one of many facilitating factors for exerting influence (albeit, admittedly, an important one).

The literature has already distinguished and discussed different means for the Commission to pursue its preferences and to influence the decision-making process. In a broad overview of the Commission's role in the EU policy-making process, Peterson (2002) clearly distinguishes between power and influence. According to him, "two important sources of Commission influence – as opposed to 'power' – are its prerogative (under Article 211 TEC) to deliver opinions on any EU matter, along with its obligation (in Article 212 TEC) to publish an annual report on the activities of the EU" (Peterson, 2002: p.88). The concept of 'influence' has a broader scope than the concept of 'power'. It could be defined as the ability to shape attitudes, structures and outcomes without necessarily being linked to legal competences. The implication of this definition is that it points to an impact without necessarily putting this in a teleological perspective, i.e. without entailing a pre-fixed end-goal, such as the expectation to acquire more competences, for example.

There are certain elements that facilitate the Commission to influence decisions and to steer the European integration process. Elements that are often identified in the literature as contributing to the Commission's influence are: various strategies for setting the agenda⁴, its role as guardian of the treaties and its day-to-day role as policy administrator (see for example Schmidt, 2000; Pollack, 1997; Marks, Hooghe and Blank, 1996; Peters, 1994; Kerremans, 1996). Such elements can enable the Commission to influence and change the costs and benefits of certain policy options for Member States and it can thus have an impact, on policy outcomes as well as on the broader process of European integration. A study by Green Cowles, for example, argues strongly that certain policy outcomes and major steps in the European integration process such as the 'Europe 1992' project cannot be explained solely by the interests of the Member States (see Green Cowles, 1995).

In the light of this literature, the argument that is put forward in this thesis could be summarised as follows. The institutional framework of external organisations can also have an impact on the Commission's ability to play a stronger role and gain influence vis-à-vis the Member States. More specifically, it will be argued that the Commission can make strategic use of certain characteristics of strongly legalised institutional settings that change the cost-benefit analysis for Member States, that change the default condition and that strengthen the Commission's position enabling it to go above and beyond its legal competences. This matters because it means that the Commission succeeds in having its preferences (at least partly) reflected in policy outcomes more often than could be expected from an analysis of the division of competences between the EU and its Member States (and between the institutions within the EU). Given that both the neofunctionalist and the intergovernmentalist literature overwhelmingly consider the Commission to have pro-integrationist preferences, increasing the influence of the Commission can thus have a considerable impact on the integration process, even if it is not accompanied by a formal transfer of competences.

1.2. The research puzzle

Even though there has been a veritable explosion of alternative theories to explain the European integration process in the 1990s, most of these can still relatively easily be categorised as being either predominantly intergovernmental in nature or being cast more into a neofunctional/supranational mould. The study of the European integration process tends to bounce like a yo-yo between periods where intergovernmentalist-inspired theories are dominant and those where supranationalist ones set the tone. Each of these paradigms has its own views on what the driving forces of the European integration process exactly are and how this process is best to be explained. The supranationalists tend to stress the

⁴ This includes, but is not restricted to, its formal agenda-setting powers under Art. 211 TEC.

independent role of the supranational institutions (most notably the European Commission and the Court of Justice), whereas the intergovernmentalists claim that integration is based on a conscious decision made by the governments of the Member States.

The last decade of the 20th century seems to have been a period that was dominated by the Member States. The Commission had largely been denied strong supranational powers in guiding, policing and governing the functioning of the Economic and Monetary Union;⁵ contrary to the 'Europe 1992' project the Lisbon process took the form of national action strategies placing emphasis on the role of the Member States; and the Common Foreign and Security Policy, despite a lot of rhetoric claiming otherwise, was still firmly in intergovernmental hands, to mention just a few examples. This had cast further doubt on the claim of early supranational integration theories that the European nation state had become obsolete and that sub-, supra- and transnational networks, with the help and under the leadership of the Commission, had taken over. After the bout of Europhoria and the reinvigorated supranational interpretations of the integration process that accompanied the Single Market programme (from the Milan summit to the Maastricht summit), the difficulties in the ratification of the Maastricht Treaty heralded the return of the intergovernmentalists.

Indeed, even with regard to the Common Commercial Policy (the traditional stronghold of EC exclusive competence in the field of external relations), intergovernmental pressure seemed to be growing with the signing of the Marrakesh Agreements establishing the World Trade Organisation (WTO). The Commission, having had exclusive competence over traditional trade issues (i.e. trade in goods) since the Treaty of Rome, appeared to have overplayed its hand in claiming that the 'new' issue areas of trade in services (GATS) and trade related aspects of intellectual property rights (TRIPS) also fell within the sphere of this

⁵ This became painfully evident in the Spring of 2005 with the stand-off between the Commission and the Council in the context of the application of the excessive deficit procedure vis-à-vis France and Germany, where the Commission eventually had to backtrack.

exclusive competence. The ECJ, following the interpretation of most Member States, ruled differently. In its infamous Opinion 1/94 the Court confirmed that the EC enjoys exclusive competence with regard to trade in goods and also for cross-border services (see Court, 1994).⁶ But it denied the EC exclusive competence over other types of trade in services and for trade related aspects of intellectual property rights. What is remarkable about Opinion 1/94 is that the Court refused to stick its neck out and extend the exclusive competence to GATS and TRIPS, even though on legal grounds a coherent argument could be made for granting the EC these competences (see for example Bourgeois, 1995; Pescatore, 1999; Hilf, 1995). This is remarkable because, since the 1970s, the Court had usually been a rather reliable ally of the Commission in the deepening and widening of the scope of Community competences. Now it put the ball back into the politicians' court.

The deeper substantial issue was the background against which the ruling was issued. Confidence in the EU and in particular in its supranational agent and embodiment, the Commission, was at an all-time low. There were several reasons for this. One of them had to do with the difficulties with the ratification of the Maastricht Treaty in France and Denmark and the overconfident and intrusive attitude of the Delors Commission (see Duff, 1994: p. 55).⁷ Another was to do with the Blair House debacle in the Uruguay Round of global trade negotiations, supposedly caused by a 'runaway' Commission, going way beyond its official mandate. After the optimism surrounding the creation of the Single European Market, the prospects for Europhiles and assorted Federalists were looking rather bleak in the 1990's.

⁶ Cross-border services are one of the four categories of services that are mentioned in the General Agreement on Trade in Services. The others are the supply of a service: (a) 'in the territory of one Member to the service consumer of any other Member', (b) 'by a service supplier of one Member, through commercial presence in the territory of any other Member', and (c) 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member' (WTO, 2002: p. 287).

⁷ Apart from the very narrow margin of the 'yes'-vote in France, there was also the serious legal challenge before the Bundesverfassungsgericht in Germany. So both members of the Franco-German axis (often described as the motor of European integration) encountered serious difficulties in the ratification of Maastricht.

Because the EC did not have exclusive competence over all the issues involved, the WTO charter was signed as a 'mixed' agreement (see earlier). Surprisingly enough, although the EC lacks exclusive competence with regard to the new trade issues (GATS and TRIPS), the Commission has nonetheless succeeded in playing a central role in the WTO (and most notably in its dispute settlement understanding, the centrepiece of the new organisation), also on TRIPS-related issues. The question that arises then is why the Commission has been able to become the key player in a field where many Member States tried so hard to push it back, and where even the Commission's traditional and natural ally within the EU, the ECJ, has refused to support it. Or, put differently, how come the Commission has been able to gain powers in such a hostile environment of increasingly EU-sceptic publics, and faced with stiff resistance and hostility by the Member States? This brings us to the main research question of this thesis: *when and why can the Commission strengthen its position and gain influence vis-à-vis the Member States in international settings?*

In general, one can conceive, roughly, of three main roads to changing the division of competences in the EU. This can be done by formal Treaty change, it can happen because of judicial activism, or it can come about by Commission agency. From the initial description of the TRIPS-case, it will already have become clear that judicial activism can safely be ruled out as an option: Opinion 1/94 excluded most of GATS and TRIPS from the exclusive Community competences. Nor has the creation of the WTO been accompanied by a Treaty change. Indeed, most of the Member States (and all of the big ones) dismissed the Commission's broad interpretation of art. 133 EC. Therefore, the explanation for this puzzle has to be sought in the exertion of agency by the Commission. Although this might seem nothing more than logic itself because of the way these choices were presented, it is nonetheless neither as straightforward nor as self-evident as it might seem on the face of it. It is true that the exertion of bureaucratic drift on behalf of the Commission is probably the 'easiest' of the three options to change the balance of competences, in the sense that the barriers

for change are lower than for Treaty change or judicial review, both of which entail tiresome, cumbersome and time-consuming procedures. However, agency by the Commission is arguably also the most contentious option since the Member States will often be loath to allow the transfer, *de facto* or *de jure*, of more competences, especially ones with external (i.e. international) aspects, to the Community level.⁸ On the other hand, in a dynamic and rapidly changing environment, the efficacy of static divisions of power is not always optimal and therefore the Commission will be strongly pressed to seek greater powers in order to cope with new challenges. The alternative is a relative decline in its powers (compare it with the ‘cycle theory’; see Preeg, 1995).

In this section I have indicated that the prominent role the Commission plays in the WTO with regard to TRIPS-related issues is surprising (this case study is worked out in more detail in chapter three). That is mainly because of the extent and intensity of Member States’ opposition for granting the EC exclusive competence in these areas (as confirmed by the ECJ). This matters because if these issues fell within the scope of exclusive community competences, then the Commission would be the sole and legitimate player with regard to these cases in the WTO. For this reason, Opinion 1/94 can be seen as yet another step in the continuous struggle for power and influence between the Commission (as the supranational defender of Community interests) and the Member States gathered in the Council (defending their sovereignty and national interests). This thesis claims that the Commission will act strategically and that it uses its influence and position in international regimes in order to increase its powers and competences. One of the main contributions of the thesis will therefore be to shed light on the reasons behind, and on the processes and dynamics of this Commission ‘drifting’ in international regimes, and to identify the facilitating conditions under which this process can take place. In the next sections of this chapter, the most important

⁸ I use the terms ‘drift’ or ‘agency’ to refer to situations where the Commission pursues or tries to pursue policy options that differ from the preferences of the relevant body of Member States (depending on the voting rule in place and on the importance of the Member State(s) involved). This will be further discussed and clarified in chapter 2 when the principal-agent framework is presented.

theories of European integration are briefly reviewed. After an approach is presented, attention will turn to the role the theory at hand attributes to the Commission, but also how this theory would try to explain the Commission's surprisingly strong position concerning TRIPS-related issues. It will be argued that none of the main theories offers an adequate explanation for the puzzle that was presented.

1.3. The Commission in the supranational paradigm

The early studies trying to explain the process of European integration were firmly rooted in the liberal camp of the international relations debate. Indeed, the integration process itself, even though it was scarcely out of the egg, was seen as a vindication and a victory of the liberal approach of international relations over the predominant, realist, paradigm. Because of the importance they attach to the concepts of power and sovereignty, realist theories seemed particularly unsuited for explaining what was happening in Europe. They were sidelined by a regional integration process in which sovereign countries voluntarily and peacefully gave up some of their power to a supranational institution (the High Authority, later the European Commission). From a realist point of view, this Commission could not be much more than a tool for implementing the preferences of the Member States. Liberal theories, on the other hand, seemed to be in a much better position to cope with this new form of international cooperation because of their firm belief "that in the long run cooperation based on mutual interests will prevail" (Jackson and Sørensen, 1999: p. 109).

On the most basic level, the initial debate was about the (ir)relevance of the nation state with the supranationalists sounding the death-knell of the sovereign state as the key player (and thus the basic unit of analysis) in international relations. Instead, these approaches granted substantial influence to the new supranational institutions (and the Commission in particular). Later the debate became more

sophisticated and centred around the *limits* of the powers and the sovereignty of the nation state in regional cooperation agreements or, alternatively, around “the limits of European integration” (Taylor, 1983; 1993).

Federalism and neo-functionalism

The supranationalist paradigm consists, roughly, of two schools of thought: federalism and neo-functionalism. The basic federalist reasoning went that the destruction and loss of yet another ‘Great War’ on the European continent led to a catharsis (see Spinelli, 1972). The insight gained was that the nation state is unsuitable as a unit for international relations since states were prone to fight each other and that a federation was the best alternative to ensure a peaceful existence.⁹ Although the European Parliament is the natural habitat of the federalists, they acknowledge readily that the Commission is still at the heart of the Union. Because of its institutional position, it is much more central than the Parliament in the EU decision-making process (although there is a steady increase in the powers and influence of the Parliament since Maastricht). The stress, however, is on the federal ideas of “the political and administrative elites working in the Commission” (Burgess, 1989: p. 6) rather than on any inherent federalism of the Commission as an institution. These federal ideas find their origins, not in an ideological conviction, but rather in the practice of “the institutional dilemmas confronting a supranational body operating within a predominantly intergovernmental framework” (*ibid.*). In other words, federalism is just a practical solution to the day-to-day problems of running Europe.

Neofunctionalism, the other supranationalist school, is more widely known and has been more influential than federalism. The two pioneers of the neofunctionalist approach to European integration undoubtedly are Ernst Haas

⁹ Note that the first premise of this argument is in fact an acknowledgement of the explanatory power of classical realism since in a Hobbesian world states will always be competitors (and thus fight each other every now and again).

and Leon Lindberg. They first developed the neofunctionalist theory in their studies of the European Community of Steel and Coal (Haas, 1958) and the early years of the European Economic Community (Lindberg, 1963). The foundations of the neofunctionalist approach were laid earlier by David Mitrany's functionalism (Mitrany, 1943; 1965). Mitrany's aim was to create a global "working peace system" with a functional approach. This works because

"[B]y entrusting an authority with a certain task, carrying with it command over the requisite powers and means, a slice of sovereignty is transferred from the old authority to the new; and the accumulation of such partial transfers in time brings about a translation of the true seat of authority" (Mitrany, 1943: p. 31).

This basic thought (cooperation in technical domains as the starting point for an integration process) was taken up by Haas and his followers and applied to study of the process of regional integration that was taking place in Western Europe in the 1950s.

The cornerstone of the neofunctional approach is the concept of 'spill-over'. This comes in two forms: functional spill-over and political spill-over. Functional spill-over refers to the process in which integration in one sector causes technical pressures that will push for and ultimately lead to integration in other sectors. The rationale behind this reasoning is the notion of (economic) interdependence. Political spill-over refers to the process whereby political pressure is created favouring further integration. Or, more precisely, "the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states" (Haas, 1958: p. 16). Note that neofunctionalists usually ignore external pressures and the external environment. The integration process, according to them, works

according to the internal logic of spill-over.¹⁰ The key actors to bring this change about are elites and the Commission.

The role of the Commission in supranationalist theories

In this supranational logic, the Commission is the single most important institution in the Community since it is the pivot of the new, superior form of decision-making that was used in the EC and which Haas labelled 'supranationalism' (Haas, 1963: p. 64; see also Lindberg and Scheingold, 1970 who preferred to call it 'the Community method'). The quality of supranational decisions was higher than that of intergovernmental decisions since supranational decision-making went beyond the lowest common denominator. The reason for this lies in the role that the Commission has to play. The Commission is seen as a dynamic force, constantly brokering agreement in the Council and forming 'coalitions of the willing' with the governments committed to integration. On top of that, because of its institutional position (its right of initiative and withdrawal of proposals, the concentration of technical expertise, etc.) the Commission was in a strong position to define the alternatives to the Member States. In other words, the Commission could heavily influence the final outcome (see Haas, 1958: 484). The image of the Commission in the early neofunctionalist theories, then, is that of a dynamic force that leaves its mark on the final policy outcome in the sense that it succeeds in reaching outcomes that move beyond the lowest common denominator. This success can be explained by looking at the institutional position of the Commission, and, most importantly, the leadership it provides.

Ever since Haas and Lindberg first articulated their neofunctional approach to the European integration process, there has been a constant refining of the original

¹⁰ In this respect, it should be noted that the 'externalisation hypothesis' that was introduced by the neofunctionalists (Schmitter, 1969) refers to the interaction of the group members with third parties rather than that it incorporates other external factors that impact upon the integration process into the analysis.

theory and its assumptions, certainly in the light of the ‘Gaullist revolution’ of the 1960s (see next section). The more radical propositions (eg that the sovereign state was dead) were nuanced, the teleological aspect was discarded of (see Muttimer, 1989; Tranholm-Mikkelsen, 1991), and the general importance of spill-over was traded in for a focus on the partial relevance of spill-over in specific policy domains and policies.¹¹ The two most important recent theories inspired by neo-functionalism probably are network analysis (Peterson, 1991; 1995; Richardson, 1996) and the multi-level governance approach (Marks, Hooghe and Blank, 1996; Kohler-Koch, 1996). These theories also stress the importance of the role of the Commission in influencing outcomes on the EU-level, as well as the fact that the Commission can act autonomously.

A supranational explanation for the TRIPS-puzzle?

How then would a supranational or neofunctional approach account for the position of the Commission with regard to TRIPS-issues in the WTO? Given the number of theories in the neofunctional mould and given their varying degrees of sophistication, the following account will inevitably fail to represent all the nuances of the various approaches. Instead, the three main principles for explaining the dynamics of European integration (and hence of Commission-Member State relations) that consistently arise in the most important theories are distilled. These are spill-over (functional and political), societal pressure (epistemic communities, transnational networks), and the autonomous role of the Commission.

Applying the notion of spill-over to the TRIPS-case, the basic argument would be that the already acquired exclusive competence in trade in goods creates pressure to extend this exclusive competence to the area of intellectual property rights. An

¹¹ See for example Peterson, 1991; Cram, 1994; Fuchs, 1994; McGowan, 2000; Thatcher, 2001; Mörth, 2000.

important element in this process of spill-over, supranationalists might argue, is that trade-issues are increasingly technical and therefore tend to be dealt with on the lower, technocratic levels of decision-making rather than at the political level. However, we have seen that the political representatives of the Member States did take a keen interest in what was going on and that they were very eager to keep control over these new issues of services and intellectual property rights. On top of that, trade issues increasingly are very political matters. That certainly goes for the TRIPS-case since it was politicised from the moment the division of competences between the EU and the Member States was mentioned, thereby transforming a technical discussion into a political one about “creeping competences” and “federalisation by stealth”.

The second major characteristic of supranational theories is the stress on societal pressure. One of the clearest manifestations of this phenomenon is lobbying by various interest groups. A supranational explanation would then expect to see a debate among and positioning of pressure groups. For example, federations of industries which stood to gain from exclusive EC competence with regard to TRIPS issues would be expected to lobby their governments to transfer these competences to the EC level. The person responsible for dealing with WTO and international trade issues at UNICE, the largest and most important business lobby group, flatly denied that this was the case (interview with Adrian Van den Hoven). Dr Van den Hoven explained that there is a general unwillingness on the part of these organisations to be drawn into competence fights between the Commission and the Member States. An important reason for this is that their member organisations have their roots and activities within the respective Member States. Therefore, it is not very attractive for them to get involved in Community politics since that has the potential to erode their basis in their home Member State.

Stressing the autonomous role of the Commission looks more promising. Given the proactive role of the Commission in its fight for power and influence, the

supranational portrayal of the Commission as more than just a Member State stooge gains credibility.

Conclusion

By stressing the relative independence of the Commission, and by depicting it as a dynamic policy entrepreneur, supranational theories claim that there is more to the Commission's role than meets the – intergovernmental – eye. The Commission actively works to have its preferences reflected in the final outcome by exercising leadership (see for example Vahl, 1997), relying on its technical expertise (to 'depoliticise' issues and thereby facilitating functional spill-over), and mobilising societal groups. However, neither the concept of spill-over, nor societal pressures provide a full and adequate explanation for the Commission's behaviour in the TRIPS-case. In particular, two important questions remain unanswered. The first one is why the Commission succeeded in its 'coup' at this particular point in time, and not earlier (or later)? The second question is why the Commission succeeded in becoming an important player with regard to TRIPS issues, but not for other issues in other areas? As an example, reference can be made to the Commission's weak role in the OECD. Any attempt to 'solve' the TRIPS-puzzle should also provide a satisfactory answer to these two questions.

1.4. The Commission in the intergovernmental paradigm

The realist paradigm, that had been dominating the study of international relations, was side-tracked by neofunctionalism in the early days of the European integration process. However, with the empty chair crisis in the 1960s and the attack on the supranational Commission by General de Gaulle, the re-emergence of the notions of 'national interest' and 'sovereignty' was a fact, and this paved the way for a strong realist comeback in the form of intergovernmentalism. If

supranationalism has its roots in the liberal IR theories, intergovernmentalism is firmly realist in nature. The basic intergovernmentalist claim is that the integration process is driven by the states and that these states are the main actors in the integration process since, ultimately, they are the ones who decide what to integrate, when to integrate, and how far to integrate. The guiding principle is self-interest since sovereign states will pursue their national interests. In this Hobbesian world, the moral imperative and the liberal idealism that characterises the early supranationalism is considered naïve at best. The empty chair crisis and the solution to it – the Luxembourg compromise – put the states back on the map as relevant players in the European integration process and it presented a serious challenge to the neofunctional view and the explanatory power of this theory.

The basics of intergovernmentalism

One of the first scholars in the intergovernmental camp to critically assess the neofunctionalist view on the European integration process is Stanley Hoffmann (see for example Hoffmann, 1964). This American scholar was highly sceptical about the supranational claim that the nation state had become obsolete. According to Hoffmann, the integration process was successful because its scope was limited and it dealt with issues of ‘low’ politics. Integration, still according to Hoffmann, was inconceivable for issues belonging to the sphere of ‘high’ politics since this domain is dominated by the national interest of sovereign states. In his own words: “[a] common fate has created a unity of concern in this little ‘cape of Asia’ but there is no unity of reaction. For each nation fate has been slightly different, and the common fate is not perceived alike” (Hoffmann, 1964a: p. 1272).

The main criticism of Hoffmann’s theory focussed on his notion of an inviolable boundary between the nation state and the environment in which it operates. The inspiration for these critics was the increasing global interdependence and the interdependence literature that emerged as a result of this. Later they were also

strengthened by the surge in European integration that accompanied the creation of the Single Market. The counter-reaction to this liberal critique was a refinement of the intergovernmental paradigm. Paul Taylor took a leading role in this process in the mid 1970s by developing a confederalist model for understanding the European integration process (see Taylor, 1975). The key aspect is that states cooperate by pooling certain resources and working closely together in order to attain mutually advantageous outcomes or at the very least to come to a certain degree of convergence.

It was Moravcsik who in the 1990s developed the most recent, and arguably the most influential and best-argued intergovernmental account. Reacting against a supranationalist resurgence that accompanied the Single European Act (see Zysman and Sandholtz, 1989), Moravcsik proposed an alternative, intergovernmental explanation for the 'Europe 1992' project (see Moravcsik, 1991). First, he looked at the negotiating history of the Single European Act and he concluded that

“[T]he findings challenge the prominent view that institutional reform resulted from an elite alliance between EC officials and pan-European business interest groups. The negotiating history is more consistent with the alternative explanation that EC reform rested on interstate bargains between Britain, France, and Germany” (Moravcsik, 1991: p. 20-21).

Moravcsik explicitly places his approach in the tradition of Keohane's 'modified structural realist' view of regime change (see Moravcsik, 1991; Keohane, 1984). Here, states are still the principal actors in international relations and, in the best realist tradition, national interest and relative power are the elements that shape interstate bargains. However, Moravcsik avoids the neo-realist pitfall of the state as 'billiard ball' (see Waltz, 1954). He clearly argues that “[S]tates are not “black boxes” (...). State interests change over time, often in ways which are decisive for the integration process but which cannot be traced to shifts in the relative power of states” (Moravcsik, 1991: p. 27). In a later reformulation of his 'liberal

intergovernmental' theory, Moravcsik uses the two level game terminology more explicitly by stating that "state behaviour reflects the rational actions of governments constrained at home by domestic societal pressures and abroad by their strategic environment" (Moravcsik, 1993: p. 473).¹² This liberal intergovernmentalism wants to offer a more complete and plausible theory of European integration by bringing together theories of preferences (the domestic level), bargaining (the international level), and regimes (the international level, two level games). Nonetheless, states still reign supreme and supranational institutions only play a marginal role in this approach

The role of the Commission in intergovernmentalism

In confederalism, the role of the Commission is that of mediator: the Commission's task is to actively try to get the governments to reach agreements. In Taylor's words, the Commission "accepted the status of 'interest group'" (Taylor, 1975: p. 348). The constraints that the Member States of the European Community faced were not the result of the dynamic force of 'spill-over' as the supranationalists claimed, but, rather, they were self-imposed in order to stimulate the (interstate) diplomatic contacts that lead to mutual benefits. The confederalists acknowledged that there were tensions between the supranational institutions (Commission, Court of Justice, Parliament) and the prime intergovernmental institution (the Council). But given its legislative dominance in the European decision-making structure, they reasoned that the Council (read: the Member States) should usually prevail over the supranational pressures from Commission and/or Parliament.

¹² The image of the 'two level game' forged a compromise between the neo-realist model of the 'state as black box' and the naïve supranational image of obsolete states being replaced by a network of global transnational relations. Here, the domestic and the international level are not regarded as being insulated from each other, but instead they were seen to be constantly influencing each other. The international sphere becomes part of the domestic calculations and interests since some domestic problems cannot be solved unilaterally. On the other hand, the higher the degree of interdependence, the more often domestic decisions will have consequences in the international sphere. For a detailed account of the two level game, see Putnam, 1988; Evans *et al.*, 1993; Milner, 1997.

The confederalist dynamics of the integration process can be summarised as follows: because of global pressures (opportunities or constraints) states decide to cooperate (further), in order to facilitate this cooperation they create institutions and develop procedures by which they agree to be bound with regards to day to day decisions. However, since the states keep control of the key legislative institution they can still defend their interests once they have agreed to be bound. In other words, confederalists acknowledge that there are elements of supranationalism and supranational influence, but they concur with the realist notion that, ultimately, the states are in control and they are the ones steering and driving the integration process. And since these states are driven by national interest, integration can only go so far: these are “the limits to integration” (Taylor, 1983).

Also in Moravcsik’s liberal intergovernmentalism, the Commission is deprived of the dynamic entrepreneurial leadership attributed to it by some of the more recent supranational theories. The primary source of integration lies in the national interests of the Member States (and their relative power needed to have these interests reflected in the outcomes) rather than in Brussels. The Commission has some leeway, but only in so far as it concerns issues or areas where the Member States have already paved the way. Any claim of the Commission as a dynamic driving force in the process of European integration, pushing the Member States in agreements they dislike, is wildly exaggerated in Moravcsik’s view (see Moravcsik, 1991; 1993; 1995; 1998).

An intergovernmental explanation to the TRIPS-puzzle?

From the above description, it already becomes clear that the intergovernmental approach struggles to come up with an explanation for the Commission’s successful *coup* in the area of intellectual property rights. The chief explanatory variable, from an intergovernmental point of view, is Member State preference.

This does not entail that the preferences of all Member States will be taken into account or reflected in the outcome, but at the very least there has to be a 'grand bargain' between the big three Member States: Germany, France, and the UK. However, all three countries (together with others) opposed the Commission's interpretation that trade in services and trade-related aspects of intellectual property rights fell under the exclusive competence of art. 133 EC. So the intergovernmental explanation that the Commission gained these *de facto* competences and powers because the Member States allocated them or did not object to the Commission claiming them, looks dubious at best.

Of course it could be argued that Member State preferences could change over time. In this interpretation, the fact that Member States denied these new competences to the Commission does not preclude the possibility of granting these powers at a later stage. Nonetheless, the centrality and importance of Opinion 1/94 in the legal literature together with the intensity with which most of the Member States fought the interpretation of the Commission seems to indicate that the issues at stake were deemed to be very important to those Member States. It would therefore be rather strange that Member State preferences on such a salient issue would change so drastically and dramatically in the span of only a couple of years.

Conclusion

In intergovernmental theories, there is very little space for autonomous action on behalf of the Commission. This is not to say that there can be no such action at all, but it will be confined to issues where the Member States decide to allow the Commission to act in that way. Ultimately, however, the Member States are still the ones pulling the strings. An intergovernmental explanation therefore also fails to provide a full and adequate answer to the TRIPS-puzzle.

1.5. The Commission and new institutionalism

Even though the recent (and more sophisticated) theories within the supranational and the intergovernmental paradigm have partly bridged the ideological divide between the two paradigms, they still talk to each other in different languages, namely that of comparative politics and international relations respectively (see Dowding, 2000) so that neither approach finds much hearing at the other side of the theoretical spectrum. This section deals with the new institutionalist approach to the European integration process. This approach is an influential attempt to come to a more integrated study of European integration, reconciling the two traditional strands of thought with all their differences in ideology and methodology.

In the second half of the 1990s, some scholars applied the ‘new institutionalism’ to the study of the EU (see Pierson, 1996; Pollack, 1996; 1997; Bulmer, 1993; 1998). From such a point of view, “it matters less whether politics occurs within or among nations. What matters more is that politics occurs within a framework of mutually understood principles, norms, rules, or procedures – that is, within an institutional context” (Jupille and Caporaso, 1999: p. 431). Institutional approaches maintain the basic intergovernmental premise that power and preferences of the Member States are crucial in setting up and changing European institutions and that the Member States continue to play an important role. But at the same time they also point out that, once created, institutions become active players in the policy process. In other words, institutions become “intervening variables between the preferences and power of the member governments on the one hand, and the ultimate policy outputs of EC governance on the other” (Pollack, 1996.: p. 431).

The basics of new institutionalism

As Dowding has noted “[s]ince Arrow (1951 – 1963) we have known that ‘institutions matter’ because the outcome of any preference-aggregating procedure depends on the principles adopted as much as the preferences of the actors” (Dowding, 2000: 126). As this quote indicates, during the past decades the question gradually shifted from ‘*do* institutions matter’ towards ‘*how* or *under which circumstances* do institutions matter’. In the last two decades of the 20th century institutionalist theory made a glorious comeback. New institutionalist theories and approaches shot up like mushrooms, and the term ‘institution’ shook off its negative connotation and moved back to the centre of political science.

The term ‘new institutionalism’ was introduced by March and Olsen in their seminal article ‘The New Institutionalism: Organizational Factors in Political Life’ (March and Olsen, 1984). However, the term ‘new institutionalism’ in the title of March and Olsen’s article is a bit of a misnomer since it seems to imply that it refers to a homogenous strand of thought. In practice, there are several, often very different, new institutionalist approaches. Therefore, the title of an article by Hall and Taylor might be more appropriate: ‘Political Science and the Three New Institutionalisms’ (Hall and Taylor, 1996). Whether the range of new institutionalist approaches is indeed limited to three is another matter open to discussion. An earlier version of their paper was titled ‘Political Science and the Four New Institutionalisms’ (see the references in Finnemore, 1996). And Peters goes even further. For him “it is clear that there are at least six versions of the new institutionalism in current use” (Peters, 1999: p. 17).

The two most popular strands of new institutionalism are the historical institutionalist variant and its rational choice counterpart. Despite some differences in emphasis, the basic premise of these two variants is the same: institutions matter and they influence outcomes. Since Scharpf published his article on the ‘joint decision trap’ (Scharpf, 1988), there has been an ever growing number of studies applying rational choice institutionalism to the study of the



European Union/Community.¹³ This literature has its origins in Shepsle's work on institutions in the US Congress (Shepsle, 1979; 1989). Drawing on the observation that policy choices are unstable in majoritarian systems of decision-making (McKelvey, 1976; Riker, 1980), Shepsle showed that also the institutional structure (and not only preferences) mattered in reaching equilibria. He called this institutionally-enriched equilibrium concept 'structure-induced equilibrium'. In other words, Shepsle claimed that preferences are only part of the picture and in order to be able to more fully understand policy outcomes, institutions have to be taken into account as well. The historical institutionalist literature can be traced back to Thelen and Steinmo's influential account of the historical institutionalist approach (see Thelen and Steinmo, 1992) and was subsequently applied to the EC/EU (see Pierson, 1996, 2000a, 2000b; Kerremans, 1996). The main differences between this approach and its rational choice counterpart are about the nature of preferences and the nature of institutional origins and change.

The issue of preference formation is, according to Thelen and Steinmo, the main difference between the two approaches: "[t]hus one, perhaps *the*, core difference between rational choice institutionalism and historical institutionalism lies in the question of preference formation, whether treated as exogenous (rational choice) or endogenous (historical institutionalism)" (Thelen and Steinmo, 1992: p. 9; original emphasis). In the 'hard core' rational choice theory preferences are exogenous because of the assumption of rational calculus. Actors act strategically and this means that the process is characterised by extensive calculation of (perceived) costs and (perceived) benefits.¹⁴ Therefore, preferences have to be exogenous since otherwise it would be impossible for actors to rank their preferences and act accordingly. Historical institutionalists, on the other hand, claim that preferences are formed in the context of an institutional structure. In other words,

¹³ See for example Garrett and Weingast, 1993; Tsebelis, 1994; 2000; 2002; Garrett and Tsebelis, 1996; Scharpf, 1997.

¹⁴ For a general view of these behavioural assumptions and their practical applications, see Shepsle, 1979; Shepsle and Weingast, 1987; Elster and Hylland, 1986.

“[...] institutions are not just another variable, and the institutionalist claim is more than just “institutions matter too”. By shaping not just actors’ strategies (as in rational choice), but their own goals as well, and by mediating their relations of cooperation and conflict, institutions structure political situations and leave their own imprints on political outcomes” (Thelen and Steinmo, 1992: p. 9)

The rational choice institutionalists have answered this critique by stressing the *interaction* of individual (exogenous) preferences and institutional-induced (endogenous) preferences. This is aptly summarised by Peters who notes that:

“[f]or most rational choice theorists those conceptions are exogenous to the theories and of little or no concern to the theorists. Institutional versions of the theory, however, must be concerned with how individuals and institutions interact to create preferences. [...] As institutions become more successful they are more able to shape individual preferences, sometimes even before they formally join the institution. In institutional rational choice some preferences, e.g. a general drive toward utility maximization, appear to be exogenous, while some preferences also may be endogenous to the organization” (Peters, 1999: p. 44; a similar view is expressed by Milner, 1997: p. 66)

Pierson has attacked rational choice institutionalism for failing to adequately explain institutional origins and institutional change (Pierson, 1996, 2000a, 2000b). He rejects the functionalist explanation that rational choice scholars use for addressing the creation of institutions (‘a certain institution is chosen because it is the most efficient for fulfilling a certain task’). According to Pierson, there are four main objections to this reasoning. Firstly, political institutions are more likely to be inefficient than economic institutions because of the lack of market pressures. The two efficiency generating market mechanisms, competition and learning, are far less effective when it comes to political institutions. The political environment, Pierson argues, is more permissive than the economic one thereby reducing competition (see Pierson, 2000). Learning is hindered by path

dependency (see Pierson, 2000a). On top of that, Garrett and Weingast have indicated that often there are several alternatives. A functional approach cannot explain why a particular set of institutions is preferred since the alternatives are equally efficient (see Garrett and Weingast, 1993).

Secondly, Pierson points to the fallacy of the rational design of institutions. The notion that institutions are intentional, far-sighted choices of purposive, intentional actors is optimistic at best since every adjective in this description is questionable. Actors are sometimes motivated by what seems appropriate instead of by what would be effective. Thirdly, politicians usually have short time horizons, which creates a problem of time inconsistency. And fourthly, this view ignores the possibility of unintended consequences. Pollack takes heed of these “powerful criticisms” and concludes that “we should begin with the policy preferences and the institutional preferences of the actors, describe and explain the process of institutional choice, and take note of the subsequent evolution, including the unintended consequences, of that institutional choice” (Pollack, 1996: p. 434).

In particular regarding the application of the new institutionalism to the study of European integration, a cross-fertilisation has taken place between rational choice and historical institutionalism. Scholars like Pierson and Pollack are not constrained by ideological borders between paradigms and the result is the creation of an approach that has a basic rational choice orientation, but avoids the pitfalls of the ‘hard core’ rational choice theory. In this approach, states are still firmly in control when it comes to the creation and/or changing of institutions, as is illustrated in the EU by the requirement of unanimity for treaty change (and for a new treaty to come into force of course). However, once created, these institutions will have their own preferences and they will exert influence through various sub-, trans-, and supranational channels in order to have these preferences reflected in policy outcomes. The new institutionalism has thus drastically redefined the debate when it comes to European integration. Now it is possible to acknowledge the (initial) primacy of the Member States without having to

designate the supranational institutions as irrelevant. Or, alternatively, to point to the impact of the supranational institutions without having to broadcast the obsolescence of the sovereign state. Instead, the focus is back on the limits of sovereignty and supranationalism, or how actors (be they of an intergovernmental, supranational, or transnational nature) act strategically in response to the limitations they are confronted with.

The role of the Commission in the new institutionalism

The institutionalist approach attributes an independent role to the Commission, but this independence is constrained by the institutional structure put in place by the Member States. The role of the Commission will therefore vary from one topic to another and from one issue area to another, depending on a combination of Member State preferences, the institutional framework in place, and Commission preferences. The preferences of the Member States determine how much 'drift' they are willing to accept. The Commission's preferences show the extent to which the Commission would have to drift if it were to obtain its favoured outcome. There will usually be at least some divergence between the preferences of the Commission and those of the Member States. The two extremes of the continuum normally are not an option. Keeping such tight control on the Commission to make sure that no other option than the one most preferred by the Council is obtained, is not a viable strategy for the Council since it is prohibitively costly. Likewise, it will be impossible for the Commission to pursue its preferred strategy irrespective of the Council's preferences since the Council would certainly block such a move. The result is a 'grey zone' that is characterised by turf wars and struggles for power between the Commission and the Council. The outcomes of the struggles in this zone are partly determined by the institutional framework in place.

For example, if the Commission oversteps the Council's 'tolerance barrier', the scope and force of the Member States' reaction will depend on the institutional

framework in place, i.e. the rules and how these rules are to be applied. The Commission will have less leeway if a Council decision on its proposals requires unanimity rather than a qualified majority. If there is a unanimity requirement, the Commission's domain of potential action is determined by the preferences of the most and least reluctant Member States (*vis-à-vis* the status quo). As long as the Commission stays within the 'unanimity' area where all Member States prefer the Commission's proposal rather than the status quo, there will never be a coalition against its actions. If only a qualified majority is required, the Commission will gain influence since there is no need to take the most divergent Member States' preferences into account.¹⁵ Note, however, that the institutional framework not only refers to the formal rules, but that it also comprises informal rules and arrangements. In this respect, a proposal formally falling within the preferences of a winning qualified majority of Member States can still be defeated because of socialisation effects (a reluctance to go against the explicit wishes of fellow Member States) or pork-barrel politics (which change the costs and/or benefits of particular policies).

An institutionalist explanation to the TRIPS-puzzle

The institutionalist approach attributes a certain degree of autonomy to the Commission. This will be central in an institutionalist reading of the puzzle. Given that the Member States have tried – and failed – to rein in the Commission in the new issue areas in the WTO, the explanation for the success in Commission activism has to be sought in this autonomy that the Commission possesses. The reason why the Commission has succeeded in increasing its external powers, against the wishes of the Member States, is because of bureaucratic drift. However, this raises some other important questions. The most pressing one being

¹⁵ As Meunier has shown rather convincingly, this is not necessarily true externally, i.e. in international (multilateral) negotiations (see Meunier, 2000; 2005). However, we are referring to the situation internally, within the EC. And here the area of possible outcomes – and thus of Commission influence – increases with a shift from unanimity voting to QMV.

why the Commission succeeds in ‘shirking’ in this case, but not in other, similar, cases. A good case in point is the comparison of the Commission’s role with regard to TRIPS-issues with its role concerning the issue of investment. Why did the Commission fail to play an important role in international investment issues when these were being discussed within the OECD, even though they are very similar to the trade in services and trade-related aspects of intellectual property rights issues? Surely the same dynamics can be expected to be playing for similar issues? Yet, as will be shown later, the Commission’s role in the negotiations for a Multilateral Agreement on Investment was not nearly as prominent as it would have wished. To conclude, this institutional approach does come closest to providing a satisfactory answer. In the next chapter, the framework that applies this approach to the study of European integration (the principal-agent approach) will therefore be taken as a starting point. However, despite the promising start, some questions remain unanswered and this approach cannot offer a fully convincing explanation to the puzzle either. Therefore, it will have to be refined further if it is to be applied to the EC’s external relations. The next chapter will indicate how this thesis proposes to do that. After having tested the hypotheses in the empirical chapters, the concluding chapter will then incorporate these findings in a more coherent theoretical framework.

Conclusion

This section discussed the new institutionalism as an alternative approach to the study of the European integration process and Commission–Member State relations. The new institutionalism strikes a balance between the intergovernmental and the supranational paradigms by accepting the importance of the central concepts of both theories, but avoiding the pitfalls. Or, as one of the leading voices of the institutional approach states: “these [new institutional] contributions [on European integration] offer the promise of overcoming the current impasse of the neofunctionalist / intergovernmentalist debate and generating a new theoretical synthesis combining many of the fundamental

insights of both approaches” (Pollack, 1996: p. 430). To achieve this, Pollack provides a new methodological toolbox in the form of the principal-agent analysis (see next chapter). The new institutionalism, similar to supranationalist interpretations, points out that the Commission enjoys some leeway, but it adds that the institutional framework in place limits this Commission autonomy. While this approach comes closer to addressing the puzzle, it, too, cannot account for most of the variation. The concluding chapter of this thesis will contribute to the further development of this approach by suggesting additions to enable it to explain more of the variation in the degree of integration in the EC’s external relations.

CONCLUSION

That there is a cleavage in the institutional set-up of the European Union between supranational and intergovernmental interests, is nothing new and it certainly is not surprising. Nor is the proposition that the European Commission is the natural ally of the supranationalists and the Council of Ministers the staunch defender of intergovernmental interests. The fact is that the European construction is a highly delicate balance of interests and conflicting ideas on where Europe stands and where it should be heading (or indeed about what Europe means). Even the slightest change in this balance can lead to frictions. A good illustration of this is the constant haggling at every Intergovernmental Conference (IGC), which often more closely resembles a fratricide than the building of a new family house.

IGCs are not the only way of changing the balance of power, however. The European Court of Justice can tilt the balance in a more supranational direction, and has repeatedly done so in the past (most famously with its *Cassis de Dijon*-ruling, see Court, 1979a). But as Opinion 1/94 has shown, there are limits to this judicial activism. The ECJ is also susceptible to the mood of the times and will tread more carefully in periods of increased Euroscepticism (like the 1990s). On top of that, the single most important source of the ECJ’s influence and power

stems from the principle of the supremacy of EC law. However, this supremacy was self-awarded and has limits in that it can only be maintained as long and in so far as the national courts uphold it. Being susceptible to the general mood is therefore not an irrational strategy for the ECJ.

The most common, but usually also lowest profile, way of changing the balance of power is by Commission activism. Many authors have studied the Commission's strategies for gaining more competences by stealth in various issue areas, from big projects like the Single European Act and the creation of the internal market to very specific areas like social policy and technology (Cram, 1994; Fuchs, 1994; Mörth, 2000; Thatcher, 2001). The situation changes drastically when it comes to external competences. External competences and the representation functions that ensue are convenient ways for states to profile themselves. Furthermore, the international recognition and profiling can quite easily be used for domestic electoral gain by using the prestige of the company of international leaders to reflect true statesmanship. The visibility and the domestic usefulness of external powers should therefore make it harder for the Commission to increase its powers by stealth in this domain. Nevertheless it succeeds in gaining competences and powers in some international regimes, as the TRIPS-case has shown, though not necessarily in others.

Neither of the two main paradigms for studying European integration could give an adequate answer to the question why the Commission succeeded in playing an important role in the TRIPS-case, nor could they account for the variation in the Commission's role in various international regimes. A new institutional approach added some valuable elements to the analysis, like a more sophisticated methodological toolbox and a renewed attention for the institutional framework, but ultimately it also failed to give a satisfactory answer to the questions posed. This thesis claims that the reason for this failure of even the more sophisticated institutional analysis is the lack of attention for the *external* framework in which Commission-Member State relations take place. The theoretical ambition of this thesis is to fill that gap and to offer some adjustments to the principal-agent

analysis so that it becomes better suited for studying (and leads to a better understanding of) the European integration process when it comes to the external relations of the EU.

2

DELEGATION AND AGENCY: INTRODUCING THE RESEARCH DESIGN

INTRODUCTION

This chapter puts forward an alternative explanation to the central puzzle that was presented in the previous one: why did the Commission succeed in playing an important role in TRIPS-issues within the WTO, despite seemingly adverse conditions? The scope of the research is then broadened and, based on the conclusions from this case, specific research questions and hypotheses are then formulated and a research design is developed in order to test these premises. The starting point is a specific application of the new institutionalist theory as discussed in the previous chapter: the principal-agent approach as it has been applied to the study of the European integration process (Pollack, 1996; 2000; 2003). The previous chapter explained how the new institutionalist approach was deemed to be the most promising (combining the best of intergovernmentalism and neofunctionalism while avoiding most of the pitfalls), as well as the most-clearly operationalised one. It also referred to the principal-agent approach as one of the clearest and most promising frameworks for understanding the European integration process. However, it was also noted that even this approach could not

provide an adequate explanation for the counterintuitive success of the Commission regarding TRIPS in the WTO, and that it needs to be refined slightly if it is to be of use for scholars of the EU's external relations as well. In this chapter it will be argued that the reason for this is that the integration theories that were discussed earlier are all too much focussed on *internal* dynamics and often lose sight of the *external* factors, something which cannot be ignored when studying the external relations of the EU. The general argument is then that the institutional characteristics of the international regime can also have an influence on the Commission's ability to exert and gain influence and power.¹

This chapter consists of three main sections. The first section focuses on the principal-agent approach. After a brief general overview of the essential elements, the principal-agent approach is presented as an integration theory and the concept of 'delegation' in the light of this approach is given particular attention. The second section forms the core of the research design. It contains the hypotheses and it constructs a research set-up to test the hypotheses. It also discusses alternative explanations. The third section presents the case studies that live up to the selection criteria and that will be used to test the hypotheses.

2.1. The principal-agent analysis as an integration 'theory'

The principal-agent model was originally developed in America by scholars studying the US Congress and it builds heavily on transaction cost economics. More recently, Mark Pollack has applied it to the study of EU decision-making (see Pollack, 1996; 1997; 2000; 2003; 2003a). In the application of this model to the EU, the Member States are the 'principals' who, under certain conditions, delegate authority for certain functions to a supranational 'agent' such as the Commission (or the Court of Justice, or the European Parliament, ...). The

¹ Throughout this thesis, the term 'regime' will be used as referring to a formal international organisation or international multilateral agreement.

question now is to what extent the supranational agent can carry out its functions independently of the influence of the principals, or, alternatively, how the principals can keep an eye on the agent. Such oversight might be desirable for the principals since

“this initial delegation immediately raises another problem: What if the agent, say the Commission, has preferences systematically distinct from those of the member governments and uses its delegated powers to pursue its own preferences at the expense of the preferences of the principals?” (Pollack, 1997: p. 108).

At least some conflict between the interests of the principals and agents is inevitable, according to Kiewiet and McCubbins, since “[A]gents behave opportunistically, pursuing their own interests subject only to the constraints imposed by their relationship with the principal” (Kiewiet and McCubbins, 1991: p. 5). Therefore, delegation inevitably entails some side effects, or ‘agency losses’. The problem, in other words, is one of moral hazard: “the possibility that bureaucracies will choose policies that differ from the preferences of the enacting coalition” (Tsebelis and Yatahanas, 2002).

The two major examples of agency losses are bureaucratic drift or ‘shirking’, and ‘slippage’ (see Kiewiet and McCubbins, 1991). Slippage refers to a process when the structure of the delegation itself provides incentives for the agent to act against the preferences of the principals. Bureaucratic drift, also – somewhat counterintuitively – called shirking, refers to the process of agents pursuing their own preferences (that differ from those of the principal) as described above.² Moe notes that there are two preconditions for drifting. Agents should have an incentive *and* they should have the ability to pursue their own preferences (Moe, 1995). In this context, as Pollack rightly remarks, “the importance (...) of

² Because of the potential for confusion when using the term ‘shirking’, I will henceforth refer to ‘drifting’ by the Commission. This refers to the Commission pursuing or trying to pursue policy options that differ from the preferences of the relevant body of Member States (depending on the voting rule and on the importance of the Member State(s) involved).

information, and of asymmetrically distributed information in particular, can scarcely be overstated” (Pollack, 1997: p.108). The reason is that information about the agent and its activities is asymmetrically distributed in favour of the agent (see also Balla and Wright, 2001). So the installation of oversight mechanisms will enable the principal to monitor agent activity and to sanction the agent (to punish or reward it) in the light of the information gathered.

However, Kiewiet and McCubbins distinguish another measure to contain agency losses, namely enhanced screening and selection mechanisms (Kiewiet and McCubbins, 1991: pp. 29-31). These mechanisms are an attempt to tackle the ‘adverse selection’ problem (the inherent problem that the ‘wrong’ agents are attracted to apply for the job since they have an incentive to misrepresent their abilities and preferences). In this light, it is particularly informative to take a closer look at the selection of Commission officials. The *concours*, the entrance exam to hire Commission officials, is highly competitive and aimed at attracting the best candidates. While the majority of Commission officials have indeed passed an ‘entrance exam’, there are also some other kinds of Commission officials. *Parachutage* refers to the process whereby outsiders are parachuted into the services. This is “sometimes linked to the alleged planting of national flags on certain posts” (Stevens and Stevens, 2001: p. 84), although it is also used to provide members of Commissioners’ *cabinets* with a permanent post after the Commissioner’s term has ended. The positive aspect of this is that it is an infusion of knowledge and expertise into the services since the people who are guided into these positions tend to be senior civil servants in the national administrations. The *sousmarin* approach differs from *parachutage* in that it originates from within the Commission. If a DG has set its eye on someone but that person cannot be recruited via the normal competition route, for example on grounds of age,

“he or she may be employed on a contract as a consultant, thereafter obtain the status of auxiliary agent, graduate to a full temporary agent contract and

thus be eligible for the internal competition for establishment, for which the age requirements are waived” (Spence, 1997: p. 80)

Again, this way of recruiting people has the advantage that the DGs can attract experts or experienced bureaucrats without having to go through lengthy recruitment procedures. It is probably fair to say that after the Kinnock-reforms the agency losses through enhanced screening and selection by the principal(s) have increased. After all, *parachutage* – or the planting of national flags on certain posts – was the most direct way through which Member States tried to limit agency losses. Such measures have become much more difficult after the Kinnock-reforms and after enlargement. Yet another way for the Member States to limit agency losses is by sending officials from their national bureaucracies on secondment to the Commission for a certain period of time. While this would look like a perfect example of increased principal control, there are some mitigating factors at play as well. First of all, seconded officials are often technocrats, experts in their field. A secondment to the Commission is also often regarded as a career-booster. Consequently, they are less prevalent in the more senior and more politicised regions of the Commission bureaucracy. Furthermore, many Commission officials also suggest that there is a socialisation-effect whereby seconded officials quickly identify as European civil servants (rather than national ones) while working in the Commission.

Nonetheless, the in-house knowledge and expertise of the Commission varies greatly from one issue area to another (see Nugent, 1995). But even in domains where Commission resources do not come up to the mark, there are several ways for the Commission to keep its informational/technical lead over the Member States. For example, the Commission can serve as a repository of knowledge by requiring the Member States to provide the necessary information. This way, the Commission will usually be better informed than any individual Member State. A second way of gathering the necessary information or expertise is by outsourcing. The Commission frequently contracts consultants and research

institutes and orders studies from them. Thirdly, the Commission can accumulate knowledge by working through the system of advisory committees. Basically, there are two types of such committees: expert committees and consultative committees (see Nugent, 2003: pp.129-131). The expert committees are made up of “national officials, experts and specialists of all sorts” (*ibid.*: p. 129) whereas the consultative committees “are composed of representatives of sectional interests” (*ibid.*: p. 130). For our discussion here, it suffices to say that both types of committees provide the Commission with information, knowledge, and expertise. Finally, we can also point to the rich and long institutional memory of the Commission services, especially of the Secretariat General which can give the Commission an informational advantage over the other players in the legislative process.

McCubbins and Schwartz (1984) identify two types of monitoring. Police-patrol, or direct monitoring, is the most effective method, but it is rather costly and time-consuming. In EU decision-making, the phenomenon of comitology (see Pollack, 2003a; Franchino, 2000; Docksey and Williams, 1994) is a good example of such police-patrol oversight. Through these committees, the Member States can collect information about what the Commission is up to and limit drift by the Commission.³ The alternative is fire-alarm oversight. Here, principals rely on third parties to monitor agents and to “seek redress through appeal to the agent, to the principals, or through judicial review” (Pollack, 1997: p. 111). The major advantages of this approach are that the costs of the monitoring are carried by the third parties and that the principals can focus on violations that are of importance to their constituency (see McCubbins and Schwartz, 1984). The drawback of this approach is that the monitoring is restricted to an (often quite small) subset of agency behaviour, namely activities that can spark sufficiently large political action by third parties (see Moe, 1987). In the EU context, article 230 TEC offers

³ Pollack (2003) convincingly shows that there is a lot to be said for this rational choice interpretation of the comitology phenomenon (as opposed to the ‘deliberative supranationalism’ of Joerges and Neyer (1997)). He concludes that “the available quantitative, qualitative, and case-study evidence supports the rationalist hypothesis (...)” (Pollack, 2003: p. 152).

the possibility for judicial review of (among others) Commission actions and on top of that, the Council gets a lot of information on the Commission from other institutions (the Parliament, the Court of Auditors, COREPER) and lobby groups.⁴

As with monitoring, the cost of sanctioning can be quite high and this affects the efficacy and credibility of the use of sanctions. Indeed, as Moravcsik rightly notes, “threats, like promises, must be ratified” (Moravcsik, 1993: p. 29). Sanctions usually require a positive decision from the principals and the agent will seek to exploit differences in the preferences of the principals in order to try to escape sanctioning. The extent of an agent’s discretion, then, “depends on the voting rules and the default condition governing the application of sanctions” (Pollack, 1996: p. 446; see also McCubbins, Noll and Weingast, 1987; 1989 with regard to the importance of voting rules, and Scharpf, 1988 for an analysis of the impact of the default condition).

The important conclusion is then that neither the strictly intergovernmental (the Member States control the Commission, there is no agency) nor the strictly supranational position (the Commission as a runaway, largely independent bureaucracy) holds the truth. Instead, the autonomy the Commission enjoys varies over time and from one function to another, depending on the mix and the credibility of the control mechanisms (Pollack, 1996: p.448; see also Majone, 2001, although Majone is more critical of the use of the principal-agent model). In other words, comitology, and the type of committee involved (advisory, management, or regulatory) will influence the Commission’s scope for drifting. Also, the organised interest groups that are active in a particular domain can influence the decision-making process (this is the ‘fire-alarm oversight’). It has even been claimed that it is not the voters, but the interest groups that really

⁴ For a formal model of the impact of lobby groups and the mitigation of asymmetric information on the outcome of the bargaining game, see Milner, 1997.

matter in intervening in and influencing policy-making (see Moe, 1995, in particular pp.129-131).

Another particularly important aspect of Commission agency is the agenda-setting powers of the Commission. It is often claimed that the Commission's right of initiative, as laid down in article 211 TEC, is a major channel through which it can have its preferences reflected in the policy outcomes. However, the effectiveness of this tool is restricted by the voting rules. If unanimity is required in the Council to adopt a proposal, the Commission's proposal will have to reflect the lowest common denominator, i.e. the preferences of the most recalcitrant Member States, if it wants to stand a chance of being adopted (depending on the position of the status quo vis-à-vis Member States' preferences). Under qualified majority voting (QMV), on the other hand, the Commission has a lot more leeway (see Meunier, 1998; Pollack, 1996;,2000). The same goes for the amendment rules: the harder it is for the Council to amend a Commission proposal, the more leeway the Commission has. Note, however, that these examples relate only to formal agenda setting. Kingdon has shown convincingly that informal agenda setting matters as well (Kingdon, 1995). In this view, the Commission acts as a 'policy entrepreneur', exerting leadership by proposing innovating ideas and proposals. The key to successful informal agenda setting is imperfect or asymmetric information among policymakers. Or, as Pollack puts it:

“(...) when policymakers have difficulties identifying policy problems, drafting appropriate solutions, and finding compromises among varying interests, a policy entrepreneur may secure the adoption of a policy, and influence its content, by stepping forth at the right time (a “policy window”) with a proposal that identifies a common problem and proposes an acceptable solution” (Pollack, 1996: p. 449).

If the Commission has a lot of expertise in a certain area, and the Member States face uncertainty or imperfect information, then the Commission has an opportunity to exert influence (see Sandholtz, 1992; 1993; Garrett and Weingast, 1993). Of course the preferences of the Member States (and the decision rules) still matter as became clear from the discussion of the formal agenda setting. Note that policy networks could be seen as a condition for entrepreneurship. By mobilising domestic interest groups, Member States' preferences can be shaped or transformed so that there is a convergence with the Commission proposal.

To summarise, the principal-agent approach claims that the Member States have delegated certain functions to the Commission. However, the Commission, as agent, does not simply implement the Council's directions. It has its own preferences and will drift to effectuate them. In response or as prevention, the Council sets up control mechanisms to monitor and sanction the Commission. This principal-agent analysis offers a convincing theoretical framework for understanding Commission actions in particular and Commission-Council relations in general. The attractiveness of this approach is not that it offers a completely new theoretical framework, but rather that it builds on the existing theories and makes them operational. Most of the concepts that are presented in the principal-agent approach (delegation, agenda-setting, oversight, monitoring, sanctioning ...) are 'testable', and this is probably the most important contribution of this approach. Even though it provides us with some methodological tools, however, this approach does not add anything to the 'content', i.e. it does not come up with new insights that shed new light on the Commission's role regarding TRIPS-issues. The next section puts forward an alternative explanation, which will be tested in the empirical chapters of the thesis. In the final chapter, the elements that are being brought forward in this alternative explanation will be integrated in the principal-agent approach, making it a more complete way of studying and understanding the European integration process. One of the important theoretical contributions of this thesis, is that it will refine the principal-agent approach so that it can also be applied as a

framework for better understanding the European integration process when it comes to external relations.

2.2. Institutions and the dynamics of agency: towards an explanation of Commission behaviour in international settings

The general argument of this thesis (also explaining the TRIPS-puzzle) could be summarised as “the Commission can exert more discretion in settings that are more strongly institutionalised”. However, two conceptual problems immediately catch the eye. Firstly, what does the term ‘institutionalised’ entail? Here, a distinction is made between two aspects of ‘institutionalisation’ of international regimes. On the one hand ‘institutionalisation’ refers to a dynamic process, incorporating the negotiations establishing the regime, any negotiations within the framework of the regime, and the regular interactions between the members of the regime. On the other hand, it is also a static concept, referring to a set of characteristics that a regime possesses at a certain point in time. Secondly, the question arises as to what ‘strong’ institutions are. Here, I take a legalistic approach in that the focus is on the strength of the dispute settlement, enforcement and/or compliance mechanisms of regimes. Strongly institutionalised settings correspond to what Jackson has dubbed rules-based systems and they are characterised by the fact that there are legal mechanisms to settle disputes between parties (Jackson, 1983; 1990; 1998, in particular chapter 4). This is in contrast with power-based systems that rely on diplomatic approaches for solving disputes (sitting around the table and trying to negotiate a compromise solution rather than having an independent body rule on the issue at hand).

The static aspect of institutions: the first hypothesis

The first hypothesis takes the static interpretation of institutionalisation as its departure point, and aims to offer an adequate answer to the puzzle introduced in the first chapter. Building on the notion that institutional provisions influence outcomes, the hypothesis is that the Commission has more leeway in institutions that have a strong and legalistic process for ensuring compliance and/or enforcement. This can be a strong dispute settlement mechanism. But also strict compliance procedures or other enforcement mechanisms can qualify, as long as there is a judicial system in place. The more legalistic the process and approach, the easier the Commission will find it to compel attention and play a bigger role. The question that comes to mind at this stage, then, is why this is so, and – if the claim is true – how this process exactly works. The next paragraphs describe this process as a virtuous circle (virtuous from the point of view of the Commission at least), consisting of three steps.

Firstly, as a precondition, the Commission has to be a player within the context of the international agreement concerned. This means first and foremost that at least some of the issues the international regime deals with are Community competences. On the other hand, there also has to be some scope for gaining competences, so there should also be issues on the table that do not fall under the Commission's (exclusive) competence (mixture, see chapter one). Secondly, the actions of the Commission in the framework of the enforcement/compliance mechanism cannot be separated from the context within which they take place. These actions will have repercussions internally (vis-à-vis the Member States) as well as externally (with regard to the other parties to the regime). Thirdly, the Commission can then try to exploit these internal and international 'externalities' of its behaviour in the enforcement or compliance mechanism to gain more or wider competences and acknowledgement. The following paragraphs describe the dynamics of the second stage of this process by looking at the potential multiplier effect that might occur if the Commission cashes in on the internal and external effects of its performance in the enforcement or compliance mechanism.

The external dimension refers to the reaction of other countries to the performance of the Commission, as representative of the EC, in the enforcement or compliance mechanisms of international regimes. They are forced to acknowledge the Commission as the legitimate EC representative and as an important actor. This will lead to an enhanced legitimisation of the EC, and in particular the Commission as its representative, as an international actor.

Internally there are several elements that may contribute to the strengthening of the Commission's position. Good representation and/or success in the handling of disputes may lead to an acknowledgement by Member States that the Commission is doing a good job and that it is beneficial for them to be represented by the Commission. From this point of view, the Commission can use its success in dispute settlement in areas of exclusive competence to lay the basis of extending its competences. It can drift further, making use of the dispute settlement provisions, *de facto* acquiring new competences. Thus it can lay the foundations for more easily acquiring these competences *de jure* in a later stage. This line of thought can be backed up with other arguments as well.

First of all the Commission is in a good position in judicial settings because this way of solving disputes requires a lot of legal expertise as well as technical knowledge. One of the important roles of the Commission is exactly that of 'technical body'. The Commission either has the in-house expertise and knowledge, or otherwise it can fall back on its vast network of contacts and 'epistemic communities'. Furthermore, its institutional position enables the Commission to act as a repository of Member States' knowledge and expertise. The argument here is quite similar to that put forward in the interpretation of the Single European Act and Economic and Monetary Union. With regard to these policy developments, it has been claimed that the Commission (or an entrepreneurial leader in the Commission) can succeed in pushing through highly controversial political reforms by presenting them as technical matters and thus pulling them away from the political bargaining (one such example is the Delors-committee, see Featherstone and Dyson, 1999).

A different interpretation would be that the strong enforcement mechanisms weaken the position of the Commission. The reason for this is that, because cases get more complicated (and the stakes are higher), the Commission needs help from specialists from the Member States and industry. This could then erode the monopoly position the Commission normally enjoys and thus weaken its position. However, the Commission acts as a repository for specialist knowledge. It still enjoys a monopoly over the co-ordination of the collection and use of information, it is still the hub in the hub-and-spoke model and therefore it will remain the prime and ultimate technical specialist. Not just because of its in-house expertise, but also because of its central position as mediator and co-ordinator. In the European policy primeval soup, the central position of the Commission in the policy process becomes an important asset. Because of its monopoly on the initiation of legislation (art. 211 TEC), the Commission is being fed all sorts of information from very different corners, ranging from Member States to lobby groups to civil society in the broadest possible interpretation of the term. Furthermore, Member States might share important expertise with the Commission rather than extensively discuss it with all the other Member States for reasons of efficiency. In other words, even if the Commission does not have the in-house expertise, its central role in the policy-making process and the efficiencies generated by centralisation mean that it usually still has an information advantage over most of the other players, most notably the Member States.

Yet another element that can prop up the Commission's role is the extra clout that comes with Community action. This can refer to a political signal the/some Member States want to give (e.g. about their vision where the EU should be heading).⁵ Or it can refer to efficiencies generated by Community action. This is for example the case if the international regime concerned provides for the

⁵ A good case in point was the 2003 Franco-German dominated initiative to dust off the plans for establishing an independent European military capacity. One of the aims was, in the light of the 2003-2004 IGC and the coming enlargement, to make clear to other (current and future) Member States that these changes should not mean the sacrifice of the vision of a political Europe for that of a purely economic project.

possibility of sanctions or retaliation for enforcing compliance with dispute settlement rulings. In situations like that, the individual Member States clearly have an incentive to be represented by the Commission (as representative of the Community). This is because, first of all, retaliation and/or trade sanctions will be more effective and less harmful for the individual states when initiated by the EC (in economic terms a big country). And, secondly, that the other country that is party to the dispute will take an EC threat more seriously because the threat of action by the EC is more credible than if it were uttered by, say, France alone. This is certainly true in the relationship with small countries (the costs for the EU of imposing sanctions on a small country is low, but the cost of EU sanctions for the small country is very high).⁶ But it also makes sense in the EC-US relation since the EC can deal with the US on equal footing, contrary to the individual Member States. Also, it would be extremely difficult for any one Member State to impose sanctions on a third country since that would inevitably have repercussions for the single market.⁷ A good example of the problems that can be caused by individual action of the Member States is a case where cross-retaliation is allowed. Whether in an offensive or defensive case, legitimate action by or against one Member State can have EU-wide repercussions when cross-retaliation affects other sectors (that might fall under EC competence).

The dynamics of institutions: the second hypothesis

The second hypothesis takes the first one even further in that it looks at some of the more general consequences this has for the Commission's behaviour in international organisations. If the Commission does indeed enjoy more discretion in organisations with a strong and judicial enforcement or compliance

⁶ Paradoxically, the existence of a rules-based system can thus give the other country an incentive to compromise and to try to come to a negotiated settlement, unless it is very sure about winning its case. And even then a negotiated settlement might be more efficient since imposing sanctions on the EU, by a small country, would be like shooting itself in the foot (or sometimes even in the head, if trade dependency is very high).

⁷ Conversely, for an excellent discussion on some of the unintended consequences of the Single Market programme on the EC's trade policy and its position in the WTO see Young, 2004.

mechanism, it will develop a preference for creating exactly such 'strong' organisations. This thus affects the Commission's behaviour in international organisations. Particularly, there are two conceivable strategies the Commission could follow. Firstly, when the Commission negotiates for the Community, it will either aim to strengthen the existing enforcement or compliance mechanisms, or it will try to create such institutional provisions (if they were previously lacking or if it is a completely new institutional framework that is being negotiated). Or else, and this is the second strategy, the Commission could try to bring new issues under the scope of the existing framework if strong, judicial provisions for enforcing compliance are already present.

Testing the hypotheses

Now that the two main research hypotheses are formulated more precisely, a research design for testing these hypotheses should be constructed. The purpose is to demonstrate that the independent variable that was put forward in the first hypothesis (differences in the strength of institutional mechanisms of international organisations) plays an important role in explaining the variation in outcomes (differences in Commission influence and (gains in) power in different institutional settings). For the selection of the case studies, it is therefore important to make sure that there is sufficient variation in the independent variable, while at the same time striving for as much continuity as possible in other variables (*ceteris paribus*). After all, too much variation other than variation in the institutional dispute settlement, non-compliance or enforcement provisions will erode our claim that the institutional setting is the relevant explanatory variable. The next paragraphs spell out more specific criteria that can be derived and which the case studies have to live up to.

First of all, there has to be an international organisation and the EC and its Member States have to be party to it. In other words, the agreement establishing the organisation is a mixed agreement, signed by both the EC and its Member

States. This entails that the Community has exclusive competence over some but not all elements that fall under the scope of the treaty of the organisation. As a consequence, 'turf wars' over competence between the Commission and the Member States are more likely than in scenarios where the issues concerned fall completely within the sphere of exclusive EC or exclusive Member States competences. Therefore, the focus is on mixed competences since any change in the relative influence of the Commission or the Member States here is a significant step in the process of European integration. This is particularly so when this change is then later codified so that it becomes a change in the division of competences between the EU and its Member States. Secondly, the requirement of variation in the independent variable entails that there should be different institutional settings, whereby one regime has a strong institutionalised setting (is more rules-based), and the other institutional setting is characterised by weaker provisions. This way, the difference in institutionalised dispute settlement can be put forward as the explanatory variable. Thirdly, the aim should be to reduce variation in variables other than the independent one to a minimum.

2.3. The case studies

When all these criteria are taken into account, there is one issue area that meets all the requirements: the multilateral global trade regime. Firstly, the multilateral trade regime deals with issues of exclusive EC competence (trade in goods), but also with issues that are mixed or shared competences. Furthermore, trade issues can touch upon very sensitive topics of national interest, like whether certain aspects of the income tax system of a country form an impediment to trade, for example. In short, the issue area of international trade is characterised by exclusive EC competences (and thus a strong role for the Commission) in some aspects, and more Member State involvement in other areas. Secondly, the multilateral trading system has experienced an evolution from a predominantly

power-based system with rather weak dispute-settlement and enforcement provisions to one of the strongest rules-based international regimes in existence. This is important with regards to the third criterion (*ceteris paribus*) as well, because it means that the variation can indeed be reduced to an absolute minimum. After all, the organisation has remained pretty much the same but for the institutional structure: both the EC and its Member States have been active in the organisation before and after the change of the institutional structure. And also the issue area under study has remained the same (while some subjects have been added, the organisation still deals with international trade, which is more consistent than comparing the Commission's position in two organisations dealing with entirely different subjects).

However, if only the Commission's position in the trade regime is studied, the argument may be susceptible to the critique that the findings could be contained to the trade regime only. Therefore, after having argued the case that strong institutional settings influence the Commission's position in view of the situation in the trade regime, another chapter will deal with the evolution of the Commission's position in some international environmental regimes. After all, trade and environment probably are the two most 'natural' issue areas for providing evidence to test the hypotheses. The main reason for this is to be found in some inherent characteristics of these issue areas: they generate externalities or can take the form of public goods. At the most basic level, both issue areas create pressures for a broad approach involving international cooperation. With regards to international trade, mercantilist thinking – still dominant in many governments – combined with political sensitivities means that a global approach is probably one of the most acceptable and efficient ways to achieve trade liberalisation, which in turn should result in higher welfare.⁸ Environmental problems also have this international dimension. They are usually associated with collective action problems since the environment (or, better, a healthy

⁸ At least from a point of view where also the political costs and benefits are taken into account. From a purely economic viewpoint, unilateral liberalisation should, in theory, be more beneficial than partial multilateral liberalisation.

environment) takes the form of a public good. The result is a prisoner's dilemma where the rational strategy for every participant (not complying with the environmental treaty) results in an outcome that is, overall, suboptimal (an environmental problem that deteriorates rather than gets solved). Institutionalised cooperation has the potential to overcome this problem by transforming the prisoner's dilemma into an iterated game and by introducing mechanisms for monitoring and enforcing compliance (thus enabling other parties to make a more informed choice when choosing their strategy). So in these two areas, the prospect of potential benefits and increased efficiency creates incentives for engaging in international (multilateral) cooperation.

Trade

The selection of case studies in the trade area is simplified by the overwhelming dominance of one organisation: the World Trade Organisation (WTO). Since the creation of the WTO in 1994, the EC and its Member States are members of this organisation. As mentioned earlier, this institution lends itself rather well for the study of institutional change since, in terms of dispute settlement, it represents a paradigm shift from the approach of its predecessor (GATT '47), thus reducing variation of many contextual variables to a minimum.⁹ Hence, even though the GATT and the WTO are two distinct and different institutions, they are closely related. Apart from the 'usual' enlargement of the content of the treaty, the main innovation of the Uruguay Round (in which the GATT was transformed into the WTO) was the establishment of an institutional setting, the creation of an organisation (see next chapter). And the most distinct aspect of this new organisation is its dispute settlement mechanism. Where dispute settlement in the GATT was based on a diplomatic approach, the WTO completely transformed the landscape by introducing a new, judicial dispute settlement mechanism. Thus the shift from GATT to WTO represents a strengthening of the institutional

⁹ From now on, I will refer to the original GATT-agreement of 1947 as 'GATT'. The new GATT-agreement that is part of the Marrakesh agreement shall be referred to as 'GATT 94'.

structure in general, in particular in the area of dispute settlement where it represents a shift from a power-based, diplomatic approach to a rules-based, legal one (see Jackson, 1990; 1998). Before getting carried away, it should be noted that the GATT itself also represented an institutionalisation, albeit to a lesser extent than planned for at first. It is therefore important to keep in mind that these are points on a continuum rather than extreme poles.

The first hypothesis, that the Commission is more empowered in more strongly institutionalised settings, can be tested by building on the TRIPS-puzzle that was introduced in the first chapter. The explanation would then be that the Commission succeeds in playing an important role with regard to TRIPS issues because of the institutionalised dispute settlement system that is in place in the WTO. As a second case study, the issue of Member State income tax practices in GATT and WTO will be discussed. It will be shown that the Commission did not succeed in playing a leading role in the GATT-disputes, but that it did speak for the Member States concerned when very similar disputes arose in the WTO. In order to test the second hypothesis, a closer look will be taken at the Commission's role in strengthening the institutional framework of the GATT/WTO and at the way the Commission dealt with the issue of investment in the WTO-framework. It will be argued that the Commission's insistence on including the 'Singapore issues', and most notably investment, in the Doha Round Negotiations points to a preference for operating in the strong WTO-framework (rather than the OECD-framework, for example, in the case of investment) in order to obtain more external influence (and, ultimately, competences).

Environment

There are two major obstacles for developing the issue area of environment into a full-blown case study. First, there is a lot of variation between environmental regimes, both in terms of their substance as well as of their membership. This

makes it harder to effectively ascribe differences in the role of the Commission to the institutional framework, since the variation in other elements (different subjects, different membership structure ...) could also be (partially) responsible for the variation observed in the role and influence of the Commission. Second, international environmental agreements tend to be 'soft' ones, i.e. the enforcement rules and compliance mechanisms in environmental treaties, if they exist in the first place, tend to avoid confrontation as much as possible, casting the provisions of these agreements more in the 'diplomatic' mould (Victor, 1996; WTO, 2001c). This in itself need not be an insurmountable problem. After all, while it is true that no environmental agreement has a strong dispute settlement system in the style of that of the WTO, the strength of the enforcement and compliance mechanisms of environmental regimes does nonetheless vary. Some organisations have a much stronger or more judicialised non-compliance system in place than others. This variation in principle still allows for the testing of the research hypotheses, albeit in a murkier and a rather more oblique manner.

These two objections therefore greatly weaken the explanatory power of the environment as a case study, especially when compared to the situation in the trade regime. Yet on the other hand, only testing the hypotheses by referring to trade cases could lead to the suspicion that the findings might be constrained to the issue area of trade only. In order to avoid this, chapter six discusses the role of the Commission in some international environmental regimes. Chapters three, four and five rigorously test the hypotheses by developing the Commission's role in the trade regime as a case study. This setting is the most straightforward one possible and should thus strip out as much interfering variation as possible, offering the clearest view on the impact of the institutional setting on the Commission's position. The function of the environmental chapter, then, is to provide *additional* evidence that the Commission does indeed prefer strongly institutionalised settings (testing of the second hypothesis), and that these dynamics are also relevant for other issue areas than trade alone.

The selection of environmental case studies looks more difficult because of the sheer number of and variety in multilateral environmental treaties. Given that the focus is on the role of the Commission in strong institutional settings, the strongest and most effective environmental agreement will be studied. In particular, the role of the Commission in the negotiations of the Montreal Protocol on Substances that Deplete the Ozone Layer and its role in the creation of its non-compliance mechanism will be explored. This Protocol is widely regarded as one of the most effective environmental agreements, and it was one of the first to include 'hard' enforcement elements, such as the possibility to impose trade sanctions. The expectation, derived from the hypotheses, would then be that the Commission should be very interested in having a strong institutional framework in place so that it can become a more important actor. However, there probably is a limit to the degree of institutionalisation that can be achieved for international environmental agreements given that their long tradition of soft enforcement elements also (at least partially) derives from inherent characteristics of environmental cooperation. If this is the case, then it would be a rational strategy for the Commission to try and incorporate environmental issues in another, highly institutionalised framework such as the WTO. Therefore, it will also have to be examined if, how and to what extent the Commission makes efforts to integrate trade issues and environmental ones within the context of the WTO, and whether this can be understood in the light of the wider scope for gaining influence of power for the Commission in more institutionalised settings.

Research methods

The information that is used in the empirical chapters to test the hypotheses comes from several sources. The core data are original documents detailing the position and actions of the Commission in international negotiations and in the working of the international organisations under study. These include, but are by no means limited to, position papers and Commission proposals, negotiating

mandates, legislative documents, official reactions, etc. While official documents are useful to determine and compare the positions of the respective institutions, it rarely happens that they also reflect the dynamics and the politics behind the process. Usually they do not even contain every piece of information, potentially leaving out some information that could well be relevant to the research. Therefore, three kinds of sources are added in order to qualify, clarify and complement the information contained in official documents.

The first one is the press. Because a substantial part of the research focuses on disputes or negotiations that took place quite a while ago, articles in quality newspapers and specialised publications often offer the best possible background to these events. The reasons for this are threefold. First, those articles will offer a better insight in the general context and turf wars within which the negotiations or discussions were taking place. For obvious reasons, this context is lacking, or at best left implicit, in official documents. In other words, newspaper articles are needed for us in order to interpret the official documents. Second, journalists generally have a much better network within the policy-making community than a doctoral student can ever hope to build in just a couple of years. Their articles are therefore an invaluable source of information, often putting their finger on a sore spot, such as disagreements between the institutions or between the Commission and some or all of the Member States. This information would be very difficult to obtain as an outsider, even more so ten years or more after the facts. Third, the alternative way of obtaining similar information can be problematic. Interviewing the people involved would be the most obvious or intuitive road to acquiring a better insight into the dynamics and politics behind the negotiations or behind certain decisions and policy positions. There are two problems with this, one minor one and one major one. The minor problem is of a methodological nature and pertains to the phenomenon whereby the recollections of the actors tend to become less reliable as time passes by. Certain nuances tend to get flattened out and the information is more neatly fitted (actively or passively) into a certain view of what happened. The major problem relates to access. Most of the events took place ten or more years ago. The actors have

since moved on and up. On the one hand, this means that some people that are in the Commission now were not actively involved in the issues under study or were at that time not even working in the Commission at all. On the other hand, it also means that many of the most active players at that time are now in such positions (career-wise or geographically) that it has not been possible to interview them. A good example of this is the EC's main representative to the Montreal Protocol negotiations, Laurens Brinkhorst, who is currently the Minister of Economic Affairs of the Netherlands.

The second additional source of information is the academic literature on the topics under discussion. Incorporating these analyses and their findings into our own research provides a useful background and will certainly enrich the analysis. Third, these sources are complemented by and checked against the information obtained in interviews that have been conducted with a wide range of actors who have been (or still are) closely involved in the issues under study. These include current and former Commission officials, Member State representatives, officials from interest groups and other organisations, and experts on the topics under study. Not all the interviews have been conducted in the same manner, since it was not always possible to have a (semi-structured) face-to-face interview. Some interviews have therefore been conducted over the telephone or some have taken the form of email-conversations. Where face-to-face interviews have been conducted, no recording device has been used. This choice was made on methodological grounds. The rationale behind it is the idea that people, especially mid-ranking Commission officials, would be inclined to talk more freely if their every word is not recorded. Of course, every strategy also comes with a cost. In this case, the decision to opt for a loose, semi-structured interview and not to record the conversation or write down every phrase entails that no exact quotes can be distilled from the interviews. In the empirical chapters, it will be indicated in more general terms if a certain argument was used or confirmed by a Commission official. Where possible, the argument made by the official or officials will be paraphrased and reference will be made to the interview

concerned. Annex 1 gives a list of people that have been interviewed, with a short description of their function and the time, place and mode of interview.

CONCLUSION

This chapter presented the principal-agent approach as an operationalisation of delegation in the EC in general and of the Commission as an agent in particular. Also, the core research hypothesis was put forward in this chapter: the external context, in the form of the institutional framework of the international organisation, should be taken into account as well in order to better understand the dynamics of the European integration process. This rests on two insights. The first one is that the vast majority of integration theories is inward-looking, meaning that the causes and dynamics of the integration process are usually sought in issue-specific or actor-specific elements (this was worked out in more detail for the three main paradigms of integration literature in chapter one). The second element on which the hypothesis is built is the insight, most clearly developed in the two-level game theory (see for example Putnam, 1988; Moravcsik, 1993a; Milner, 1997) that the ‘domestic’ and international levels cannot be separated from each other, but that they are mutually impacting on one another (specifically regarding the EC, see Smith, 1995). These two insights are mutually exclusive: if there is *interaction* between the domestic and international levels, then external elements should contain at least part of the explanation for the European integration process in external relations. Therefore, the hypotheses introduced in this thesis look at the impact of the external framework on the possibilities for the Commission to increase its influence and power.¹⁰

¹⁰ European integration in this thesis is understood as a zero-sum game for influence and power between, on the one hand, the Commission and, on the other hand, the Member States, gathered in the Council. Since this is a zero-sum game (power rests either at the EC level, or at the Member State level, or it is shared), any gain in power of one actor has to be at the expense of the other. This thesis will therefore usually focus on the Commission and refer to a gain in power and/or influence by the Commission as an ‘increase’ in European integration. This does not necessarily entail a value judgement.

When taking into account the international framework, the expectation is then that the Commission should find it easier to gain influence and power in settings where there is a strong institutional framework for settling disputes or monitoring compliance. The higher the (monetary, reputational and other) costs of non-compliance with the dispute settlement system, the more likely a strong Commission position becomes because of the clout that comes with acting united, as a 'big' country. More technical settings – as opposed to traditional diplomatic ones – will also favour the Commission because of the technocratic nature and origins of this institution. If the external context does indeed impact upon the internal power balance within the EC and if stronger institutionalised settings do indeed favour the position of the Commission vis-à-vis the Member States, then the question arises as to the Commission's awareness. The second hypothesis claims that the Commission is indeed aware of this extra flexibility. Furthermore, it is claimed that this awareness has an impact on the Commission's negotiating strategies and its representation of the EC in the day-to-day activities of some international organisations. In the course of the following chapters, these hypotheses will be tested for the areas of trade and environment.

3

STATIC INSTITUTIONALISATION AND TRADE: THE COMMISSION IN GATT AND WTO

INTRODUCTION

Having set out the research design in the two previous chapters, this chapter refers back to the core research questions and tests the first hypothesis. This stated that the institutional characteristics of the international regime can influence the Commission's room for manoeuvre (vis-à-vis the Member States), with 'stronger' institutionalisation leading to more possibilities for bureaucratic drift. This is the first of four empirical chapters, which form the core of the thesis and contain most of the original analysis expected from a PhD. This chapter, like the next two, deals with the Commission's position in the trade regime. Chapter six, on the other hand, focuses on the issue area of environment. While chapters four and five deal with the Commission's role in negotiations (the 'dynamic' aspect), this one specifically focuses on the Commission's behaviour in the *functioning* of the GATT and the World Trade Organisation (earlier referred to as the 'static' aspect). Hence, questions about why or how the system came about in the first place and the role of the Commission in that process, are not being

addressed for the time being. As the title already suggests, this chapter is only concerned with showing that the Commission has gained influence and power because of the change from GATT to WTO and that an important reason for this was the institutionalisation of the organisation, in particular the creation of a strong, legal dispute settlement mechanism.

The chapter is divided into three main sections. The first section gives the background against which the case studies are set. It explores the changes that occurred with the transition from GATT to WTO and it examines the repercussions of this change for the position of the EC, and in particular for the Commission, in the world trading system. The second section studies two case studies to illustrate the impact of the institutional framework on the Commission's position. The first case study deals with the Commission's role in issues concerning trade-related aspects of intellectual property rights (TRIPS) within the World Trade Organisation (WTO). This case has already been concisely introduced in chapter one as an interesting puzzle that the integration theories struggle to explain, and it will be discussed in substantial detail here. It will be argued that the Commission plays a more important role than could be expected given the circumstances. The second case study compares two similar sets of cases under GATT and WTO respectively. These are disputes concerning the effect of certain income tax practices (and their trade effects) that were initiated by the US against some EU Member States. The role the Commission played differed markedly, which can be explained by taking the changed institutional context into account. Before concluding, the last section of this chapter then discusses, and rejects, a number of alternative explanations that could discredit the institutional interpretation that is put forward in this thesis.

3.1. A brave new world: the shift from GATT to WTO, and the EC in the new trade system

This section gives an overview of the most important changes that occurred with the transition from GATT to WTO. In particular, several differences between the GATT and the WTO are discussed in more detail to explain why this transition constitutes a process of institutionalisation. The discussion of the new dispute settlement system in the WTO takes up a special place in this section because of its centrality to the argument of the thesis. The second part of this section then briefly explores the impact of these changes on the role of the Commission in the trade regime. Without developing a fully-fledged legal analysis of EC competences, these paragraphs deal with the issue of the division of competences between the EC and the Member States. The expectations and assumptions about the role the Commission should play in this new trade organisation originate from this division of powers. In turn, these expectations (refined in the context of the specific case studies) form the benchmark against which the Commission's role in the case studies is measured.

The institutionalisation of the world trading system: from GATT to WTO

One particular problem with GATT was that the umbrella organisation it was meant to fall under (the International Trade Organisation, henceforth ITO) was never established (Jackson, 1998; Palmetier and Mavroïdis, 1999). For legal and political reasons – mainly the domestic political context in the US – GATT nevertheless came into force, albeit only temporarily. Hence, GATT has never been an 'organisation' in the strict sense of the word, but it remained an agreement that was only provisionally applied for almost half a decade. This changed with the creation of the World Trade Organisation (WTO) and that is why GATT's successor has been hailed as the "third leg" of the "stool" of the Bretton Woods system (see for example Jackson, 1998 or Paemen, 1995).

The fact that GATT was an agreement that was *provisionally* applied is not only of mere academic relevance, but it also had very real implications for the evolution of the structure and the rules of this *de facto* organisation. For example, Jackson notes that “[b]ecause of the fiction that GATT was not an “organization,” there was considerable reluctance at first to delegate any activity even to a “committee”” (Jackson, 1998: p. 41-42). Similarly, there were no provisions for a GATT secretariat, so GATT leased staff that were supposed to prepare the ITO and – since it gradually became clear that the ITO would never come into existence – these became the *de facto* GATT secretariat. In other words, because of the lack of a constitutional treaty the development of GATT happened in a trial-and-error way. Despite this uncertain and very special context, the participants in GATT nonetheless succeeded over the years in translating working practices into protocols and rules of procedure. Perhaps because of the success of this flexible approach, all of the attempts to transform GATT into a formal organisation that were launched before 1986 failed.

Another important implication of the fact that GATT did not start off as a full-fledged organisation was that there was more scope for flexibility than usual. While this was undeniably very attractive from a political point of view, the lack of a common constitutional ‘corset’ also led to a scattered organisational landscape when GATT expanded its field of action.¹ Up to the Kennedy Round (1962-1967), the GATT Rounds were mainly concerned with cutting tariffs. The Kennedy Round also tried to tackle non-tariff barriers (NTBs), although this effort was not particularly successful. Eventually, it was the Tokyo Round of trade negotiations that really opened up the GATT-agenda. For the first time, the focus was not just on tariffs, but also NTBs were discussed extensively. This broadening of the scope of GATT was accompanied by fragmentation. Nine agreements (and four understandings) were signed at the end of the Tokyo Round

¹ Because the costs are usually confined to a relatively small group, whereas the gains from free trade tend to be diffuse, issues of international trade can easily become important issues in domestic political contexts. Therefore, a certain degree of flexibility can be rather appealing on the international stage (but it should be limited because otherwise one could not rely on any of the other parties to adhere to the international agreement).

negotiations, but these were signed as ‘stand alone’ agreements, i.e. they were only binding on the parties that had signed and ratified them. The result was a ‘GATT à la carte’: besides the (core) GATT agreement, there were now other agreements with different degrees of strength in their obligations, separate dispute settlement mechanisms, different signatories, and different institutional provisions. This raised several questions and problems. Not least importantly, it created uncertainty about the relation between GATT and these codes. Also, the independent dispute settlement mechanisms of the codes raised questions concerning the appropriate forum for the settlement of disputes and the compatibility of the interpretation of GATT and code obligations by the respective panels (see for example Jackson, 1991: pp. 55-57; Jackson, 1998: pp. 75-79).

Even though the Tokyo Round had achieved a lot, many still felt that it was incomplete. For that reason, a new negotiation round was started in 1986 in Punta del Este, Uruguay. This resulted, eight years later, in the signing of the Marrakesh Agreement Establishing the World Trade Organisation (henceforth ‘the Marrakesh Agreement’). Finally, after almost half a decade, the major institution for dealing with international trade issues was no longer a provisionally applied agreement, but rather a full-blown organisation: the WTO. The most important changes of this transition concern the scope of the issues that the organisation deals with, the creation of a common institutional framework, and the creation of a strong judicial dispute settlement mechanism.

The organisational structure of the WTO is outlined in article IV of the Marrakesh Agreement, and the decision rules are described in article IX. Article IX states that “[T]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947” (WTO, 2002: p. 8). However, it also adds that “where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting (...). Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast” (*ibid.*). For the interpretation of the Agreement or one of the Multilateral Trade Agreements (see

next paragraph), a three-fourths majority is required. Although the principle of decision-making by consensus is a continuation of GATT-practice, the importance lies in the fact that the decision rule is now codified and defined since in GATT, consensus grew as a practice, without being explicitly mentioned or defined (see Jackson, 2000: p. 405). Another institutional improvement introduced by article VI is that it provides for the establishment of a WTO secretariat. That means that the GATT-practice of 'leasing' secretarial staff from the Interim Commission for the ITO now is a thing of the past. One could argue that this institutionalisation of its role strengthens the hand of the secretariat to play an influential role in the activities of the WTO. Another institutional innovation is the creation of a Trade Policy Review Body, the aim of which is "to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements" (WTO, 2002: p. 380). It fulfils this task by carrying out trade policy reviews, and relies on name-and-shame effects and peer pressure as main vehicles for pushing countries into compliance.

In short, it can be said that the Marrakesh Agreement signals an institutionalisation and codification of the GATT regime, even though, to a certain extent, the legacy of the GATT à la carte is sometimes still visible in the WTO. For example, annex 4 to the Marrakesh Agreement contains four plurilateral agreements, leftovers from the Tokyo Round.² But then again, even in this area there has been an important consolidation. After all, with the creation of a new Dispute Settlement Understanding in the WTO (DSU, see later), disputes concerning the plurilateral agreements are now being dealt with under the DSU rather than under their own, separate, dispute settlement systems (as was the case after the Tokyo Round).

² Note that only two of these, the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft, are still in force. The other two, the International Dairy Agreement and the International Bovine Meat Agreement, expired in 1997.

There are also clear differences regarding the substance of the issues dealt with by the GATT and WTO respectively. As the result of a long and rocky negotiation process during the Uruguay Round, the WTO agreement contains several 'new' issues. The most important of these are trade in services (dealt with in the General Agreement on Trade in Services, or GATS) and trade-related aspects of intellectual property rights (dealt with in the Agreement on Trade Related Aspects of Intellectual Property Rights, or TRIPS). Both of them are annexed to the Marrakesh Agreement (as Annex 1B and 1C respectively). They go beyond the discussions about tariff reductions that were prevalent under GATT, and they are a good deal farther-reaching than the discussions that took place in the context of the Tokyo Round. The inclusion of these agreements thus definitely is a breach with the past and fits into the move towards the more 'complete' approach to international trade relations that the WTO represents.

The most revolutionary aspect of the Marrakesh Agreement, however, is undoubtedly the new dispute settlement mechanism, as laid down in the Understanding on Rules and Procedures Governing the Settlement of Disputes. This is the centrepiece of the new organisation, and the most important achievement of the Uruguay Round talks. Here, the impact of the new rules for decision-making is most pronounced. This is not to say that the GATT dispute settlement system was static, on the contrary. The GATT dispute settlement system itself experienced a substantial evolution before the DSU took over, becoming increasingly formalised and showing signs of an increasingly legal approach (see Hudec, 1990; 1993; Jackson, 2000). Initially, the chairman would rule on disputes. Later, working parties (open to all GATT contracting parties, so also the disputants) were established (see McGovern, 1986: p. 76). Later still, there was a shift to the creation of panels, with three or five members acting in a personal capacity (rather than as representatives of their governments). The normal procedure was for the GATT Council (acting for the contracting parties) to set up a panel. This panel would then examine the complaint and produce a report that was sent to the contracting parties, which could then make a recommendation or give a ruling. The CONTRACTING PARTIES could even

decide to authorise the complaining party to suspend concessions (although this only happened once: in 1953 the Netherlands was authorised to retaliate against the US, but it never used this authorisation). The main problem with this way of settling trade disputes did not lie with the range of decisions the CONTRACTING PARTIES could take, but with the decision-making rules that led to those decisions. Because of the practice in GATT of decision-making by consensus, the creation of a panel could always be blocked by one of the parties to the dispute. And even though Jackson notes that “by the mid-1980s such a blocking vote became diplomatically very difficult to use” (Jackson, 2000: p.177), the losing party could still block the adoption of the panel report and thus formally prevent a ruling to be issued on a specific dispute.

In contrast, the WTO’s dispute settlement system, as codified in annex 2 of the Marrakesh Agreement, contains some major improvements to the GATT system. First of all, it establishes a unified dispute settlement system for the whole WTO system, also with regard to the new issues such as trade in services and intellectual property rights (although it has to be noted that the parties to the plurilateral agreements may make a decision how the DSU shall apply to these agreements). Secondly, the decision-making rules are reversed from consensus to negative consensus. This means that a report is now adopted unless there is a consensus among WTO members *not* to adopt it. Since that would require the support (or at least the abstention) of the winning party, this is highly unlikely and, at the time of writing, this had never yet happened. Thirdly, the dispute settlement procedure takes place within a strict timeframe, with the next steps following more or less automatically from this schedule. When consultations are still unsuccessful after 60 days, one of the parties can ask for the establishment of a panel. Hereafter, the rest of the process is determined by tight timeframes, resulting in a panel decision normally being taken within 15 months and an Appellate Body decision within just over a year and a half. This automaticity again derives from the negative consensus rule (a request for the establishment of a panel is almost guaranteed to be met). Fourthly, the DSU provides for an appellate procedure. The Appellate Body is composed of judges and independent

trade experts rather than diplomats from the national missions, which further adds to the 'judicialisation' of the GATT since it narrows the scope for the creative, but usually very ambiguous, approaches and solutions that diplomats tend to concoct.

To conclude, the Uruguay Round signalled the end of the GATT à la carte by forming a single package, thereby considerably improving transparency. This is only one symptom of a more fundamental change, namely the institutionalisation from agreement (GATT) to organisation (WTO). This is reflected in the creation and codification of institutions and procedures, examples of which are the legal basis that is given to the secretariat, the clear institutional structure, the creation of the Trade Policy Review Mechanism, and the Dispute Settlement Understanding. These last two elements could be seen as evidence of the greater supranationality of the new World Trade Organisation. The Trade Policy Review Body examines and publishes reports on the trade policies of countries. The dispute settlement system goes even further in that it can force countries to change their policies and/or legislation in the case of an adverse ruling. The guiding principle for these changes is easier, better and more effective implementation and enforcement of the rules.

The repercussions of these institutional changes for the EC

The EC was not involved in the early stages of GATT since the Treaty of Rome (TEC) did not come into force until 1958.³ In the Dillon (1960-1961) and Kennedy (1962-1967) Rounds of the GATT, the Commission participated and negotiated on behalf of the Member States. This happened even though the

³ But note that the High Authority of the European Coal and Steel Community already participated in the fourth multilateral round of trade negotiations in Geneva in 1956 (see Petersmann, 1986: p. 34), as well as in the two subsequent rounds. However, the 1979 Geneva Protocols, containing the results of the tariffs negotiations of the Tokyo Round, were not signed by the ECSC (for the issues falling under its competence), but by the ECSC member states (see Groux and Manin, 1984: p. 63).

Community was not one of the contracting parties to GATT, “and in theory does not have the right to vote in GATT bodies” (Groux and Manin, 1984: p. 93). However, backed by several judgements of the European Court of Justice (for example Case 21-24/72, *International Fruit*; see Court of Justice, 1972), it has generally been recognised that the Community has taken the place of the Member States with regard to matters that fall within its exclusive competence. The fact that the Commission represented the Member States in GATT was thus not terribly controversial within the EC and it did not cause too many problems since the early GATT rounds were overwhelmingly concerned with tariff barriers (falling within the category of exclusive Community competences).

As was discussed earlier, tentative attempts had been made in the Kennedy Round to focus on non-tariff, as well as tariff barriers. This move was even more pronounced – and successful – in the Tokyo and Uruguay Rounds, where new issues (other than trade in goods) were added onto the agenda. This makes things a lot more interesting since the potential for conflicts over competence between the Commission and the Member States increases greatly in these situations. This evolution is illustrated by a change in the signing of these trade agreements by the EC. Most of the agreements emerging from the Dillon and Kennedy Rounds, and even many of the agreements concluded in the Tokyo Round, were signed as ‘Community agreements’, i.e. they were signed only by the EC and not by the Member States (see Petersmann, 1986: p. 36-37). However, with more issues on the negotiating agenda, including issues where the Member States were not so accommodating in acknowledging the existence of exclusive Community competence, ‘mixed agreements’ (signed by the Community and its Member States; see first chapter) became the norm. The Uruguay Round agreements, for example, were signed as mixed agreements. But also some earlier ones were signed by the EC and the Member States alike, such as the Agreement on Technical Barriers to Trade and the Agreement on trade in Civil Aircraft, both among the plurilateral agreements of the Tokyo Round.

The only criterion for deciding whether an agreement is to be signed as a mixed or a Community agreement is a comparison of the provisions of the agreement concerned with the competences that are attributed (directly or indirectly, see chapter two) to the EC (Groux and Manin, 1984: p. 67). The problem is that interpretations of Treaty provisions can differ a great deal and differences of opinion between the Member States themselves and/or between the Member States and the Commission about who should sign a particular agreement are rife. Art. 300(6) TEC states that the opinion of the ECJ can be asked to assess the compatibility of an international agreement with the Treaty provisions, but this is not always a viable option given the political delicateness and the slowness of the procedure. Groux and Manin note that:

“In the majority of cases, the Member States have therefore to settle their differences with the Commission themselves and the compromise often reached has involved a ‘mixed’ agreement without specific identification of the parts of the agreement which fall, respectively, within either their or the Community’s jurisdiction” (Groux and Manin, 1984: p. 59)

Because of the increase in the range of issues dealt with and, consequently, the resulting rise in mixed agreements, the possibility for conflict over competences and influence between the Commission and the Member States increased significantly. Moreover, the lack of a clear division of competences in most mixed agreements arguably just shifted the burden to Commission-Member States relations *within* the functioning of the agreement.⁴ This already hints at the likely importance of the institutional provisions of the agreement since, if these turf battles are being fought when the problem arises, the institutional structure within which the conflict takes place could prove to be an important factor in influencing the outcome or the range of possible outcomes of the competence dispute. The question thus becomes when, or in what kind of agreement, the

⁴ There are instances of agreements that require ‘regional cooperation organisations’ to provide the secretariat of the treaty with a list of issues for which it is competent. An important example of such a treaty is the United Nations Convention on the Law of the Sea.

Commission is more successful in ‘winning’ these conflicts with the Member States, i.e. in gaining influence and power. Or, more specifically applied to the trade regime, why the Commission arguably is more successful in extending its influence and competences in the WTO than it was in GATT.

The argument made in this thesis is that the institutionalisation of GATT into the WTO has changed the incentive structure for the Member States to be represented by the Commission. It has been noted earlier that the most important aspect of this institutionalisation is the creation of the WTO’s dispute settlement mechanism. In case of disagreement over competences between the EC and the Member States in GATT, there is no clear incentive for the Member States to give up their central position. The main reason for this is that they, being GATT contracting parties, can control the dispute settlement system anyway because of the consensus requirement for forming a panel and adopting panel reports. Ultimately, every GATT member thus has a veto that might be used. Within the framework of the WTO, however, the situation has changed completely. Because of the negative consensus requirement, neither the creation of a panel nor the adoption of a panel or Appellate Body report can be blocked any more. On top of that, the WTO dispute settlement system has got teeth: the option of retaliation by the winning party in case of non-compliance by the losing party is not merely theoretical (like in GATT). On the contrary, the option to impose trade sanctions in order to enforce a WTO ruling is actually made use of and can indeed be effective. The threat to impose trade sanctions is therefore a credible one.⁵ Since this system, in which retaliation seems to be the ultimate means of enforcing compliance, favours big countries (in economic terms), the Member States now have a strong incentive to be represented by the EC.

⁵ In many of the intractable, high profile WTO disputes, sanctions have been imposed in case of non-compliance with the WTO ruling. For the EC, for example, this was the case in such high profile disputes as the beef hormones-case and the bananas case. That a threat to impose trade sanctions can be effective to enforce compliance is shown by the effect the publication by the EC of a ‘sanctions-list’ had on the behaviour of the US in the Foreign Sales Corporation case.

3.2. The Commission and WTO dispute settlement: the cases

3.2.1. *Trade-related aspects of intellectual property rights in the WTO-framework*

Opinion 1/94 and its context

Intellectual property rights and services were the two major ‘new’ issues on the Uruguay Round agenda. At the end of the negotiations, the Commission claimed that the agreements reached could and should be signed as Community agreements, i.e. only by the EC and not by its Member States. The reason was that the Commission interpreted article 133 EC, which gives the EC exclusive competence to conduct a Common Commercial Policy (CCP), to include the general agreement on trade in services (GATS) and the agreement concerning trade-related aspects of intellectual property rights (TRIPS). Most of the Member States, on the other hand, disagreed and thought that these issues fell outside the scope of the CCP, and thus outside the scope of the exclusive competence of the EC. The Commission then requested the Court of Justice to give an advisory opinion on the competence issue, a procedure that is provided for by article 300(6) TEC. The Court responded with Opinion 1/94 in which it basically backed the Council and most Member States. It argued that the EC and the Member States have shared competence to conclude GATS – except for cross-border services, which are covered by art. 133 – and that the EC and its Member States are jointly competent to conclude the TRIPS agreement, except for the fight against counterfeit goods, which also falls under the CCP (see Opinion 1/94; Court of Justice, 1994). This ruling of the Court surprised many in the legal community and it left some scholars fearing that “Opinion 1/94 is likely to have negative effects [...] on the status of the EC within the WTO” (Bourgeois, 1995: p. 786). Another influential academic and practitioner even described the Court’s ruling as a “programmed disaster” (Pescatore, 1999) and it left yet another

prominent observer pondering that the decision was “no surprise, but wise?” (Hilf, 1995).

This gloominess is quite understandable when the wider context within which this dispute between the Commission and the Member States went on is taken into account. Several events had taken place in the early and mid-1990s that had an impact on the relationship between the EU institutions and that significantly reduced the Commission’s stock of political capital. First of all, in the context of the Uruguay Round negotiations, the Commission went too far for the Member States (definitely for France) in negotiating the Blair House agreement on agriculture in November 1992. This agreement between the EC and the US was negotiated by an autonomous Commission, largely independent from Member States’ control. The outcome, however, proved to be unacceptable to France, which rallied enough Member States around its position to force the Commission to renegotiate the agreement (see Paemen and Bensch, 1995; Van den Bossche, 1997; Meunier, 2005). The Blair House saga was certainly not the first – nor the last – time that there was friction between the Commission and (some of) the Member States, caused by disagreement about how to interpret the negotiating mandate. Another notable example during the same round of negotiations was the GATT Ministerial Meeting in Brussels in 1990 that was supposed to conclude the Uruguay Round. Here, the Commission was also blown the whistle on by the Member States, who feared the Commission might overstep its mandate. But even in the Tokyo Round there had already been discussions on the competence issue. There is, however, a substantial difference between the Blair House debacle and other disagreements over competence. While other arguments relating to competence manifested themselves either before the crucial stage of negotiations or in the implementation phase, in the Blair House-case the Commission was actually forced to re-open a sealed deal under pressure from the Member States while the overall negotiations were still ongoing. For this reason, it is certainly not exaggerated to claim, as Meunier and Nicolaïdis have done, that the result was “a turning point in the delegation of negotiating authority to the supranational representatives, seriously calling into question the informal

flirtation with majority rule and increased autonomy of the negotiators that had started to prevail” (Meunier and Nicolaïdis, 1999: p. 484).

Secondly, the Commission had overplayed its hand in promoting the Maastricht Treaty, and was held at least partly responsible for creating the atmosphere in which a Danish ‘No’, an extremely narrow French ‘Yes’, and a challenge to Maastricht’s constitutionality before the German Bundesverfassungsgericht were possible. In other words, the Commission was not exactly at the height of its popularity: not with the Member States, nor with the European popular opinion. Eurobarometer polls indicate a decline in the percentage of people with a favourable impression of the Commission from 56% in 1990 to 47% in 1992 (see Eurobarometer 33 and 37; Commission, 1990; 1992) before plummeting to 34% in 1993 (Eurobarometer 39; Commission, 1993). Thirdly, the Court’s ruling in Opinion 1/94 can hardly be read as an endorsement for the Commission. It is stated quite clearly that (most) TRIPS and GATS issues fall outside the exclusive competence of the CCP. Finally, the general mood among the Member States was captured well by the sheer scale of their resistance to the Commission’s position. As many as eight Member States, as well as the Council and the European Parliament, submitted observations to the ECJ. All of them, even the Parliament, were arguing against the Commission’s interpretation (that TRIPS and GATS did fall within the scope of art. 133). Taking all these elements together, the logical expectation should be – and was, witnessing the quote from *Bourgeois* earlier – that the Commission would not really play a role of great significance with regard to TRIPS issues.

WTO dispute settlement: the Commission as the central actor

In practice, however, the Commission does play an important role in disputes concerning intellectual property rights. The focus here is on TRIPS-issues since they are the substance of the majority of disputes concerning the ‘new’ issues in

which the EC has been involved.⁶ On a very general level, one could point out that none of the Member States has initiated a TRIPS dispute (or, for that matter, any other dispute). Hence, all offensive WTO disputes on intellectual property rights concerning the EC and/or (some of) the Member States have been initiated by 'the European Communities and their Member States'. The implication of this joint action is that there is a clear need for coordination of positions and expertise, favouring the Commission.

Also, the decision-making process in the EC puts the Commission in a stronger position. For 'spontaneous' disputes, initiated through the procedure described in art. 133, the Community method of decision-making applies and the Commission has a monopoly on taking the initiative: it has to make a proposal to the Council, which then has to decide. For disputes initiated through the Trade Barriers Regulation, the Commission's position is even stronger (for a comparison of the Commission's role in the two procedures see Billiet, 2005). Under the Trade Barriers Regulation, it is the Commission that has to decide whether or not to initiate proceedings in the WTO. This decision holds unless a Member State asks to refer the decision to the Council within ten days. If the Council hasn't made a ruling after 30 days, the Commission's decision applies. These strict time frames play to the advantage of the party having the initiative, i.e. the Commission. On top of that, the Member States have an incentive to defend their interests offensively through the EC because of the better chances for a big country of enforcing compliance. Taken together, that means that the Commission is in a rather strong position since the Member States have an incentive to act through the EC, but there they are dependent on the Commission for obtaining their national objectives.

The primacy of the Commission in offensive TRIPS disputes can be illustrated by looking at specific disputes, for example the dispute initiated by the EC against the US concerning Section 211 of the Omnibus Appropriations Act of 1998 (WT/DS176; see WTO, 1999c). Section 211 basically forbids the renewal

⁶ This is also a general trend, see for example Zimmermann, 2005 (particularly pp. 34-35).

or the registration in the US of a trademark that was previously abandoned by a trademark owner whose business and assets have been confiscated under Cuban law, or the recognition of and enforcement by American courts of such rights. The legal basis for the complaint is certain provisions relating to intellectual property rights, in particular “the TRIPS agreement, notably its Article 2 in conjunction with the Paris Convention, Article 3, Article 4, Articles 15 to 21, Article 41, Article 42 and Article 62” (WTO, 1999c). Nonetheless, the request for consultations “by the European Communities and their Member States” (*ibid.*) is circulated by the permanent delegation of the European Commission in Geneva, *not* by the permanent delegation of one, some, or all of the Member States. Also all the subsequent communications concerning this dispute (request for establishment of a panel and the notification of appeal) stem from the Commission’s delegation. So while it could have been expected that the Member States for whom (or for whose industry) the stakes are highest would take the lead in specific disputes, this is not the case in the formal WTO proceedings. There is no ‘enhanced cooperation’-like situation where a smaller group of interested or affected Member States takes action rather than the Community as a whole.

Since TRIPS are a mixed competence, the phrase ‘the European Communities and their Member States’ has to be used. But apart from that, there is no indication of the Member States actually playing a leading role. On the contrary, the minutes of the meetings of the Dispute Settlement Body where this dispute was discussed make no mention of any official from a Member State taking the floor. The only person who spoke on behalf of the EC was the representative of the European Communities, in other words the official from the permanent delegation of the Commission (see WTO, 2000: p. 13; 2000a: p. 11). This impression is unambiguously confirmed in interviews with DG Trade officials and an official of the Legal Service (interviews with Christophe Kiener, Stefan Amarasinha, Barbara Eggers, Søren Schonberg and Lothar Ehring). All the officials in DG Trade that were interviewed left no doubt about the fact that it was the Commission that was firmly in charge in initiating and dealing with the

Section 211-dispute. In interviews, each of these officials claimed (independently of each other) that national officials and experts were hardly involved in the Section 211-dispute and that most of the work was done by officials in DG Trade and, for the pleading in Geneva, the Legal Service.

According to the interviewees, the decision to appeal the panel ruling in this dispute was also taken by the Commission. Søren Schonberg and Lothar Ehring pointed out that this decision was first communicated in draft form to the 133-committee (interview with Søren Schonberg and Lothar Ehring). When asked whether this did not point to an increased involvement of the Member States, these DG Trade officials pointed out that one of the functions of running proposals through the 133-committee is to take the political temperature and check whether there are any fundamental objections by some Member States. They stressed that the importance or the impact of this should not be exaggerated since the presence of such objections would not at all necessarily entail that the Commission would adjust its position accordingly. Usually, the effect would first and foremost be to signal to the Commission to spend more time explaining the rationale for its actions and making its argumentation more explicit in order to avoid being confronted with a blocking minority in the Council (interview with Søren Schonberg and Lothar Ehring). In other words, the involvement of the 133-committee should not be exaggerated since its function here is primarily that of a consultative committee (in line with the jurisprudence of the Court, which in Case C-61/94 *Commission v. Germany* described the role of the 133-committee as “purely advisory”, Court of Justice, 1996; see also Rosas, 2003, particularly p. 316).

When questioned, the Commission officials interviewed confirmed that the same applies to the other TRIPS disputes that were initiated by the EC and their Member States. Here as well, it is the Commission that is the most important actor in the dispute settlement process. It initiates the dispute settlement procedure, is responsible for the preparations, argues the case in Geneva and decides on possible actions to follow up a WTO ruling. At least this was the case

for other TRIPS-disputes initiated by the EC such as WT/DS114 against Canada regarding patent protection of pharmaceutical products (WTO, 1998a), WT/DS186 against the US regarding section 337 of the tariff act of 1930 (WTO, 2000d), or WT/DS160 against the US regarding section 110(5) of the US copyright act (WTO, 1999d; for an informative discussion of the legal aspects of some of these cases and of the effect of ‘mixity’ on the EC’s position in the WTO, see Heliskosi, 1999). This last dispute is particularly interesting given that it was initiated through the Trade Barriers Regulation based on a complaint by the Irish Music Rights Organisation (supported by the Groupement Européen des sociétés d’auteurs et compositeurs). So the interests are very much concentrated in a particular Member State. But again, according to officials from the unit in DG Trade dealing with WTO dispute settlement, it is still the Commission and not (one of) the Member States involved that played the leading role in this dispute (interviews with Lothar Ehring and Søren Schonberg). This is also confirmed by the minutes of the meetings of the Dispute Settlement Body in which this dispute was discussed. Nowhere in these minutes is there an indication that a representative from a Member State was active. Instead, the only (European) actor that is named is the representative of the European Communities, i.e. the permanent representative of the Commission (see WTO, 1999a: p. 11; 1999b: p. 4; 2000a: p. 14; 2000b: p. 2; 2001b: p. 9).

During the interviews, all of the DG Trade officials that were mentioned above also made the more general – yet very interesting – observation that they do not experience any differences in terms of how disputes that concern mixed competences are being dealt with compared to disputes involving only exclusive competences. In both cases, according to the officials interviewed, Commission people do the brunt of the work and national officials or experts are only occasionally involved (interviews with Christophe Kiener, Stefan Amarasinha, Søren Schonberg and Lothar Ehring). Interestingly, during an interview this point was also made spontaneously by an official from the external relations unit of the Legal Service, dealing with WTO disputes. She added that the 133-committee did usually not even come into the picture, even when TRIPS-issues are involved

(interview with Barbara Eggers). This points to a substantial autonomy for the Commission in the practice of WTO settlement, when it comes to TRIPS-issues in particular and issues of mixed competence in general. It lends strong support to the claims that are being made in this chapter that the Commission is in a strong position in the WTO dispute settlement process, and not only regarding issues that fall under the EC's exclusive competences. Furthermore, the fact that these remarks are made unhesitatingly by several of the practitioners dealing with WTO dispute settlement on behalf of the EU, independently of each other and – in the case of Barbara Eggers – spontaneously, means that this mode of action is strongly ingrained in the Commission's practice of dealing with WTO dispute settlement. This provides strong empirical evidence for the hypotheses put forward in this chapter, namely that the Commission plays an important role in WTO dispute settlement and that this is not confined to issues that fall within the exclusive competence of the EC.

But also defensively there is considerable evidence for a strong Commission position. The US in particular has initiated several TRIPS-disputes against individual Member States. With the exception of a TRIPS-case against Portugal in 1996, however, all these TRIPS-cases involved the Commission's delegation. In some cases the US also officially involved the EC by initiating the same dispute against both the specific Member State concerned and the EC. This was the case for a dispute dealing with the enforcement of intellectual property rights for motion pictures and television programs in Greece (cases WT/124 against the EC and WT/125 against Greece, see WTO 1998b; 1998c). Or for a dispute dealing with an Irish infringement on providing copyright and neighbouring rights (cases WT/82 against Ireland and WT/115 against the EC, WTO 1997a; 1998d). In this last case, when the chairman of the Dispute Settlement Body proposed that these cases were considered together, the representative of the EC replied that "[T]his procedure was also appropriate from the Communities' standpoint as it corresponded to the internal organization of the Communities and their Member States regarding the subject matter under the review, namely the

TRIPS Agreement” (WTO, 1998k: p. 5) Nowhere in the minutes of this meeting is there a record of the Irish representative taking the floor.

In other cases the US only aimed the dispute against the specific Member State. This was the case in WT/83 and WT/86, dealing with the enforcement of intellectual property rights in Denmark and Sweden respectively (WTO, 1997b; 1997c). However, even though the request for consultations is directed only at the ‘Permanent Mission of Denmark’ and the ‘Permanent Mission of Sweden’, the notification of a mutually agreed solution is distributed by the Permanent Mission of the US and Denmark or Sweden *and* the Permanent Delegation of the European Commission. It is interesting to note that, even though it is the Danish or Swedish parliament that has had to pass or amend national legislation in order to bring that country’s rules into line with the TRIPS agreement, the WTO documents consistently refer to “the European Communities – Denmark” or “the European Communities – Sweden”. When pressed on this issue, an official in DG Trade who is familiar with these disputes confirmed that Commission officials did indeed play an important role in these disputes. In particular, Commission people were pivotal in negotiating with their American counterparts (interview with Søren Schonberg). This strongly suggests that the Member States rely heavily on the Commission and its delegation in Geneva in WTO dispute settlement when it comes to TRIPS-issues, even when the dispute is initiated only against the Member State and concerns national legislation. However, this is by no means an unproblematic or automatic process. The Commission still has to force its way onto the stage sometimes. This was particularly relevant in the context of the Danish dispute, for example. Here, the Danes at first ‘forgot’ to inform the Commission that they were conducting consultations with the US so that it took some pressure from the Commission before it formally got involved (interview with Søren Schonberg).

This indicates that the involvement of the Commission is not always wholeheartedly agreed to by the Member States, meaning that the strong position

of the Commission in the context of the WTO dispute settlement system cannot only be explained by the 'big country' argument, i.e. the clout that comes with action undertaken by the EC, as opposed to each Member State acting separately. While this argument certainly has its merits, for example in helping to explain the early delegation of powers to the Commission in the dispute settlement process, the above-mentioned Danish reluctance to include the Commission in, and even inform it of, its negotiations with the US over this particular WTO dispute shows that there are limits to the 'big country'-argument for explaining the Commission's role in the WTO dispute settlement system. Here, other elements, such as the entrenched position of the Commission (concentration of experience and technical expertise) and the institutional design of the WTO dispute settlement (possibility of sanctions and the credibility of this threat) to name but a few, can be called upon in order to explain the Commission's involvement. It should be noted that this example of Danish intransigence in including the Commission in its consultations with the US lends credence to a discordant interpretation of the European integration process (see chapter 7.2.1.).

From 113 to 133: the internal consequences of the Commission's role in WTO dispute settlement

In the previous paragraphs it has become clear that, contrary to the expectations, the Commission nonetheless plays an important role regarding TRIPS-issues. Despite the efforts of the Member States to avoid that the Commission holds on (in the implementation phase) to the powers it enjoyed in the negotiation phase, the Commission nonetheless manages to profile itself as the most relevant and most important EC actor. The main driving force behind this is the central position the Commission enjoys in the new institutional structure of the WTO. This new structure, and in particular the provisions of the new dispute settlement system, has provided incentives for the Member States to be represented by the Commission. However, *de facto* power gains could still be reversed by the Council quite easily. That is why it is important to look at the evolution and

legislative history of article 133 (ex art. 113). This is done in the next paragraphs. From this overview it will become clear that the Commission has long argued for the incorporation of services and intellectual property rights within art. 133, but that the Member States (backed by the Court of Justice in Opinion 1/94) strongly opposed it. Despite this opposition, the situation has nevertheless changed substantially since the new WTO dispute settlement system became operational, and this is reflected in the evolution of art. 133. Because of the Commission's strengthened role in the WTO's dispute settlement system, among other things, these *de facto* competence gains have subsequently been cemented in the treaty and, in the process, been given a more permanent character, becoming *de jure* competences.

The insistence of the Commission that art. 133 also covers trade in services and trade-related aspects of intellectual property rights is not new. The Commission's position can be traced by looking at its contributions to the Intergovernmental Conference (IGC) that was called at the European Council in Rome in mid December 1990. In the run-up to Maastricht, the Commission proposed to replace the Common Commercial Policy (then articles 110-116 TEC) by a common "external economic policy" (Commission, 1991: p. 92). The Commission interpreted this new concept very broadly in that it would not only deal with trade, but also with other "economic and commercial measures involving services, capital, intellectual property, investment, establishment, and competition" (*ibid.*). The primary aim of the Commission was to clearly establish or reinstate its authority as the sole negotiator, and thus "to put an end to constant controversy surrounding the scope of art. 113" (Commission, 1991: p. 99). In the end, "[T]he new Article 113 incorporates almost textually Article 113 EEC Treaty adding only a few minor and technical details and is therefore a far cry from what was originally conceived by the Commission" (Maresceau, 1993: p. 12).

As was already discussed earlier, the positions had not shifted substantially two years after Maastricht. The Commission still claimed that services and

intellectual property rights fell under the scope of the Common Commercial Policy. The Member States clearly did not agree, as is witnessed by the fact that two thirds of the Member States, including the three big ones (the UK, France and Germany), submitted observations to the ECJ when it was deliberating Opinion 1/94 in which they strongly argued against the Commission's position. The Court's ruling was pretty much a confirmation of what the Member States had already codified in the Maastricht treaty. Therefore, this could be interpreted as an equilibrium point: the Member States redrafted art. 113 in the light of their preferences in the IGC and the Court confirmed this situation. It seems therefore that there was not much the Commission could do about this since two of the most obvious ways of changing the situation (treaty change and judicial activism) were ruled out.

Yet at the Amsterdam summit in 1997, when the Maastricht treaty was to be reviewed, the same question was lying on the table yet again. Once more, the Member States found themselves debating over what to do with art. 133 and the new trade issues. In the end, art. 133 was amended so that the Council could expand the exclusive competence for the new issues with a unanimous vote. The importance of this is that "[T]his could be done on an ad-hoc basis without requiring an IGC" (Meunier and Nicolaïdis, 2001), thereby substantially lowering the barriers for bringing services and intellectual property rights under art. 133 and thus making this more likely in the future.

The issue was also on the agenda of the Nice summit in 2000, and the compromise reached here moved further still in the direction of the Commission's preferred outcome. Art. 133(5) under Nice categorises trade in services and the commercial aspects of intellectual property rights as exclusive EC competences, but unanimity is still required if the voting rule to adopt internal rules is unanimity or if the EC has not yet exercised its powers internally (Cremona, 2001 provides an excellent discussion of the genesis as well as the difficulties with the Nice amendments of the CCP). For all the other aspects of intellectual property rights (other than the 'commercial aspects') the EC and the

Member States remain 'jointly' competent. However, art. 133(7) states that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property". So with regard to intellectual property rights, the commercial aspects are now covered under art.133, and all other aspects can be transferred by the Council acting unanimously, without the need for an IGC.

Explaining the TRIPS-puzzle and the evolution of article 133: institutional dynamics

The stronger institutional dispute settlement system of the WTO can account for this successful expansion of the Commission's influence and competences. Because of the way the system operates, big countries have gained an advantage in the functioning of the WTO. Two elements in particular favour big countries, namely the loss of the power to veto the establishment of panels and the adoption of panel reports, and the credible and much used option to retaliate and impose sanctions or suspend concessions. Therefore, the Commission – as representative of the EC – benefits, and both its internal as well as its external role is strengthened. This is in turn boosted by the fact that the Commission is in a good position to take on this role given its function of (partly) technical body. Because of the legal approach to dispute settlement in the WTO, a lot of legal expertise as well as technical knowledge is required in order to be able to function effectively within this context. Through its function of technocratic expert, the Commission possesses the necessary expertise either in-house (eg its extremely good Legal Service) or it 'borrows' it from the Member States through its mediation function (see Nugent, 2001: pp. 13-14). The Commission's expertise in trade issues should be particularly emphasised. While many players on the international trade scene might not agree with the goals and means of the EC's trade policy, almost no one questions the fact that DG Trade has many extremely competent foreign trade officials. One particular study of the decision-making process in EU trade

policy states in the clearest terms that “Commission trade officials have greater expertise than their national counterparts at every level of seniority” (WWF, 2003: p. 13). The reason for this is not only the rigorous selection process (the *concours*) through which the Commission employs only the brightest and best people, but also the fact that many good national civil servants are seconded to the Commission. In this context, there might also be a spill-over effect at work since the exclusive competence of art. 133 could form the basis of a virtuous (or vicious, depending on your standpoint) circle. After all, if the EC has exclusive competence over most trade issues, then it would not make much sense for a Member State to put its best and brightest civil servants in charge of this matter. And the weaker the national civil servants dealing with international trade are, the more important it is that their counterparts in the Commission are well-trained.

But there are also other structural characteristics of the new dispute settlement system that favour the Commission such as, for example, the principle of cross-retaliation. Kuyper notes that cross-retaliation “demonstrates how «impossible» separate Member State action before panels has become” (Kuyper, 1995: p. 99). Consider the following hypothetical example. Say that a Member State wins a dispute concerning TRIPS provisions.⁷ It could very well turn out that retaliation within the TRIPS agreement is not possible. Since cross-retaliation is allowed under WTO rules, this Member State could then retaliate in another issue area. The most likely area would be trade in goods since that still has the broadest WTO coverage. However, in this sector the competence to take retaliatory measures is in the hands of the Community, and the Community would probably not be allowed to act.⁸ In other words, “cross-retaliation is not really a serious possibility for Member States and hence the dispute settlement system would lose much of its effectiveness for them” (Kuyper, 1995: p. 100). Whether in an offensive or defensive case, legitimate action by or against one Member State

⁷ This is perfectly possible since according to Opinion 1/94 the Member States retain a large measure of competence with regard to trade-related aspects of intellectual property rights.

⁸ For a more extensive and complete discussion, see Kuyper, 1995: pp. 99-100.

can have EU-wide repercussions when cross-retaliation affects other sectors (that fall under EC competence).

This example is yet another illustration of how the WTO's legalistic approach to dispute settlement has an influence on the position of the Commission in the internal division of competences in the EC. That does not mean that other factors, like the preferences of the Member States for example, have suddenly become superfluous. It will have become clear from the discussion of the gradual change in the scope of art. 133 that the Member States are the principals in the first place, delegating tasks and power to the Commission. But there are other influencing factors at work as well, not in the least the institutional context. The Member States, despite the preferences they might have and the central decision-making role they occupy within the EC, are sometimes overtaken by the events on the ground, caused by their reliance on the Commission in the dispute settlement system. This then increases the pressure for a more formal shift in powers to the benefit of the Commission by transforming its gained *de facto* competences into *de jure* ones.

In short, thanks to the strengthened institutional framework that was put into place with the creation of the WTO, the Commission has been able to gain competences it would otherwise probably not have gained, or at least not so quickly. When it first argued strongly in favour of integrally incorporating services and trade-related aspects of intellectual property rights in the CCP, the Commission was clearly rebuffed by the Member States. Barely two years later, the Court of Justice upheld this 'status quo'. In the meantime, however, the Commission was becoming increasingly active in TRIPS cases in the context of the new dispute settlement system of the World Trade Organisation. It seems that the Member States have been overtaken by these events on the ground, continuously being pressured into bringing more and more elements of services and TRIPS under the CCP because of the Commission's *de facto* involvement in

such disputes.⁹ The changes to the scope of the CCP that the Commission could not push through during the Uruguay Round, suddenly came within reach after the WTO's dispute settlement system was up and running.

Before moving on to discuss another case study, an important caveat should be added. Treaty changes and the Intergovernmental Conferences (IGCs) negotiating those changes are notoriously complex events, where a multitude of negotiating games are being played simultaneously. For this reason, it is often very difficult to distinguish and identify the key independent variable in a single negotiation. In other words, there are many intervening variables that have the potential to blur the link between two issues. In the case of the EC's competences over TRIPS, a similar process might have taken place in the negotiations of a Draft Constitutional Treaty. While this text would make only relatively minor changes to the provisions of the Common Commercial Policy, it would scale back the EC's legal potential regarding TRIPS. The proposed Art. III-217, the centrepiece of the CCP in the Draft Constitutional Treaty, states that "[T]he Common Commercial Policy shall be based on uniform principles, particularly with regard to (...) the conclusion of tariff and trade agreements relating to trade in goods and services and the commercial aspects of intellectual property" (Art. III-217 of the Draft Constitutional Treaty). Only the commercial aspects of intellectual property rights would thus fall under the CCP and the amendments that were made to the CCP in Nice would be overturned. In Nice, it was decided that the EC and the Member States remain 'jointly' competent for all the other aspects of intellectual property rights other than the commercial ones. But Art. 133(7) was also amended to state that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property". So while the Draft Constitutional Treaty still recognises that the commercial aspects of intellectual property rights fall

⁹ The uncertainty created by the blurry delineation of competences also generates pressure to codify the factual role of the Commission. After all, the effects of a WTO Member State challenging the Commission's authority in a TRIPS dispute would not be very positive, neither for the EC, nor for the individual Member States.

under the remit of the CCP, the possibility for the Council, acting unanimously, to extend the scope of the CCP to cover negotiations on all other aspects of intellectual property rights **without** the need for an IGC does not exist anymore.

These new provisions in the Draft Constitutional Treaty amount to a scaling back of the TRIPS provisions of the CCP and this seemingly goes against the argument that was developed in the previous paragraphs (that the increased Commission influence over TRIPS issues was a major driving force for the lower threshold for obtaining or the effective increase in legal competences for the EC in this field). However, it has been noted above that IGCs are complex negotiating games, with many potential intervening variables that can influence the impact that the Commission's increased influence on the field has on the distribution of competences between the EC and the Member States. To give just a few examples of such intervening variables: during IGCs, trade-offs within and between different sectors and policy areas are made, ideological issues play a more decisive role, because of the salience of these meetings and their output political considerations also gain in importance (increasing the potential to change the otherwise likely outcome), and so on. Any of these elements (and many more) could explain why the threshold for including intellectual property rights into the CCP has been raised in the Draft Constitutional Treaty. A more in-depth study of the negotiating history of the provisions of the CCP in the Constitutional Treaty would be needed in order to find out more precisely if and to what extent this example goes against the argument developed in the previous paragraphs. Unfortunately, the limited resources of this project do not allow for this research track to be pursued further.

In short, while certainly disturbing the pattern that more Commission influence in intellectual property rights issues is being translated into more EC competence in this field, the CCP provisions of the Draft Constitutional Treaty are not interpreted as necessarily undermining this argument. The reasons for this are twofold. First, the uncertainty surrounding the key influencing factors for this demotion of intellectual property rights within the CCP in the Draft

Constitutional Treaty as discussed above. Second, the fact that the previous changes to the EC Treaty since the establishment of the WTO do not raise these doubts. Indeed, as was shown earlier, the Amsterdam and Nice revisions of the Treaty did go a substantial way in accommodating the Commission's desires regarding the incorporation of intellectual property rights issues into the CCP, which it had already clearly expressed in 1990 in its proposals for the IGC leading up to the Maastricht Treaty. Before taking a slightly different angle and look at the Commission's role from a more comparative point of view, there is one more general issue that is worthwhile recalling. In chapter 1 it was clearly pointed out that this thesis first and foremost focuses on Commission *influence*. This matters because influence is a broader concept than just competence. Therefore, the absence of formal competence or – in this case – making the potential transfer of competences regarding intellectual property rights more difficult, does not mean that there would also be an absence or decline in Commission influence.

3.2.2. *Tax disputes in GATT and WTO*

One of the more interesting elements in the TRIPS-case study is the formal recognition of EC competences that derived from the Commission's actions. This explicit, formal gain in competences is helpful to this research because of the difficulties involved in measuring 'increased Commission influence', 'influence' being a rather hazy concept and particularly prone to diverging interpretations. Therefore, even when measuring elements and standards are devised to determine how influence can be conceptualised, they will undoubtedly be challenged on their accuracy (or indeed whether they are at all measuring what they are supposed to) and on the assumptions under which they were devised, applied and are operating. For this reason, the discussion of the legislative history of art. 133 and the widening of the scope of the Common Commercial Policy is important because it undeniably shows that there has been a gain in (exclusive) competences for the EC, with the ensuing prominent role and increased influence

for the Commission. On the other hand, the set-up of the case study is not ideal in that there is no clear counterfactual. The second case study, which will be dealt with in the following paragraphs, remedies that problem. The set-up here is as rigorous as possible: the same actors are involved and the issues at stake are almost identical, but there is variation in the institutional setting (GATT and WTO) and in the role of the Commission. Hence, while the TRIPS-case may have drawn attention to the *impact* of the institutional framework on the balance of power between the EU institutions, this case study pushes the *influence* of the institutional framework to the forefront.

In 1971, the US introduced the Domestic International Sales Corporation (DISC) Act, which came into force on 1 January 1972. In very general terms, this act grants tax deferral to US companies since a company that qualifies as a DISC is not subject to US federal income tax on its export earnings. In 1974, the EC challenged this piece of legislation before GATT, arguing that it was inconsistent with GATT rules. The EC representative argued that the aim of the DISC legislation was to increase exports, and that it thus constituted an illegal export subsidy (GATT, 1976a).¹⁰ The reaction of the US was to initiate complaints against France, Belgium and the Netherlands attacking their income tax systems, claiming that certain elements of these systems constituted an illegal export subsidy (GATT, 1976b; c; d). These complaints also focussed on tax breaks and other measures in the tax code aimed at avoiding double taxation of exports or profits or compensating for it.

Because export subsidies of third countries distort their trade relationship with the EC, it seems fairly straightforward and intuitive that these issues should fall under the CCP. It is therefore not surprising that it is the EC, and not one or more Member States, that is the main official actor in the GATT complaint against the American DISC-legislation. Correspondingly, it probably does not come as a big

¹⁰ Such a subsidy should have been notified and explained under article XVI: 1 of the GATT 1947 agreement.

surprise to learn that the retaliatory disputes the US brought against Belgium, France and the Netherlands were dealt with on a bilateral basis between the US on the one hand and Belgium, France and the Netherlands respectively on the other. The EC is not even mentioned once in these panel reports. Even though some authors have hinted at some behind-the-scenes involvement of Commission officials (Petersmann, 1983), Commission and Member State officials that were questioned about this claimed that this engagement was minimal and that the Commission was hardly involved in these disputes (interviews with David Maenaut, Henk Mahieu and Søren Schonberg). All this in spite of the fact that all three countries were EC Member States and that these cases were a clear retaliation for the initiation (by the EC) of the DISC-case against the US. The linkage between these income tax-cases and the DISC-case was explicitly made by the US, who suggested that “the four complaints on the DISC legislation and income tax practices in France, Belgium and the Netherlands should be considered together” (GATT, 1976b: p. 1).

The main problem is of course that the EC had no clear competences over tax issues in the late 1970s. Furthermore, taxation is often seen as being one of the very core elements of sovereignty and consequently it is a highly sensitive topic to discuss in the framework of the division of competences in the EU. Even the link between certain aspects of taxation and trade policy (or the internal market, for that matter) has not been sufficient to create a spill-over effect for taxation issues. Nor is this discussion confined to the period before the Single European Act. Consider, for example, the UK’s insistence on taxation (and the requirement of decision-making by unanimity regarding taxation issues) being one of their ‘red lines’ in the negotiations over the Constitutional Treaty for the EU (see Financial Times, 2004; Press Association, 2004). Hence, while the EC had made modest inroads into the issue area of (indirect) taxation by the time of the coming into force of the WTO, its competence in this issue area was still very limited.

In November 1997, the EC requested consultations with the US (the first step in the WTO dispute settlement system) on their Foreign Sales Corporation (FSC)

Act, which the EC claimed constituted an illegal subsidy for American firms (WTO, 1997d). The FSC Act is in fact the successor of the DISC Act, which the US had repealed in 1984 following a package deal on the handling of all four tax cases in the context of the Tokyo Round negotiations (Basic Instruments and Selected Documents, 1982: p. 114). In 1998 the Commission representative requested the establishment of a panel to rule on this dispute (WTO, 1998e). In reaction, the US initiated WTO proceedings against Belgium, France, the Netherlands, Ireland and Greece, claiming that certain elements within these countries' national taxation systems constituted illegal export subsidies (WTO, 1998f; g; h; i; j).

The context of these disputes (substance as well as initiation) is very similar to the situation within GATT when the DISC dispute and the related tax income-disputes were initiated. Unfortunately, the documentary evidence on these cases is rather thin. The only WTO documents to be found on the complaints initiated by the US are the requests for information and they are addressed to the individual governments concerned, so the documentary evidence does not shed much light on the role of the Commission in this dispute. However, interviews with officials from the Flemish and Belgian Ministry of Foreign Affairs, the Commission's Legal Service and DG Trade bring to light that the Commission did play an important role in these disputes (interviews with Barbara Eggers, Allan Rosas, Henk Mahieu, David Maenaut, Søren Schonberg and Lothar Ehring). DG Trade officials as well as officials from the Belgian and Flemish Ministries of Foreign Affairs confirmed independently of each other that there was only one round of consultations about these tax-disputes after the US' request, and that in this round – contrary to the situation in the similar tax cases in GATT – it was the Commission that represented the interests of the Member States concerned, not the individual Member States themselves (interviews with Henk Mahieu, David Maenaut, Søren Schonberg and Lothar Ehring). Rather than Commission officials being discreetly involved in the background in (limited) support of the Member State officials dealing with the case – as was the situation in the GATT-cases – they were now firmly in the lead in defending the interests

of the individual Member States. This increased role for the Commission can be considered highly unexpected because of the sensitivity of tax-issues for the Member States (certainly in this case, which relates to income tax). It does correspond, however, with the expectations flowing from the hypothesis that stronger institutional frameworks favour the Commission.

3.3 Alternative explanations and their weaknesses

In the previous sections, the hypothesis that the institutional framework influences the Commission's position has been tested with the help of case studies. Since Popper, it is known that every research is inevitably reductionist (no hypothesis can be tested against the whole of the real world). This also makes it impossible to 'prove' a theory conclusively (since one simply cannot falsify against all possible events). Nevertheless, this section aims to boost the credibility of the proposed institutional explanation by contrasting it with several alternative explanations that can be derived from other major theoretical approaches. If these alternative approaches can be rejected, that greatly strengthens the position and credibility of the institutional interpretation. First, our attention will turn to how the major approaches to European integration would explain the role of the Commission in these cases. This is important given that the focus of this research is on the integration process, which makes these theories the main contenders for explaining Commission-Member States relations. Since this has already been discussed in chapter one, when the research puzzle was introduced, it will be dealt with rather concisely here. Then, a couple of other alternative explanations regarding the Commission's role in the cases studied, or specific elements of this role, are discussed. Some of these explanations have to be rejected outright. Others are more promising, but in the end, none of these approaches matches the explanatory power of the institutional approach.

The concept of spill-over would undoubtedly take a central position in any **supranational** approach. The most obvious source of spill-over, then, would be the EC's exclusive competence for trade in goods (the CCP). After all, this is a closely related field and, furthermore, the technicality of the issues at stake should facilitate a technocratic approach. As was already noted earlier, however, these issues were not at all merely technocratic matters but they were heavily politicised, with the Member State representatives taking a keen interest in the TRIPS-negotiations, for example. Furthermore, if the process of spill-over really was the explanatory factor, then the Commission should be expected to play an important role in the GATT as well, since a much higher percentage of issues dealt with in the GATT context fell within the sphere of exclusive EC competence. However, when agreements on standards or trade in civil aircraft were included in GATT, the Member States insisted on dealing with those issues themselves. This is not to say that the process of spill-over is meaningless. The fact that the EC enjoys exclusive competence in a closely related issue area definitely is a facilitating factor, but it cannot adequately account for the Commission's role in the case studies.

For **intergovernmentalists**, the Member States are the key actors, and in particular the three big ones, Germany, France and the UK. It was shown, however, that all three countries (together with others) opposed the Commission's interpretation that trade in services and trade-related aspects of intellectual property rights fell under the exclusive competence of art. 133 EC. The intergovernmental explanation that the Commission gained these *de facto* competences and powers because the Member States allocated them or did not object to the Commission claiming them, thus looks dubious at best. The situation is slightly different in the analysis of the change in the Commission's role in the tax cases in GATT and WTO. After all, the argument that the preferences of the Member States had changed over time is more credible in the tax-case than it was in the TRIPS-case since more than 20 years passed between the GATT and WTO tax disputes, whereas the Commission started to tackle TRIPS-cases almost immediately after Opinion 1/94. But even then, the question

remains as to why those preferences changed. Given the sensitivity of tax-issues, it seems highly unlikely that the Member States (at least those concerned, which, in the WTO-case include Ireland) came to the conclusion that they would like the Commission to gain more power over tax issues. This brings us back to the argument that the stronger institutional framework of the WTO, with its option to impose trade sanctions in order to enforce compliance, has created an incentive for the Member States to be represented by the Commission, and has thus strengthened the position of the Commission.

Even the most sophisticated analytical approach to the European integration process, the **principal-agent analysis**, fails to account for the variation in the Commission's role. The major elements in this approach are the concepts of 'agency' and 'control'. In this view, the Commission will be able to pursue its preferred policy options, as long as the Member States do not create barriers that cannot be overcome. Within the context of the debates in the preparation of Opinion 1/94, it became very clear that the Member States, the principals, did not want to delegate these responsibilities to the agent. This created a formidable barrier, in principle severely curtailing the Commission's room for manoeuvre. Nonetheless, the Commission succeeded in playing an important role in the TRIPS cases. Also in the case of taxation, there is no wish on behalf of the principal to delegate (part of) these competences to the agent. But while it plays no role in the GATT-tax cases, the Commission does represent the Member States involved in the WTO-cases.

Another explanation is rooted in rational choice theory, and more specifically in **transaction cost economics**. The argument here would be that the Member States allow, and indeed want, the Commission to act on their behalf in Geneva because they want to minimise costs. On the one hand this could point to the actual costs associated with being represented in the WTO: a representation in Geneva swallows up scarce diplomatic and financial resources that might be put to better use elsewhere. However, given the huge costs and benefits of trade policy choices, it would be short-sighted at best if Member States would take into

account this relatively minor cost factor. Furthermore, there is no evidence for this since all Member States are still WTO members and still have their own delegations in Geneva. Similarly, if the EC would formally substitute the Member State as WTO members, that would lead to a sharp fall in the contributions that are payable to the WTO. Meunier indicates that the combined contributions of all the (then) fifteen Member States make up 42% of the WTO's budget, whereas this would only be 20% if only the EC represented the Member States (Meunier, 2005: p. 25). The WTO website indicates that its annual budget is around 160 million Swiss Franc. At an exchange rate of 0.63 (August 2006), that corresponds to a little bit more than €100 million. The savings for the fifteen Member States to cede their WTO membership would thus be a paltry €22 million per year. This pales compared to the value of the trade flows that are being regulated at the WTO level. For example, the WTO values the EU's exports at \$1 643 560 million (source: WTO website). Hence, the Member States have a very strong incentive to remain WTO members themselves as well since the advantages this entails (in terms of information gathering, lobbying opportunities, maybe being in a better position to defend the national interest when the need/opportunity arises, ...) are substantially larger than the savings. On the other hand, the cost-minimising argument could also refer to the costs that can be incurred by another country imposing trade sanctions. This is indeed a very good point and it definitely gives a strong incentive for Member States to be represented by the Commission, as the EC representative. In this case, though, the Member States' preference for Commission action is a consequence rather than a cause. Again it is the institutional framework that comes out as a decisive factor in determining trade-offs, and in influencing the Commission's scope for action.

Another argument would draw attention to the **decision-making rules**. This would claim that more and more decisions in the EU have been taken by qualified majority rather than unanimity since the WTO came into force. Related to this, another question is whether, because of the fact that the creation of the WTO and the entry into force of the Maastricht Treaty lie very close to each

other, the Commission had more influence because of a Maastricht-effect that was playing? For several reasons, this argument should be rejected as well. Most importantly, from the discussion of the legislative history of art. 133, it should have become clear that the Commission did not succeed in pushing through the changes to art. 133 it wanted in the run-up to Maastricht. It is only later, with the Amsterdam and Nice treaty revisions, that the CCP was gradually adjusted more in line with the Commission's 1990 proposals. If there is a 'Maastricht-effect' at all, it probably means less leeway for the Commission to achieve its preferences (if they run counter to those of at least some of the Member States), given the Commission's unpopularity at the time. Furthermore, the decision to alter art. 133 still required unanimity and bringing TRIPS-issues under art. 133 also still requires unanimity (but no formal treaty change any more). Therefore, the issue of increased qualified majority voting does not hold since any decision to increase the use of qualified majority had – and still has – to be taken unanimously.

Yet another explanation would take into account the role of the **United States**. Could it not be the case that the US actively pushed for an increased Commission role? That would at least (and finally) give it a single European representative whom to talk to about trade issues. While Kissinger's famous remark about the lack of a telephone number for Europe might have referred to what is now developing into a Common Foreign and Security Policy, the scattering of competences in the field of international trade is not exactly creating clarity for foreign trading partners about who is responsible for what in the EC. It is hardly surprising that third countries have difficulties in knowing who speaks and acts for Europe if the European actors themselves even have to turn to the Court of Justice for adjudication. This uncertainty, the argument then goes, could greatly be reduced if the Commission would be responsible for the whole CCP. However, the US has been rather ambiguous regarding the position of the EU in the world trading system. On the one hand the US was very supportive in the beginning, immediately recognising the EC's exclusive competence in the CCP (and hence its role in GATT). On the other hand, it often still tries to use divide

and rule-tactics when it comes to trade issues. A good example is the episode at the end of the Uruguay Round where President Clinton tried to break the European front in the final stages of the negotiations by directly contacting the heads of government of the three big Member States. In this case, “Mr. Clinton’s attempt to split EC leaders among themselves, and against the European Commission” (Brock, 1993: p. 10) failed, but this example clearly shows that the US will not hesitate to try and drive a wedge between the Europeans if it is in its strategic or commercial interest to do so (for more examples of such American negotiating techniques vis-à-vis the EC, see Meunier, 2005). Paradoxically, while one of the arguments to support EC competence for all trade issues is creating certainty, it is exactly the lack of such certainty regarding the *implementation* of agreements that often causes the US to hesitate to rely too much on the Commission as an interlocutor on the international stage. Given that the Commission is still largely dependent on the Member States for implementation and execution of agreements, there are often questions about its ability to deliver on its promise.¹¹

CONCLUSION

The aim of this chapter was to test the hypothesis that the institutional framework of an international regime can influence the Commission’s scope for drifting from the preferences of the Member States. This is not to say that the Commission gets *carte blanche* to pursue its own agenda. Of course there are certain limits within which the Commission should remain if it is not to be blown the whistle on by the Member States. This thesis argues that these limits are influenced and can be broadened by the institutional framework of the international regime. In particular the degree of ‘judicialisation’ of the institutional framework is important. Rigid, judicial frameworks favour the

¹¹ The most notorious examples here are in the field of environment where the US has regularly opposed EC involvement in international environmental agreements on exactly these grounds (see Jachtenfuchs, 1990; Benedick, 1991).

Commission for the reasons mentioned earlier (expertise, experience, incentives). Equally important, and closely related to a judicial approach, is the presence of a strong enforcement mechanism. This will offer incentives that reinforce the dynamics that favour Commission action.

The first case study focused on the Commission's surprisingly (pro-)active role in TRIPS-related disputes within the WTO context. Because of this activity, the Commission succeeded in gradually adjusting the scope of its competences in international trade policy, not only *de facto* but also *de jure*, through adjustments in article 133 TEC. This case showed how the role of the Commission in trade policy has become more important, even though the EC was not exclusively competent for the new issue areas such as TRIPS or GATS. The second case study paid particular attention to the impact of the difference in the institutional setting between GATT and the WTO by comparing the Commission's role in very similar cases in both organisations. In GATT, the Commission did not manage to play an important role in the defensive tax cases. In the WTO, by contrast, the Commission defended the Member States concerned, even though the complaints were specifically directed against the individual Member States. This evidence suggests that the institutional setting of an international regime can influence the Commission's scope of action, which is a confirmation of the first hypothesis as it was formulated in chapter two.

4

DYNAMIC INSTITUTIONALISATION AND TRADE: NEGOTIATING STRONG INSTITUTIONS

INTRODUCTION

The findings of the previous chapter raise other questions, which have important repercussions for the broader issue of how the European Commission behaves in the field of external relations. One of the questions that come to mind is whether there is any awareness within the Commission that it has more scope for drifting in more highly institutionalised settings. If there is, then this should be incorporated in the preferences of this institution. The expectation would then be that the Commission has a firm preference for strong institutional frameworks. In practice, this can show in two ways. Firstly, it can be reflected in the Commission favouring the creation of strong institutional frameworks in international negotiations. Secondly, efforts by the Commission to incorporate new issues in existing (strong) institutional frameworks can also be an important indication of its awareness that it is in a stronger position within such frameworks. The second strategy is particularly relevant for issues that do not

fall under the exclusive competence of the EC because the scope for disagreement and conflict with the Member States is greatest here.

This chapter and the next one take a closer look at these two preference-revealing strategies. This chapter focuses on the first option. It explores the Commission's role in the process of the institutionalisation of GATT into the WTO in general, and in the development of the dispute settlement system in those two organisations in particular. The emphasis is on the (changing) position of the EC. This is then linked to the dynamics of the negotiations so that their final outcome can be interpreted in the light of the respective preferences of the Commission and the Member States. Chapter five, then, turns its attention to the second explanation and discusses evidence that shows that the Commission actively tries to bring other issues within the strong institutional framework of the WTO.

4.1. The Commission and the institutionalisation of the world trade regime

The debate over trade authority has been above all a reflection and a test of a larger ideological battle over European integration.

Sophie Meunier and Kalypso Nicolaïdis (1999: p. 479)

The provisions of the Common Commercial Policy gave the Commission a central role in the Community's external trade relations, not in the least because it became the spokesperson for the EC and its Member States. While the Treaty of Rome provided for a gradual transfer of competences, no time was lost over it and the Commission already started to represent the Member States in the Dillon Round (1960-1961), even before the CCP fully came into force (see Petersmann, 1996). The role and functioning of the Commission in GATT was not always unproblematic, however. There are several reasons for this, but one of the most important ones undoubtedly was the Commission's uncertain institutional position within GATT. Even though the Commission represented the Member States in areas where the EC had exclusive competence, the EC was not a

contracting party to GATT and thus the Commission found itself in a rather peculiar position. Indeed, the GATT working party that had been established to examine the compatibility of the EEC Treaty with the provisions of the GATT never reached agreement on this issue (Basic Instruments and Selected Documents, 1959: p. 70; see also Petersmann, 1996). One consequence is that one could expect the Commission to be in favour of an institutionalisation of GATT since this clearly had the potential to strengthen the Commission's (institutional) position within the world trade regime.

Another important reason for the fact that the Commission's position in GATT was often problematic relates to the behaviour of the EC Member States. While, according to the provisions of the CCP, the Commission represented the EC Member States in matters falling under the EC's exclusive competence (i.e. most of the issues dealt with under GATT until the 1980s), the Member States all too often were not ill-disposed to undermining the Commission's position in GATT. One of the most prominent WTO scholars has noted that "[T]here have been occasional instances (...) when some tension on this question [the allocation of competences] arose between the EC Commission representatives and the member states" (see Jackson, 1990: p. 20). This could take the form of challenging the Commission's position or trying to bypass the Commission in order to defend national interests or other specific interests, for example those of certain domestic industries. The most striking illustration of a Member State trying to undermine the Commission for domestic reasons is probably the conflict between the French representative and the Commission representative at the GATT Council meeting of June 1988. On the agenda was a request by the US for the establishment of a dispute settlement panel against the EC on oilseeds. As for all GATT decisions, consensus was required. When the Commission delegate, as EC representative, agreed to the establishment of the panel, however, the French delegate intervened and expressed his clear and strong objections. Consequently, he claimed that his objection meant that there was no consensus and, hence, that the panel could not be established. The reaction of the EC representative is described in the minutes of that Council meeting, which read:

“[I]t was quite clear that France was a contracting party, but it was equally clear that France no longer had competence on matters of trade policy. That was the exclusive competence of the Community, which he represented in the Council as the representative of the Commission of the European Communities. [...] To take the French views into consideration would put into question all the current Community’s obligations and rights. For these reasons, even when France spoke as a contracting party, its views as to trade policies were null and void and could not be taken into account” (GATT, 1988a: p. 15)

A fierce debate ensued between several GATT members, with France repeating its stance four more times, despite unfavourable opinions from the Commission representative, the chairman, the GATT Director-General and several Contracting Parties (among which the United States).¹ After several attempts, the GATT Council nonetheless agreed to the establishment of a panel. The French representative, after being left with the short end of the stick, had to back down (and the French Prime Minister consequently apologised the following day, see Petersmann, 1996: p. 265). This account very clearly illustrates some of the tremendous difficulties the Commission faces when acting as the external representative of the EC. Surely it does not help in convincing third parties that the Commission acts as the spokesperson and negotiator for the EC regarding matters falling under its exclusive competence if the competence base is sometimes even questioned by EC Member States themselves. Of course, this example is an extreme case. It is certainly not the case that the Commission representative was facing challenges like this on a regular basis, but it does point out that the position of the EC within GATT was still not completely safeguarded. Even forty years of GATT practice and thirty years of EC participation within GATT could not avoid this argument about the very foundation of the role and position of the EC in the GATT system from taking

¹ The contentiousness and intensity of the discussion is also reflected in the minutes of the meeting, 30% of which are devoted to the description of this debate.

place. Two elements are particularly important in this 'oil-seeds fight'. First, the fact that such a head-on challenge of the Commission's authority was possible in the first place, given that there was no doubt that the issue fell under the EC's exclusive competence and that the Commission had been representing the EC for close to 30 years. Secondly, the eagerness with which several other GATT member states joined to express their concerns about the legitimacy of the EC's position in the GATT system. Australia and New Zealand, for example, were sceptical that the French position could be ignored in the GATT context. But particularly India and Brazil were openly hostile to the idea that the spokesperson for the Community could overrule the French position.

This touches upon a second important point, namely that Commission - Member States relations alone are not enough to determine and understand the EC's role in an international context. In order for the position of the Commission in GATT to be effective and meaningful, it is not only the internal coherence of the EC Member States in terms of their delegation of competences (to the EC/Commission) that is important. A lot also depends on the acceptance of the EC by the other contracting parties, most notably the United States (the most important trading power among the third countries). In fact, this did not pose too much of a problem when the EC at first became a player on the international scene. It was noted earlier that the GATT-consistency of the EEC Treaty could not be agreed upon, which blanketed the position of the EC within GATT in uncertainty. The US, however, was quick to accept the EC, represented by the Commission, as a full partner on the GATT stage. This became clear from the reaction of the American delegation to the issue of the conformity of the provisions of the Treaty of Rome with those of GATT. According to Evans, "the American delegation had given its support to the Community's refusal to submit to the procedures proposed" (Evans, 1971: p. 135). Furthermore, the same author notes that "[T]he Kennedy administration continued to lend sympathetic support to the EEC" (*Ibid.*).

That does not mean that the US has always been unambiguous in its policies when dealing with the Commission. More than once, it has tried to break the European coalition and undermine the Commission's authority by approaching Member States directly. This happened not only – as one might expect – in the early days of GATT when the Common Commercial Policy was not yet fully established, but it was even more pronounced later on. One of the most striking examples happened in the final days of the Uruguay Round negotiations when President Clinton tried – and failed – to set the Member States up against one another and against the Commission by directly dealing with Chancellor Kohl and Prime Ministers Major and Balladur, the representatives of the three big Member States (see Brock, 1993). Another, even more recent example reveals actions by the US that could easily be interpreted to be aimed at weakening the Commission's position within the functioning of the dispute settlement system. In April 1997, the US requested the establishment of two panels challenging the customs classification of certain computer equipment. One panel was initiated against Ireland (WTO, 1997e), the other one against the United Kingdom (WTO, 1997f), despite the fact that the US had already requested consultations with the EC on this very same issue as early as 8 November 1996 (WTO, 1996). The singling out of two Member States in these new requests for the establishment of a panel could indicate American frustration at having to deal with the EC rather than with individual Member States, which can much more easily be manipulated by a big player such as the US. This American move therefore prompted a strong reaction from the Commission representative. According to the minutes of the relevant meeting of the Dispute Settlement Body, he stressed that

“the issues raised in the request for a panel had to be properly addressed to the Communities as a whole. Application of the Common Customs Tariff with [*sic*] the Communities and the implementation of the EC Schedules were matters on which the Communities' [*sic*] had sole responsibility. [...] To avoid all doubts, he confirmed that in addressing the issues raised by the United States before the panel, the Communities would be acting on behalf

of the member States, including in particular Ireland and the United Kingdom” (WTO, 1997: p. 6)

In this light, it is understandable that the Commission would prefer a more institutionalised setting where its position as equal partner would be enshrined in a treaty that it would sign as an ‘original member’. From a more theoretical point of view, this also shows a conceptual problem in focusing on external relations to study the European integration process, namely the intrinsic links between the internal and the external level. On the one hand, external recognition is very important for the Commission in order to strengthen its position internally, but on the other hand internal coherence, the support of the Member States, is also an important element for the Commission in convincing third parties of its credibility. After all, third countries will want to have some guaranty that the Commission can deliver what it negotiates. This interaction between the internal and external levels will have to be integrated in the concluding chapter, when the theoretical framework is revisited.

In short, there are internal issues (Commission-Member States relations) as well as external elements (the Commission’s relation with the other contracting parties, and with the US in particular) that influence the Commission’s standing and credibility in GATT. The institutionalisation of GATT and the ensuing recognition of the EC’s and thus the Commission’s role could strengthen the Commission’s position in GATT in that it would lessen its dependence on the ‘goodwill’ of the Member States and relevant third parties. This view that institutionalisation can benefit the Commission is also shared by close observers of the Uruguay Round. Raghavan, for example, claims that

“[O]ne of the EC Commission’s main objective [*sic*] in pushing the Multilateral Trade Organization (MTO) in the Uruguay Round has been that with an MTO, and as a definitive treaty, it would not only strengthen the EC’s position vis-à-vis the US, but would have also strengthened the EC

bureaucracy's position vis-à-vis the member-states and national bureaucracies" (Raghavan, 1992)

Indeed, the same author had earlier suggested that "[T]he idea of creating such an ITO [International Trade Organisation] through the Uruguay Round (to implement results in the new areas that could not otherwise be incorporated into the GATT) appears to have been discussed informally at some consultations of the GATT Director-General". And that "[T]he EEC is reportedly behind this idea" (Raghavan, 1990, see also Raghavan, 1990a). That this informal meeting took indeed place is confirmed by Jackson, who also adds that "[D]iscussions about a new organization began to develop in some delegations, particularly within the European Community" (Jackson, 1998: p. 27). This move by the EEC to press for an institutionalisation of the GATT was also acknowledged – and criticised – by Kenneth Dadzie, the Secretary-General of UNCTAD (quoted in Raghavan, 1990b). The EC formally tabled its proposal for the creation of a 'Multilateral Trade Organization' on 9 July 1990 (GATT, 1990; for a comment in the press regarding this development, see Dullforce, 1990a).

As indicated above, it should not come as a great surprise to find the Commission in favour of institutionalising the GATT by creating a formal organisation since that would substantially increase the Commission's standing as well as strengthening its position. In order to achieve this, the Commission, negotiating for the EC, was forced to play a leading role. The main reason for this is that the US was not very excited at the prospect of creating a new international organisation and saw no need to create an ITO almost fifty years after the US congress had made clear it would not approve such an organisation. Paemen and Bensch note that "it was widely known that they [i.e. the Americans] had misgivings about the institutional aspects (...)" (Paemen and Bensch, 1995: p. 220). And Jackson states that "[T]he US, perhaps alone of the quad and other major participants in the negotiation, refused to commit itself to the establishment of anew organization at that time" (Jackson, 1998: p. 28). In his voluminous negotiating history of the Uruguay Round, Stewart describes

how, in the negotiations over the final package, the US reopened the discussion on this institutionalization expressing the view that “an MTO was not necessary to accomplish the basic objectives of the negotiations” (Stewart, 1993: p. 52).² Furthermore, the Commission saw a window of opportunity in the interpretation of some Member States, especially Italy and France, that the creation of a coherent institutional framework would offer some protection against the increasing unilateralism of the US. As a Financial Times article on the proposal of Renato Ruggiero, then Italy’s trade minister, regarding reviving the idea of an ITO indicates, officials within the Commission had already been playing with this idea for a while (see Dullforce, 1990).

So, given that nothing happens if the two biggest players are against, and given the US resistance to the idea of creating an MTO, the EC would have had to have made a considerable effort to push through this institutionalisation of GATT (and thus have strong preferences for this outcome, given the cost in negotiating capital for becoming *demandeur* for this issue). Internally, there are indications that the Commission was already pondering the idea of creating “[S]ome kind of umbrella organisation” (Dullforce, 1990) some time before the idea was first uttered by the Member States. This interpretation of the Commission as the driving force for greater institutionalisation within the EC seems to be confirmed in an article in The Times, reporting on the final outcome of the Uruguay Round, which states that “[T]he European Commission (...) would be justified in claiming that it has kept the Gatt ball rolling towards the declared goal of a Multilateral Trade Organisation (MTO), armed with the means to judge and settle disputes” (Narbrough, 1993: p. 25). This is consistent with the hypothesis that the Commission was proactive in bringing about an institutionalisation of the world trading system because this would have the potential to substantially strengthen its position, not only internally vis-à-vis the Member States, but also externally vis-à-vis other WTO members.

² Regarding the American resistance to the creation and naming of the new organisation and the problems this created in the last moments of the negotiations, see also Williams (1993).

4.2. The Commission and the evolution of the GATT/WTO dispute settlement system

The single greatest achievement of the Uruguay Round was the agreement on the Dispute Settlement Understanding. This provided, for the first time in the history of international trade negotiations, for the strict application of the rule of law (...)

Philip Lee, who represented the Eastern Caribbean States in the 'Bananas' dispute
(House of Lords, 2000: paragraph 248)

With regard to the dispute settlement system, the EC seemed quite content with the more 'diplomatic approach' (see Jackson, 1979) that dominated the GATT (certainly in the early stages). Unlike the US, which had always been a solid proponent of a strongly judicial approach to tackling trade disputes, the EC had a long tradition of opposition against any form of judicialisation of the GATT dispute settlement system at the beginning of the Uruguay Round. Since Jackson has noted that big countries could be expected to prefer a more diplomatic approach (where they can use their relative power to bully smaller states into acceptance), scholars have tried to explain the puzzle why these two trade giants have such different preferences (see Jackson, 1979; Hudec, 1979; Roessler, 1987). What is important in the light of this thesis is the EC's initial firm and consistent opposition to any attempt to weaken the control of GATT member states when it comes to dispute settlement.³ The EC position is summarised aptly by Phan Van Phi, ex-director of DG I and the EC's permanent representative in Geneva during the Uruguay Round, who referred to the GATT as "un organe de méditation en cas de litiges (mais nullement une instance juridictionnelle dont les décisions s'imposent aux Parties)" (Phan Van Phi, 1987: p. 40).⁴ A good ten years later the official position had changed dramatically. A European Commission information pamphlet on 'The European Union and world trade' states that "[D]uring negotiations on the WTO, the European Union worked hard

³ This seems quite counterintuitive at first since the EC has the strongest degree of judicialisation of any international organisation, if it can be regarded as one (see for example Jackson, 1990).

⁴ "an organ to mediate in disputes (but certainly not a judicial entity whose decisions are imposed on the parties)" (freely translated).

to ensure that (...) its [i.e. the dispute settlement system's] use would be compulsory and that no single country on its own could prevent an allegation being investigated" (Commission, 1999a: p. 5). This section investigates what caused this U-turn and how it relates to the main argument of the thesis.

There is widespread evidence of the Community's hostile attitude towards greater legalisation of the GATT in the period up to the late 1980s. The earlier mentioned decision of the GATT contracting parties to abandon discussions on the compatibility of the Rome Treaty with the GATT, under pressure from the EC, can be regarded as one of the earliest indications of EC aversion for clear, legal settlements in the GATT context (see Petersmann, 1996: pp. 67-68). Then there is also the pragmatic approach that was adopted when examining some of the EC's preferential trade agreements (those with the EFTA countries, the Mediterranean countries, and the Yaoundé and Lomé conventions) with Art. XXIV GATT.⁵ The compatibility of these agreements with GATT was "each time left undecided in view of the diverging views of, on the one side, the EC Member States and their preferential trading partners, which account for the majority in the GATT Council, and, on the other side, adversely affected third GATT member countries" (Petersmann, 1996: p. 68).

This EC propensity to avoid solutions and approaches in a judicial mould became especially clear in the Tokyo Round negotiations over the strengthening of the GATT dispute settlement system.⁶ The EC was strongly opposed to proposals to grant a country the right to a panel. Instead, the EC argued in favour of keeping the system in use where the GATT Council decided whether a panel should be established on a case by case basis. Obviously this decision had to be taken by consensus, as was the practice in GATT. The EC argued that "[GATT] Council action was desirable in order to stop trivial and meritless complaints" (Patterson,

⁵ Article XXIV basically states that the provisions of the GATT shall not prevent the creation of customs unions or free-trade areas if the duties are not higher or more restrictive than before. For both customs unions and free-trade areas, duties have to be eliminated on "substantially all the trade between the constituent territories" (Art. XXIV, 8 a(i) and b GATT 1947).

1983: p. 238). This ties in with the official EC position expressed in a GATT Council meeting that the GATT dispute settlement procedure should not be expected to help resolve conflicts in which vital national interests were at stake (GATT, 1988: p. 14). The same view is expressed by the EC negotiator in the Negotiating Group on Dispute Settlement at the beginning of the Uruguay Round. He stated that “[I]t [i.e. the GATT dispute settlement system] remains a delicate instrument between sovereign contracting parties, especially when fundamental interests are at stake” (GATT, 1987: p. 1). This shows that, as far as the EC was concerned, the consensus rule in GATT was sacrosanct.

Other tactics the EC employed to weaken the GATT dispute settlement process were more technical, but no less important. The EC pressed, for example, for panels to be made up of five rather than the traditional three members. Having larger panels means longer time frames since it takes more time to find panel members, for them to meet and deliberate, and issue a conclusive final report. Furthermore, the EC strongly argued against the proposal for admitting non-government persons to sit on a panel, a measure that was intended to speed up the panel proceedings and make the panels more independent. The EC also proposed that panels should be required to discuss their reports with the parties to the disputes before finalising its findings. This proposal ran into strong opposition and the EC was forced to abandon it, but “the fact that it was brought forward, when combined with the other Community positions noted, led many to believe that the EC did not in fact want to strengthen international dispute-management systems and would, in general, prefer to handle its disputes bilaterally” (Patterson, 1983: p. 239). As if to illustrate this, in 1982 the EC emphatically rejected a US proposal for consensus minus two for the adoption of panel reports and countered with the demand that the GATT practice of decision-making by consensus be officially recognised.

For some, this European foot-dragging might seem a bit strange. After all, had these countries not delegated jurisdiction to the European Court of Justice when

⁶ This paragraph and the next draw strongly on Patterson, 1983, pp. 237-241

it comes to fundamental economic issues? Given their experience, one could expect them to be great proponents of a rule-oriented approach in trade issues. Several other elements go some way to explaining this EC reluctance to accept a more judicial approach to dispute settlement. First of all, the Commission, just like each of the individual Member States, was used to dealing with other countries on a bilateral basis, which fits better into a power-oriented approach.⁷ Second, it could also be argued that the Commission was experienced in international negotiations because of its role of external representative of the EC. This expertise in negotiation connects more closely to the diplomatic, power-oriented approach of negotiation and consultation than to the arbitration mechanism of a strongly legalistic method (the GATT-division of the Legal Service, for example, was not established until after the first changes were made to the dispute settlement system). Third, as was mentioned earlier, the field of external relations is quite contentious, with the Member States often being reluctant to cede power to the EC. Fourth, decisions were usually taken unanimously. Even when a qualified majority was required, the Luxembourg compromise was always hanging over the heads of the Ministers and the Commission like the sword of Damocles. Combined with the uncertainty over the exact scope of Community's external competences, it would take a very strong Commission to 'drift' from the Member States' preferences in such a delicate matter. After all, the inherent danger was that if the Commission went too far and confronted the Member States, they might well decide to rein in the Commission. Furthermore, there were some other facilitating factors for sticking to a power-oriented approach. For example, the lack of direct effect of GATT-law in the EC legal order meant that there was no overview or control by individuals (fire-alarm oversight, see chapter two) on the actions of the Commission and Council. Also, there was no European 'Section 301' that could

⁷ Although it could just as well be argued that the Commission should have an intuitive preference for rules-based systems. After all, the power-based approach is founded upon the basis of the more traditional diplomatic interaction between states, which puts the Commission in a somewhat unfavourable situation since the EC is a strange entity in inter-state relations. In such settings, Member States are thus advantaged in that for them as well as for third countries, it will be easier and more natural to interact on a bilateral basis in such a context.

force the EC to initiate a dispute. Even the New Trade Policy Instrument of 1984 had only very limited effects because of the rather high hurdles of admissibility (see Hilf, 1990: p. 67).

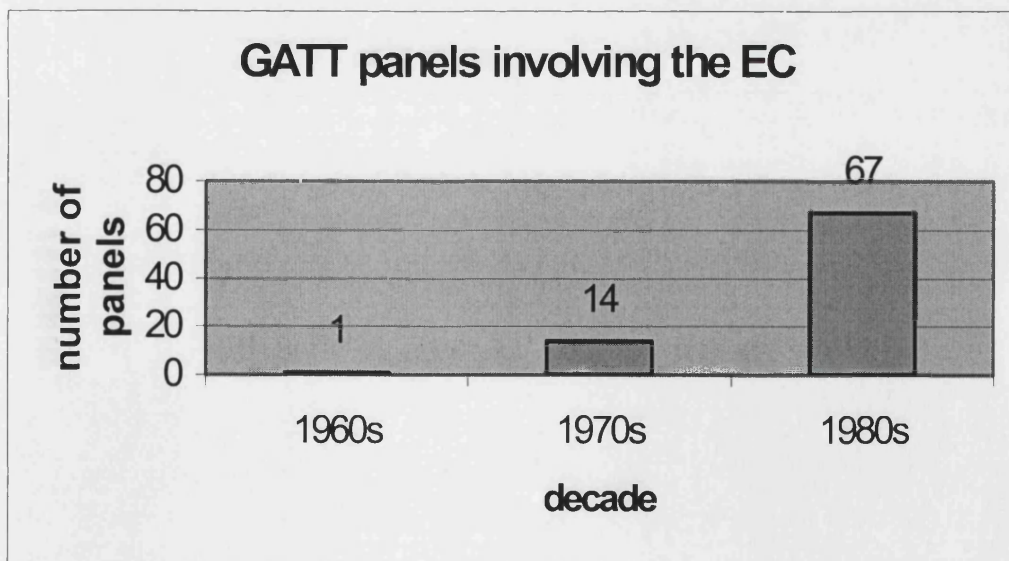
While all the factors mentioned previously did play an important role, the single most important reason for this European intransigence over introducing stronger dispute settlement provisions was probably the EU's Common Agricultural Policy (CAP). This distortive system of (often GATT-inconsistent) import barriers and export subsidies provided an obvious and easy target in the particularly sensitive sector of trade in agricultural products. It was therefore prone to being challenged before the GATT's dispute settlement system. (a glance at the dispute settlement statistics shows that 59% of all formal GATT disputes involving the EC (until 1986) involved agricultural products and foodstuffs, rising to 65% if only the cases where the EC was defendant are taken into account).

On the other hand, the CAP was (and in some cases still is) regarded as a core element of the European construction by several key actors. France, for example, is notorious for defending the CAP tooth and nail. There are, of course, several self-interested reasons for taking this position. France is the biggest net beneficiary of the CAP, so any decrease in CAP spending would lead to a net decrease in the direct financial benefits of European integration (for France). Furthermore, there is a pressing domestic incentive for French politicians to defend the CAP because of the strength of the agricultural lobby. Yet there is also a more idealistic argument for supporting the CAP. This is based on the fact that the CAP was one of the earliest fully-fledged European policies so that some still regard it as the core of what the EU is about.

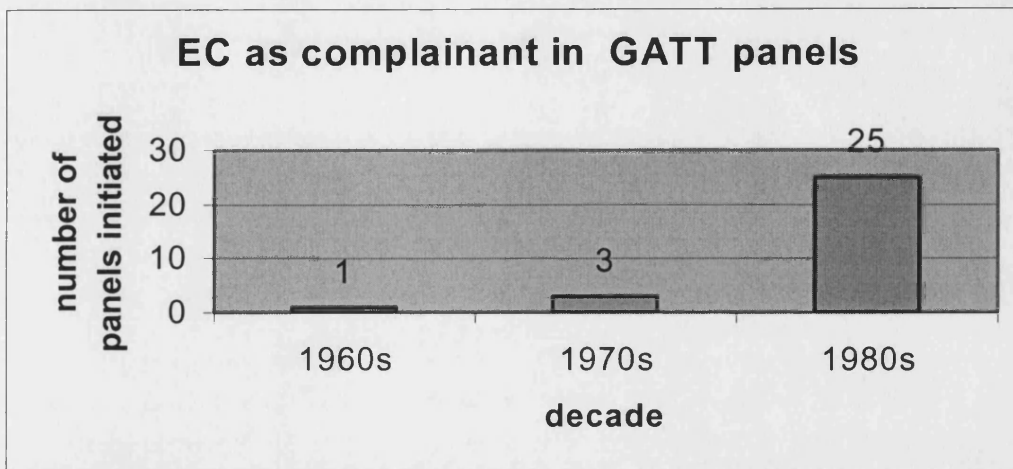
The same two strands of argument also explain why the CAP was so important to the Commission. The CAP was (and still is) easily the single biggest item of the EU-budget. Furthermore, it was also the most important policy area in terms of the sheer scope and extent of the Commission's powers, transferring "welfare

state functions (...) to the European level” (Rieger, 2000: p. 179). This is reflected in the fact that the Treaty of Rome had given the Commission extensive powers when it came to agriculture. In short, the fact that the GATT-consistency of a policy, which was perceived by key actors (Member States and Commission alike) to be of central importance, was debatable at best did not exactly give the Commission nor the Council an incentive to agree to closing some of the loopholes in the GATT dispute settlement system and making it more binding.

In the 1980s the situation started to change. This period saw a huge increase in GATT panels involving the EC (see graph 1). Interestingly, the EC also became much more active in the GATT dispute settlement system as a complainant (see graph 2). In the 1970s, the EC was complainant in only 3 of the 14 panels (21.4%) it was involved in. In the 1980s, this was the case for 25 of the 67 panels (37.3%). This increased EC involvement in the GATT dispute settlement system was reflected in the EC’s policies in that it led to a more ambiguous approach to the issue of strengthening the system.



Graph 1: GATT panels involving the EC



Graph 2 : GATT panels initiated by the EC

On the one hand, the EC's agricultural policies as well as its preferential trade agreements were still fertile ground for third countries to initiate disputes against the EC (see for example Murphy, 1990; 1990a; Petersmann, 1996; Paemen and Bensch, 1995). As mentioned earlier, these attacks and the resulting pressures on the domestic EC policies (which are themselves often very delicate compromises, especially when it comes to agriculture) influenced the EC to stick to its anti-legal stance. After all, it did have to block some high profile cases (like the first hormones case) and the adoption of some damning panel reports (for example in the EC/US dispute over pasta subsidies or in the EC/US dispute over preferential tariffs for Mediterranean citrus products). This goes a long way in explaining the EC's position that the consensus rule should be maintained since the dispute settlement system could not and should not deal with disputes where vital interests are at stake.

Additionally, the EC was not exactly on the best of terms with the GATT secretariat, or at least its legal department. The EC had long blocked the establishment of a Legal Office in the GATT secretariat. Only in 1983 did the EC give in, after assurances that the director of the Legal Secretariat would be a

trade diplomat (Petersmann, 1996: p. 268). Despite this compromise, the mistrust and discontent between the EC and this legal branch of GATT persisted. According to Paemen and Bensch, the EC “had regularly criticised the intrinsic legal quality of the reports, which it felt to be too inclined to the views of the legal department of the GATT secretariat, a somewhat politicised body, only too happy to offer its services to panellists” (Paemen and Bensch, 1995: p. 161).

On the other hand, as is indicated by the sharp increase in EC initiated panels, the EC ‘discovered’ the dispute settlement system as a more efficient – or effective – way to solve trade disputes. With the increased use of the judicial approach to dispute settlement came the realisation that the traditional ways of dealing with these disputes, namely negotiation and consultation, could be quite tedious and inefficient. A good example is the dispute over Japan’s discriminatory liquor taxes. For seven years, the EC had tried to settle this dispute through a series of bilateral negotiations, but to no avail. When the Japanese government finally tried to amend the liquor tax legislation, its proposals were rejected by the Diet where the liquor lobbies were still very powerful. In 1986, the EC then asked the GATT contracting parties to establish a panel, which the GATT Council did on 4 February 1987 (Basic Instruments and Selected Documents, 1988: p. 84). The panel that was established ruled in favour of the EC and the panel report was adopted on 10 November 1987. By 1989, the Japanese had complied with the findings of the panel. This provided the EC with a particularly strong example of the advantages of the GATT system, illustrating the benefits of strengthening the GATT dispute settlement system. After all, what proved to be too contentious to be done in seven years of bilateral negotiations was achieved in just over one year and a half by making use of the dispute settlement system.

The fact that previous attempts by the EC to establish a GATT panel were frustrated by the Japanese (for example at the GATT Council meeting of 5 and 6 November 1987, see Basic Instruments and Selected Documents, 1988: p. 83) would only have brought the point home that the system of decision-making by consensus also played against the EC. But there were other reasons for the EC to

support a strengthening of the dispute settlement system. An important element was the desire to curtail or prevent the threat and use of unilateral trade sanctions by the US (as allowed for under Section 301 of the – amended – Trade Act of 1974). For the EC, this was an important objective in the Uruguay Round negotiations (see Paemen and Bensch, 1995). Another experienced practitioner noted in this respect that “[T]he European Community negotiators were particularly fixated on this objective (...)” (Stoler, 2004: p. 103). The increased threat of American unilateralism has to be understood in the context of the early 1980s. At this time, the US experienced one of the worst recessions in its recent history, saw the dollar appreciate strongly (nearly 30% between 1980 and 1984; source: Sapir, 2002) and oversaw a sharp deterioration in its foreign trade balance (to a deficit of 3% in 1984 and 1985; source: Sapir, 2002). At the same time, the full effects of the Common Agricultural Policy kicked in. Since 1979, the EC became a net exporter of temperate foodstuffs, which were heavily subsidised in order to be competitive enough to be sold on the world market. As a consequence of this situation, US exports to the EC diminished, while EC exports to the US – including for agricultural products – soared (see Ostry, 2006). Predictably, this led to cries of outrage in the US over this unfair competition of subsidised European products. And given that there was no strong dispute settlement system in place which the US could use to address these concerns, threats and the likelihood of unilateral action under Section 301 became much more likely. This, in turn, as witnessed by the earlier quotes of several practitioners, was a strong incentive for the EC to push for a strengthening of the rules governing dispute settlement on international trade issues. In short, as some insiders have put it: “[T]he European Community was torn between its desire to reinforce the binding nature of GATT procedures on the one hand, and (...) political considerations [against enforcing the system] on the other” (Paemen and Bensch, 1995: p. 161).

Apart from the realisation, with the increased number of offensive cases initiated by the EC, that the consensus system could be rather frustrating, there was also the development within the EC that the relative importance of the CAP

decreased. Although the CAP was still hugely important and easily the biggest EU policy (and certainly not only in purely monetary terms), the rationale behind this policy as well as the policy itself were increasingly being questioned by new policy developments. Probably the biggest set-back for the CAP was the launch of the Single Market programme. After all, the Single European Act led to an increase in the number of policy areas in which the EC was attributed competences, but also in the depth and scope of the many of the EC's existing competences in 'old' policy areas (like competition, for example).

The fundamental tension between the benefits of having a binding dispute settlement system for offensive purposes and the usefulness of having blocking possibilities for defensive uses is clearly reflected in the outcome of the Montreal 'mid-term' review of the Uruguay Round in 1988. At this ministerial meeting, the parties (including the EC) made an attempt to make the dispute settlement system more effective by accepting stricter procedural rules for dispute settlement, making it harder for any party to block the establishment of a panel. However, 'harder' does not mean 'impossible' and as the EC-US dispute over hormone treated beef shows, the consensus rule was still very relevant when fundamental interests were at stake. This dispute erupted at the end of 1988 and continued into the next year (and, for that matter, was still not entirely resolved at the time of writing).⁸ Interestingly, both the EC and the US used blocking techniques to defend their interests. The EC blocked the establishment of a panel requested by the US to examine the GATT-consistency of EC import restrictions on hormone-treated beef, and the US blocked the establishment of a panel requested by the EC to examine the GATT-consistency of unilateral American sanctions imposed in retaliation for the import restrictions. In general, however, while blocking the establishment of a panel became politically much more

⁸ The WTO Appellate Body ruled that the EC had not complied with WTO law because its import ban of hormone-treated beef was not based on a solid risk assessment. Consequently, the EC ordered more studies to be carried out into the risks of using hormones. At the time of writing, these studies had just been finalised and the EC claims that they provide sufficient evidence to justify the European import ban (and, thus, that the American and Canadian sanctions in place in retaliation for the EC's non-compliance with the Appellate Body's ruling are illegal). The WTO hearings are ongoing.

difficult as a result of the mid-term review agreement (see Jackson, 2000), no steps were taken to limit the possibilities to block the adoption of a panel report. The mid-term review thus resulted in a tentative move to a stronger judicialisation of the dispute settlement system, but it still left open plenty of diplomatic loopholes.

At the beginning of the Uruguay Round, the EC position still was to “reaffirm its readiness in the search for more effective procedural formulae in the area of dispute settlement *based on consensus*” (Bourgeois, 1995a: p. 83). In closed-door negotiations on the reform of the GATT dispute settlement system in mid-April 1987, the Commission representative was reported to have been defending the view “that GATT did not provide for judicial rules and sovereign states could not be forced to accept decisions which they regard to be in breach of their balance of rights and obligations” (Raghavan, 1987: p. 1). The major change occurred later in the Uruguay Round, when the new dispute settlement understanding was agreed (Paemen and Bensch date this around 1990, see Paemen and Bensch, 1995). Within the EC, the Commission had become the most dynamic advocate for introducing a more formal and legalised approach to dispute settlement. A *Financial Times*-article, written at around the time of the decisive negotiations on the dispute settlement system in the Uruguay Round, clearly spelt out this proactive role of the Commission. It reads: “European Community foreign ministers will today consider new Commission ideas for dealing with trade disputes that would strengthen the authority of the Geneva-based General Agreement on Tariffs and Trade (Gatt) and could put it in conflict with national interests” (Dickson, 1990: p. 2). One of the more controversial ideas that was floated by the Commission was the creation of “some new form of legally binding appeals procedure” (*ibid.*), which later became the Appellate Body. Also, an important active participant in the Uruguay Round negotiations has confirmed the central role of the Commission in this process of “moving the Brussels community off the ‘diplomatic model’ and onto the ‘judicial model’ of dispute

settlement” (Stoler, 2004: p. 102).⁹ According to Stoler, certain parts of the Commission played a prime role in influencing the EC position and in moving the negotiations forward in the direction of a stronger dispute settlement system (*id.*).

The new approach to solving trade disputes offers no possibilities any more for individual countries to block the process, so having agreed to this can rightly be seen as a major turning point in the EC’s external policy. It was indicated in the previous paragraph that the EC was actually playing a constructive role in the negotiations over the reform of the dispute settlement system, which is an even bigger U-turn from previous policy. It was also pointed out that within the EC the Commission was a major driving force in this process, pushing through some fairly far-reaching proposals (certainly when compared to earlier statements and actions). But the EC position has evolved even further. In a discussion paper in the context of the general review of the dispute settlement system, the EC argued for the establishment of “a standing Panel Body” (Commission, 1998a). These permanent panellists would form chambers of three (as opposed to the EC’s earlier insistence on panels of five). Furthermore, the panellists should be experts and act independently (again, as opposed to the EC’s earlier insistence on staffing the panels with diplomats). This position is further explained and defended in subsequent communications (WTO, 2002b; Commission, 2003).

The previous paragraphs again draw attention to the use of the term ‘the Commission’ in this thesis. It has already been pointed out that this in no way implies that the Commission is regarded as a unitary actor, something that becomes particularly clear in the context of the evolution of the Commission’s position concerning the fine-tuning of the world trade regime’s dispute settlement system. Initially, agricultural and diplomatic interests were predominant, leading the EC to resist any stricter form of dispute settlement. Gradually, other issue areas gained prominence on the European level as well,

⁹ Andrew L. Stoler was principal US negotiator for the Agreement Establishing the WTO during the Uruguay Round.

resulting in a more nuanced (or contradictory) approach. This is summarised aptly by a former deputy Permanent Representative of the United States to the WTO – and the principal negotiator for a wide range of WTO agreements – who notes that

“[F]ormer Commission negotiators indicate that the development of European Community objectives in the negotiations [on dispute settlement] was mostly a progressive and incremental process where certain sectors of DG-I (Trade) and the Legal Service slowly overcame resistance of other sectors of DG-I and DG-VI (Agriculture)” (Stoler, 2004: p. 102)

The final U-turn in the EC’s negotiating position thus had its roots in the shifting balance of power within the Commission. Initially the coalition between DG Agriculture, representing agricultural interests, and large parts of DG External Relations, representing the diplomatic face of the Community, was strong enough to impose its preferences on the Commission and put its stamp on the EC’s position. Gradually, other issue areas gained ground, changing and reshaping power politics within the Commission. It was already mentioned earlier that the emergence of new policy areas where the EC gained competences and the ‘deepening’ of the EC’s competences in some existing areas started to mitigate the dominance of agricultural interests within the Commission (when it comes to external trade). It also became increasingly clear that there was a shift between the parts of DG-I working on international trade and other parts working on other issues. Given the nature of the EC’s external competences, these other issue areas tended to be less technocratic and thus more prone to being governed by a traditional, diplomatic approach. This tension, and the emergence of trade interests as an important power in intra-Commission politics, came to the surface in the Uruguay Round negotiations on dispute settlement and were later formalised in the split of DG-I and the creation of a separate DG for international trade issues.

With the use of the term ‘the Commission’, these games of bureaucratic and power politics are implied without making them explicit if they do not directly add anything to our understanding of the issue at stake. The main reasons for this are conceptual as well as analytical. The conceptual argument is that it is hard to operationalise a multi-faceted three level game where not only domestic politics within the Member States have to be taken into account, but also inter-institutional relations within the EC as well as intra-institutional politics within each of the EC institutions. Analytically, going into detail about the bargaining game that goes on within the Commission would (often unnecessarily) blur the picture of the Commission-Council/Member States bargaining game. Furthermore, the question about the limits of the analysis would certainly be an issue. After all, the intra-Commission bargaining game starts at the unit-level (although some say they start even earlier, at the personal level) and works its way up from there, sometimes going through all the hierarchical stages up to the college of Commissioners. In order to avoid such analytical fuzziness, the final Commission output is taken as the point of departure. This is interpreted as showing the preference of ‘the Commission’, knowing full well that this is not the work of a unitary actor and that this outcome is itself the result of an intense bargaining game being played within the Commission.

CONCLUSION

This chapter further explored the impact of the institutional framework of international organisations on the Commission’s competences in the area of trade. It did so by exploring if there is any realisation within the Commission that there are possibilities for strengthening its position when there are strong international institutions. If that is the case, the expectation would be to see firm Commission support for such strong international institutions. This can take two forms. Firstly, it could be translated in the policy preferences (and actions) of the Commission in that it might favour a strengthening of the institutional framework. This was explored in the first section of the chapter, which looked at

the Commission's position on how, in its opinion, disputes should be settled in the international trade regime. The Commission's position at first was a firm anti-legal stance, but now it is one of the biggest supporters of strengthening the system even more and making it more judicial. A second way in which the Commission's liking for strong institutions could be exposed is to examine whether the Commission will try to include new issues into the existing, strong, institutional framework. This is particularly relevant for issues that do not fall under the exclusive competence of the EC because the scope for disagreement and conflict with the member states is greatest for those issues. This will be explored in the next chapter.

Finally, it is also worth drawing attention to the methodological difficulties in trying to separate the international and the domestic (i.e. EU) level. These levels cannot be seen independently from each other since there is a very clear interaction effect going on. On the one hand, the international level is important in that it can be a useful tool for the Commission to influence and change the internal balance of power. In this sense, the international system is thus clearly impacting on the domestic level. On the other hand, the EC is one of the main players at the international level, which means that the domestic level (intra-EU politics) can heavily influence what happens at the international level. At first sight, this might seem to be reason for optimism for the Commission since it could mean that the Commission is able to shape the international context that it can then 'exploit' to gain competences. However, it also means that the position of the Member States is strengthened since they could influence the Commission's behaviour by setting stricter limits and reducing the set of possible/acceptable outcomes (for example concerning the negotiating mandate, or the actual outcome of negotiations). The strength and extent of this interaction between the domestic and international level and the consequences for the balance of power between the Commission and the Member States only reinforces the claim of this thesis that the international institutional context should be taken into account more seriously when addressing Commission-Member States relations in external relations.

5

DYNAMIC INSTITUTIONALISATION AND TRADE: THE ISSUE OF INVESTMENT IN THE INTERNATIONAL TRADE SYSTEM

INTRODUCTION

While the previous chapter analysed the Commission's role in the negotiations concerning the dispute settlement system in the trade regime and its subsequent evolution, this chapter explores a specific case study to illustrate the Commission's preference for dealing with and bringing new issues within the strong WTO framework. A lot has been written about the so-called 'Singapore Issues' in the past couple of years (see for example Evenett, 2003; Cosby, 2003; Bercero and Amarasingha, 2001, Anderson and Holmes, 2002). At the Singapore Ministerial Conference in December 1996, the first such meeting, the ministers of the WTO member states decided, among other things, that the link between trade on the one hand and, on the other hand, investment, competition policy, transparency in government procurement, and trade facilitation respectively should be studied more closely (see WTO, 1996a). To this aim, three working groups were established to examine how these issues can influence trade, and,

hence, how they could or should be integrated in the legal framework of the WTO.¹

Among the Singapore Issues, investment is arguably the most vehemently contested topic. It certainly is among the most hotly debated ones, which is one of the main reasons it is singled out here as a case study (rather than, for example, competition policy or government procurement). The issue of investment had already been dealt with in the Uruguay Round negotiations, but the results were fairly limited. The provisions of the agreement on trade-related investment measures (TRIMS) are of a rather general nature, basically reaffirming the pre-existing GATT-rules (see Hoekman and Kostecki, 1995: p. 203; Buurman and Schott, 1994: p. 112). The GATS agreement, for example, often contains more detailed provisions on investment than the TRIMS agreement (Kentin, 2002). The next paragraphs analyse how the issue of investment has been dealt with in the international trade regime and, more importantly, how the Commission has approached this. It will become clear that the Commission has always been a fervent proponent of the inclusion of investment in the WTO. This seems strange at first sight for a number of reasons, such as, for example, the fact that the economic case to be made for this is not always compelling or that there is no strong, coherent lobbying effort focusing on the inclusion of investment in the WTO framework.

If the Commission's increased leeway within the strong institutional setting of the WTO is taken into account, this dogged insistence on dealing with investment issues within the World Trade Organisation can be understood more readily. This not only refers to the Commission's stronger position in the WTO when it comes to trade *negotiations* (compared to, for example, its position in the OECD; see later), but also to the increased scope for gaining *competences* over trade policy within the EC. Investment was one of the issues the Commission

¹ One working group examines the relationship between trade and investment, another the interaction between trade and competition policy, and a third one studies transparency in government procurement.

wanted to see covered by art. 133 in 1990, but which the Member States refused to transfer. According to the institutional logic put forward in this thesis, bringing investment issues within the WTO framework and its strong dispute settlement system could pave the way for pushing these issues under the umbrella of the CCP, in the same manner as with the TRIPS-issues discussed earlier. The insistence of the Commission on including investment into the WTO could thus point to awareness within the Commission that it is empowered under the strong institutional framework of the WTO.

This chapter is composed of two major sections. The first section gives an overview of the recent history of the negotiating efforts to integrate the issue of investment within the international trading system. The discussion is not confined to the setting of the WTO, but also includes the failed negotiations on a Multilateral Agreement on Investment in the context of the Organisation for Economic Cooperation and Development. Particular attention is paid to the role and the position of the Commission in these negotiations. The second section then tests several alternative explanations for explaining the Commission's behaviour. Again, an approach that incorporates the institutional strength of the external framework and the impact this has on the Commission's preferences, will offer the most convincing interpretation for explaining the Commission's efforts to integrate the issue of investment within the international trading system.

5.1. Investment during and after the Uruguay Round: an elusive issue

After the limited success of the TRIMS negotiations and the sharp divergences in views between (most) developed and (most) developing countries on what investment rules should look like, a dual-track approach was adopted. On the one hand, the issue was kept alive (although some would rather say on life support) within the WTO framework. As mentioned before, the issue of investment was discussed, together with three other ones, at the Singapore Ministerial

Conference in 1996. The result was the establishment of a working group to “examine the relationship between trade and investment” (WTO, 1996a). On the other hand, negotiations on a Multilateral Agreement on Investment (MAI) were initiated within the Organisation for Economic Cooperation and Development (OECD), an organisation that consists mainly of developed, Western countries.²

This dual track approach gives rise to some interesting questions. If more highly institutionalised settings open up possibilities for the Commission to pursue its interest and preferences more successfully, as is claimed in this thesis, and if there is some awareness of this within the Commission, then the Commission should have a preference for dealing with investment in the framework of the WTO rather than in the OECD. This is the claim that is examined in this chapter. In general, this points to the importance of the external institutional framework as well as of the position of the Commission within this framework as influencing factors when issues of mixed competences are on the table. Regarding the latter, it should be noted that the Commission’s position as negotiator on behalf of the Member States, together with the principle of the Single Undertaking in the WTO (nothing is agreed upon until everything is agreed upon) have an impact on the Commission’s scope for influencing the final agreement. That does not mean that the preferences of the Member States are not taken into account. On the contrary, Member State preferences will still determine the ‘win-set’ within which any agreement should fall if it is to be ratified (see Putnam, 1988; Moravcsik, 1993; Milner, 1997). Package deals, however, increase the Commission’s win-set because they are supposed to contain benefits for everyone in order to increase the cost of non-ratification for every individual participant.

This has two important implications. First, the above would lead one to expect the EC to favour broad trade negotiation rounds. Apart from the external

² Although its membership also includes some emerging economies or newly industrialised countries. Mexico, South Korea and Turkey, for example, are also members of the OECD.

pressures for broad rounds, namely that agreement between the 148 WTO member states should be easier to obtain when there is more scope for bargaining and trade-offs, there are also some internal pressures for the EC to favour broad rounds. Firstly, since the EC consists of 25 Member States, the chances of them agreeing on the need to launch a WTO round and the content of such a round, increase when enough issues are included so that the list reflects issues of particular concern for every Member State. Secondly, and no less important given the Commission's role as catalyst in trade policy, the Commission has an incentive to start broad rounds because that increases the win-set within which it can negotiate successfully. It is therefore not surprising to find that the EC has indeed consistently favoured broad trade negotiation rounds (this was the case for the Kennedy, Tokyo and Uruguay rounds in GATT, but also for the Ministerial Meetings in the WTO: Singapore, Geneva, Seattle, Doha, Cancún and Hong Kong).³

Second, the dynamics of the strong dispute settlement system in the WTO that have been explored in chapter three add to the relative strength of the Commission's position in the 'implementation phase'. Again, this is of particular relevance when issues of mixed competence are at stake since Commission action with regards to these issues will further strengthen the Commission's position to lay a claim on these competences. Because of its stronger position in the negotiating phase as well as in the implementation phase, the expectation is that the Commission would prefer issues of mixed competence to be dealt with within a strong framework (for trade-related issues: the WTO) rather than in an organisation with a weaker institutional framework.⁴

³ Note that there are also other factors that help to explain this EC preference for broad negotiation rounds. Avoiding being isolated in a round that would focus on attacking the Common Agricultural Policy with few or no possibilities to trade this off against other concessions, for example, would be an important factor as well.

⁴ Since the WTO's dispute settlement system is one of the most highly legalised ones and the EC is a fully-fledged member of the WTO (which is not the case in many other organisations), this means that the WTO should be the Commission's favourite forum for trade-related issues. After all, one would be very hard-pressed to find an organisation where the Commission is in a stronger position.

Applied to the case of investment, the expectation is thus that the Commission has a clear preference for dealing with this issue within the WTO rather than the OECD. After all, the institutional position of the Commission undoubtedly is much stronger in the WTO than it is in the OECD. The Commission's strong role as the representative of the EC and its Member States in the WTO has already been discussed in some depth earlier. Within this organisation, the Commission speaks on behalf of the Member States. A good example confirming this was the decision of the GATT Council to disregard the misgivings of the French representative in the oilseeds case (see chapter four). Within the OECD the situation is quite different. The EC is not a full member of the OECD but instead, it only has observer status. The Commission, therefore, does not speak on behalf of the Member States in the OECD. Indeed, it does not even operate at the same level as the Member States (that are all full members of the organisation).

The relative weakness of the Commission's position in the OECD becomes clear from the Local Cost Standard-saga. Within the OECD, an Understanding on a Local Cost Standard had been negotiated. The Commission argued that this fell within the scope of the EC's exclusive competence because of the link with the Common Commercial Policy. Given that elements of export aid are inextricably linked to the Common Commercial Policy, the EC clearly had exclusive competence over this issue. The Member States, however, were not very keen on signing this as a Community agreement, since that would undermine the privileged position of the Member States within the OECD. As a result, the Commission had to resort to the Court of Justice and ask for an opinion, in line with art. 228(1) of the EC Treaty (now art. 300(6) TEC). The Court ruled that "[T]he Community has exclusive power to participate in the Understanding on a Local Cost Standard referred to in the request for an opinion" (Court of Justice, 1975). In other words, the Understanding on a Local Cost Standard had to be concluded as a Community agreement (Opinion 1/75, see Court of Justice, 1975). Nonetheless, the fact that the Commission had to resort to judicial action in order to be acknowledged as the relevant actor in an issue area where it possessed exclusive competence in the first place is a good illustration of its weak position

within the OECD. Such a context is hardly very promising as a platform for drifting from Member States' preferences or gaining competences in situations where the division of competences is disputed.

As has been indicated in the previous chapters, the WTO's strong dispute settlement provisions can play to the advantage of the Commission in its 'battle' for competences with the Member States. Because of its leading role in the dispute settlement system, the Commission will find it easier to lay a Community claim on what are originally mixed competences, thereby changing the *de facto* balance of power in the field and hence pave the way for *de jure* acquiring these competences at a later stage (see the analysis of the TRIPS-case in chapter three). If this institutional interpretation is correct, then the expectation should be to see the Commission wanting to deal with the issue of investment within the WTO framework rather than in the context of the OECD. The remainder of this section describes the position and role of the Commission in the negotiations on investment in the context of the WTO and the OECD.

5.1.1. Negotiating investment in the Uruguay Round: a strained history

“The TRIMS negotiations were to be among the most frustrating and least productive of the Uruguay Round. Given that most developing countries had not wanted to negotiate on trade-related investment measures (...), this outcome was almost inevitable” (Croome, 1995: p. 138). This quote, from a privileged participant in the Uruguay Round, makes it crystal-clear that investment was one of those issues in the Uruguay Round that were characterised by a clear North-South divide.⁵ The vast majority of developing countries (led by India and Brazil) was not particularly interested in discussions on investment (one of the

⁵ John Croome was a senior official in the GATT secretariat. One of the positions he held was that of Director of the Trade and Finance Division. His book *Reshaping the World Trading System* is the official WTO history of the Uruguay Round negotiations. Besides having participated in the negotiations, he was given full access to all Uruguay Round documents.

'new' issues dealt with), and saw these talks mainly as negotiating chips in a package deal so as to obtain more concessions in other areas. The US (supported by Japan) was the single biggest advocate of a wide-ranging, encompassing and thorough approach to dealing with TRIMS in the international trading system. The US proposed to ban the most trade-distorting TRIMS outright, and put in place a framework for controlling all other TRIMS (see Stewart, 1993a; Evans and Walsh, 1994). The EC was also a great proponent of including investment into the GATT framework, but it did not favour the hard-line approach like the US. The key EC submission in the TRIMS negotiations therefore put forward a list of 13 TRIMS, only eight of which were considered to be directly related to trade (GATT, 1988). The EC therefore only supported the inclusion within the GATT framework of these eight TRIMS, as opposed to the US' list of 14. Even this more mitigated proposal ran into strong opposition, and by 1989 – after the mid-term meeting – “the results on TRIMs were brief, reflecting little progress beyond the mandate and negotiating plan” (Stewart, 1993a: p. 2091).

In short, the TRIMS negotiations were among the most difficult ones in the Uruguay Round. This was mainly due to the sharp divergence in views between, on the one hand, some developing countries and, on the other hand, most developed countries, in particular the US and Japan. As a consequence, the end-results of the TRIMS negotiations were very modest. The provisions of the TRIMS agreement are characterised by their general nature. There are some other investment-related provisions scattered over the other sections of the WTO agreement, the most important ones being in the GATS agreement. All in all, for (most of) the developed countries these investment rules did not go nearly far enough. On the other hand, many developing countries were not very eager to discuss a broader definition of investment or non-trade related investment measures (see Croome, 1995). The modest outcomes of the investment negotiations can thus be attributed to resistance from developing countries to a comprehensive investment agreement in the WTO. In 1995, after the Uruguay Round had ended, the key developed countries therefore sought another forum to come to an investment agreement. And what organisation is better suited for that

than the OECD, a club consisting mostly of developed countries? For this reason, it has been argued that the true importance of the TRIMS agreement lies not so much in its provisions, but rather in the fact that it “allows continuing discussion of investment issues that affect trade, and in the longer run it opens the door to full-fledged negotiations both on investment questions and, in the guise of competition policy, restrictive business practices” (Croome, 1995: p. 310). Referring to the – then – pending OECD negotiations, Croome continues by saying that “[A]lready, it seems likely that such negotiations will take place” (*ibid.*).

5.1.2. *From Paris to Singapore: investment in the OECD and the WTO*

After the failure to reach a broad agreement on investment in the WTO, negotiations were continued in the OECD. This was convenient since, as noted earlier, the strongest opposition to a comprehensive investment treaty came from developing countries, who are as good as absent from the OECD.⁶ Several officials within the Commission, however, pointed out that the European Commission’s attitude to negotiations in the OECD has never been more than lukewarm (interviews with Stefan Amarasinha and Richard Carden). Trade Commissioner Brittan, for example, while recognising that “the WTO is not ready yet to negotiate [a multilateral investment agreement]” (Commission, 1995) nevertheless saw the ongoing OECD negotiations mainly as a tool for preparing the ground for a WTO agreement on investment. Indeed, after the OECD negotiations have finished, he argued, “the WTO will be well placed to consider a complementary negotiating mandate to free investment flows worldwide” (*Ibid.*). “That is”, he continues, “why the Commission is proposing why the WTO is involved, starting now, in discussion of investment issues”

⁶ Some developing countries (China, Chile, Argentina and Brazil, among others) were accredited as observers to the negotiations. However, this is a somewhat misleading term since in fact they were not allowed to follow proceedings and negotiations directly. Instead, they were kept briefed on what was happening in the negotiations (*post factum*) but they had no direct say in or sway over them (interview with Stefan Amarasinha).

(*ibid.*). As mentioned earlier, this would seem to be understandable, given the Commission's stronger negotiating position in the WTO compared to that in the OECD. The weakness of the Commission's position as negotiator in the OECD is confirmed by the actions of the Member States during the MAI negotiations. One official that is now working on investment issues in the Commission, but who at the time of the MAI negotiations was representing the Danish government, recalled how Member States all pursued their own, often diverging, interests. According to him, the Member States acted largely independently, even regarding issues that probably fell under the EC's exclusive competence and thus should have been the preserve of the Commission (interview with Stefan Amarasinha). When asked, this was confirmed by another Commission official who worked for the Swiss government at the time of the OECD-negotiations (interview with Christophe Kiener). In this light, the Commission's persistence in trying to get investment on the WTO agenda, even though negotiations were being simultaneously conducted in the OECD, or – later – after the OECD negotiations had been abandoned, seems a logical thing to do. While this certainly was a rational strategy for the Commission to pursue in 1995, the desirability of such an approach becomes questionable after that, certainly from 1998 onwards, when the OECD negotiations collapsed.

The negotiations on a Multilateral Agreement on Investment (MAI) in the OECD got underway in April 1995 immediately after the end of the Uruguay Round. Almost exactly three years later, in April 1998, they were suspended because of the withdrawal of France from the negotiations. The background for the collapse of the negotiations, however, was not the resistance of the 'usual suspects' (labour groups, or developing countries). Instead, "it was a diverse collection of self-styled 'civil society' non-governmental organizations (NGOs), especially environmental groups, that mobilized opposition to the negotiations in a number of important countries" (Walter, 2001: p. 3). They took their cue from a leaked draft of the MAI in 1997 to get organised and start mobilising public opinion by pointing out the potential adverse effects of the MAI on environmental and social standards and on democratic values (see for example Friends of the Earth, 2001).

Because of the growing grassroots opposition against the MAI in several developed countries, the political climate had changed quite drastically by 1998. This is reflected in a report that was ordered by the French government on the MAI negotiations. The report is highly critical of the substance of the negotiations as well as of the secretive atmosphere in which they were being conducted (Lalumière, Landau and Glimet, 1998). The conclusions of this 'Lalumière'-report ultimately led to the French withdrawal from the negotiations and it can thus be seen as the *coup de grâce* for the MAI.

One can be forgiven for thinking that this would be the end of a multilateral investment agreement. After all, with suspicious (and quite activist) publics at home, and less than enthusiastic negotiating partners abroad, the general political context was not exactly advantageous for pursuing this track any further. This insight led the US negotiators to abandon their insistence on a multilateral investment agreement, given that a broad treaty did not seem achievable (see Walter, 2001a). The EC and Japan, however, insisted on dealing with investment within the WTO. At the Singapore Ministerial Conference, the EC had already succeeded in convincing the other WTO members not to disagree with the establishment of a working group on the relationship between trade and investment. Instead of rethinking the usefulness or the feasibility of a multilateral investment agreement (as the US did), the EC and Japan pushed even harder to get investment on the WTO agenda after the failure of the MAI negotiations. Investment was explicitly included in the negotiating mandate of the European Commission for the Seattle Ministerial Conference in 1999 (Commission, 1999). Because of the confusion and chaos created by "the battle of Seattle", however, discussion on this issue was rather limited and never really took off (WTO, 1999e; f; g).

That changed in Doha in 2001. At this meeting, after a lot of haggling, the EC managed to get a provision inserted in the ministerial declaration, stating that the WTO members "agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit

consensus, at that session on modalities of negotiations” (WTO, 2001: paragraph 20). Almost immediately there arose discussion about the interpretation of this sentence. Did it say that negotiations should start anyway and the members only have to agree on the modalities (as the EU claimed)? Or did it mean that the start of negotiations is conditional upon a consensual decision (as the developing countries claimed)? Eventually, the chairman of the Ministerial – Youssef Hussain Kamal – clarified that the mandate should be understood so as to mean that “a decision would indeed need to be taken by explicit consensus, before negotiations (...) could proceed” (WTO, 2001a).

In fact, the story of the genesis of this chairman’s ruling gives a good idea of the contentiousness of including investment onto the WTO agenda.⁷ After nocturnal negotiations between the representatives of all the major trade actors, an agreement on including investment in the new negotiation round was reached. When the Director-General of the WTO did the tour of the table during the plenary meeting the next day to establish whether there was consensus, India suddenly voiced objections against the investment provisions, while the other major actors believed these provisions to have been agreed the night before. Since another objection would be the end of the investment provisions, people from the WTO secretariat took advantage of the tumult that followed India’s statement to provide the chairman with a list of countries that should be given the floor and another list with (anti-investment) countries that absolutely should not be allowed to speak. In the meantime, the Director-General, the US Trade Representative and the EC Trade Commissioner disappeared to a back room with the Indian ambassador. While a considerable amount of arm-twisting went on in that back room, the ‘investment-friendly’ countries that were given the floor were discreetly encouraged to speak as long as they possibly could, rather than keeping to their 30-second slot to state their acceptance of or objections to the conclusions of the negotiations. The Canadian trade minister, Pierre Pettigrew,

⁷ This is the story how it was told to me by Christophe Kiener, now working on investment issues for DG Trade, but at the time of the Doha Ministerial a member of the Swiss delegation and a participant in the Ministerial.

apparently was a particularly gifted improviser, entertaining the delegates for half an hour rather than 30 seconds, to the ever-mounting frustration of the Malaysian delegation in particular, that was eager to get the floor so that it could kill off the issue of investment once and for all. The chair managed to prevent any country that was opposed to the inclusion of investment from taking the floor and when the representatives of the EC, US and India returned he gave the floor back to the Indian representative. The Indian representative subsequently declared that India had changed its mind and did not object to the text at hand on the condition that the chairman would read out a clarification, which is now the 'chairman's ruling'. This shows very clearly how contentious the issue of investment still was at the time of the Doha Ministerial (15 years after the Uruguay Round negotiations on TRIMS started) and that a good deal of arm-twisting by developed countries, not least the EC, was needed to get even a diluted version of investment on the WTO agenda.

Before the Cancún Ministerial Conference, the EC again stressed the importance it attached to the issue of investment and the Singapore Issues in general. The day before the Cancún Ministerial kicked off, Commissioner Lamy proclaimed that "[W]e should not gut the Doha Round: we need the Singapore issues" (Lamy, 2003: p. 19). Even though the stakes were quite high in Cancún, the Commission kept insisting on including all the Singapore Issues in the negotiations. Only at the very last minute did Lamy propose to drop two or possibly three of the Singapore Issues. Yet even this apparently was not acceptable to the G90 group of developing countries, so that the chairman decided to call the negotiations to an end. It is therefore not surprising that the EC in general, and Lamy in particular, was widely blamed for the failure of the Cancún Ministerial (Elliott, Denny and Munk, 2003; Jonquières, 2003). This also led to frictions between the Commission and the Member States. The most pronounced illustration of this is a paper of the UK's Department of Trade and Industry, written – and leaked – in the aftermath of the Cancún failure, that was highly critical of the way Commissioner Lamy had dealt with the negotiations (Elliott, 2003; Denny, 2003; Jonquières, 2003a).

The Member States were not the only ones who were critical of the Commission's behaviour. Also the European business leaders urged the Commission to focus again on the bigger picture. The European Round Table of Industrialists, for example, urged the EU to go back to 'substance', implying that the Singapore Issues would best be dropped (Jonquières, 2003b). The International Chamber of Commerce was even more explicit when it asked the Commission to deal with each of the Singapore Issues "on their own merit and at their own pace" (International Chamber of Commerce, 2003), leaving no doubt that some issues should best be put on ice. And even UNICE, one of the staunchest supporters in the EU of a WTO investment agreement, stated that "[T]o achieve the European business trade and investment objectives set out above, UNICE supports a *pragmatic approach* (...)" (UNICE, 2003a, original emphasis). Furthermore, many national parliaments as well as the European Parliament (that had always been wary of dealing with investment in the WTO) remained critical. All this on top of the 'traditional' opposition from various development, environmental and anti-globalisation NGO's and the continued contentiousness of the issue of investment internationally. The EC looked increasingly isolated when even Robert Zoellick, the US Trade Representative, openly and "firmly supported the developing countries in saying that investment and competition talks should be dropped" (Alden and Barber, 2004).

The Commission's reaction was somewhat surprising. The logical expectation would be that all this pressure would force the Commission into re-thinking its approach to the Singapore Issues. Instead, almost the exact opposite happened. After the failed Ministerial, the Commission at first engaged in some soul-searching. But this period of reflection did not result in the acceptance that, in the current climate, the WTO was not the appropriate forum to deal with investment or competition policy as the opponents of the Singapore Issues had hoped. Giving evidence before the International Development Committee of the House of Commons, Commissioner Lamy talked about his last minute offer at Cancún to drop two of the Singapore issues and he boldly declared: "I have withdrawn

the offer". He then continued to say that "there was not much on the table other than what we had put on the table, and that was through Doha, between Doha and Cancún and through Cancún. The table crumbled; there is no table and there is nothing on the table" (House of Commons, 2003c: questions 45 and 46). This confirms what is unambiguously stated in an internal DG Trade position paper of 25 September 2003, namely that "[A]lthough the Commission indicated its willingness to reduce the agenda at Cancún, this offer was not accepted and therefore does not constitute any formal or informal commitment on behalf of the EU" (Carl, 2003a: p. 13).

At the end of November 2003, the Commission's position had moved a little bit. In a communication to the Council, the European Parliament and ECOSOC, the Commission acknowledged the difficulties in reaching consensus on the Singapore Issues in the WTO. Instead, it proposed that the Community agree with unbundling the issues and that it "should explore the potential for negotiating some, or even all four Singapore Issues, outside the Single Undertaking" (Commission, 2003e: p. 11). This position, however, proved a recipe for uncertainty and confusion. A Third World Network article described the situation as follows:

"According to trade diplomats, at an informal meeting of a few ambassadors convened on 4 December morning (...) the EC apparently indicated that it would like the four Singapore issues to be retained in the WTO, if necessary through plurilateral negotiations for some of the issues. Some diplomats said they considered this to be a shift from what the EC had said only the previous morning [when] the EC ambassador had said that the EC was willing to drop one or more issues "from the Doha Development Agenda"" (Khor, 2003)

This position is confirmed on numerous other occasions: the EC is not willing to leave any of the Singapore Issues completely out of the WTO, but it is willing to unbundle the issues and treat the most contentious ones outside the Single

Undertaking (see for example WTO, 2004a; Lamy, 2004). This new strategy did not succeed in solving the EC's problems concerning the Singapore Issues. The fact that the EU still wanted to deal with these issues within the WTO, even though only on a plurilateral basis if a multilateral approach did not prove to be possible, was still quite discomfoting to many (mainly developing) WTO members that were opposed to the inclusion of most of these issues in whatever form. The Commission, on the other hand, kept pushing as many of these issues as possible into the Single Undertaking, a cause of friction not only with many developing countries, but also with the US. At the end of February 2004, for example, Zoellick (the US Trade Representative at the time) and Lamy clashed over the position of the Singapore Issues in the Doha Round negotiations (see Inside US Trade, 2004). Note also that the Commission's proposal for dealing with some or all of these issues on a plurilateral basis indicated a fundamental shift from the Commission's earlier position that the single framework was one of the main achievements of the WTO (compared to the GATT *à la carte*). During the Uruguay Round, the Commission had been one of the most fervent supporters for creating a single framework, which gives an idea about the strength of the Commission's preference for getting investment into the WTO, even if it means departing from the single framework. Compare, for example, the Commission's idea of unbundling the Singapore Issues with the fact that as late as 2 April 2003, the Director General of DG Trade told the WTO Trade Negotiating Committee that "[W]e should be guided by a few basic principles (...) Firstly, the principle of the single undertaking" (Carl, 2003).

From this account, it follows that the Commission's insistence on including investment in the WTO cannot always be understood easily. After all, there were numerous internal and external pressures against incorporating this issue within the multilateral trade regime. Externally, most developing countries were very much opposed to including the Singapore Issues in the negotiations from the beginning, but later even the US found the Commission's insistence on including the Singapore Issues unhelpful. Internally, there were critical sounds coming from several parliaments, including the European Parliament, but also directly

from some of the Member States (especially after the failed Cancún meeting). The next section explores several explanations that might shed light on the Commission's behaviour.

5.2. Explaining the Commission's behaviour: the struggle for power revisited

This section argues that there were substantial costs involved for the Commission in pursuing the strategy that was outlined in the previous section. This is particularly true after the breakdown of the MAI negotiations and during as well as after the Cancún meeting. At this stage, it will be argued, the desire for a stronger negotiating position alone cannot fully account for the Commission's persistence any longer. If only the argument of a stronger negotiating position is taken into account, pursuing its case in the WTO would initially seem to be a rational strategy for the Commission. In the later stages, however, this argument is undermined by the degree of opposition by key developing countries to an investment agreement, and becomes weaker with every failure to integrate investment into the multilateral trading system (MAI, Seattle, Cancún). After all, the decision to incorporate an investment agreement in the WTO would have to be taken by consensus and hence strong opposition by developing countries makes a successful outcome unlikely. Given the chances of failure, then, pursuing its case in the WTO regardless is not necessarily a very rational (nor a very efficient) strategy for the Commission to pursue. After all, what good is a strong negotiating position in negotiations that are bound to fail anyway? Instead, attention will be drawn to the broader issue of competences in the EU. In the WTO, the Commission not only has a stronger negotiating position, but it is also better placed to tilt the balance of power in its favour *after* the negotiations have finished (see chapter three). Furthermore, the uncertainty with regard to the feasibility of dealing with investment in the WTO points to increased political costs for the Commission in nonetheless undertaking such talks.

The question that comes to mind then is why the Commission did it anyway. Four possible explanations are discussed (and rejected) before an alternative, institutionalist interpretation is proposed (the second research hypothesis, see chapter two). The first approach looks at the dynamics of the negotiations. In this explanation, the Commission only held on to the Singapore Issues because they served as negotiating coinage in the wider context of broad trade negotiating rounds. The second explanation focuses on the intrinsic value of the Commission's position (is there an unambiguous technocratic case to be made for including investment in the WTO?). The third one looks at the preferences and positions of the EC Member States (was the Commission driven by the preferences of the Member States?). Fourthly, the lobbying efforts are examined in more detail to investigate whether the Commission's actions were driven by industry preferences (was there capture of the Commission by certain specific interests?). The fifth and final approach then suggests that the Commission is pursuing its own policy preferences. Given that the institutional structure of the international regime can influence the Commission's scope for having its preferences reflected in the outcome, its choice for the WTO-forum and its insistence on incorporating investment into this framework can be more readily understood.

5.2.1. Is there a place for investment in the international trade regime? Part 1: the problematic politics of WTO investment negotiations

First of all, the overview of the history of the TRIMS negotiations in the Uruguay Round in the previous section showed that investment was a highly contentious topic, and that there was a serious conflict between the preferences of most developed and most developing countries. The Uruguay Round was the largest round of trade negotiations ever undertaken, so few – if any – other contexts would offer better conditions for making trade-offs between issues and hence for concluding a multilateral investment agreement. Investment turned out to be such a sensitive issue, though, that it proved impossible to negotiate a broad

treaty even within the context of the Uruguay Round. The sensitivity of this topic became clear again after the Singapore Ministerial in 1996 where the EC was accused of bullying countries opposing the inclusion of the so-called Singapore issues (mainly developing countries) and forcing these four topics, including investment, on the agenda. One could ask the question why the EU would expect to succeed after 1995 if a broad agreement could not even be reached within the context of the Uruguay Round.

After the collapse of the MAI negotiations in 1998 this question becomes even more pressing. What is the use of discussing investment in the WTO, where there are developing countries' interests to be taken into account when the relatively like-minded, developed countries that largely make up the OECD membership cannot even negotiate an investment agreement among themselves? After all, the OECD countries are supposed to have broadly similar interests and policy environments, especially when compared to the differences between developed and developing countries. In other words, success was never guaranteed. On the contrary, investment was always going to remain a contentious issue and negotiations on this within the WTO were always going to be extremely difficult. This is confirmed by a Federal Trust Report, compiled by an impressive group of experts, which states that “[I]n particular investment seemed to us the most controversial, with the least pressing case for multilateral rules now” (The Federal Trust, 2003: p. 22). The extent of the controversy becomes clear from a look at the September 5 (2003) edition of *International Trade Daily*, where a senior US official is quoted as saying that “the Singapore Issues remain “very controversial”” and that “the EU [*sic*] position is “not widely shared” among WTO countries” (Yerkey, 2003). There is also strong pressure from within the US corporate sector to oppose the EC’s position. The same article mentions a letter from USTrade – a lobby group representing almost 350 US companies and trade associations – to President Bush, arguing for the unbundling of the Singapore Issues and making very clear that investment is the least interesting of these issues (*ibid.*). And also from within Congress there was considerable pressure. Another article in the same issue quotes a letter to Zoellick from two

(Democratic) Senators in which “[T]hey said that the issue of investment, in particular, is "not ripe [for negotiations] in the WTO at this time.”” (Yerkey, 2003a). From this, it becomes clear that even the US, once one of the major supporters of a multilateral investment agreement,⁸ did not see how investment could successfully be included in the WTO framework.

Some would argue that the Commission’s demand for the Singapore Issues in general, and investment (for which there was little hope to a successful conclusion) in particular was nothing more than gathering negotiating coinage that could be used in the traditionally tough negotiations over agricultural liberalisation. The strength of this argument, even though it may very well hold a grain of truth, is undermined by the sheer resources spent by the Commission on the Singapore Issues. First of all the Commission pushed hard at the Singapore Ministerial to introduce the four Singapore Issues onto the WTO agenda in the first place (and to institutionalise them through the establishment of working groups). This *cost* the EC political and negotiating capital rather than giving it a negotiating edge because it led to accusations of the EC bullying the other WTO members – and in particular the developing countries – into accepting these issues (Day, 2003; Jawara, 2003; Althaus, 2003). On top of that, the institutionalisation of the Singapore Issues required a mobilisation of resources by the Commission. After all, the EC was the main *demandeur* for these issues, had pressed hard to get them onto the agenda in Singapore (to the dismay of many NGOs) and hence had to take up a leadership role. That means submitting position papers, interpretations, etc. to the working groups. For example, all communications from the European Community and its Member States made to the WTO Working Group on the Relationship between Trade and Investment have been issued by the Permanent Delegation of the European Commission, even though investment is still largely a mixed competence. This takes up valuable and scarce resources in terms of time and manpower. The EC had to

⁸ The US started pushing for the incorporation of investment into the – then – GATT as early as 1981 (Graham and Krugman, 1990: p. 150).

take on this leadership role since the US was very much aware of the limited chances of success for investment negotiations in the WTO. Alan Larson, the assistant US secretary of state for economic and business affairs at the time of the OECD negotiations, stated that “[W]e chose not to press the issue of WTO investment negotiations (...) [because] we were aware that many important developing countries were not interested at this stage in embarking on global investment negotiations” (Larson, 1997). This US realism with regards to the chances of success for a WTO investment agreement stands in stark contrast with the EC’s optimism and even undermines it. It also raises questions about the rationale for the Commission’s insistence on dealing with investment in the WTO, given the poor chances of a successful outcome.

Furthermore, these issues then still had to be incorporated in a negotiating round, something which the EC had to spend yet more effort and political capital on in Doha. But even then the EC did not have the negotiating chips yet because serious disagreement arose on the interpretation of the hard-fought Doha declaration. The EC understood the Doha declaration to mean that negotiations on the Singapore Issues would begin automatically, and that only the modalities on how to proceed should be addressed in Cancun. A ruling by the chair of the Doha Ministerial, however, gave the text a different interpretation (see earlier). This effectively brought the EC back to where it came from, namely no closer to a WTO agreement on investment. On top of this, since consensus is still required to start negotiations on the Singapore Issues, it is very questionable whether the negotiating coinage gained (not very much, if any) was worth the (substantial) effort and the high price paid for it. Therefore, it looks highly unlikely that the major driving force behind the Commission’s insistence on investment is the creation of negotiating leverage. After all, according to a spokesperson for the US Trade Representative, the EC had “isolated themselves from the rest of the planet” (Bridges, 2003a: p. 2), which is usually not a very convincing strategy to extract concessions from your negotiating partners. This is again confirmed by the way the Commission dealt with these issues after Cancún (see earlier) and its

insistence on keeping these issues within the WTO, on a plurilateral basis if necessary.

Explaining the Commission's insistence on including investment in terms of finding negotiating coinage that could be used in the agricultural negotiations is also rejected by officials from DG Trade. In my interview with Stefan Amarasinha, for example, he referred to the joint letter of Commissioners Lamy and Fischler of 9 May 2004 to disprove this argument. In this letter, the Commissioners suggested eliminating "all forms of [agricultural] export support" (Lamy and Fischler, 2004: p. 1) while at the same time also dropping at least two and maybe even three of the Singapore Issues, leaving "only trade facilitation, and perhaps transparency in government procurement, inside the DDA [Doha Development Agenda]" (*ibid.*). The proposal of these two elements combined and outside the heat of the negotiations showed, according to the DG Trade official, that the Commission's pursuit of the Singapore Issues was not primarily intended to be traded off against concessions in the field of agriculture.

5.2.2. Is there a place for investment in the international trade regime? Part 2: the economic case

Another explanation for the Commission's behaviour might be that there just was an unambiguous, clear-cut economic case to be made for dealing with investment within the WTO. Even though most people involved acknowledge that – regulated – FDI can be beneficial, that does not mean that the case for a multilateral approach to investment has been made. Two prominent observers conclude in a World Bank working paper that "(...) we are pessimistic about the need for – and the feasibility of – negotiating a multilateral agreement on investment" (Hoekman and Saggi, 1999: p. 24; for a stronger critique, see Chang and Green, 2003). According to UNCTAD, "the effects of FDI on development often depend on the initial conditions prevailing in the recipient countries, on the investment strategies of TNCs and on host government policies" (UNCTAD,

1999a: p. 3) so it is not clear why a multilateral approach would yield the best results. While acknowledging that the legal framework has to be taken into account, it is nonetheless economic factors that are still the most important ones in determining FDI flows (see UNCTAD, 1999b), and this has led some to attack the Commission's claim (or assumption) that a multilateral investment agreement would significantly affect FDI inflow in developing countries (see Ferrarini, 2003). Furthermore, it is not always clear whether negotiating a multilateral agreement would be worth the trouble since there is already a vast network of bilateral investment agreements in place. It was estimated that in 2003, there were more than 2100 bilateral investment agreements in existence (Cosby *et al*, 2003: p. 16). In this light, one can hardly claim that a multilateral approach would remedy the absence of rules governing international investment. Instead, one of the arguments put forward by proponents of a multilateral approach to investment is that this would be more efficient than the hotchpotch of bilateral agreements that are in place now. The problem is that it is not clear how these two levels would interact or if a multilateral agreement would indeed replace – rather than coexist with – the network of bilateral treaties.

In this respect, an UNCTAD paper notes that “[T]he existence of a network of BITs [Bilateral Investment Treaties] containing similar provisions by and between the negotiating parties does not necessarily indicate the readiness to proceed to another level of international commitments (...)” (UNCTAD 1999). In the WTO working group on trade and investment, India has repeatedly – and explicitly – made clear that it shares this view. At one point it stated that “the argument that multilateral rules were more efficient because they would obviate the need for concluding a large number of bilateral treaties was without merit” (WTO, 1999: p. 11). Three years later, the Indian representative went one step further, questioning the usefulness of a multilateral approach to investment for developing countries by saying that “(...) it had heard no convincing argument that a multilateral framework on investment would achieve this objective [i.e. maximising the positive while minimising the negative effects of FDI]” (WTO, 2002b: p. 37)

On a different level, several elements in the way the EC presents the case for a multilateral approach for investment give further rise to suspicions of a hidden, politicised agenda behind this drive to have investment included. Ferrarini criticises the Commission because “[R]ather than building its case on sound conceptual grounds and compelling empirical evidence, the arguments are seemingly based on conjectures. Attempts to provide definitions or explanations of key concepts are often inaccurate, or overly simplistic” (Ferrarini, 2003, p. 20). In its submission to the WTO working group on the relationship between trade and investment, for example, the Commission puts a lot of stress on the importance of transparency. To back up this claim, it cites a survey that it commissioned, showing that “lack of transparency on local legislation and rules was considered the most frequent hindrance to investment by 71 percent of the companies” (WTO, 2002a: p. 2).

It conveniently ignores that the same report also finds that “[T]here is a very clear correlation between the size of the enterprise and the number and diversity of investment barriers encountered” where “[T]he smaller enterprises in the sample tended not to know whether or not they had encountered investment barriers” (TN SOFRES Consulting, 2000: p. 14). The vast majority of European enterprises are small companies (45% of European companies have a turnover smaller than €0.2 billion; *ibid.*: p. 4). Furthermore, only 10 percent of enterprises have a ‘working knowledge’ of GATS, about the same percentage as those that have a working knowledge of bilateral investment treaties. For TRIMS, that figure drops to around 5 percent (*ibid.*: p.28). More specifically, the report states that “[I]t is furthermore observed that medium-sized enterprises (turnover under one billion euros) know far less about the existing agreements than the large enterprises” (*ibid.*: p. 28). This can hardly be read as strong demand by the stakeholders for integrating investment in the multilateral trading system. If the companies do not even have a better working knowledge of the current, limited, multilateral rules than of the supposedly confusing network of bilateral agreements, that does not look like a strong basis for demanding a more comprehensive multilateral framework. Or, to put it in Ferrarini’s words,

“[H]owever one may interpret these results, arguably they do not appear to make a particularly strong case for the proposed multilateral disciplines on transparency in investment” (Ferrarini, 2003: p. 21). This is supported by the attitude of the business community itself. In the first meeting of the Investment Network (an initiative of the Commission, bringing together stakeholders in the investment debate), the argument that investment decisions depend on the international regulatory framework was discussed. On this topic, the minutes of the meeting state that “[M]ost business correspondents considered that the presence or absence of multilateral or bilateral commitments did not constitute a key criterion in the investment decision-making process” (Commission, 1998).

5.2.3. Back to the roots: what about lobby groups?

A strong lobbying effort could be another possible explanation as to why the Commission was so eager to deal with investment in the WTO. Looking at the preferences and the level of activity of pressure groups is particularly relevant since it has been noted that in EU trade policy-making

“[T]he Commission needs to consult interest groups in order to reduce “slack” with the principal (Member States). In other words, the Commission has to keep interest groups fully informed of what it is negotiating at the WTO to prevent them from trying to block the multilateral negotiations in the Council of Ministers. Therefore, the Commission’s ability to represent the EU in multilateral negotiations and to keep the Member States united behind its negotiating position largely depends on keeping interest groups satisfied with the concessions that it is giving and receiving in the WTO” (Van den Hoven, 2002: p. 23)

In other words, interest groups can be very powerful actors that can play a hugely important role in determining the negotiating agenda if they can exert enough pressure. Also, there is an inherent danger of ‘capture’ of DG Trade by certain (business) interest groups (on capture and special interest groups, see Foster,

1997).⁹ Hence, a strong and coherent lobbying campaign to get the Singapore Issues incorporated within the framework of the WTO could still have been the driving force behind the Commission's actions. From the next paragraphs, however, it will become clear that this was not the case and that pressure from interest groups cannot explain the Commission's dogged pursuit of a WTO investment agreement.

First of all, there was no coherence within the wider lobbying community. There will always be groups that oppose any given policy, so in this sense 'coherence' does not refer to the position of all groups involved. Rather, it is about the relative strength and the effectiveness of the groups involved: do they have access to policy-makers? Are they being listened to? Are they in a position to effectively influence them? The strongest opposition to a multilateral investment agreement when it was being negotiated in the OECD came from an *ad hoc* coalition of environmental NGOs, development NGOs, and – later – various anti-globalisation organisations (Walter, 2001). 1997 can be seen as a turning point for the anti-MAI movement. In this year, a draft of the proposed MAI was leaked and this was exploited by the organisations fighting against the MAI to raise awareness with the general public about these rather secretive negotiations. By skilfully playing – and mobilising – the media and by drawing attention to the allegedly harmful environmental and social consequences of such an investment agreement, these groups galvanised public opinion across the world, most crucially in their own – developed – countries. This put huge pressure on the governments and acted as a counterbalance to the industry lobby groups. This strategy eventually paid off in that it was an important element contributing to the failure of the MAI negotiations.

⁹ The Commission has been trying hard to reduce that risk by, for example, stimulating and supporting the creation of lobby groups for more diffuse ('weaker') interests like consumers. These influences can then counterbalance the business pressure groups that have a much stronger incentive to get organised since the number of people in the groups is limited and the benefits for each member are substantial (see for example Krugman and Obstfeld, 1997: p. 232).

When the investment focus then moved to the WTO, these organisations – most of which had never been very appreciative of the WTO anyway – were emboldened by their success in scuppering the MAI. Their opposition against dealing with investment in the WTO was substantial, as becomes clear from the position papers and other output of organisations such as Oxfam, Actionaid, Cafod, Greenpeace, Friends of the Earth, Christian Aid, Attac and Corporate Europe Observatory, to name but a few. Given the success of the “anti-multilateral investment” movement in bringing down the MAI negotiations, and given the high-profile impact this had, it will be clear that the ‘corporate lobby’ did not have *carte blanche* and that there were sufficiently important and sufficiently vocal opponents of a WTO investment agreement and that they were numerous enough to credibly counterbalance the corporate lobby groups. Hence, the argument that the Commission insisted on WTO investment negotiations because it was pushed by a uniform lobbying effort (i.e. the opponents were not vocal/powerful enough to make themselves heard) does not hold.

Nonetheless, there is still the possibility that DG Trade was in fact ‘captured’ by the business lobby and their interests. In that case, the effectiveness of non-business interest groups opposing a WTO investment agreement would of course be greatly reduced. Yet that still leaves the problem of the political fall-out caused by the increased public awareness surrounding this topic. It would be very difficult for a government to push through such an investment agreement if it is widely perceived to be detrimental to the environment, or if people think it will only protect multinational companies at the expense of poor Africans, to take two of the examples used by the anti-MAI campaign. It would take even more pressure from the business lobby to overcome this resistance at a political level. In other words, support for bringing investment into the WTO would have to be very strong and almost universal across the business community.

Some European lobby groups are indeed among the most fervent supporters of dealing with investment in the WTO (see for example UNICE, 2001; 2003; 2003a; European Services Forum, 1999; 2003; or Foreign Trade Association,

2003). Other important business interest groups, however, have given only tepid support to the cause of a WTO investment agreement. The section on trade and investment in Eurocommerce's position paper for Cancún, for example, is surprisingly short and tellingly bland (see Eurocommerce, 2003). For Eurochambres, "it is paramount that all countries are given the opportunity to assess what the possible implications of an agreement on investment would be, before they commit to a fixed framework" (Eurochambres, 2003: p. 4). This can hardly be read as a ringing endorsement for the Commission's insistence on including investment in the WTO framework. The issue of investment is also noticeably absent from the priorities list of the European Roundtable of Industrialists (ERT), arguably the most influential European business lobby group. In 2000 an ERT-study on investment remarked that "[I]t is important to note that all the measures of liberalisation identified by our survey have occurred despite the failures in Paris with the Multilateral Investment Agreement (MAI) and in Seattle with the omission of investment on the agenda" (European Roundtable of Industrialists, 2000: p. 9). In short, not all – or even all major – business groups were actively lobbying for the opening of investment negotiations in the WTO. Rather, the attitude of some of the most important organisations (ERT, Eurocommerce) is one of passive support. While they do not oppose the goal of dealing with investment in the WTO, it is certainly not a priority for them. That there was considerable disagreement within the business lobby community is something that was readily acknowledged by Adriaan Van Den Hoven of UNICE. When interviewed, he pointed to diverging interests within the business community, most notably between importers and exporters, to explain why some business organisations gave only lukewarm support to the case of a WTO investment agreement. Whatever the reason, the lack of enthusiasm within important lobby groups for prioritising investment on the WTO agenda, also means that when this issue becomes a deal-breaker for the negotiations as a whole, this passive support of these less enthusiastic advocates of investment should disappear since the wider interests of these organisations are threatened if the negotiations collapse altogether and the result is no further liberalisation.

In this respect, Cancún is a good case study in that the success of the negotiations was threatened by – among others – the EC’s insistence on the Singapore Issues. After the failure of the Cancún Ministerial, the dividing lines in the business community become more visible. In a publication by the Business and Industry Advisory Committee to the OECD (BIAC), for example, the major OECD business organisations call for their trade ministers to focus on non-agricultural tariff reductions and reduction of non-tariff barriers, more efforts on services, and trade facilitation (the least contentious of the Singapore Issues). More specifically, the statement says that “[O]n the Singapore issues, we urge our governments to find the flexibility to move each of these issues forward on its own merit and at its own pace although we wish to see Trade Facilitation included in the single undertaking” (Business and Industry Advisory Committee to the OECD, 2004: p. 1). Interestingly, there is a footnote attached to this sentence in the statement in which MEDEF¹⁰ adds that “[T]his shall not be understood as excluding that investment is negotiated within the timeline of the DDA [Doha Development Agenda]” (*ibid.*). This points to clear and rather substantial differences in opinion within the OECD business community. In fact, after Cancún most interest groups re-adjusted their positions on investment in the light of the events. UNICE, for example, drastically toned down the rhetoric, even though this organisation was one of the most fervent proponents of a WTO investment treaty. Where in May of 2003 this organisation “strongly supports launching negotiations on a multilateral framework on investment” and considers this “to be one of the four priority issues at the WTO” (UNICE, 2003: p. 2), after Cancún they call for a “pragmatic” approach and the resumption of the negotiations “on the basis of a balanced agenda” (UNICE, 2003a: p. 5).

In practice, the Commission’s actions do not immediately follow this move away from insisting on the inclusion of investment in the DDA. For example, it was

¹⁰ Mouvement des entreprises de France, the organisation bringing together 85 industry federations of France.

discussed earlier that, for several months after Cancún, Lamy insisted that the offer that was on the table in Cancún (i.e. dropping of two or even three of the Singapore Issues) did not bind the Commission's position in any way since it was not accepted (see earlier). For months after the failed Ministerial, this was the Commission's official position, despite the changes in position by industry lobby groups and to the dismay of many Member States (see next section). Even a year after the Cancún debacle, the Commission was holding on to dealing with the Singapore Issues within the WTO, albeit plurilaterally if necessary. This indicates that the explanation that the Commission's insistence on a WTO investment agreement is driven first and foremost by a concerted lobbying effort is not tenable. Furthermore, the possibility of 'capture' of DG Trade by certain interests was rejected by people from the business lobby community (interview with Adrian Van den Hoven). One of the main reasons that Dr Van den Hoven indicated for this was that there are simply too many interest groups involved, so that it becomes practically impossible for any one group to influence the Commission without due checks and balances by other interest groups. Equally, DG Trade did not give privileged access to any interest group. After all, the group that DG Trade would be most likely to collaborate with or give special access would be UNICE, since this is an important lobby group and their position was closest to the Commission's. Yet Adrian Van den Hoven, the UNICE official responsible for external trade and WTO matters, formally denies that this was the case. According to him, UNICE's views on including investment into the WTO were important to the Commission, but no more than usual, i.e. not more than the importance of UNICE within the business lobby community would allow for. He added that there certainly was no special relationship between UNICE and the Commission or any sort of extraordinary collaboration between them on the issue of investment (interview Adriaan Van Den Hoven). Therefore, the activity of lobby groups cannot account for the Commission's proactive approach either.

5.2.4. *Cohesion policy: where are the Member States on investment?*

On the DG Trade website one can read that “[T]he European Community and its Member States support a gradual and progressive work programme for the Working Group on Trade and Investment” (Commission, 1997). If one did not know that the phrase ‘The European Community and its Member States’ has to be used for legal reasons (investment is a mixed competence), one would immediately want to correct this sentence into ‘the EC and some of its Member States’. In spite of the arguments and uncertainties raised in the previous subsections, the Commission’s push for a WTO investment treaty could still be explained if the Member States were united in their desire to deal with this issue. This section will show that this was not the case. There was considerable disagreement among (and indeed within) the Member States as to the appropriateness of an encompassing WTO investment agreement.

First of all, there were already clear tensions between the EC Member States in the context of the MAI negotiations. Countries such as the Netherlands and Germany (before the SPD won the elections in 1998) were fervent supporters of an encompassing investment agreement (for the position of the Netherlands, see for example the comments of the Dutch Secretary of State for Economic Affairs, Ms van Dok-van Weelen, to the Dutch parliament; van Dok-van Weelen, 1995). Other Member States, most notably France, but also Belgium were more hesitant in their support, insisting for example on an exemption for culture (see Friends of the Earth, 1998: p. 40). Sometimes, these tensions became highly visible. One example of this is when the chairman of the negotiations, the Dutchman Mr. Engering, stepped down in 1998, Germany nominated a German candidate, Mr. Schumeros to take up this position. France, instead of supporting this candidate from another EC country, “blocked his nomination throughout the summer and fall” (Vallianatos, 1998a). Elsewhere, Vallianatos had already drawn attention to the varying level of support for finishing the MAI negotiations, where “France reportedly favoured ending MAI negotiations altogether. [And] Germany and some of the smaller EU countries still favoured completion” (Vallianatos, 1998).

In the end, the MAI collapsed “following a decision by France to cease participating in the negotiations” (Hoekman and Saggi, 1999: p. 19). Paradoxically, this led to the situation where the most recalcitrant Member State became an ally for the Commission to deal with investment in the WTO. After all, the chances of success for reaching agreement in the WTO are lower than in the OECD (which France did not really mind). Furthermore, France would still be able to influence the events indirectly from behind the scenes (in the Council of Ministers and the 133-committee). And if the Commission would against all odds succeed in negotiating an investment agreement after all, the Commission (rather than the French government) would take most of the political flak (see Blake, 1999, in particular on p. 30).

After the collapse of the negotiations in the OECD, it looked as if the Member States had no choice but to follow the Commission’s preference and deal with investment in the WTO. Even before the failure of the Cancún Ministerial, however, there were already some signs of dissent between the EU Member States. A report from ActionAid notes that “deep divisions have become apparent at all levels across the EU body politic during preparations for Cancún, making the European Commission look increasingly isolated in its aggressive stance to launch negotiations (...) in the WTO” (Eagleton, 2003: p.1). There have always been critical voices against the prioritisation of the Singapore Issues from within various parliaments. In the European Parliament, for example, the Greens and the Party of European Socialists have been particularly vocal in expressing their doubts on the usefulness and desirability of initiating negotiations on investment in the framework of the Doha Round (see for example PES Group, 2003; Greens EFA Group, 2003). Also some national parliaments have made themselves heard in this respect. Most notably, the German and UK parliaments have both called for the Commission to drop the Singapore Issues in general and investment in particular (see for example Bundestag, 2003; House of Commons, 2003).

Even though parliaments in general – and the European Parliament in particular – can try to influence trade policy indirectly, they usually have very little power in the actual decision-making process. In that respect it is interesting to see that some dissenting voices have also come from within the governments of some Member States, even before Cancún. In late July 2003 (one and a half months before the Cancún meeting), for example, the German Minister for Economic Cooperation and Development, Heidemarie Wieczorek-Zeul, expressed her sympathy for the concerns of the developing countries with regards to the launch of investment negotiations in the WTO. She goes further than just expressing sympathy, stating that “I would certainly understand if the launch of negotiations on any further topics [than implementation of the development agenda] were to be postponed” and that “[T]he other question is whether now is the right time to begin negotiations on a WTO investment agreement” (Wieczorek-Zeul, 2003). This is two weeks after the Italian Minister of Productive Activities told journalists he felt that it would not be appropriate to expand the list of issues on the agenda (see Marzano, 2003). Also in France the weak support that existed for an investment agreement in the WTO was already waning. Advisors to François Loos, the French Trade Minister, reportedly played down the importance of the Singapore Issues, claiming they were “less of a priority now and may not be launched at Cancún” (Eagleton, 2003: p. 3).

In this light, it will hardly be surprising that there was also disagreement between the EC Member States. A press release from Actionaid, for example, claims that “[O]n the contentious issue of investment, Sweden, the Netherlands, Belgium and Ireland have said they do not consider negotiations to be a priority for Cancún” (Actionaid, 2003: p. 1). There are also indications that the Spanish government “did not seem to be strongly committed to it” (House of Commons, 2003a). The strongest, or at least the best documented, break with the Commission’s position, however, comes from the UK. The UK’s Secretary of State for Trade and Industry, Patricia Hewitt, repeatedly claimed in the run-up to Cancún that the Singapore Issues were no longer a priority for the UK in these negotiations. This was explicitly confirmed by Baroness Amos, the Secretary of

State for International Development, in an oral answer to a question before the House of Commons International Development Committee where she stated that “I cannot answer the question about who is driving it [i.e. the pursuit of the Singapore Issues in the WTO] – it is certainly not us. Patricia Hewitt has said publicly that it is not a priority for us” (House of Commons, 2003c).

This rift became even more apparent after the failure of Cancún for which many blame Lamy’s insistence on the inclusion of the Singapore Issues (see earlier). Gordon Brown, for example hinted at a shift in the UK’s position, namely dropping investment and competition (the most controversial of the Singapore Issues) altogether. In a press conference after the IMF Committee Meeting in Dubai on 21 September 2003, he said that “we believe that these problems [i.e. competition and investment in the Doha Round] can be overcome, and all of the countries, at present, around the table believed that these obstacles could be *removed*” (Brown, 2003: p. 5; emphasis added). In an article in *The Independent* that same day, Brown is a little bit more specific, writing that “(...) we must focus on agriculture and not be distracted by the Singapore Issues” (Brown, 2003a). This seems to confirm Patricia Hewitt’s comments in the House of Commons four days earlier when she declared that “WTO agreements on investment and competition are off the EU’s agenda” (House of Commons, 2003b). This was also reported in *The Guardian* where it was written that “Britain favours abandoning the issues completely” (Osborn, 2003).¹¹ While the Danish parliament and government had both been staunch defenders of the Singapore Issues, by early November the failure of Cancún had convinced the Danish foreign minister that the Singapore issues “should not be pursued if this leads to a blockage of the Doha-Round negotiations” (Møller, 2003).

¹¹ This was also confirmed by another source. In a meeting between with UK minister’s political advisors and some senior trade, development and agriculture officials on 1 December 2003, representatives of NGOs were reportedly “told that the UK would press for investment and competition to be dropped from the EU mandate” (NGO email, 2003).

From this overview, it has become clear that there was no uniform, constant or unconditional support by the Member States for the inclusion of the Singapore Issues in the new WTO round. The rift became even more pronounced after the failure of the 5th WTO Ministerial Meeting. The insistence of Pascal Lamy and DG Trade that the last-minute offer at Cancún of dropping competition and investment was invalidated by the lack of agreement (see Carl, 2003) was diametrically opposed to the preferences of some important Member States. It would therefore be hard to argue that the EC's position on the handling of the Singapore Issues was driven by a demand from the Member States. The next section proposes an alternative explanation.

5.2.5. An institutional explanation: how well does the second hypothesis fit?

If there is no clear-cut economic case to be made for a multilateral investment agreement, if the political costs outweigh any negotiating coinage that might be gained, and if the investment rules the Commission so vigorously pursued were in fact “a low priority for many EU governments and businesses” (de Jonquières, 2003), then the question what drove the Commission in its actions still remains unanswered. Exactly why the Commission was willing to go so far as to almost endanger the Doha negotiation round as a whole in order to try (but ultimately fail) to get investment (and competition, the other very contentious Singapore Issue) incorporated within the WTO remains clouded in mystery. Consistent with the general argument made in this thesis, and building on the findings of chapter three that the institutional structure of an international organisation can impact on the Commission's room for manoeuvre, this section argues that taking into account the (external) institutional framework can help to explain the Commission's preferences and behaviour. This is not to say that the other elements that have been discussed have become superfluous or uninfluential. They still have a role to play, of course, since they help delineating the boundaries of the Commission's ‘win-set’. In that sense, they influence rather than determine the Commission's position. They are less informative about the

rationale behind the Commission following or choosing a given path in the first place.

Here, it is argued that there is awareness within the Commission of its success in the strong setting of the WTO. Issues of mixed competence are thus best dealt with in this forum if the Commission wants to keep its edge over the Member States and wants to remain or become the main player on these issues. Paradoxically, this means that the forum that gave rise to the legal morass of 'mixed' and 'shared' competences in the first place is also the most effective forum available to the Commission to pave the way for turning more of these issues into exclusive competences, falling under art. 133 TEC. In this particular case study, the inclusion of investment in the WTO framework would make it easier for the Commission to gradually push this issue under the cover of the CCP. What, then, makes the Commission think that the WTO is the best forum to pursue the case for investment?

First of all, the fact that the Commission had been dealing with multilateral trade issues since the 1960s provided it with invaluable experience and expertise, also in dealing with GATT trade disputes. The EC quickly replaced the individual Member States as the most important player in the dispute settlement system, as defendant as well as complainant.¹² This is unambiguously reflected in the GATT dispute settlement statistics. Whereas there have only been 20 (formal) GATT disputes involving an individual Member State, there have been 104 disputes involving the EC. Or, in other words, in almost 84% of the GATT disputes involving the EC or the Member States, it was the EC rather than a Member State that was defendant or complainant.¹³ If the playing field is levelled and only the disputes from 1963 onwards are taken into account, the share of the

¹² Keep in mind that GATT mainly dealt with issues falling under the EC's exclusive competence.

¹³ Note that only 'formal' GATT disputes are taken into account here, i.e. disputes that have been formally discussed in the GATT framework. The calculations are based upon data collected by Eric Reinhardt (Reinhardt, 1996), available from: <http://userwww.service.emory.edu/~erein/data/#GATT>

disputes in which Member States are involved falls further to only 6%.¹⁴ Furthermore, with the only exception of a complaint initiated by the Netherlands against the US in 1991, the last GATT dispute in which a Member State was involved directly was in 1973.¹⁵ The Commission thus has the advantage of an extensive learning period where it was the main defender of the EC's interests in GATT.

Then there is also the learning effect from the Commission's experience with the WTO dispute settlement system. The creation of the WTO and the coming into force of its new dispute settlement system immediately had a very significant impact on the EC. For example, two of the most contentious cases involving the EC, the infamous *Bananas* and *Hormones* cases, were both launched in the early days of the new system (the *Bananas* case in October 1995 and the *Hormones* case in January 1996). Given the sensitivity and importance of these cases, the Commission immediately got a taste of the possibilities of this new judicial system and the strong position it enjoys in dispute settlement over the Member States. This is likely to have raised awareness of the benefits for the Commission's institutional position that derive from its central position in this strongly legal and institutional approach to settling international trade disputes. The claim that there is awareness within the Commission of its stronger position in the WTO was also confirmed in interviews with officials in DG Trade and the Commission's Legal Service. During these interviews it became clear that most officials interviewed, and this holds for junior and senior officials alike, regarded this as rather self-evident, which suggests that this awareness has already been firmly institutionalised within the organisation (interviews with Alan Rosas, Stefan Amarasinha, Richard Carden, Christophe Kiener, Robin Ratchford, Søren Schonberg and Lothar Ehring). While being very diplomatic in stressing the

¹⁴ 1963 is a symbolic date for the Common Commercial Policy for two reasons: the establishment of a customs union (and thus also a common commercial policy) was speeded up, and this year also saw the – unofficial – opening of the Kennedy Round in which the EC represented its Member States for the first time.

¹⁵ And even the complaint filed by the Netherlands was filed simultaneously with an identical complaint by the EC.

interaction between the Commission and the Council/Member States, when explicitly asked all these officials nonetheless answered that they were aware of the stronger position of the Commission vis-à-vis the Member States in the WTO context.

Taking into account the influence of the institutional framework on the Commission's preference formation would help to explain its behaviour with regards to investment more fully. One aspect of the Commission's position that was particularly baffling for many actors (observers and people involved alike) was its insistence on the bundling of the Singapore Issues. The founding director of the Evian Group put it as follows:

“what I cannot understand – and no one has been able to explain – is why these Singapore issues had to be bundled. The issue remains shrouded in mystery. Through your columns, perhaps we can invite Mr Lamy to inform us (the public) of exactly which organisations, on what dates and on what occasions, asked that the EU insist on having the four Singapore issues bundled” (Lehmann, 2003).

It was pointed out earlier that this view was also shared by important actors within the governments of the Member States. By taking into account the external institutional framework as well as the Commission's preferences and by placing the issue in the context of the ongoing (though often implicit) power struggle between the Commission and the Member States, it is easier to understand the Commission's insistence on the bundling of the Singapore Issues.

In this explanation, the key element is the Commission's desire to gain competences, in this case concerning international investment measures. Relying on judicial activism by the Court of Justice to obtain these competences is tricky and no guarantee for success, as was witnessed by Opinion 1/94. Lobbying for a treaty change is time consuming, takes up a lot of political capital (you are likely to have to 'pay' for it by making concessions in other fields) and is rather static.

For example, in the draft constitution, foreign direct investment (FDI) would have been brought under the remit of the Common Commercial Policy (Article III-217, paragraph 1). But FDI flows are affected by the regulatory framework of the host country, and are hence intrinsically related to a whole range of liberalisation issues (the OECD mentions for example the movement of key personnel, privatisation, state enterprises, etc., see OECD, 1996: p. 13). These issues do not clearly fall within the CCP and the Commission would therefore still have a hard time convincing the Member States it should be responsible for these issues. Most likely, these competence fights would sooner or later end up again before the European Court of Justice to be clarified.

Therefore, it is much more attractive for the Commission to try and 'smuggle' these issues into the WTO. Here, the institutional framework of the WTO, combined with the strong role of the Commission in this forum, creates a favourable atmosphere for the Commission to *de facto* gain these competences in the day-to-day workings of the organisation and within its dispute settlement system (where the stakes are usually quite high). Given the contentiousness of the topic of investment, the only way the Commission could hope to integrate this issue within the WTO was by bundling it and presenting the Singapore Issues as a package. Of course, this is no guarantee for success and it was never certain that the Singapore Issues would be accepted as a package and included in the Single Undertaking. But here the Commission's post-Cancún strategy is quite enlightening since the Commission kept stressing that the Singapore Issues that are dropped from the Single Undertaking (definitely investment and competition), should still be dealt with within the WTO framework, albeit in plurilateral negotiations rather than in the Single Undertaking. The result for the Commission, however, would be the same: investment would be dealt with within the WTO and investment disputes would most likely be resolved by making use of the dispute settlement system. This would also explain why the Commission suddenly is *demandeur* for a plurilateral approach, compared to the Uruguay Round where the Commission was one of the biggest supporters of the Single Undertaking and the 'multilateralisation' of the GATT à la carte (see

Preeg, 1995: pp. 114-125). This support for the principle of the Single Undertaking did not wither after the Uruguay Round. In a Communication on the EU approach to the Millennium Round, the Commission states that “[T]he results of a Round should be adopted in their entirety and apply to all WTO members. (...) The Community should therefore continue to argue in favour of launching and concluding the negotiations as a single undertaking” (Commission, 1999b: p. 6). Even as late as April 2003, Peter Carl (Director-General of DG Trade) told the WTO Trade Negotiating Committee that “[W]e should be guided by a few basic principles (...). Firstly, the principle of the single undertaking” (Commission, 2003a: p. 1). The Commission’s sudden preference for plurilateral agreements is therefore highly significant and is a good indication of the importance it attached to integrating some of the Singapore Issues, most notably investment, into the WTO framework.

CONCLUSION

This chapter explored the Commission’s role in dealing with the issue of investment in the trade regime. From this discussion, it has become clear that the Commission was very keen to bring investment into the (strong) WTO framework, even though both the necessity and the desirability of these efforts have often been questioned. One of the major driving forces behind these efforts, it was argued, is the Commission’s desire to expand its competences vis-à-vis the Member States, a goal that is more likely to be achieved in the strong institutional setting of the WTO. This is itself a good indication that there is some awareness within the Commission that it is in a favourable position in the strong institutional context of the WTO (the second hypothesis that was put forward in chapter two). The next chapter expands the scope of the thesis by focussing on international environmental agreements. The same fundamental question will be addressed in this chapter as well: does the Commission actively employ strategies in order to strengthen the institutional context in which the action takes place in order to gain influence? Therefore, the stress will be again

on the two main strategies that could be used to this aim. These are strengthening the institutional frameworks of agreements and/or trying to incorporate these issues within existing strong frameworks.

6

INSTITUTIONALISATION AND ENVIRONMENTAL ORGANISATIONS

INTRODUCTION

The previous chapters were focussed on making the case that the institutional framework of international regimes can influence the balance of power between the Commission and the Member States. This was done by first showing that the Commission enjoys a stronger position in the WTO than it did in GATT, and by linking this change to the strengthened institutional framework. Then, attention was paid to the role of the Commission in bringing about this strong framework in the first place, and to its attempts at extending the number of issues falling under the scope of the strong institutional set-up of the WTO. The question that arises now is whether this dynamic is restricted to the trade regime, or whether there are indications that the institutional explanation is also relevant in other settings. This chapter therefore studies the role of the Commission in the evolution of international environmental regimes. The central question is whether the Commission actively tries to profile itself on the international (environmental) stage as well, in line with the findings of the previous chapters. With this aim in mind, some of the Commission's preferences and actions on the international environmental stage are analysed. The main question is whether

there is any evidence of attempts by the Commission to strengthen its position by institutionalising international environmental agreements or its position within these agreements. This can take the form of exerting pressure to strengthen the institutional framework of an existing regime, but – due to the relatively weak starting position of the Commission in international environmental affairs – this can also mean lobbying to become party to an agreement.

6.1. General background: the environment as a case study

Reasons for looking at environmental issues when studying international policy competences are not very difficult to find. Issues such as water management policies, or water and air pollution can have broader regional and transboundary repercussions, as was clearly pointed out as early as 1938 and again in 1941 in the famous Trail Smelter Arbitration cases (see United Nations Reports of International Arbitral Awards, 1941). The same is true for other well-publicised issues, such as climate change or ozone layer depletion. These problems cannot be tackled on a country-by-country basis but require a co-ordinated joint effort. For this reason, many environmental policies, like trade, are of an inherently multilateral nature. The success and effectiveness of these environmental agreements depends on their implementation by all parties, whereas the cost of this implementation is restricted to the individual countries. This is the setting for a classic collective action problem. In order to overcome this collective action problem and to avoid free-riding, the agreement can be institutionalised so that a one-shot game is transformed into an iterated game, changing the pay-off matrix and giving countries an incentive to comply. In short, environmental policies often have transboundary effects, inviting international cooperation. This raises the likelihood of collective action problems and free-riding, and in order to avoid this, the response to an environmental problem can be institutionalised by concluding international agreements or by creating an international organisation. This need for international cooperation and the propensity to produce

international organisations makes the environment a good study object for external policy competences.

The fact that trade and environmental issues both invite international cooperation does not mean there are no substantial differences between these two areas. Quite the contrary is true. A substantially different logic is at work in both domains, which leads to a fundamentally different approach to dispute settlement in environmental and trade organisations (recall that, since the approach to dispute settlement can be highly legalistic, it is an important element in the description of 'institutionalisation' in this thesis). For example, there will be less (if any) bilateral dispute settlement regarding environmental disputes because these problems, unlike trade disputes, are often not restricted to two countries but tend to be regional or sometimes even global in their dimensions. Furthermore, this transboundary character of environmental problems means that it is difficult to pin these problems down to a single source (as opposed to, for example, country X's specific anti-dumping duties that are impacting on country Y's industry). Therefore, the aggressive or conflictual litigation approach that exists in the trade regime seems to be unsuitable for enforcing compliance with environmental standards (see also WTO, 2001c). As a consequence, the dispute settlement provisions in environmental organisations usually differ from that in the WTO (and regional trade agreements) in that they tend to be rather vague and focussed on diplomatic solutions. Instead of relying on confrontational dispute settlement, multilateral environmental agreements (MEAs) mostly contain 'soft' enforcement provisions with more stress on compliance monitoring and 'name and shame'-mechanisms (Esty, 2002; Sands, 1993). Or, as one of the organisations involved has put it, "[T]he focus of MEAs is on procedures and mechanisms to assist Parties to remain in compliance and to avoid disputes, not on the use of provisions for the settlement of disputes" (WTO, 2001c: p. 2).

This is reflected in the fact that no dispute settlement provision has ever been invoked in an environmental agreement (WTO, 2001c: p. 2; Brack, 2001: p. 11).¹ This raises a measurement problem since it means that the role of the Commission in the initiation of and response to environmental disputes cannot be analysed in the same way as it was in the case of trade. Even concentrating on the non-compliance proceedings does not seem to offer a way out since the focus of MEAs' non-compliance procedures is not so much on policing adherence to the treaty, with the possibility to invoke sanctions in order to enforce compliance, but is rather aimed at offering the parties incentives to comply (Victor, 1996). Usually, there is an elaborate procedure that has to be followed (parties are named and shamed, summoned to explain themselves before committees, etc.) before the option of introducing 'hard' sanctions or similar measures, if the treaty in question provides such an option in the first place, might finally be contemplated.

All in all, it therefore appears that 'hard' dispute settlement systems are not really suitable for MEAs and that non-compliance procedures in MEAs are more geared towards developing countries or transition economies since the primary concern of such procedures and mechanisms is to *facilitate* compliance (Yoshida, 2001). Hence, neither mechanism seems to create a 'favourable' condition for the EC to end up entangled in a dispute or non-compliance proceeding and there is thus not much scope either for the Commission to profile itself through its (extensive) use of the litigation system. For these reasons, another approach is needed than that in the trade chapters, where participation in and use of the dispute settlement system by the EC were more straightforward to observe. Instead, this chapter will turn its focus on the aspect of 'dynamic institutionalisation', by looking at the attempts of the Commission to establish itself as an international actor in environmental issues and at its role in the establishment and functioning of the institutional frameworks for the MEAs,

¹ With the exception of the EC-Chilean 'Swordfish' dispute if the United Nations Conference of the Law of the Sea is regarded as an environmental agreement. This case will be discussed in more detail later.

particularly the dispute settlement and/or non-compliance mechanisms. In other words, this chapter focuses on testing the second hypothesis rather than the first one (see chapter two).

Another important difference between trade and environment relates to the divergent nature of the EC's external competences in both areas. Whereas external trade relations were clearly mentioned in the Treaty of Rome as falling under the exclusive competence of the EC (at least where trade in goods is concerned), the environment did not feature at all in that Treaty. It was not until the 1970s that EC started to develop competences in the field of the environment, thanks to the spill-over effects from the single market and judicial activism by the Court of Justice through its ERTA-ruling and the related doctrine of implied powers (Sbragia and Hildebrand, 1998; Sbragia, 1998). The next paragraphs give an overview of the emergence of the environment as an issue area, both on the international stage and within the EC.

The environment featured high on the political agenda in the 1970s and 1980s. Increased public concern about the state of the planet, and growing environmental awareness in general led to the 1972 UN Conference on the Human Environment in Stockholm (UNCHE) (see for example Tenner, 2000). This global environmental agenda-setting exercise was repeated in 1992 in Rio, where the UN Conference on Environment and Development took place. This also had an institutional component in that both of these high-profile events resulted in the adoption of important MEAs: the Convention on International Trade in Endangered Species (CITES) in the case of the Stockholm conference, the UN Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity, among others, in Rio. Moreover, there are strong indications that the Stockholm conference gave the opening shot for the fairly recent boom in MEAs, since about 75% of the MEAs concluded between 1951 and 2000 were adopted after the 1972 conference (Tenner, 2000: p. 133). It therefore seems fair to conclude that this conference played a pivotal role in introducing international environmental issues on the political agenda and in

making them salient. Even more importantly, perhaps, activists were able to keep the momentum by constantly reaffirming the important role of the environment in international political affairs, as is witnessed by the huge increase in MEAs since 1972.

These international developments also had repercussions for the EC. The EC's founding treaty, the Treaty of Rome, did not mention environmental protection – or the 'environment', for that matter – once (Haigh, 1992; Commission, 2002a; Grant, Matthews and Newell, 2000). Hence, there was no explicit legal basis for an environmental policy at the Community level.² Nonetheless, the 1972 Stockholm conference and the growing environmental awareness that preceded and accompanied it, created considerable pressure for the EC to move into environmental policymaking (Haigh, 1992; Jordan, 1999). Only a couple of months after UNCHE, the Paris summit of the heads of state and government called upon the Commission to draft a programme of action for an EC environmental policy. The environmental action programme of 1973 (covering the period 1973-1976) was thus the first of these programmes and also the first explicit reference to environmental policy on the Community level, even though a strict legal basis was still lacking. It was not until the entry into force of the Single European Act (SEA) in 1987 that this legal basis was provided. The SEA added an environmental chapter to the Treaty by introducing Articles 130r-130s, which specifically dealt with environmental protection. In Maastricht and Amsterdam, these provisions were further refined and entrenched in the Treaty.

But where does this leave the EC on the international environmental scene? With regards to trade issues or fisheries policies, the Treaty of Rome explicitly stated that the Community possessed exclusive competence to conduct the external

² Although this does not mean that there was no EC legislation relating to the environment at all. The first EC environmental (or better: environment-related) directive dates from 1967 and deals with standards for classifying, packaging and labelling dangerous substances. Early environmental legislation was intrinsically related to (intra-EC) trade facilitation, and the Commission "proved creative in the use of Article 100 [...] and Article 235" (Grant, Matthews and Newell, 2000: p. 9; see also Golub, 1999).

aspects of these policies. Regarding the environment – and despite the emergence of this issue area as an internal EC competence – the extent and nature of the external dimension of this new Community competence was not nearly as clear-cut. The European Court of Justice has played a major role in the emergence of the EC as an international actor on environmental issues. Or, as one analyst has put it: “[T]he extent to which the Community has been able to claim a place on the international plane over the years is mainly a consequence of the substantial body of case-law developed by the Court” (Nollkaemper, 1987: p. 61). One ruling by the Court particularly stands out in this respect, and that is the ERTA case (Court of Justice, 1971; for comments and analyses see Sbragia, 1998; Macrory and Hession, 1996; Nollkaemper, 1987). Building on the principle ‘*in foro interno, in foro externo*’, the Court developed its doctrine of implied powers in this ruling. It ruled that if the Community had been given the competences to act internally, it implicitly had been given the competence to act externally as well. After all, if the Community did not have powers over the external dimensions of its internal competences, the Member States might take actions in the external forum that could undermine the Community’s internal competences.

The result of all this is that “since 1972 discussions on the desirability of a transfer of powers have increasingly been provoked by the appearance of the Community on the *international* plane” (Nollkaemper, 1987: p. 55; emphasis added). However, there is also another front on which the Commission is fighting a battle when it comes to external environmental affairs.³ There are some preconditions that have to be fulfilled if the Commission is to drift from the Member States and if it is to be able to use the institutional provisions of the MEA to extend its influence and power, should the opportunity arise. Two of these conditions are that the EC should first of all be a party to the MEA and also that it be in a reasonably strong position within the functioning of that MEA. The

³ While the Commission is certainly not the exclusive spokesperson of the EC in international environmental negotiations (the Council Presidency can also, and regularly does, speak for the EU, see Golub 1999), it does represent the EC in the institutional structures of international environmental organisations.

first condition is closely related to the issue of third party recognition of the EC. It has already been pointed out that the EC faced – and to a certain extent is still facing – some problems concerning third country recognition when it comes to international trade. In international environmental affairs, however, the problem is much more serious. For example, US and Soviet Union opposition prevented the EC from becoming a party to the Convention on International Trade in Endangered Species. And also in the more recent case of the Montreal Protocol, there was fierce resistance against the EC joining the Protocol (see later). From the point of view of the Commission, there is an important link between the vagueness of the division of external competences in environmental matters on the one hand, and the problem the Commission faces concerning third country-recognition of the EC as an international environmental actor on the other. This is because the absence of a clearly delineated core set of exclusive community competences on international environmental issues (in other words, the absence of an environmental equivalent of art. 133) means that getting international recognition becomes much more important for the Commission. After all, it will have to rely on and need this third country-endorsement to strengthen its international position and hence to have the possibility to use this strong international position as a platform to gain more influence and power internally as well. In the absence of a strong dispute settlement system that raises the costs of non-compliance and thereby gives the Member States an incentive to rely on the Commission, the element of third-country recognition of the EC becomes even more important in the environmental field.

Strengthening its position internationally also means paving the way for a stronger position for the Commission domestically (i.e. vis-à-vis the Member States). By becoming a party to many (or at least the most important) MEAs and by fulfilling the role of EC spokesperson within these organisations, the Commission has an opportunity to strengthen its external representation function. This will in turn lead to increased acceptance by third parties of the Commission as an international environmental actor, thereby making it easier for the Commission to become more assertive in the area of international environmental

affairs. This process, in which external recognition empowers the Commission internally as well, can be strengthened by creating stronger institutional frameworks in MEAs. This would empower the Commission as external EC spokesperson within the EC, profile the EC as a coherent external actor and make future acceptance of the EC as an actor in international environmental affairs more likely.

After all, having to depend on obtaining international recognition over and over again for every new MEA is not only a cumbersome, but also dangerous strategy, as was illustrated by the reluctance of the US to accept the EC as a party to CITES, the Vienna Convention and the Montreal Protocol. In the last two instances, the EC prevailed and became a party, but not after having had to put the success of the negotiations in the balance first. This strategy worked in these cases, but it would probably be doomed to fail in negotiations for which the EC would be the *demandeur* and where at the same time the US – while willing to negotiate – would only be only lukewarm about reaching an agreement. Some mechanism to provide more certainty to the Commission regarding its international status would therefore be useful. The institutionalisation of MEAs is such a strategy since a stronger Commission position in existing agreements would increase its credibility as an international actor and make its participation in future agreements more likely (the precedent effect). Above all, a strong Commission position also has the potential to discredit one of the most important arguments against acceptance of the EC in MEAs, namely that the EC cannot deliver or effectively function as a coherent actor.

While international recognition certainly is a necessary condition in order for the Commission to be able to use the external context to affect the internal balance of power in the EC, it is not a sufficient one. If the Commission has more scope for playing the first fiddle over mixed competences – and thus gaining influence and power – in contexts of judicial, bilateral dispute settlement, then international environmental regimes are hardly an ideal setting. After all, it has already been indicated earlier that dispute settlement provisions in MEAs have never yet been

invoked (Victor, 1996) and that non-compliance procedures are more cooperative in nature (than litigation). One strategy for the Commission would be to try and lure these issues into a framework that does have a high degree of institutionalisation. This is the question about the Commission's role in incorporating environmental issues within the framework of the WTO.

In conclusion, there are three elements that could point to a drive by the Commission to use the external institutional framework as a tool to gain influence in environmental issues: a strong push for external recognition in international environmental affairs, efforts to strengthen the institutional framework of MEAs, and attempts to push environmental issues into the WTO. The remainder of the chapter explores whether and to what extent these factors are present in the Commission's actions. The next section will tackle the first two issues by looking at the Commission's actions in the framework of the Montreal Protocol on Substances that Deplete the Ozone Layer. It has to be noted that the Commission openly expressed its intention of using the Montreal Protocol and the Vienna Convention negotiations for gaining international recognition (see later). As a result, the implications of international recognition of the EC for Commission-Member States relations have already been discussed in this context by other scholars. The next section places these findings within the broader theoretical framework that has been developed in this thesis, before going into specifics and discussing the role of the Commission in the creation of the non-compliance mechanism of the Montreal Protocol. The last section then deals with the Commission's position regarding the link between trade and environmental matters and the extent to which the WTO should be involved in trade-environment issues.

6.2. The Commission in the Montreal Protocol: international recognition and stronger institutions

The Montreal Protocol on Substances that Deplete the Ozone Layer is a protocol of the Vienna Convention for the Protection of the Ozone Layer and is “generally regarded as one of the most, if not the most, successful environmental conventions in existence” (Brack, 2003: p. 209). Unusually for a multilateral environmental agreement, it is highly effective and this is not in the least because it has “one of the most effective non-compliance mechanisms of any MEA” (*ibid.*: p. 216). This is a clear break from the traditional weak approaches to international environmental cooperation and thus forms the best possible setting in international environmental politics for studying the role of the Commission.

6.2.1. Dispute settlement and non-compliance in the Montreal Protocol

Dispute settlement in the Montreal Protocol is governed by the provisions laid down in Article 11 of the Vienna Convention. This article states that states should first try to resolve their disputes through negotiation (paragraph 1). If no agreement can be reached, they may turn to a third party for mediation or for good offices (paragraph 2). If a settlement still proves elusive after these steps, parties to the dispute can – with mutual consent – request the submission of the dispute to the International Court of Justice or to arbitration (paragraph 3).⁴ If one of the parties objects to such arbitration, a conciliatory commission is established whose recommendations the parties shall consider ‘in good faith’ (paragraph 5). Although this dispute settlement system could be highly legalistic (if the parties agree to be bound by an arbitration panel or if they decide to refer their dispute to the International Court of Justice), there is still a lack of ‘hard’ sanctions. No mention is made of compensation in case of a breach of the

⁴ Note that only states can be party before the International Court of Justice. The European Community is not a state and therefore the Commission would only be able to rely on arbitration tribunals.

agreement, and there are no additional incentives to comply with the arbitration panel's ruling. In any case it is impossible to judge the effectiveness of this formal dispute settlement mechanism since – to date – it has never yet been invoked. Whenever reference is made to the Montreal Protocol's strong and effective dispute resolution system, it is therefore not article 11 of the Vienna Convention that is referred to, but rather the non-compliance mechanism incorporated in the Montreal Protocol itself.

The non-compliance provisions of the Montreal Protocol can be found in article 8. However, this article only states, in the most general terms, that “[T]he Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance”. Thus, the details of the procedure for dealing with instances of non-compliance were to be worked out after the Protocol came into force. To this aim, an *ad hoc* Working Group of Legal Experts was established. Interestingly, the procedure this group proposed was accepted only on an interim basis since some Parties thought a stricter approach was needed (Victor, 1996: p. 4), until the final – only slightly revised – procedure was adopted at the Fourth Meeting of the Parties in Copenhagen in November 1992 (UNEP, 1992: p. 13).

The central institution in Montreal's non-compliance mechanism is the Implementation Committee. This committee, which consists of two members of each of the five geographical regions of the United Nations, normally meets twice a year. It considers submissions, information and observations on issues of implementation of the Montreal Protocol. In principle, there are three ways for an issue to end up before the Implementation Committee. The Committee can be alerted to instances of non-compliance by the non-complying Party itself, by the Secretariat, or by a third Party. In reality, however, third Party action seldom occurs. Victor notes that “[V]irtually all issues related to data reporting have arrived on the Committee's agenda at the initiative of the Committee or the Secretariat” and “all the issues related to compliance with the Protocol's

obligations to phase out ODS [Ozone Depleting Substances] have been put on the Implementation Committee's agenda by the affected Parties themselves" (Victor, 1996: p. 16). Thus, the 'oversight' that is crucial for an effective compliance procedure is the responsibility not only of the Parties to the agreement, but also of the Secretariat, which is supposed to be technocratic and impartial – or at the very least less politicised than the Meeting of the Parties (MoP). Following conventional institutional theory, this (partial) delegation to more independent agencies should enhance the credibility of the policy, in this case the non-compliance procedure (see Kydland and Prescott, 1977 for an early account of this problem). Furthermore, it is important to note that the Committee not only deals with specific instances of non-compliance, but that it also serves as a standing body, something which has also substantially increased the standing and effectiveness of the Committee (Victor, 1996).

The Implementation Committee cannot take decisions autonomously, but it reports to the Meeting of the Parties and it proposes recommendations to deal with instances of non-compliance. The indicative list of measures that might be taken by the MoP includes:

- A. Appropriate assistance (...)
- B. Issuing cautions.
- C. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.

(Ozone Secretariat, 2000: p. 297)

This last option, the threat of restrictions on trade in products covered by the Montreal Protocol, undoubtedly is the strongest incentive and the biggest 'stick' to induce compliance (see also Brack, 2003; and in particular Brack, 1996).

Another important element that strengthens the non-compliance procedure and gives it credibility is the rule that “[N]o Party, whether or not a member of the Implementation Committee, involved in a matter under consideration by the Implementation Committee, shall take part in the elaboration and adoption of recommendations on that matter to be included in the report of the Committee” (Ozone Secretariat, 2000: p. 296). Recall that the ability of the parties to the dispute to block the dispute from being investigated or ruled upon was one of the major weaknesses in the early GATT dispute settlement system. The Montreal Protocol clearly scores better in this respect.

In conclusion it can be stated that, even though the dispute settlement system incorporated in the Vienna Convention has never yet been used, the Montreal Protocol does have a relatively strong non-compliance mechanism. The important role of the Secretariat and the Implementation Committee in the non-compliance procedure, as well as the exclusion of parties involved in investigations from the Committee’s decision-making process, prevents the procedure from becoming overly politicised. The fact that alleged instances of non-compliance can be brought to the attention of the Implementation Committee by the Secretariat, the Party involved or a third Party adds to the credibility of the non-compliance mechanism. And the possibility of the use of trade sanctions gives countries an incentive to comply with the Montreal Protocol, which is key to creating an effective agreement.

6.2.2. The role of the Commission in the making of Montreal’s non-compliance mechanism

In search of international recognition

The main challenge for the Commission at the start of the Montreal Protocol negotiations was at the same time its primary objective: obtaining international

recognition. This was important for two reasons. First of all it would give the Commission a stronger platform to act, given that there is no environmental equivalent of art. 133 (see earlier), which means that international recognition of the EC is of utmost importance when it comes to international environmental issues. Secondly, Commission participation in the functioning of an MEA would put it in a stronger position vis-à-vis the Member States. After all, in environmental *negotiations* it is still often the Presidency that speaks for the Community. Within the *functioning* of an agreement to which the EC is a party, on the other hand, it is the Commission that represents the EC. Becoming a party to the agreement was thus of double importance to the Commission at the start of the Montreal negotiations since, firstly, it would send a clear signal that it is a full international partner when it comes to environmental issues and, secondly, it would strengthen its position vis-à-vis the Member States.

Obtaining international recognition was not just on the Commission's hidden agenda, it was made fairly explicit early onwards that this was what the negotiations were all about according to the Commission. This was not only the case for the Montreal Protocol negotiations, but had also been so for the bargaining leading to the conclusion of the Vienna Convention. A communication from the Commission to the Council on the negotiations for a global framework convention for the protection of the ozone layer states that "[T]he Commission did not wish to accept any clause which would make participation by the Community subject to prior participation by one Member State (...) or by a majority of Member States (...)" (Commission, 1985: p. 1). The Commission's (stated) goal was thus to gain influence and competences by obtaining EC participation in the international agreements. If the EC could become a party to the Vienna Convention, the Commission could then 'transfer' this issue to the internal level by claiming the right to propose legislation to implement the Vienna convention, thereby increasing its internal competence over environmental issues (see Jachtenfuchs, 1990). The same reasoning was central to the Commission's approach to the Montreal Protocol negotiations. Sbragia and Hildebrand, for example, note that "[T]he Commission viewed the

Montreal Protocol as an opportunity to increase the Community's international standing, and thereby its own institutional prestige and influence" (Sbragia and Hildebrand, 1998: p. 225). It is hard to underestimate the salience of the issue of EC participation to the Commission in both of these international negotiations (Vienna and Montreal). It is certainly not exaggerated to state that "the Vienna Convention was about "institution-building" in Brussels as much as it was about CFCs" (*ibid.*: p. 223). While facing strong international (especially American) resistance to EC participation in both negotiations, in the case of the Montreal Protocol, the Commission pushed this issue of EC participation and recognition so far that it nearly endangered the successful conclusion of the negotiations as a whole. In the end, only a New-Zealand brokered compromise after a "nerve-racking midnight standoff over this issue" (Benedick, 1991: p. 96) saved the Montreal Protocol. This episode illustrates very clearly the importance the Commission attached to being taken seriously on the international stage and becoming an international environmental actor.

The Commission and the creation of Montreal's non-compliance mechanism

Finally, we should take a closer look at the role of the Commission in the negotiations of the actual provisions of the non-compliance procedure of the Montreal Protocol. Whereas MEAs have usually been characterised by a soft or diplomatic approach (in other words, they were power-based systems), one of the most interesting and intriguing aspects of the Montreal Protocol is exactly its move towards a more rules-based system. Though still a far cry from the WTO's judicial approach, the Montreal Protocol's non-compliance procedure nonetheless does have several characteristics of a rules-based system. In the next paragraphs, it will be shown that the Commission was a pivotal actor in pushing for the incorporation of these strong institutional elements and thus in making the Montreal Protocol much more rules-based than the average MEA.

In order to work out a non-compliance mechanism for the Montreal Protocol, an *ad hoc* Working Group of Legal Experts was established. The Commission took a very proactive approach in this working group and argued forcefully for a strong institutional mechanism tackling non-compliance. Indeed, Victor notes that the European Commission was one of only a few participants in the negotiations on the non-compliance system that “led the way” (Victor, 1996: p. 5). The most important document that sheds light on the Commission’s position and influence in the creation of the non-compliance system is the EC’s proposal of 8 April 1991, suggesting several changes and additions to the draft non-compliance procedure that was on the table (UNEP, 1991). All of these suggestions were designed to make this procedure stronger and give it teeth. They fall broadly within three categories: introducing time limits, strengthening the role of independent actors (i.e. the Implementation Committee and the Secretariat) and preventing conflicts of interests.

Firstly, the EC proposal is the first to advocate strict time limits in the procedure. While the wording that the Implementation Committee (IC) “consider the matter as soon as practicable” (UNEP, 1991: p. 2) is unchanged, the timeframe for the submission of information to the Implementation Committee by the Secretariat is fixed at three months and two weeks, unless the Secretariat decides differently. Equally, the EC proposed that when the Secretariat requests information from a Party, that this information should be provided within three months. Otherwise the Secretariat “shall forthwith refer the matter to the Implementation Committee for examination” (*ibid.*). Nonetheless, even with these stricter time limits, the whole process could still be an empty threat since the requirement that the IC consider the matter as soon as ‘practicable’ could render the exercise futile, for example in the case where it would only meet, say, once every two years. In order to avoid this scenario, the EC also proposed to introduce a more specific calendar for the IC meetings. The first draft only recommended that “[T]he Committee shall meet as necessary to perform its functions” (UNEP, 1991: p.3). The EC draft is more precise by adding that “unless it decides otherwise the Committee shall meet twice a year” (*ibid.*). This puts the *minimum* number of

meetings of the IC to two a year, thus avoiding that investigations regarding complaints about non-compliance get stalled because of a large gap between, and an overcrowded agenda of, IC meetings.

Second, but closely related to the issue of imposing time frames, the EC proposal seeks to strengthen the role and position of the IC and the Secretariat. The Secretariat, for example, may request further information from parties on specific matters when it “is aware of possible irregularities with regard to the compliance of a Party with its obligations under the Protocol” (UNEP, 1991: p. 2). The IC, under the EC proposal, can “address requests for information to Parties, organisations or individuals as appropriate” (UNEP, 1991: p. 3) as well as “send, with the consent of the Party in question, one or more of its Members to the territory of the Party concerned for further clarification of the relevant facts” (*ibid.*). The strict time frames in combination with broad information gathering capacities for the secretariat can play in the hands of the Commission and strengthen its position vis-à-vis the Member States in the functioning of the non-compliance system. The reason is that this very much fits into the Commission’s profile as technical body of the EC. Given that the strict time frame greatly increases the pressure to deliver the requested non-compliance information, Member States will be more likely to (have to) rely on the Commission’s expertise and experience should they ever be asked to explain themselves before the Implementation Committee (in the same way the strict time frame of the WTO dispute settlement system favours Commission action).⁵ The possibility of ultimately facing trade sanctions in cases of continued non-compliance should make Commission action even more likely, not least because trade sanctions involving only one Member States would be a distortion of the Single Market. It should be noted, however, that this scenario is hypothetical since neither the EC nor a Member State has ever been in that position and it is highly unlikely that a

⁵ Except, of course, when it concerns requests to clarify or provide purely national data, which only the government of the Member State can provide. This was the case when Italy was repeatedly called before the IC.

scenario in which any of these actors would be found in non-compliance with the Montreal Protocol and end up facing trade sanctions would materialise.

Finally, the EC proposal also tried to prevent conflicts of interest by proposing that a member of the IC that is itself involved in a case of non-compliance be replaced. This bears a striking resemblance to the changes that were made to the GATT dispute settlement system. Recall that under GATT rules parties to a dispute also had a veto over the creation of a panel or the adoption of panel reports on that dispute. This was a major source of frustration and blockage in the GATT dispute settlement system and was subsequently dealt with during the Uruguay Round negotiations.⁶ It is therefore quite interesting to see that the EC proposal is very explicit in its desire to close this loophole for rendering Montreal's non-compliance procedure ineffective.

In short, the Commission has pushed hard for getting this relatively highly institutionalised, rules-based non-compliance in place. Furthermore, there are several striking similarities between elements introduced by the Commission in the Montreal's non-compliance mechanism and some of the changes in the dispute settlement system with the transition from GATT to WTO. This is in line with the findings of the previous chapters, that the Commission favours strongly institutionalised international settings to operate in since they offer more scope for the Commission to gain influence and power.

Another element that contributed to a stronger role for the Commission is the degree of technicality involved in the implementation of the provisions of the Montreal Protocol. To begin with, "[T]he European Community's main instrument to implement the Montreal Protocol is through a Community Regulation that is directly applicable in all Member States" (Commission, 2003g: p. 1), which gives the Commission a much firmer grasp on the implementation

⁶ The first inroads to remedying the weaknesses of the GATT dispute settlement system in the Uruguay Round were made in 1988 at the mid-term review in Montreal.

process than in the case where a Directive would have been issued. But Peter Horrocks, the head of delegation of the European Community, adds in a speech at the 12th Meeting of the Parties to the Montreal Protocol that “the new Regulation introduces a range of measures concerning all ozone depleting substances that go beyond the Protocol (...)” (*ibid*). The effect of this on the inter-institutional relations within the EC is hinted at by the Commission in an outline of its policy and objectives regarding the protection of the ozone layer, when it is stated that “[T]he Commission is a major driving force in the Montreal Protocol process since the commitments under this Protocol are mainly implemented at the Community level” (Commission, 2003f: p. 1). When interviewed, Peter Horrocks went even a bit further by claiming that the Commission is “generally more active than the Member States in trying to achieve a high level environmental ambition” (interview with Peter Horrocks). Regarding the effect of the technicality of the issue matter on the position of the Commission within the Montreal Protocol, Mr Horrocks is very clear. In a response (by email) to this question, he answers that “[i]t is true that the increased technicality of the subject matter gives the Commission (DG ENV), which is more knowledgeable than most MS [Member States], an edge in guiding the implementation of the Regulation and in leading negotiations within the Montreal Protocol’ (interview Peter Horrocks).

While the Montreal Protocol is of course but one case study, it is all the more interesting to note that its widely acclaimed ‘strong’ non-compliance mechanism seems to have set a trend. In the early 1990s, for example, non-compliance mechanisms were also adopted by two of the protocols to the Convention on Long-Range Transboundary Air Pollution (LRTAP), the Sulphur Protocol and the Protocol dealing with emissions of Volatile Organic Compounds, whose provisions were almost identical to those of the compliance system of the Montreal Protocol (Széll, 1997). Later, it also served as a source of inspiration for the non-compliance mechanism of the UN Framework Convention on Climate Change (FCCC), including the (in)famous Kyoto Protocol. The non-compliance mechanism of the Kyoto Protocol even goes beyond the provisions

of the Montreal Protocol and seeks to give the Kyoto agreement sharper teeth still (see for example Oberthür, 2001; UNFCCC, 2000). For example, Kyoto's equivalent of Montreal's Implementation Committee is a Compliance Committee consisting of a facilitative branch and an enforcement branch. Sanctions for producing more emissions than allowed can include having to cut an extra 30% of the surplus emissions, and a country being barred from the emissions trading scheme. This puts the Commission in a very strong position within the functioning of the agreement (compared to its position in other MEAs).

Here as well, the issue of climate change in general and the role of the Commission in dealing with it in particular can be seen in the context of the process of European integration. Jachtenfuchs and Huber have pointed out earlier that the Commission very quickly approached climate change "as a question involving the future of the Community" (Jachtenfuchs and Huber, 1993: p. 43). This was not only the line of thinking of Carlo Ripa di Meana, the flamboyant Commissioner for the Environment (European Parliament, 1991). The idea of framing the climate change issue, and the European response to it, in terms of the European integration process also lived in the Forward Studies Unit of Jacques Delors (Jachtenfuchs and Huber, 1993). There was thus an impressive political machinery at work for turning the politics of climate change in favour of the position of the Commission, both within the EU and on the international scene. Commissioner Ripa di Meana, for example, referred to the Commission's strategy to combat CO₂ emissions as a proposal which "will contribute towards European integration and the credibility of the European Community at international level (European Parliament, 1991: p. 47). In the words of some analysts, the Kyoto Protocol "would also serve the cause of EU political integration by establishing new competences for the European Commission" (Boehmer-Christiaensen and Kellow, 2002: p. 178). Other analysts have put it even more explicitly, pointing out that "[T]he politics of climate change are inextricably linked to the institution-building process which has characterised the process of European integration since 1957, and the exercise of global leadership

forms one component of such institution building” (Sbragia and Damro, 1999: p. 66).

6.3. Environment and trade: back to the WTO

The previous chapter explored some of the consequences of the impact of the external institutional framework: if the Commission is indeed empowered in such settings, trying to get issues that are mixed competences included into this strong framework would be a perfectly rational strategy. This was illustrated by working out in some detail the Commission’s position regarding the incorporation in the international trading system of the issue of investment. It also has repercussions for the expectations concerning the Commission’s actions in international environmental matters since these issues usually fall in the category of mixed competences. As one scholar has put it, “nearly every single case in the field of environmental policy has been one of mixed competence” (Golub, 1999: p. 454). Hence, the expectation in the environmental domain would be to see the Commission trying to deal with these issues in a strong institutional framework. While the Commission’s negotiating efforts in favour of strong non-compliance mechanisms (see previous section) certainly fit into this picture, this still leaves us with the problem that environmental agreements have a fundamentally different approach to resolving disputes. Or, more precisely, that the disputes that emerge within the framework of MEAs are of an inherently different nature, compared to trade disputes, and that they invite soft rather than hard enforcement mechanisms.

This means that the Commission’s efforts to strengthen the institutional frameworks of MEAs in recent years will not be sufficient to fully exploit the advantage offered by a rules-based approach. That is not to say that these efforts are not useful, on the contrary, but they should be seen in the context of strengthening the Commission’s credibility as an international environmental actor vis-à-vis third states rather than directly in the context of Commission-

Member States relations. It has been pointed out before that these two elements are, of course, intrinsically related. But in terms of the struggle over competences, third party recognition – as in the case of trade – is a necessary but not a sufficient condition. The question then is what forum the Commission could use if it wanted to gain influence and power regarding international environmental issues. This section will take up this question by looking at the Commission's efforts to include environmental issues into the WTO. The successful inclusion of these issues would lead to the Commission being in a much stronger position vis-à-vis the Member States.

In the international trade regime, the discussion about the relationship between trade issues and environmental ones has rekindled over the past couple of years. This has been a particularly hot topic since the creation of the WTO, and especially after some high profile environment-related trade disputes had been brought before the WTO's dispute settlement system. Here, the Shrimp-Turtle case certainly comes to mind (WTO, 1998), or the Tuna-Dolphin cases, although these were initiated during the Uruguay Round and thus still under the GATT framework (GATT, 1991; 1994). As early as 1971, a Group on Environmental Measures and International Trade had been set up in the framework of the GATT. Yet this group was not convened until 1991 when, in the midst of the Uruguay Round, the EFTA countries asked for a meeting (WTO, 2004: p. 4). In this, they were strongly supported by Canada and the EC. The result was that the issue of the relationship between trade and environment found its way onto the agenda of the Uruguay Round negotiations. As a consequence of this, the creation of the WTO also saw the establishment of a committee to study the relationship between trade and environment in wider sense (WTO, 2004: p. 5). The mandate of this newly established committee was to identify the relationship between trade measures and environmental ones and to make recommendations for changes in the multilateral trading system (WTO, 2004).

It is important to note, in the light of this thesis, that the EC took a leading role in the efforts to include environment on the agenda of the Uruguay Round and,

later, in institutionalising it within the framework of the WTO. Back in 1990, a (critical) observer of the Uruguay Round negotiations noted that “[O]nly the European Community has been trying to float the idea of a decision or declaration by the GATT Contracting Parties [*sic*] to deal with issues of environment, health and consumer protection in trade and GATT’s work (...)” (Raghavan, 1990c). When the EFTA countries then formally asked the director-general to convene the GATT Group on Environmental Measures and International Trade in 1991, the EC was among the most fervent supporters of this initiative in order to push environment higher on the Uruguay Round agenda.

This is also confirmed from within the Commission, where the head of unit of the unit responsible for issues of ‘trade and environment’ in DG Trade confirmed that it was the Commission that was the driving force behind the efforts to put the relationship between trade and environment on the WTO agenda (interview with Robin Ratchford). According to the same official, there was not really a lot of pressure from any of the Member States to insist on dealing with environment in a WTO context. He continued by explaining that, as could be expected, the environmental leaders (Nordic countries, Germany, the Netherlands) were more proactive in the EC Working Groups in discussing the relationship between trade and environment, but that even they were not pushing for incorporating these issues into the framework of the WTO. Therefore, Mr Ratchford described this Commission ploy of having the EFTA countries speak out and convening the GATT Group on Environmental Measures and Trade to revive the trade-environment debate in the context of the Uruguay Round negotiations as “a clever negotiating tactic”. After all, if this proposal had come from the EC directly, it would have generated a lot of ‘automatic’ resistance in some corners and, as was discussed earlier, the EC was already defending more than enough contentious issues in these negotiations. In order to lose as little negotiating capital as possible and to increase the chances of success, it therefore made sense for the Commission to have another country put this topic on the table and support it rather than bring it up itself.

Also after the Uruguay Round, the EC continued to push for discussions on the relationship between trade and environment within the framework of the newly established Committee on Trade and Environment as well as within the context of new rounds of multilateral trade negotiations.⁷ This is particularly pronounced in the context of the most recent round of multilateral trade negotiations, the Doha (Development) round. In these negotiations the EC, in the Commission's own words, "is among the most active supporters of a positive "environment" and "sustainable development" agenda in WTO" (Commission, 2001: p.1). Indeed, in the same Memorandum, the Commission boldly proclaims that "[W]e have been studying all these issues since 1995 in the WTO. That is enough study. The time has come for action, which in the WTO requires a mandate to negotiate in order to reach conclusions" (*ibid.*). One of the key issues in this respect, and one the EC had also been pressing for in the context of the (failed) WTO Ministerial in Seattle, is that of the relation between the WTO and MEAs. The EC was the main *demandeur* for this issue in the Doha negotiations. Some press comments did not leave much doubt about where this left the EC, claiming that "[O]n the environment, the EU [*sic.*] has isolated itself from other WTO members" (Mizumoto, 2001). Nonetheless, at the eleventh hour, the EC did manage to have certain aspects of the trade-environment debate included in the Doha Ministerial Declaration, thereby committing the WTO to negotiations on, among other things, the relation between WTO rules and trade provisions in MEAs. Again, an important Commission official stressed that it was the Commission that took the lead in keeping this issue on the WTO agenda and getting it included into the Doha negotiation round (interview with Robin Ratchford).

Tellingly, and somewhat predictably, the Commission's achievement in Doha of having succeeded in committing the WTO to start negotiations on certain aspects

⁷ In fact, the GATT Working Group on Environmental Measures and International Trade was first transformed into an *Ad Hoc* Committee on Trade and Environment. It was not until the Singapore Ministerial Meeting in 1996 that the Committee on Trade and Environment became a permanent body of the WTO (Lang, 1997).

of the trade-environment issue was not everywhere well received. The summary of a workshop of the Heinrich Böll Foundation on the trade-environment nexus that took place one month after the Doha summit highlights some of these complaints. Unsurprisingly, representatives of the business community at this workshop express their dissatisfaction with the inclusion of environmental concerns. And also developing countries, a majority of which had opposed the inclusion of environment as a negotiating topic onto the WTO agenda, were not very happy, being left with “a feeling of frustration and suspicion” (Schalatek, 2001: p. 3). More interesting, though, is the lukewarm reaction of other actors. The paper states that “[E]ven from NGO side, though, there was some criticism that the EU had done a disservice to the issue of trade and environment (...)” (*ibid.*). The absence of grassroots pressure, combined with the relative inertia of the Member States regarding the issue of trade and environment, again strengthen the interpretation that the Commission pushed this issue on the agenda in order to strengthen its position on environmental issues by incorporating these in the strong WTO framework.

In its submissions on the issue of trade and environment in the Doha Round, the Commission is careful to avoid creating the impression that the EC puts trade interests above environmental concerns by favouring the WTO as the ultimate forum (“Multilateral environmental policy should be made within multilateral environmental fora and not in the WTO”; Commission, 2002: p. 6). But the desire to apply the WTO and its dispute settlement system to (trade-related) environmental issues becomes nonetheless apparent in claims that “WTO rules should not be interpreted in clinical isolation of complementary bodies of international law, including MEAs” (*ibid.*). This is a clear attempt to bring environmental issues and considerations into the WTO’s dispute settlement system ‘through the back door’. And once this dispute settlement system becomes a forum for dealing with environmentally charged disputes in which the EC or its Member States are involved, the Commission (and not the Member States) will be defending the Community as well as the Member States’ interests. This would strengthen the Commission’s position and standing as an

international environmental actor greatly, creating the potential for a virtuous circle (from the point of view of the Commission) in which this enhanced status leads to more credibility and power in other environmental organisations and negotiations. After the account of the trade-environment debate in the previous paragraphs, this institutional explanation gains credibility. After all, several other possible explanations were ruled out. There was no clear and strong pressure from (some of) the Member States, nor was there a demand by third parties. On the contrary, most of the developing countries (whom the Doha Round was seemingly aimed at, hence the name 'Doha Development Agenda') actively opposed the inclusion of an environmental agenda in the WTO. Furthermore, the Commission's achievements could not even please NGOs since the trade-environment issue that was of most importance to them, the precautionary principle, did not make it into the Doha Ministerial Declaration. In this light, the Commission's desire to push environmental issues more clearly within the WTO framework offers a credible explanation for why the Commission was willing to raise the stakes substantially (the environmental paragraph was reintroduced during the last night of the negotiations, raising the stakes by risking complete failure of the ministerial meeting).

Before turning to a concrete example to give additional support to our argument, it is worth recalling that the dynamics of intra-Commission politics are left implicit in this analysis. The starting point is instead revealed Commission preference (and strategy), leaving the underlying power relations unspoken. In the case of the relationship between trade and environment and the role of the WTO in trade-related environmental issues, for example, it is DG Trade that has firmly taken the leading role. When asked how she felt about this evolution, the European Commissioner for the Environment was not very enthusiastic about linking trade issues to environmental ones or incorporating environmental concerns into the WTO. The reason was that she feared the primacy of trade over environment, reflecting the internal balance of power within the Commission (interview with Margaret Wallström). Strangely enough, at the same time she also showed to be a big proponent of applying economic approaches and trade

mechanisms to the issue area of the environment when it comes to internal policies. Externally, however, the primacy of trade and the importance of the WTO apparently is still too overpowering.

As an illustration, a discussion of the Chilean swordfish case is informative and will shed some light on the EC's actions in international disputes with an environmental component (see International Tribunal for the Law of the Sea, 2000, WTO, 2000c). This dispute between the EC and Chile arose when Chile prohibited Community fishing vessels to unload swordfish in Chilean ports on the grounds of protecting the conservation and sustainable exploitation of swordfish in the south-eastern Pacific Ocean. It fell both under the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS), the dispute settlement body of the United Nations Convention on the Law of the Sea, and the WTO, thereby providing an excellent example of the interaction between the WTO and MEAs and the legal uncertainty this can create. Whereas Chile initiated proceedings before ITLOS, the European Commission brought this issue to the attention of the WTO's dispute settlement body. Eventually, a mutually agreed solution was found and the disputes in both fora were suspended. The interesting point here, however, is the choice of dispute settlement forum. Under article 5 of the UN Convention on the Law of the Sea (UNCLOS), the EC and its Member States have to make a declaration of competences which have been transferred to the EC and for which the EC is responsible (see also Simmonds, 1983). This requirement, intended to provide third countries with legal security in the early days of the EC as an international environmental actor (the UN Convention of the Law of the Sea III came into force in 1983), of course makes this organisation much less attractive from the point of view of the Commission. This list of competences cements the balance of power between the Commission and the Member States and prevents the Commission from increasing its influence. In the light of the above account of the Commission's role in the efforts to incorporate environmental issues in the WTO, therefore, it would be more interesting for the Commission to pursue this dispute within the WTO

framework, in which the division of competences is more dynamic.⁸ By initiating this dispute involving environmental concerns in the WTO, the Commission could thus use its strong position in that organisation to actively start to introduce environmental issues as well. This would lead to a strengthening of the EC as an international actor, making it a more credible partner. Such a gain in influence by the Commission might even result, eventually, in the Commission gaining more power and (formal) competence over those issues.

There are also other elements illustrating the eagerness on behalf of the Commission to have this issue dealt with within the framework of the WTO. In an internal draft press release on this dispute, the Commission claims that ITLOS is not the right forum for dealing with this issue since – still according to the Commission – the transit and importation of fishing products is not regulated by UNCLOS. “That”, so the text continues, “is why on this issue we did not have any other option than to resort to WTO dispute settlement” (Commission, 2000: p. 1). However, the next paragraph then continues by stating that “we will actively participate in UNCLOS proceedings” (*ibid.*). Strangely enough, the Commission’s legal defence does not include challenging the competence of ITLOS to rule over this dispute (since it was claimed that the subject matter falls outside the scope of UNCLOS). Instead, the Commission’s legal argumentation focuses on the definition of what constitutes an MEA. In this respect, the negotiations should be open to all interested parties, which was not the case with the Galapagos Agreement that was invoked by Chile to justify its conservation measures. In short, in the light of the argument made in this thesis, the Commission’s choice for the WTO as the forum for dispute settlement in the Chile swordfish case is more deliberate and informative than it would appear at first sight.

⁸ Even if it is argued that the substance of the dispute falls under the common fisheries policy, and is thus an exclusive Community competence, and that it is not a conservation issue (as Chile claimed), the argument that the Commission prefers the WTO because of the better opportunities for increasing its influence would still hold. After all, there would be spill-over effects from the link of the trade component of this dispute with the environmental component and this would reflect on the Commission (acting on behalf of the EC).

CONCLUSION

This chapter has broadened the scope of the empirical grounds on which the institutional argument of this thesis rests. In a departure from the approach of the previous chapters, this one focused on the issue area of the environment, rather than trade. Immediately it became clear, however, that there are substantial differences between these issue areas and that this has certain methodological implications. Since the nature of dealing with disputes in environmental regimes differs fundamentally from the nature of disagreements (and the way they are tackled) in trade settings, the opportunities for the Commission to use the dispute settlement or non-compliance systems of environmental regimes is rather limited, to say the least. Therefore, this chapter only focussed on the dynamic aspect of institutionalisation, namely the Commission's efforts to strengthen the institutional settings in which international environmental issues are being dealt with. Through a discussion of the Commission's role in the drafting of the non-compliance regime of the Montreal Protocol, and the Commission's approach of similar provisions in, for example, the Kyoto Protocol it became clear that the Commission's strategy was indeed aimed at strengthening these provisions and – only through its participation – to enhance its own institutional position and standing, both internationally as well as within the EC.

But the Commission's attempts do not stop at strengthening the institutional frameworks of environmental regimes. The Commission has been – and still is – one of the strongest advocates of incorporating environmental issues within the WTO, the strong institutional setting *par excellence*. And while it managed to get a discussion started within the WTO about the relationship between trade and environment, the negotiations on this topic are momentarily stuck – the WTO's Committee on Trade and Environment being, in fact, inactive. However, the case study of the Chilean Swordfish dispute, where the Commission initiated proceedings before the WTO rather than following Chile in its choice for ITLOS, showed that the Commission's hand consists of more than negotiation results alone. Just like it succeeded in gaining competence over TRIPS issues through its

role in the WTO's dispute settlement system, the Commission is also trying to use that same system to force environment-related issues on the agenda. The focus of this chapter was on the environment in order to provide a counterweight to the predominance of trade case studies and to show that the core argument made in this thesis does not only hold when it comes to trade issues, but that it has a wider appeal. The fact that the argument in this chapter has ended up discussing environmental issues within the WTO again does not render the attempt to divert attention from the trade regime useless. After all, the reason why the role of the Commission within the WTO is discussed in this environment-focussed chapter is not because the WTO deals with trade issues (that would undermine the effort to show that our argument is not restricted to the issues area of trade) but rather that the WTO simply offers the strongest institutional framework of any international organisation. This makes it the most logical choice of forum for any actor looking for a strong setting.

7

CONCLUSION: TOWARDS A MORE COHERENT FRAMEWORK

7.1. Summary and main argument of the thesis

The role of the EC in the international system has always been problematic. Non-recognition of the EC – and the Commission as its representative – by third parties, lack of clarity regarding the division of competences between the EC and its Member States, turf wars over whether a particular external Community competence is exclusive or not These are but a few examples of the daunting problems that arise when it comes to the Community's external relations. From this, it becomes clear that the Commission's role of executing the EC's external policy and representing the EC on the international stage is not always easy. Against this background, it is particularly interesting to note the central position the Commission occupies within the World Trade Organisation. While this may seem not more than logical under the provisions of the Common Commercial Policy, which gives the EC exclusive competence over trade in goods, there is more to it than that. Firstly, the Commission's role in the world trade regime had not always been so central. For example, under the WTO's predecessor, the GATT, it was not unheard of for Member State representatives to take the floor during GATT meetings, and sometimes even publicly challenge the

Commission's competences, as became clear from the example – given earlier – of the French representative challenging the Commission representative's position within GATT (see chapter four; GATT, 1988a; Petersmann, 1996). Within the WTO, the Commission is firmly in charge of the conduct of the EC's trade policy. Secondly, under the impulse of the Commission the scope of the definition of art. 133 (the Common Commercial Policy) has gradually been broadened to include elements of other trade issues such as trade-related aspects of intellectual property rights or trade in services.

The central research puzzle derives from this last observation: how come the Commission managed to play a central role regarding the 'new' trade issues (trade-related aspects of intellectual property rights and trade in services) within the WTO, even extending the scope of the EC's exclusive competences over these issues, when most Member States were adamantly opposed to transferring these competences to the Common Commercial Policy? In the lead-up to and the aftermath of the Maastricht summit, the climate in which the Commission had to operate had deteriorated decidedly. The Commission was widely and publicly blamed for (at least part of) the ratification difficulties of the Maastricht Treaty in France and Denmark, its negotiating credibility came under fire when the Member States challenged the result and the Commission's conduct of the agricultural negotiations in the Uruguay Round (the Blair House agreement) and – to add insult to injury – the Court of Justice largely sided with the Member States and refused to extend the application of art. 133 to all of the 'new' trade issues, as the Commission had requested. Nonetheless, the empirical evidence presented in chapter three shows that the Commission does play a central role in the WTO, and in particular in its dispute settlement system. This thesis argues that the strength of the institutional framework of the WTO (i.e. its rules-based system) strengthens the position of the Commission vis-à-vis the Member States. In order to show this, two sets of case studies were examined. First, the role of the Commission in offensive and defensive TRIPS disputes in the WTO was examined. Second, several disputes that were initiated against individual EC Member States concerning tax issues were compared. The earliest of these

disputes took place under GATT and hardly saw any involvement on the part of the Commission. The more recent of these disputes, initiated under WTO rules, saw the Commission negotiate with the US on behalf of the Member States concerned.

While this offers support to the hypothesis that the Commission is indeed in a stronger position in highly institutionalised settings, it does not provide any clues as to the policy preferences of the Commission (is there some kind of awareness within the Commission of the possibilities that are presented by strong institutional frameworks?). There are two courses of action available to the Commission to use its advantage, both of which would offer strong indications that the Commission does indeed have a preference for highly institutionalised settings. The first one is simply to push for the creation of strong institutions in international negotiations. The second possible strategy is to push for the incorporation of new issues in existing organisations with a strong institutional framework.

Chapter four focused on the first option. It shows not only that the Commission was a major driving force in turning the WTO into a real organisation (as opposed to the GATT, which was merely a provisionally applied treaty), but also that there was a dramatic U-turn in the Commission's thinking about the need for and desirability of a binding system for settling trade disputes. The impetus for this U-turn was not only the changing domestic policy setting, but also the experience gained from the increasingly legal approach to settling trade disputes under the late stages of GATT (particularly after the agreement reached on dispute settlement at the Montreal mid-term review). Chapter five tackled the second strategy by discussing the Commission's dogged efforts for the incorporation of, among other things, the issue of investment into the international trade regime. Despite fierce external and internal resistance, the Commission nonetheless pushed this issue to the brink, almost endangering the whole negotiation round. Several possible explanations are discussed in the last

section of chapter five, but it is argued that the institutional interpretation is better in explaining more of the Commission's actions in this context.

At this point one might wonder whether the findings also hold for other issue areas than trade. This is addressed in chapter six, which studies the Commission's role in Multilateral Environmental Agreements (MEAs). An overview of the evolution of the EC's competences in the field of environment reveals that "since 1972 discussions on the desirability of a transfer of powers have increasingly been provoked by the appearance of the Community on the international plane" (Nollkaemper, 1987: p. 55). Again, the same two questions are posed to establish whether the Commission tries to tilt the balance its way: is it actively trying to establish strong institutional frameworks and is it actively trying to incorporate issues over which it holds relatively little sway into strongly institutionalised settings where it has more influence? The first question is answered by looking at the Commission's role in the negotiations establishing the Montreal Protocol on Substances that Deplete the Ozone Layer. From Commission and negotiation documents, it becomes clear that the Commission was indeed a pivotal player in pushing for a strong non-compliance mechanism, which makes the Montreal Protocol one of the most highly effective environmental agreements in place (see for example Brack, 2003). The second question is tackled by pointing out the Commission's important role in attempts to integrate environmental issues and concerns within the context of the World Trade Organisation. To this aim, the Commission not only makes use of the negotiating table, but it also follows this through with action through more practical channels, as was illustrated by the Commission's choice of dispute settlement forum in the Chilean Swordfish case.

In sum, the picture painted of the Commission is that of a dynamic agent that succeeds in using strong institutional frameworks, i.e. those with a more rules-based approach to the resolution of conflicts, to strengthen its position vis-à-vis the Member States. There are several facilitating conditions for this process such as the technicality of the issue area, the extent of international recognition of the

EC as a legitimate player regarding the issue at hand, the competence grounds and the division of competences within the EC in the area as well as the presence of exclusive competence in a closely related field, and the idiosyncratic characteristics of the issue area. The Commission proactively exploits the presence of these conditions to broaden its competence base, *de facto* as well as *de jure*. A key element in this process is the dynamic interaction between the domestic (EU) level and the international level. Because the 'traditional' integration theories have largely focused on the relations between the national and the European level, they usually cannot account for the increase in EU competences deriving from the Commission's role and position on the international stage.

The literature on the EC's external relations is of course more concerned about including the international level into the analysis. Even here, however, the analysis has largely focused on the interaction between the EU and the international level in terms of specific policy outcomes. A prime example is the reform of the Common Agricultural Policy in the 1990s, which would not have been possible (at least not at that point in time) without the external pressure generated by the Uruguay Round negotiations and, later, by the functioning of the WTO and in particular its strong and highly effective dispute settlement system (see for example Skogstad, 2001; Patterson, 1997). The theoretical contribution of this thesis is to combine these two elements by pointing at the structural impact of the international level on the European integration process. Not only can the interaction between the international and the European level influence specific policy outcomes, it can also impact on the division of competences within the EU. For this reason, the existing approaches to the study of European integration should be refined so that they can also account for competence shifts that originate in the interaction between the EU and the international level.

7.2. To boldly go...? Limitations of the thesis.

This section offers a discussion of several important issues of methodology and theory. It also points to the limitations of the research. After all, the old dictum that “to choose is to lose” does not only refer to the essence of what the ‘dismal science’ is all about, but it also offers sound methodological advice. No matter how elaborate a theory, or how sophisticated a methodology, it will be impossible to incorporate every angle to look at a problem. Choosing a certain angle from which to study a subject entails an opportunity cost, namely not being able to use other angles to their fullest extent. This section discusses some of the repercussions of having chosen the particular angle that we have in this research. It also points out limitations of the research and it offers a defence of certain important choices of a methodological nature.

7.2.1. European integration as a zero-sum game between the Commission and the Member States

The relation between the European Commission and the Member States of the European Union, gathered in the Council of Ministers, has usually been at the core of the study of the European integration process. In recent years, there has been a gradual extension of the focus in European studies, a move that was long overdue, to pay more attention to other EU institutions as well, and to include them into the analysis. The most notable examples of this, that have already generated a substantial body of literature, are the Court of Justice (see for example Shapiro, 1991; Garrett, 1995; Neill, 1995; Chalmers, 2000) and the European Parliament (see for example Hix, Raunio and Scully, 2003; Rittberger, 2003). These institutions too are often categorised as being supranational in nature and, hence – since this aligns their interests – as allies of the Commission. One of the consequences is that the somewhat discordant view of European integration as a zero-sum process between, on the one hand, the supranational

institutions at the European level and, on the other hand, the Member States or the Council of Ministers, is maintained and even strengthened further. Inevitably, this way of looking at the European integration process does ignore important dynamic factors at work (such as, for example, socialisation pressures) and it certainly minimises the role of other institutions and various regional and subnational actors. On the other hand, it offers the substantial advantage that it is intuitive, parsimonious and relatively easy to operationalise. As an additional advantage, this approach has a strong basis in theory and empirical research.

Theoretically, the tension between EC interests and national interests is at the core of the most influential approaches to explain the process of European integration. Usually, the Commission is portrayed as the chief defender of the EC interest and the Member States as defenders of their respective national interests. The main difference between intergovernmentalism and neofunctionalism relates to which side is more influential in determining policy outcomes, with intergovernmentalism stressing the primacy of the Member States and neofunctionalists attributing a more autonomous role to the Commission. As was discussed in some detail in chapter two, this divergence of interests between the Commission and the Member States is also at the core of the principal-agent approach, as applied to the European integration process. After all, if the interests of the principal and agent were the same, there would be no reason for the agent to drift or to shirk, which would in turn make the establishment of any oversight mechanism by the principal superfluous.

Strong arguments for looking at the relationship between the Member States and the Commission in discordant terms also have a strong basis in practice, most notably in the jurisprudence of the European Court of Justice (ECJ or the Court). There are a substantial number of cases initiated by the Commission against the Council, for example challenging certain Council decisions on competence grounds. Furthermore, among these cases are some of the more important rulings of the Court of Justice, certainly in the field of the Community's external relations where many of the seminal cases were initiated by the Commission

against the Council. One notorious example of such a case is the AETR-ruling (Case 22/70) (see Court of Justice, 1971). This ruling forms the basis of the ECJ's implied powers doctrine and is thus a crucial building stone in extending the scope of the EC's external (and exclusive!) competences. This case was initiated by the Commission against the Council and concerned the negotiation and conclusion by the Council of a European Agreement on Road Transport in the framework of the UN's Economic Commission for Europe. The importance of the ruling lies in the fact that the Court decided that the EC can have external competences that are exclusive not because they are specifically attributed to the Community by the Treaty (such as the Common Commercial Policy in art. 133), but because they have become exclusive through internal Community action in that field. Opinion 1/76 is another erosion of the principle that exclusive Community competences can only be attributed to the EC by the Treaty (see Court of Justice, 1977). Again, it was the Commission that resorted to the ECJ to question the legality, i.e. the consistency with the Treaty, of an act of the Council. And there are numerous other such cases: Opinion 1/78, ruling C-25/94, Opinion 1/91, Opinion 2/94 and ruling 45/86 being only a few (yet very important) examples (see Court of Justice, 1979; 1996a; 1991; 1996b; 1987).

Some readers will undoubtedly point out that this first and foremost shows the importance of the role of the ECJ in the European integration process. That may be true, and the central position of the ECJ and its importance are certainly not put into question in this thesis. What is more important for the sake of the argument here, however, is that this record of jurisprudence shows the existence of a confrontational pattern in the international relations of the EC, where the Commission is often challenging an action of the Council before the Court.¹ Typically, the Commission claims the measure or decision at hand falls under the competence of the EC, so that the Commission should have had a much more prominent role in the negotiations and a more important input in the outcome.

¹ And, by implication, where the Member States have wanted to shield off certain international agreements from EC and Commission involvement.

Hence, within the framework of 'competence issues', the history of cases brought before the ECJ offers some support for the portrayal of Commission-Member State relations in discordant terms. Again, this is not a general statement about the nature of how the EU functions. It has been pointed out elsewhere that non-discordant mechanisms such as coordination, cooperation and socialisation effects, to name but a few (see for example Wallace, 2000; Kerremans, 1996; or, for a more general discussion: Haas, 1992), are often more accurate representations of inter-institutional relations in the EU or of Commission-Member State relations. The question of the division of competences, however, is much more delicate since it touches upon the core characteristic of a state: its sovereignty.

Another reason why the list of cases mentioned earlier is more informative regarding the role of the Commission rather than that of the ECJ is that asking the Court for an opinion or judgement is certainly no guarantee for success for the Commission. The clearest manifestation of this is probably the Court's much-discussed and infamous Opinion 1/94. Furthermore, Alter and Meunier-Aitsahalia (1994) have shown rather convincingly that it is not necessarily the Court's decision as such that impacts on the integration process, but that the political use and interpretation of the rulings afterwards is sometimes more important. The initiation of proceedings against the Council before the ECJ as well as the application of the Court's rulings are thus highly politicised decisions. For this reason, the antagonism between the Commission and the Council (with the vast majority of Member States usually supporting the Council in the proceedings) in the case law of the European Court of Justice supports a discordant interpretation of Commission-Member State relations in the field of the EC's external competences.

7.2.2. What about 'commitment' as a delegation strategy?

Some readers might take issue with the application of the principal-agent theory to the study of the European integration process as it is presented in this thesis. In particular, the lack of variation within the concept of 'delegation' might prove a sticking point. This thesis takes a rather radical view of the principal-agent approach in that any deviation by the agent from the revealed preferences of the principal is considered as 'shirking' or 'drifting', i.e. an undesirable feature of delegation from the principal's point of view. One could, however, argue that not every deviation between the actions, preferences, or even interests of the agent on the one hand, and the preferences or interests of the principal on the other hand, constitutes undesirable drift by the agent. A prime example of such a 'desired' deviation within the context of the principal-agent approach would be the mechanism of commitment. A notorious and well-worn illustration of this mechanism in action is the independence of central banks, where the central government delegates responsibility for monetary policy to a conservative central banker. In this case, it is clear from the onset that the preferences of the principal and agent are quite likely to diverge substantially over the course of the economic and electoral cycle, yet this is exactly the reason why the decision to delegate is taken in the first place. This has been worked out in substantial detail by Kydland and Prescott in their seminal 1977 article, where they referred to this phenomenon as 'dynamic inconsistency' (see Prescott and Kydland, 1977).

This mechanism of commitment might seem to undermine the more discordant interpretation of the principal-agent dynamic as it was defended in the previous section. After all, the question arises whether the process of European integration cannot better be conceived of as an example of commitment rather than the harsh power struggle as it was depicted earlier. In this interpretation, the Member States would use the EU as a – not fully controllable – commitment mechanism to lock in certain policies (e.g. free trade or sustainable development).

While introducing the mechanism of commitment is indeed promising and certainly does have its merits, there are two main arguments for sticking with the discordant view of European integration. Firstly, it should be conceded that the commitment mechanism is rather appealing and convincing, especially when applied to the early days of the integration process. Using the technique of commitment as a delegation strategy, however, requires further implementation measures, otherwise the principal risks giving too much leeway to the agent, which would be counterproductive (from the point of view of the principal). The independent central banker, for example, will find that the field of action in which she can exert her delegated powers is strictly defined. Therefore, this technique does not seem very well suited when the field of action is broad and not clearly defined. And this is exactly what seems to be the case when it comes to European integration. The integration process is not a straightforward, linear process of attribution of competences from the Member States (principals) to the EC/Commission (agent), certainly not regarding the external relations of the EU. A good example of this is the earlier mentioned implied powers doctrine of the ECJ (see cases 22/70 AETR and Opinion 1/78; Court of Justice, 1971; 1979). Commitment works as long as, and in so far as, the principal can define the limits of the delegation. Developments such as the emergence of the implied powers doctrine dent the capability of the principal to exert this overall control. Suddenly, the principal will find itself on the defensive, with the commitment mechanism backfiring because of the unwanted and unforeseen 'spill-over' from one issue area to the other.

Furthermore, such commitment would need to be executed or implemented in order to be put into practice. And this process would arguably still involve the antagonistic dynamics that were described earlier. After all, this is the moment when the discussions over the nitty-gritty details will come to the surface (what is included in the delegation and what not, what about closely related issues in other fields, etc.). It will be clear from the current state of the EU as well as from the history of European integration that the commitment – if such a relatively clear-cut and readily identifiable process took place in the first place – was

certainly not detailed enough to contain or prevent these discussions over competence. And in these circumstances, i.e. where the exact limitations of the division of competences are blurred, the discussions on the application and implementation of the commitment do take an adversarial form: the principal and agent clashing over specific competences.

7.2.3. Equating the Member States with the Council (using the Council as a proxy for the revealed preference of the Member States)

Throughout this thesis, the Council has been equated with the Member States. The rationale for doing so has been discussed in detail in chapter one (pp. 26-29). The main argument, in a nutshell, is that the Council's position represents the revealed preferences of a critical mass of Member States, all the more so since a study by Matilla and Lane (2001) has shown actual voting in the Council to be a relatively rare event, even after the switch from unanimity to qualified majority voting in many areas. There are two main disadvantages that derive from equating the Council with the Member States, both of which relate to the fact that this approach ignores certain dynamics within the Council that actually shape the preferences of the Member States.

The first such dynamic is socialisation. This concept was introduced in the early stages of the study of European integration to refer to the process whereby "the immediate participants in the policy-making process, from interest groups to bureaucrats and statesmen, begin to develop new perspectives, loyalties, and identifications as a result of their mutual interactions" (Lindberg and Scheingold, 1970: p. 98). This is of particular relevance here since, according to Kerremans, "socialization is the most visible in the case of the councils" (Kerremans, 1996: p. 232). So much so to the point that "national affiliations are often thwarted by the affiliations with the council" (*ibid.*). Whether the process actually goes that far is debatable, but it is true that these interactions between the Member States'

representatives are not directly taken into account in this thesis. If one were to study the dynamics behind the formation of the preferences of the individual countries (or of those of their representatives in the Council), the preferences of each Member State or of each representative would have to be examined. Within the context of this thesis, this is not feasible in terms of time or resources available. Nor would it be desirable to do so in the context of this study since that would move away from the core analysis of the thesis and arguably result in an idiosyncratic analysis that would lack a sufficiently general explanatory power. Nonetheless, this does not mean that these socialisation effects are ignored altogether. They are, after all, reflected in the output of the Council. These effects are thus being taken into account indirectly (i.e. *ex post*) rather than that the dynamics of their genesis are analysed.

The second preference-shaping dynamic that occurs within the Council relates to the simultaneous games that are being played at the EU policy-level. There are constant interactions between national representatives in the context of different Councils. The repeated decision-making on the European level therefore forms the context of an iterated game, because of which interdependence between the participants is created. Because of the repeated nature of the game, a rational decision-maker will not only have to take the consequences of his choices for the current game into account, but also the consequences his choices now have for parallel and future games. On issues of relatively minor importance, for example, it might be worth appeasing the preferences of another actor to whom the issue at stake is important in order to build a stock of political capital or goodwill that could be used for forming a strategic coalition with regards to issues that are of greater importance. Or sometimes, certainly in a system of qualified majority voting, it could be worth giving up its resistance to an issue if the alternative is becoming isolated and spending political capital without the chance of succeeding in obtaining the preferred policy outcome. This is in line with the concept of 'coaptation', which is central to Heisler's and Kvavik's European Polity Model (Heisler and Kvavik, 1974).

Coaptation and socialisation are in fact very similar processes. In both cases, preferences are influenced and can be changed because of exogenous factors (social pressure in the case of socialisation, the iterated nature of the decision-making game in the case of coaptation). This thesis does indeed to a large extent lose sight of the multiple trade-offs involved in the complex decision-making game that is being played by the national representatives at the EU level. However, it is nigh impossible to track all or even most inter-issue bargaining processes or to place decisions in the framework of certain package deals which they are part of. All the more so because national representatives do not tend to publicly announce why they cast their vote the way they did (or even how they voted at all, for that matter). The result of trying to map these games (and integrate them into the analysis) is therefore bound to be fraught with measurement problems and difficulties in gathering the necessary information.

To conclude, while equating the Council with the Member States might be only a second best option, the first best option turned out to be not always very practical. Using Council output as a proxy for the revealed preferences of the Member States has huge advantages in terms of transparency, operationalisation and measurement compared to a more detailed analysis of the processes that shape these outputs. It has to be borne in mind, however, that this is a pragmatic decision in order to create a benchmark to compare Commission influence against. This is not meant to ignore and even less so to negate that the situation in the EU is more complex and that the Commission in fact faces multiple or collective principals. This has an impact on the room for manoeuvre of the agent, of how much influence the agent can exert. For this reason, the preferences of certain individual Member States have also been taken into account in the specific case studies.

7.2.4. Regarding the Commission as a unitary actor

It cannot be stressed often enough that the frequent use of the term ‘the Commission’ should not be misunderstood as to imply that the Commission is regarded as a unitary actor in this thesis. Coombes’ early and influential study of the Commission already pointed out the heterogeneity of interests that exists within this institution (Coombes, 1970). Ever since, scholars have come up with different catch phrases in attempts to describe the nature of the Commission in a single noun. Whether it is a ‘multi-organization’ (Cram, 1994) or a ‘bourse’ (Mazey and Richardson, 1995), all these terms try to catch the “distinctively hybrid” character of the institution (Peterson, 2002: p. 71) and the heterogeneity it houses. It would therefore be decidedly unwise to be in denial about the complexity of the structure of the Commission and the intra-institutional politics that ensue from this. In chapter four (particularly pp. 127-129; pp. 132-134), some attention is paid to the bureaucratic politics within the Commission in the context of the Commission’s position on the creation of a binding dispute settlement system in the WTO. And chapter six touches upon the same issue in the context of integrating environmental concerns into the trade regime (chapter six, p. 199).

On the other hand, it is equally important to keep the analysis sharply focussed. Conceptualising and operationalising a theoretical framework that integrates the different levels of decision-making (national, European and international) as well as dissecting the genesis of the outputs of the national and European levels is worth a thesis on its own. Some broad ideas for the establishment of such a theoretical framework will be given later, and avenues for further research will be indicated. Working this out in detail and providing a full-blown theoretical framework for understanding the EU’s external relations (including the interaction with the national and international level) lies outside the scope of this thesis. Furthermore, going too much into the intra-Commission politics would blur the bigger picture on which this thesis is focussing: the relation between the Commission and the Member States/Council. The intra-commission politics have

been referred to in the analysis in places where they are highly relevant, for example for gaining a necessary understanding of certain policy changes.

7.2.5. Arch enemies or brothers-in-arms? Conflicting and aligned preferences of the Commission and the Member States

An earlier section defended the decision to interpret the process of European integration in discordant terms in this thesis. However, that does not mean that the preferences and the interests of the Commission and the Member States are always diametrically opposed. These different actors can – and regularly do – have broadly similar preferences. In many cases preferences are more or less aligned and the fact that this thesis (as most research) focuses almost exclusively on cases where preferences diverge should not be misread as implying that this would somehow be the only option. The reason why this thesis has focused mostly on cases where the preferences of the Commission and those of the Member States diverge is that these instances are often more informative because of this variance (which indicates that it is likely that there are influencing factors at play that only or more strongly affect one actor). In a more general sense, this also holds for the central argument of the thesis. Throughout the previous chapters, the focus has been almost exclusively on the external institutional setting and on showing that this can have an impact on Commission influence and on the European integration process. In the drive to make this argument as forcefully as possible, too little attention has been paid to other influencing factors. This is a good place to stress that this should not be taken to mean that the external institutional framework is the only – or even the major – factor determining the scope of the Commission's influence and the direction of the European integration process. Rather, this is an additional element that has often been ignored previously but that can help to explain a degree of the variation in the influence of the Commission.

In this light, it should be noted that the reasons for countries to agree to be bound by and to create certain institutional frameworks have been examined to a considerable extent in the literature on legalisation (see for example Keohane, Moravcsik and Slaughter; Kahler; Goldstein *et al*; Abbott *et al*; Goldstein and Martin, 2000). In an influential contribution to the study of legalisation, Abbott and Snidal (2000) examine why countries sometimes opt for soft law and in other cases for hard law. They distinguish between several dimensions, focusing on contracting and transaction cost theory as well as on normative considerations to explain why countries agree to make a particular set of institutional arrangements 'harder' or 'softer'. Goldstein and Martin (2000) add to this that it is not only the anticipated consequences of a legal agreement (credible commitments, reduced transaction costs, transparency, political strategies, ...), or normative preferences for such agreements (the firm believe that law is 'good', usually derived from the notion that the rule of law is at the very basis of democratic societies) that make actors opt for legalisation. They also stress the impact of the preferences and calculations of domestic political actors on the shape of the agreement and the degree of legalisation.

From this it becomes clear that, when it comes to the legalisation of an international regime, there is much more scope for the preferences of the Commission and those of the Member States to be aligned than was mentioned in the previous chapters. One of Abbott and Snidal's hypotheses, for example, is that "[M]undane issues such as the availability of resources and trained personnel can be quite significant: the United States and other advanced industrial nations with large legal staffs should be more amenable to legalization than countries with few trained specialists" (Abbott and Snidal, 2000: p. 432). Clearly, this holds for the Commission as well as for the individual EU Member States. The same authors also note that "legalization provides actors with a means to instantiate normative values" (*id.*: p. 422). This also entails that sometimes the preferences of the Commission and the Member States are aligned.

In short, it is very likely that the Commission has a preference for (hard) legalisation because it supports the process of legalisation in general, in line with the general arguments put forward in the legalisation literature (see earlier). Furthermore, as was discussed in the previous paragraph, in these cases the preferences of the Commission and the Member States would be similar in that they would both be expected to support legalisation, for example, on normative grounds. The question then arises if and how this is compatible with one of the arguments developed in this thesis, namely that one of the reasons why the Commission supports legalisation is that this process strengthens its position vis-à-vis the Member States and increases its influence. In fact, it is perfectly possible to acknowledge the findings of the legalisation literature and at the same time uphold the argument that the Commission's preference for legalisation is at least partly because this increases its influence. The reason is that this thesis has mostly focussed on cases where there the preferences of the main actors diverged. As explained earlier in this section, such a narrow focus offers advantages and disadvantages. One of the advantages is that this setting better allows for measuring the potential impact of differences in the external institutional framework on Commission-Member State relations. The disadvantage is that, often, not enough attention has been paid to the wider context. In this case that refers to the fact that there are, of course, also other factors that influence and shape the Commission's preference for legalisation (as identified in the legalisation literature). These elements, however, should equally shape the preferences of the Member States and many of the factors identified in the legalisation literature can therefore not account for divergence between the Commission's and the Member States' preferences when it comes to legalisation. The argument that the Commission sometimes prefers to strengthen an external institutional framework because this can increase its influence, also domestically, can help to explain these cases *where there are diverging preferences*. This does not ignore or negate the findings of the broader legalisation literature, but complements them in a specific application of this literature.

7.2.6. The (un)reliability of empirical sources

Since a relative increase in or decline of influence and/or competence for the Commission almost necessarily entails a corresponding decline or increase in the influence of the Member States, this thesis has mostly focussed on the Commission and taken this institution as its point of reference. As a consequence, the largest group of practitioners interviewed are Commission officials. They represent half of all the people interviewed for this thesis. At first sight, this could raise a fundamental question regarding the quality of the information gathered from these interviews. After all, how could we trust these Commission officials not to exaggerate their own role? As an example, we could refer to the tendency of international trade negotiators to overestimate their importance and their impact on the final deal that is reached (see for example Meunier, 2005: p. 46-47). Why could a similar process not be at work here? And can we still consider the interview material to be trustworthy if their content is not extensively cross-checked with outside parties?

While extensive cross-checking would indeed have been the ideal solution, this has usually not proven feasible for many reasons, not least importantly the fact that almost all members of the 133-committee contacted refused the request for an interview. There are, nonetheless, at least three reasons to be optimistic about the truthfulness and reliability of the interview material. First of all, for one trade case study, the tax disputes discussed in chapter three, there has been a cross-check, albeit a limited one, only concerning officials from one of the four Member States that were involved. Furthermore, one trade official that has been interviewed was at the time of the interview temporarily seconded to the Commission from the UK civil service. Since this secondment was only for a duration of two years, this official had no obvious interest in exaggerating the role of the Commission. Any socialisation effect would also be expected to be fairly limited given the relatively short period of time spent in the Commission. Specifically regarding the case study of the Montreal Protocol in chapter six, an official from a Member State – the UK – who was very closely involved in the

creation and functioning of the agreement has been interviewed in order to cross-check the statements of the Commission official interviewed. In a similar vein, it should be noted that one interviewee is in fact an ex-Commission official, but is currently working as a judge at the European Court of Justice. This would thus give him few incentives to exaggerate the role of the Commission. On the contrary, given his supposed loyalty to another institution, and given the delicateness of many of the issues at stake and their tendency to eventually end up before the ECJ, one would expect him to have a more detached view. The fact that none of these checks has contradicted the core statements of the Commission officials interviewed, while not being a guarantee that these officials did not exaggerate their roles in other cases, should nonetheless raise the expectation that there is a good possibility that this was not the case.

Secondly, there is some variation within the Commission officials that have been interviewed. Especially regarding the trade case studies, the interviews were not limited to DG Trade officials, but were extended to people from the Legal Service as well. The latter have no apparent reason to exaggerate the role of the former, especially regarding issues that cannot have an impact on the division of tasks between them anyway. For example, while the officials from the Legal Service are very well informed about the relations between DG Trade and the 133-committee, they still have no incentive to favour one or the other since it does not really impact on them who does the preparatory work. Thirdly, and probably most importantly, all interviews have been conducted independently of one another, yet all interviews relating to the same topics pointed very clearly in the same direction. Although this is certainly no irrefutable evidence that the officials interviewed have not exaggerated their role, it would nonetheless seem to suggest that it is plausible that the interview results do, to a large extent, reflect a balanced and truthful view of the situation. It would be a fruitful avenue for further research or for projects on a bigger scale and with more means at their disposition than a PhD research project, to extend the analysis more directly to the Member States and their representatives, thereby providing a more rigorous cross-check. In the absence of that, however, the partial checks and balances

provided by the measures that were described above will have to fulfil that task in this thesis.

7.2.7. The limits of a multidisciplinary thesis

When it comes to the study of the position of the EC on the international stage, and particularly of the position of the EC in the international trading system since 1995, it is the legal scholars that have generated the vast majority of research articles and monographs. For lawyers, the complex relationship between EC law and international trade law, and the role of the EC in the GATT/WTO, has always been a point of intense discussion (Hilf, Jacobs and Petersmann, 1986). Because of the legalistic nature of the new WTO dispute settlement system, lawyers were also among the first to investigate its impact on the EC (Bourgeois, 1995; O’Keeffe and Emiliou, 1996; Cottier, 1998). After the European Court of Justice’s infamous Opinion 1/94 on the division of competences between the EC and the Member States with regards to the WTO subject matter, this debate only intensified. In short, the study of the role of the EC in the WTO is heavily dominated by legal scholars. It is only relatively recently that the attention of political scientists and international relations scholars studying the EU has turned to this issue area. There is an increasing amount of literature on the EC’s role in the international trade system in general (Woolcock, 2000), the internal aspects of its negotiating position in the WTO (Meunier and Nicolaïdis, 1999), and its performance in the settlement of international trade disputes (Young, 2003a), often with a focus on its implementation record (Neyer, 2004).

While any discussion of the EC’s international position is bound to be inherently multidisciplinary, the focus of this thesis – in terms of its interpretation of the empirical evidence as well as its choice of methodology and theory – is primarily political. The main aspiration of this thesis is to make a contribution to filling the hiatus that exists in political science/international relations literature on the international position of the EC (a gap that, ironically, is probably most

pronounced when looking at international trade issues) and to approach this issue from the perspective of its contribution to and implications for European integration. The analysis needs to have a firm ground in the legal literature and a good grasp of the economic sensitivities involved. Ultimately, however, this thesis has looked at the topic studied through the telescope of political science, and the microscope of the European integration literature. These approaches therefore provide the ultimate grounds on which the thesis should be judged.

In conclusion, all methodologies offer benefits and costs. The comments and remarks in this section recognise this, and pointed out that the approaches used in this thesis also have certain opportunity costs in that they exclude other viewpoints from being fully taken into account. However, this section also offered a sturdy defence of the approach followed. After all, no methodology is perfect and it was argued here that the benefits of the methods chosen outweigh their costs.

7.3. Theoretical repercussions: towards a more coherent framework for understanding the EC as an international actor

7.3.1. The principal-agent approach as an integration 'theory'

The application of the principal-agent approach to the study of European integration has arguably been one of the more inspiring moments for the theoretical development of European Studies since the 1960s. The reason for this is that this approach is ideally placed for accommodating the complexity of the European actors and, indeed, the complexity of the EU itself. Dealing with this unprecedented bout of international integration or cooperation (depending on your view of the finality of the EU) has always generated substantial problems for any attempt at theorising the dynamics of this process. The sheer vagueness of the functions and aims of the European construction, combined with differing

views on its rationale and end-goal rapidly led to the well-known schism in integration theory between intergovernmentalism and neofunctionalism. For decades, theories seeking to explain (parts of) the European integration process were cast in one of these two moulds. The appeal and importance of the principal-agent approach derives from its ability to combine the strong points of both intergovernmentalism and neofunctionalism, while avoiding most of their pitfalls. This approach can acknowledge the (initial) primacy of the Member States without denying the supranational institutions any meaningful independent role. Or it can point out how the supranational institutions play a role in shaping policy outcomes without implying that sovereignty has become obsolete.

Also on a lower level, it is very appealing to use the principal-agent model as an integration 'theory' because it is often easier to operationalise than its more traditional theoretical counterparts. The role of agent, for example, fits the Commission like a glove. It allows for flexibility in interpreting the Commission's actions, in that it acknowledges that these actions are not only the result of the Commission's own preferences, but also of the institutional framework and the terms of reference (i.e. the mandate and leeway it was given by the principal). Furthermore, and this is important in the light of the findings in the literature on the Commission, the principal-agent theory does not necessarily focus solely on the final outcome or the revealed preferences of the Commission. The decision to do exactly that in this thesis was based on methodological grounds, but the principal-agent approach can also be integrated with bureaucratic politics-theories of the functioning of the Commission to come to a more complete framework for understanding the dynamics of the EU (see Pollack, 2003). This not only allows for incorporating intra-Commission politics in the more traditional, bureaucratic sense (units competing with each other, directorates defending their own turf, directorate-generals fighting each other because of conflicting interests, etc.), but it also allows for capturing the horizontal divide that runs through the Commission. This refers to the dual function of the Commission as a technocratic body and as a political one, as a bureaucracy and as an executive. While its technocratic functions might be more

intuitively linked to the role of the Commission as agent, the political levels of the Commission's hierarchy are very influential in determining the revealed preferences of this institution and they are thus an integral part of the conceptualisation of the Commission as an agent. Note that this not only refers to the ultimate level of political decision-making, i.e. the College of Commissioners, but also to the politicised higher levels of every DG separately.

At the same time, this touches upon a weakness of the principal-agent approach. Like most other well-developed theoretical approaches for explaining the European integration process, it seems to have an inward-looking bias. On the one hand this could be seen as a natural or logical consequence of the unique nature of the creation and functioning of the EU. While the broader aims and impulses of European cooperation have usually been described in rather general terms, placing these events in their historical setting and connecting them to the international context (see for example Dinan, 1999, particularly part 1), the dynamics of the integration process itself, however, have mostly been explained by referring to very specific *internal* policy developments. Such research projects have made an invaluable contribution to our understanding of the evolution of the integration process and they have paved the way for the emergence of more complete theoretical frameworks, such as the principal-agent approach. On the other hand, however, such introvert approaches miss significant aspects of the dynamics and development of an increasingly important part of the EU's policies: its external relations and their impact – through implementation and execution of international agreements – on internal competences. There is thus a clear need for making some adjustments to the principal-agent approach to allow for the inclusion of this external dimension, certainly in light of the EU's position in an ever increasing globalised policy environment. The result will be a more coherent framework for gaining a better understanding of the European integration process, also when it comes to external relations and external policies.

7.3.2. *Theorising the external dimension*

Theoretical approaches to international relations have long struggled with conceptualising the relationship between the level of the state and the international level. According to one of the most influential neo-realist thinkers, the behaviour of states in international settings was influenced, even determined, by the structure of the international system (Waltz, 1979). One of the central assumptions of this neo-realist ‘billiard ball’-approach (the presumption that states are unitary actors) quickly came under fire, mainly from scholars in the foreign policy analysis school. They focussed instead on the diversity and the structure of the domestic level (see for example Jervis, 1976; Steinbrunner, 1974; Brecher, 1972; Brecher, 1975).² They even went so far in their criticism of the neo-realist approach that they ignored the international context altogether and explained states’ international relations purely by looking at their domestic politics. At the end of the 1970s, Gourevitch tried to bridge the divide by ‘reversing’ this ‘second image’-school of thought and by stressing the need to tackle the domestic and the international system together (Gourevitch, 1978). The important contribution of this article was the insight that the domestic and the international level are intrinsically connected and should therefore not be separated. Nevertheless, even Gourevitch was still looking for a causal relation, wanting to explain the actions at one level in terms of what happened at the other level.

Putnam reacts against this. In a seminal article, published in the late 1980s, he introduced the concept of the ‘two-level game’ to put in place a basic framework for understanding the outcome of international negotiations (Putnam, 1988). His aim is to come to a ‘general equilibrium’ theory of international negotiations that accounts “simultaneously for the interaction of domestic and international factors” (Putnam, 1988: p. 430). These ideas were subsequently refined and

² This was Waltz’s ‘second’ level, between the international system and the individual decision-maker. This is the reason why this strand of literature is often referred to as the ‘second image’-approach.

elaborated (Evans *et al*, 1993) and built upon to come to a more general theory of international cooperation (Milner, 1997). Specifically for scholars of European Studies, however, the timing of the publication of these important theoretical insights could hardly have been worse. The Single European Act was signed in 1986, introducing the 'Europe 1992'-programme with the aim to establish a Single Market by that date. Furthermore, the beginning of the 1990s saw a rekindling of the battle between neofunctionalism and intergovernmentalism over their claim to be the pre-eminent theoretical framework for approaching and understanding European integration (see Sandholtz and Zysman, 1989; Moravcsik, 1991). The result was that the focus of EU scholars was again mostly inward looking, pinned down on the policy dynamics of the Single Market project and the question whether the integration process is inherently supranational or intergovernmental in nature. In that light, it is interesting to note that many of the most influential books and articles about the EC's and the Commission's role in the Uruguay Round negotiations, the most encompassing round of trade negotiations ever conducted, only started to appear from the late-1990s onwards (see for example, Vahl, 1997; Meunier and Nicolaidis, 1999; Meunier, 2005). At the moment, the international relations of the EC are again an important centre of attention in EU studies (see Meunier, 2005; Young, 2002). Some reflections on how the findings of this thesis can contribute to the formulation of a more coherent and complete integration theory are therefore welcome.

There are two major obstacles to developing a theoretical framework for interpreting and understanding the EC's external relations. The first is the lack of continuity in those relations. The sheer variation in the EC's international position becomes clear from comparing its role under the provisions of the Common Commercial Policy or the Common Fisheries Policy to that under the provisions of the EC's Common Foreign and Security Policy (CFSP). As recent events, such as the discord over the Iraq war in 2003, have yet again confirmed, there is often not much 'common' to the CFSP. That is not to say that there is no movement toward a stronger CFSP. From Maastricht onwards, the EU's foreign

policy arm has been continually adjusted and strengthened. This hard-fought unity, however, has a tendency to evaporate in the light of concrete challenges where specific national interests are at play. Also in other fields, the external relations of the Community are shrouded in uncertainty because they have not been codified and have developed or are developing in an *ad hoc* manner. The genesis of the EC's role and competences in international environmental issues that was discussed in chapter six is a good example of this. The second big obstacle is the complex and *sui generis* nature of the entity that is the EU. The EU is unlike any other player known on the international stage. Wallace's quote of the EC as "more than a regime, less than a state" (Wallace, 1983) might be well-worn by now, but it still captures the ambiguity of the EC as an international player very well.

Several authors have tried to tackle the latter problem by adjusting Putnam's two level game. The EU's external relations, so the argument goes, should in fact be seen as two overlapping two level games being played. In one, the Member States make up the domestic level and the EU is the international one. In the other one, the EU becomes the domestic level and the external organisation or agreement becomes the international level (see Young, 2002; 2003: p. 55; Jølstad, 1997). The result is a three-level game with a domestic level, a supranational level, and an international level (see Moyer, 1993; Patterson, 1997; Collinson, 1999; Meunier, 2000). This three-level game framework is remarkable because it has the potential of developing into an overarching, encompassing theoretical framework for understanding European integration. The reason is that it not only highlights the interactions between the different levels, but that it can also be merged or integrated with other theories in the 'second image'-mould that focus on the internal dynamics of the national and/or supranational level. Many theories of and approaches to European integration have concentrated on the national and supranational level and their interrelations. Also the traditional integration theories can be understood in this way. In such an interpretation, intergovernmentalists stress the importance of the national level, neofunctionalists point out the central role of the supranational level and new-

institutionalists (as described in chapter one) pay attention to the interactions between these two levels.

7.3.3. The external relations of the EU and European integration

The main theoretical contribution of this thesis has been to refine one of the most successful frameworks for interpreting the European integration process: the principal-agent analysis. The starting point was the observation that the traditional integration theories, including the principal-agent approach, are too inward-looking to be successfully applied to the study of the rise of the EC as an international actor. On the other hand, as discussed in the previous section, there is an extensive literature that draws on the two-level game framework in order to come to a better understanding of how the EC behaves in international settings. The chief importance of this strand of literature is the acceptance that the second – or, in the case of the EC’s external relations, the third – level also has an impact on the choices that are made at the domestic level. These two or three level game approaches have originally been developed in order to better understand the outcomes of international negotiations (Putnam, 1988; Evans *et al.*, 1993). The result is that most of these studies, in determining the influencing factors on the international level, still very much focus on the dynamics and strategic interactions between the negotiators (exploiting and/or influencing each other’s win-set, reducing informational advantages, etc.). Also regarding the study of the EC’s external relations, all too often the analysis of the third level has remained restricted to saying that ‘it mattered’ or else it has tended to focus on the interaction between the negotiating parties, on systemic or on issue specific elements.³

³ Even the much-hyped and fast growing literature on ‘Europeanization’ (see Featherstone and Raedelli, 2003), which deals with the impact supranational policy-making and policy-outcomes have on the national level, does not really spell out clear conditions, even though some studies are moving some way towards a more formal approach (see in particular Jordan and Liefferink, 2004).

This thesis has tried to reconcile (important elements of) the two strands of literature that were discussed in the previous paragraph by pointing out the impact of the external institutional framework on the domestic level. After all, institutions matter, and the institutional framework of the international organisation can have an important impact on the win-set of the Commission in its domestic game with the Member States. In other words, the external institutional setting is also an element in determining how much leeway the Commission enjoys to drift from the preferences of the principal(s). Two very different conclusions can be deduced from this insight. On the one hand, the identification of a very specific variable (the external institutional framework) helps to operationalise the two/three-level game approach. It should be noted, however, that this does certainly not mean that other factors are deemed to be irrelevant. In its drive to convince the reader that the external institutional framework is an important influencing factor, the thesis has undoubtedly paid too little attention to, or maybe even ignored, other more widely used influencing variables. A good example can be the more systemic characteristics of the workings of multilateral trade negotiations, the dynamics between negotiators, or even issue-specific elements. This should not be interpreted as a statement that such variables are deemed to be superfluous or irrelevant. The opposite is true. The external institutional framework is of course but one of several key influencing variables. The stress has been heavily on this particular element, however, because it was the task of this thesis to prove the validity and relevance of this influencing factor. On the other hand – and on a different level – this is a contribution to turning the principal-agent approach into a more complete framework for understanding the general process of European integration. It does so by widening the scope and the explanatory power of this theoretical paradigm.

Because of interaction effects, tinkering with one variable will not statically shift the equilibrium point. Instead, this happens in a dynamic process, bouncing back and forth until an equilibrium point is reached. The short overview, earlier in this section, of the competing interpretations over which level is more important in determining international relations shows that it is not fruitful to look for a

simple causal relationship. Instead, international relations only derive their meaning and dynamics from the constant interaction of these different levels. It is, of course, impossible for any article that deals with the EU to take all levels and their interactions into account. However, the research should still be placed within the wider framework of the multi-level game that is being played if it is to avoid the mistakes and weaknesses of some of the earlier approaches. For this reason, integrating the principal-agent approach within the context of the three-level game greatly enhances the scope for its application. Like most traditional integration theories, the principal-agent approach (as applied to the study of the EU) mainly focuses on the national and supranational level and their interactions. This thesis has tried to shift the angle to the international and supranational level and it was shown how the provisions and characteristics of the international level can impact on the lower levels by influencing the discretion, the scope for shirking, that the Commission enjoys vis-à-vis the Member States. The importance of this is the conclusion that the principal-agent approach can also be a good framework for understanding the European integration process when it comes to the EC's complicated external relations, as long as the interactions between the international and the supranational level are taken into account.

7.4. Policy repercussions

In the previous chapters, several claims have been put forward regarding the interaction between the national, European and international level. This section explores some practical aspects, i.e. policy repercussions, of the findings of the thesis. What are the possible consequences and implications of the explanations that this thesis offered? If the interpretations that were presented over the course of the previous chapters hold some truth, what does it entail for other policy areas? And what effect does the predicted strategy of the European actors on the international stage have for the international institutions and organisations? Some of these questions are tackled here. This section looks beyond the points that the

thesis set out to prove and gives a glimpse of how these findings impact on and shape the real world.

Issues to do with the repercussions of the findings of the thesis regarding the role and position of the EU and the Commission in international organisations are discussed later, when topics for further research are identified. Another important set of questions, which is tackled here, concerns the repercussions of the strategies and actions of the Commission for the international organisations themselves. Within the context of WTO negotiations, for example, the institutional interpretation put forward in this thesis would predict that the EC would have a preference for broad negotiation rounds and that this is not likely to change any time soon. On the one hand, there are some internal reasons for this. Most notably the difficulties involved in reaching a common position with 15 or 25 Member States. In principle, a qualified majority of Member States suffices to approve a negotiating mandate. A negotiating mandate covering many topics is therefore much more likely to accommodate the interests of a sufficiently large group of Member States. In practice, unanimity among the Member States is desirable in order not to undermine the negotiating position of the Commission from the outset. However, it follows from the findings of the thesis that the Commission itself will also have a preference for broad negotiation rounds. This will allow it to include issues over which it would like to gain influence within the strong institutional framework of the WTO. Examples of this strategy that were discussed in this thesis are the Commission's attempts to include the topics of investment and environment into the WTO-framework.

These strategies are induced by elements that are exogenous from the WTO's point of view. However, they carry a clear danger for the WTO, in that repeatedly and consistently overloading trade negotiation rounds might pose a threat to the effectiveness of the organisation. The events of the past couple of years, and the last three Ministerial Meetings (Seattle, Doha and Cancún) in particular, already seem to point in that direction. Some groups of developing and transition countries have become disillusioned by the lack of results of

previous (broad) negotiation rounds and insist the ‘left-over’ issues from those rounds (and not in the least the full implementation of previous agreements) are dealt with first before moving on to talk about other ones. This is at least partially responsible for the many deadlocks and the difficult progress in the current round of negotiations (the Doha-round). Ironically, the danger in the ‘natural’ strategy of the Commission to favour broad negotiation rounds is that it undermines the opportunities that the WTO has to offer to the Commission. Again, the cases of the Singapore issues and the relationship between trade and environment can be referred to as examples. Most of the Singapore issues – including investment, which the Commission was so keen to include – are now unambiguously dead and buried in the ongoing negotiations. This is also the case for the discussions about the relationship between trade and environment within the WTO. Robin Ratchford referred to the discussions on this issue as “clinically dead” (interview with Robin Ratchford). While the committee still meets at regular intervals, its reports are limited to summarising the discussions and the different viewpoints of the WTO members, without any decisions being made or suggestions put forward (see for example WTO, 2003). Therefore it does indeed seem fair to say that the activities of the Trade and Environment Committee are effectively put on hold. In conclusion, on the one hand the EC in general, and the Commission in particular, has an incentive to try and introduce new issues into the WTO. On the other hand, however, there is a risk of overburdening the institutional capacity of the WTO, thereby undermining the effectiveness of this strategy in the first place.

The fact that the rationale for the EC to opt for broad negotiation rounds is largely internal, means that it will be much more difficult for the EC to adjust this strategy in order to prevent the WTO from losing credibility as an effective and inclusive forum. It also means that interpretations and criticisms of the EC’s drive to incorporate new issues into the WTO as being solely aimed at being used as trade-offs or bargaining chips in order to protect its agricultural interests are too cynical. These interpretations, while they might very well contain some degree of accuracy, ignore some of the internal forces driving the EC and the

Commission (as the EC negotiator). This matters since it indicates that possible alternative package deals, which might make everyone better off, are not being explored seriously enough. This misunderstanding about the driving forces of the EC could also prove important in the scenario where a crisis caused by the overburdening of the WTO has to be handled. It is very hard to find to a solution to a problem if the perception of the causes of the problem diverge.

An example of the possible difficulties that could be caused if negotiating parties at the international level ignore the internal dynamics of the EC is to be found in the negotiations over the Montreal Protocol (see chapter six). After the transformation of the Montreal Protocol into EC legislation, the Commission (prodded by the European Parliament) was pushing very hard for more stringent criteria to tackle CFC emissions (see Jachtenfuchs, 1990). The EC was so keen on taking the lead on tackling climate change that it adopted legislation that even went beyond what was required by the Montreal Protocol. In his book on the Montreal Protocol and its negotiations, the chief US negotiator, Richard Benedick, brushes this EC activism off as being an attempt in trying to outdo the US – the real leader in the creation of the Montreal Protocol (Benedick, 1991). The reason why this is regarded as such a cynical move by the EC, and why the Commission is frowned upon by Benedick is the implementation deficit in the EC. It is very easy for the Commission to claim the moral and rhetorical high ground by proposing farther-ranging measures, so the argument goes, because it will not have to bear the cost. This is because the responsibility for implementation lies with the Member States and is not easily enforceable. A country like the US, on the other hand, cannot hide behind such an implementation gap and has to bear the full cost of these expensive promises. Again, this misses an important aspect of how the EC functions. The Commission will want to push for these more stringent measures, not only to claim the moral high ground, but also to make the issue as technical as possible and to draw it as much as possible into its sphere of expertise and competence. This will make it easier for the Commission to act on behalf of the EC in other parts of the negotiations, where it would have found it difficult to do so without

this linkage. This example illustrates the importance of a good understanding of the internal motives for the EC's position in international negotiations so as to avoid, for example, unnecessary tensions and misunderstandings between the negotiators.

Ultimately, the source of these tensions is the open-ended nature of the EU as a political system. This allows for many views on the dynamics of the European integration process. Eurosceptic tabloids often see it as a cynical struggle between, on the one hand, a power-hungry Commission that is intent on establishing a 'European super-state' in which it would wield disproportionate power and, on the other hand, states that are jealously guarding their sovereignty, having become increasingly weary about losing any more of their powers to unelected Brussels bureaucrats. Other sources more sympathetic to the idea of European integration will point out that increased cooperation between European countries is necessary in order for them to remain meaningful players in a game that is becoming increasingly global in scope. The transfer of sovereignty to supranational institutions, such as the Commission, is the price you pay for making these arrangements binding and more effective. What these views do have in common is the fact that they can both be made simultaneously because of the open-ended nature, the lack of a stated political end-goal of the European integration process. The fact that the question '*Quo vadis* the EU?' is – and for the foreseeable future will probably remain – unanswered, means that it is politically very difficult to agree on any codification of the division of competences between the European and the national level.

The absence of such a framework gives the Commission an incentive to shirk. The result is a lack of direction, i.e. the limits of European integration will be *ad hoc* and more difficult to foresee. This is in turn closely related to what was coined the 'capability-expectations gap' (Hill, 1993). If the Commission has an incentive to shirk, and if there is no overarching framework governing the division of competences to manage this, then there is an inherent risk that the Commission will, at a certain point, become overstretched. This would

undermine its credibility and the effectiveness of its role as external representative of the EU. This poses a problem for the Commission as well as for the Member States if competences have become entrenched by then. That is, if the Commission has become the default policy centre, or better: centre of expertise, in a particular area. In such cases, there is usually a decline in the expertise/experience the Member States retain in these areas since it would make more sense for them to use their scarce resources in other areas where they could have more of an impact. An example of an issue area where this process seems to have taken place is trade. Because of the strong and established position the Commission enjoys in this area, the national officials dealing with this issue tend not to be as experienced as their Commission counterparts (interview with Lothar Ehring and Søren Schonberg). The result is that the Member States rely heavily on the Commission. Overstretching of the Commission's resources would be particularly damaging in those issue areas where competences are entrenched since the Member States would not be able to take over some functions of the Commission here.

7.5. Broader questions deriving from the thesis and avenues for further research

This chapter started off by giving a brief summary of the main argument of the thesis. It then offered some clarifications on methodology and pointed out the limitations of the research, before moving on to discuss how the findings of the thesis contribute to the enhancement of our understanding of the European integration process. The previous section went slightly off the academic track to reflect on some policy repercussions. This leaves one question unanswered and that question is, as the – unfortunately – fictitious President Bartlet likes to put it: “What’s next?”. The end of a thesis is a place that should encourage the author to move on. But in order to do so, it is important to map out some possible roads to which the thesis might lead. This means identifying the core questions that remain unanswered, identifying new questions that are raised by the findings of

the research, and pointing out elements that need to be examined in more detail. This section sets out to map some of these avenues for further research.

The central research finding of this thesis was that the Commission is in a stronger position to shirk domestically, i.e. vis-à-vis the Member States, if the institutional framework of the international regime is more rules-based. Chapter two introduced the major driving forces behind this process: the need for technical expertise, the importance of experience and the economic benefits of being a 'big' country. These are all fundamental factors that favour action by the Commission in rules-based systems. The problem is that the situation can differ quite substantially from one issue area to another. Often, this variation originates from the complexity of the EU. The differences in the competence base of the external powers of the EU in different areas or in closely related areas, for example, can make it difficult to compare two sets of cases. This, in turn, renders distinguishing between facilitating factors (that make shirking by the Commission easier) and structural factors (enabling the Commission to shirk in the first place) much more difficult. To complicate matters further, there are also substantial differences between issue areas on the international level. This was clearly illustrated by the fundamentally different way of tackling disputes within the World Trade Organisation compared to environmental agreements. Environmental regimes generally rely on soft approaches, whereas it is the hard approach that is prevalent in the trade regime (OECD, 1998). More research on the impact of the institutional provisions on Commission-Member State relations in more areas of international cooperation is therefore needed to better map out and further refine the conditions under which the possibilities for the Commission to shirk increase.

More research into different areas of the EU's external relations is also needed for another reason. While the Commission's negotiating efforts to incorporate environmental concerns into the trade regime was discussed extensively in chapter six, the Commission does not seem to be limiting itself to the WTO negotiations to try and achieve its goal. There are indications that it is actively

making linkages between different forms and forums of international cooperation. One case in point is the Cartagena Protocol on Biosafety, where the Commission played a pivotal role in working out and pushing through the inclusion of the precautionary principle in the text. Earlier, it was exactly this principle that proved the major sticking point in the contentious *Beef Hormones* case in the framework of the WTO. Here, the Appellate Body rejected the Commission's use of the precautionary principle. By integrating it within other, softer, international agreements, the Commission was actually supporting its claim that this principle is a "full-fledged and general principle of international law" as it had already argued in its Communication on the precautionary principle (Commission, 2000a: p. 10). This looks like a devious way of trying to incorporate this principle into the legal framework of the WTO through the backdoor. Also on a general level, Falkner has pointed out that "[T]he EU's position has been strengthened by the Protocol: while the Treaty does not add significantly to the EU's existing regulatory system, it does provide it with greater international legitimacy" (Falkner, 2000: p.313). Such cross-fertilisation and inventive use of different forums by the Commission to bring about linkages between different areas makes it all the more important for more research to be done so as to be able to better map these efforts.

The need for more research into other areas of international cooperation becomes even more pronounced when the Commission's drive for profiling itself on the international stage is considered. Over the course of the past couple of years, the Commission seems to have found renewed energy to start an offensive for gaining a more prominent role in various international organisations. In September 2003, for example, the Commission tried to seize upon the SARS-epidemic in South-East Asia to strengthen its role in the World Health Organisation, an organisation to which it only has observer status. A Commission press release states that "The European Commission is calling for the EU to play a central role in World Health Organisation (WHO) negotiations to reinforce international rules on the control of infectious diseases and other health threats" (Commission, 2003b: p. 1). In chapter six, the Commission's

attempts to play a more important role in international environmental negotiations were interpreted as a bid to strengthen its position in external environmental relations. In this light, this eagerness to play a role in these WHO negotiations might point to a desire to take on a more important external role when it comes to health issues. This should be followed up by further research.

Similar elements can be distinguished in the Commission's drive for better representation and participation in the United Nations (UN) system (for a more general discussion of the EU and the United Nations, see Jorgensen and Laatikainen, 2004; regarding EU coordination on human rights issues in the UN, see Smith, 2006). Also in September 2003, the Commission published a Communication on the EU's position in the UN (Commission, 2003c), in which it calls for, among other things, a considerable strengthening of its institutional position at the UN. The Commission states, for example, that "[T]he EC should be given the possibility to participate fully in the work of UN bodies where matters of Community competence are concerned" (Commission, 2003c: p. 23). It then goes on to give some specific examples, including the need for the EC to be able to "participate effectively" in international environmental negotiations "to which the EC must later become a Party" and in "UN bodies dealing with refugee and asylum issues" (*ibid.*). The Commission communication expresses frustration with the fact that the EC still only has observer status in the UN. While this was meaningful in 1974 (when it was granted) because back then the EC "was almost alone in having permanent observer status" (Commission, 2003c: p. 22), today – among 40 other 'permanent observers' – it does not reflect the importance and special position of the EC in the international system any more. Or, in other words, "the EC's overall status in the UN no longer reflects the level of integration the Community has attained" (*ibid.*). The press release accompanying the Communication is rather blunter, expressing the need to establish "direct EC representation in fora that deal with issues of Community competence" (Commission, 2003d: p. 1). This fits in with the EC's full membership of, for example, the Food and Agricultural Organisation (FAO), and the Commission's recommendation to the Council for the same status in the

International Civil Aviation Authority and the International Maritime Organisation (Commission, 2003c). Again, it would be interesting, in the light of the findings of this thesis, to analyse the Commission's negotiating position as well as the different institutional frameworks of the organisations to see to what extent they have an impact on the respective roles that the Commission and the Member States have to play within these institutional frameworks.

Another (long-standing) issue on which more research is needed is that of preference formation in the Commission. In order to come to a better understanding of the Commission's actions, a better insight into the nature and origin of the Commission's preferences is needed. How did the Commission learn that strong institutions bring it certain advantages in the first place? Did this insight grow with the Commission's evolving role in the GATT, the CCP being the only external Community action with enough coherence so as to resemble a policy? Or did this awareness grow because of the Commission's role within the institutional system of the EU itself? After all, the EU has a highly legalistic and constitutional structure, making it the strongest rules-based system of international cooperation in place (see for example Jackson, 2000: p. 272; 1975: p.79). And how and where exactly within the Commission did these preferences come about? This automatically leads to the issue of intra-commission politics, which was touched upon in this thesis, although not discussed extensively. More research regarding the formation of preferences (and hence intra-Commission politics) in the Community's external relations is therefore needed in order to come to a better understanding of the Commission's position in international negotiations and organisations.

CONCLUSION

This chapter started by giving an overview and a summary of the main argument of the thesis. After defending some of the methodological choices made in the research design, it then moved on to discuss the relevance of the findings of the

thesis in the light of existing integration theories and it pointed out the contribution that the thesis makes to the understanding of the European Union. The most important finding is that there are elements at the international level that cause this level to have a more structural impact on the balance of power within the EU than is accounted for in the more traditional integration theories. In particular, the empirical research provided very strong evidence for the claim that the institutional structure of the international regimes is one of those elements, enabling the Commission to exploit this and strengthen its position externally as well internally. Since the major integration theories, including the promising principal-agent approach as applied to the EU, are all rather inward-looking, they tend to largely lose sight of these complex interactions between the 'domestic' and 'international' levels, focussing on the internal dynamics of the European integration process instead. Approaches to the EU's external relations do take the impact of the international level more seriously, but most studies in this mould also focus on very specific policies, thereby leaving the question about a more structural impact of the international level and the conditions under which this might take place unanswered.

The importance of the finding that the institutional structure of the international regime has such a profound impact on the role and position of the Commission lies not only in a better theoretical understanding of certain developments in the European integration process (such as the Commission's surprisingly dominant role regarding TRIPS issues within the WTO, for example). It also points to potential pitfalls that lie ahead, as was discussed in the section on policy repercussions and it raises many questions. What is the impact of the EU's policy preferences on the future of the WTO? Is there a danger of an overstretched Commission not being able to keep up with its tasks? And will this lead to a deterioration of the relative position of the EC as a world player? These are all important policy questions that derive from the theoretical contributions of this thesis. This, in turn, opens up further avenues for research. Are the same dynamics also at play in areas where the EC is only recently emerging as an international actor and where it barely has any competence at all? Notable

examples that come to mind here are the Commission's position in the other Bretton Woods institutions (World Bank, IMF – especially in the context of the pending IMF reform), or in the UN system. And what are the policy repercussions?

While this leaves us with more questions that we started with, it also opens up a promising research agenda. After all, if the structural impact of the institutional structure of the international level can be incorporated into future analyses of the process of European integration, then this will lead not only to a better understanding of Commission-Member State relations in specific cases, but also to a more coherent framework for studying the European integration process more generally.

BIBLIOGRAPHY

- Abbott, Kenneth W. and Snidal, Duncan (2000) 'Hard and soft law in international governance', *International Organization*, Vol. 54, No. 3, pp. 421-456
- Actionaid (2003) *EU Splits in Face of Call to Drop New Issues from Cancún*, Actionaid News release, 12/09/2003, available from http://217.199.179.132/index.asp?page_id=556 (last accessed on 01/07/04)
- Alden, Edward and Barber, Lionel (2004) 'US moves to restart stalled trade talks', *Financial Times*, 11 January 2004
- Alter, Karen J. and Meunier-Aitsahalia, Sophie (1994) 'Judicial politics in the European Community: European integration and the pathbreaking *Cassis de Dijon* decision', *Comparative Political Studies*, Vol. 24, No. 4, pp. 535-561
- Althaus, Dudley (2003) 'Talks can't be heard over the shouting; Opinions free, plentiful at WTO parley', *Houston Chronicle*, 12 September 2003, p. 1
- Anderson, Robert D. and Holmes, Peter (2002) 'Competition policy and the future of the multilateral trading system', *Journal of International Economic Law*, Vol. 5, No.2, pp. 531-563
- Balla, S.J. and Wright, J.R. (2001) 'Interest groups, advisory committees, and congressional control of the bureaucracy', *American Journal of Political Science*, Vol. 45, No. 4, pp. 799-812
- Basic Instruments and Selected Documents (1959) *Seventh Supplement. Decisions, Reports, etc. of the Thirteenth Session. Intersessional Procedures*, Geneva: The Contracting Parties to the General Agreement on Tariffs and Trade
- Basic Instruments and Selected Documents (1982) *Twenty-Eight Supplement. Protocols, Decisions, Reports 1980-1981 and Thirty-Seventh Session*, Geneva: The Contracting Parties to the General Agreement on Tariffs and Trade
- Basic Instruments and Selected Documents (1988) *Thirty-Fourth Supplement. Protocols, Decisions, Reports 1986-1987 and Forty-Third Session*, Geneva: The Contracting Parties to the General Agreement on Tariffs and Trade

- Benedick, Richard E. (1991) *Ozone Diplomacy. New Directions in Safeguarding the Planet*, Cambridge, MA : Harvard University Press
- Bercero, Ignacio G. and Amarasingha, Stefan D. (2001) 'Moving the trade and competition debate forward', *Journal of International Economic Law*, Vol. 4, No. 3, pp. 481-506
- Billiet, Stijn (2005) 'The EC and WTO dispute settlement: the initiation of trade disputes by the EC', *European Foreign Affairs Review*, Vol. 10, No. 2, pp. 197-214
- Blake, Julian (1999) *Power, Money and the People: the Challenges to Democracy from the New Alliance between States and Transnational Corporations*, unpublished thesis, Monash University
- Boehmer-Christiaensen, Sonja and Kellow, Aynsley (2002) *International Environmental Policy. Interests and the Failure of the Kyoto Process*, Cheltenham: Edward Elgar
- Bourgeois, Jacques H.J. (1995) 'The EC in the WTO and advisory opinion 1/94: an Echternach procession' *Common Market Law Review*, Vol.32: p. 763-787
- Bourgeois, Jacques H.J. (1996) 'The Uruguay Round of GATT: some general comments from an EC standpoint', in: Emiliou, Nicholas and O'Keefe, David (eds) *The European Union and World Trade Law: After the GATT Uruguay Round*, London: J. Wiley, pp. 81-90
- Brack, Duncan (1996) *International Trade and the Montreal Protocol*, London: Royal Institute of International Affairs
- Brack, Duncan (2001) *International Environmental Disputes. International Forums for Non-Compliance and Dispute Settlement in Environment-Related Cases*, London: Royal Institute of International Affairs
- Brack, Duncan (2003) 'Monitoring the Montreal Protocol', in: Boutin, Kenneth and Findlay, Trevor (eds) *Verification Yearbook 2003*, London: VERTIC, pp.209-226
- Brecher, Michael (1972) *The Foreign Policy System of Israel. Setting, Images, Process*, New Haven, CT: Yale University Press
- Brecher, Michael (1975) *Decisions in Israel's Foreign Policy*, New Haven, CT: Yale University Press

- Bridges (2003a) *Daily Update on the Fifth WTO Ministerial Conference*, Issue 4, 13 September 2003, International Centre for Trade and Sustainable Development
- Brock, George (1993) 'America forced to pay price of tactical errors', *The Times*, 15 December 1993, p. 10
- Brown, Gordon (2003) *Transcript of a Press Conference Following the International Monetary and Financial Committee Meeting*, 21 September 2003, Dubai International Convention Centre, available from <http://www.imf.org/external/np/tr/2003/tr092103.htm> (last accessed on 01/07/04)
- Brown, Gordon (2003a) 'Gordon Brown: globalisation and the poor man's burden', *The Independent*, 21 September 2003, available from <http://argument.independent.co.uk/commentators/story.jsp?story=445366> (last accessed on 01/07/04)
- Bulmer, Simon J. (1993) 'The governance of the European Union: A new institutionalist approach', *Journal of Public Policy*, Vol. 13, No. 4, pp. 351-380
- Bulmer, Simon J. (1998) 'New institutionalism and the governance of the Single European Market', *Journal of European Public Policy*, Vol. 5, No. 3, pp. 365-386
- Bundestag (2003) *Securing Fair and Sustainable Trade Through a Comprehensive Development-Oriented World Trade Round. Motion of the Parliamentary Fraction of the SPD in Conjunction with the Parliamentary Fraction of the BUNDNIS 90/DIE GRUNEN*, German Bundestag Published Record 15/1317, 15th legislative session
- Burgess, M. (1989) *Federalism and European Union*, London: Routledge
- Business and Industry Advisory Committee to the OECD (2004) *Statement of the OECD Business Community to OECD Trade Ministers: Revitalising the WTO Doha Round Urgent*, Paris: BIAC, 14 May 2004
- Buurman, Johanna W. and Schott, Jeffrey J. (1994) *The Uruguay Round: An Assessment*, Washington DC: Institute for International Economics

- Carl, Peter M. (2003) *The Commission Outlines the EU Strategy for Cancun. Presentation of the EU Position by M P Carl, Director General, DG Trade to the Trade Negotiating Committee of the WTO*, 2 April 2003
- Carl, Peter M. (2003a) *The Doha Development Agenda after Cancun*, Brussels: European Commission, 25 September 2003
- Chalmers, Damian (2000) 'The legal dimension in European integration', in: El-Agraa, Ali M. (ed.) *The European Union: Economics and Policies*, 6th edition, Harlow: Financial Times Prentice Hall
- Chang, Ha-Joon and Green, Duncan (2003) *The Northern WTO Agenda on Investment: Do as we Say, Not as we Did*, Geneva: South Centre
- Collinson, Sarah (1999) 'Issue-systems, multi-level games and the analysis of the EU's external commercial and associated policies: a research agenda', *Journal of European Public Policy*, Vol. 6, No. 2, pp. 206-224
- Commission (1985) *Communication from the Commission to the Council Concerning the Negotiations for a Global Framework Convention on the Protection of the Ozone Layer*, COM (85) 8, 16 January 1985, Brussels: Commission of the European Communities
- Commission (1990) *Eurobarometer. Public Opinion in the European Community*, No. 33, June 1990, Brussels: European Commission
- Commission (1991) *Intergovernmental Conferences: Contributions by the Commission*, Supplement 2/91, Luxembourg: Office for Official Publications of the European Communities
- Commission (1992) *Eurobarometer. Public Opinion in the European Community*, No. 37, June 1992, Brussels: European Commission
- Commission (1993) *Eurobarometre. L'Opinion Public dans la Communauté Européenne*, No. 39, June 1993, Brussels: European Commission
- Commission (1995) *Commission Calls on European Business to Intensify Worldwide Investment Efforts*, 17 March 1995, IP/95/269
- Commission (1997) *Working Group on the Relationship between Trade and Investment. Submission by the European Community and its Member States*, available from

- http://europa.eu.int/comm/trade/issues/sectoral/investment/wto_nego/contrib4.htm (last accessed on 25/06/2004)
- Commission (1998) *Civil Society Consultation on Trade and Investment: Report. Minutes of the First Meeting of the Investment Network*, Brussels, 27 November 1998, available from <http://europa.eu.int/comm/trade/miti/invest/1meeinne.htm> (last accessed on 12/01/2005)
 - Commission (1998a) *Review of the Dispute Settlement Understanding (DSU) – Discussion Paper from the European Communities*, 21 October 1998, available from <http://europa.eu.int/comm/trade/issues/respectrules/dispute/improving/0212dstl.htm> (last accessed on 21/06/2005)
 - Commission (1999) *Commission Sets Out Millennium Round Priorities*, 8 July 1999, Brussels: European Commission, IP/99/475
 - Commission (1999a) *The European Union and World Trade*, Luxembourg: Office for Official Publications of the European Communities
 - Commission (1999b) *Communication from the Commission to the Council and the European Parliament – The EU Approach to the WTO Millennium Round*, COM (1999) 331 final, 14/07/1999
 - Commission (2000) *Press Release*, DG Trade, Brussels: European Commission
 - Commission (2000a) *Communication from the Commission on the Precautionary Principle*, COM (2000) 1 final, 2 February 2000
 - Commission (2001) *Trade and Environment: What Europe Really Wants and Why*, 11/11/2001, MEMO/01/365
 - Commission (2002) *Multilateral Environmental Agreements: Implementation of the Doha Development Agenda*, 25/03/2002, available from http://trade.ec.europa.eu/doclib/docs/2003/september/tradoc_111168.pdf (last accessed on 20/08/2006)
 - Commission (2002a) *Environment DG Information Brochure*, Luxembourg: Office for Official Publications of the European Communities

- Commission (2003) *Contribution from the EC and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, 20 January 2003, 009/03 –Rev. 2, Brussels: European Commission
- Commission (2003a) *The Commission Outlines the EU Strategy for Cancun. Presentation of the EU Position by P M Carl, Director General, DG Trade to the Trade Negotiating Committee of the WTO*, 2 April 2003
- Commission (2003b) *Commission wants EU role in strengthening global health threat defences*, Commission Press Release, IP/03/1282, 23 September 2003
- Commission (2003c) *Communication from the Commission to the Council and the European Parliament – The European Union and the United Nations: The Choice of Multilateralism*, COM(2003) 526 final, 10 September 2003
- Commission (2003d) *EU-UN: Commission Calls for the EU to Renew its Commitment to the UN System and Multilateralism*, IP/03/1230, 10 September 2003
- Commission (2003e) *Communication from the Commission to the Council, to the European Parliament, and to the Economic and Social Committee. Reviving the DDA Negotiations – the EU Perspective*, 26 November 2003, Brussels: European Commission
- Commission (2003f) *Ozone Layer Protection – European Commission Policy and Objectives*, Brussels: European Commission, 3 March 2003, available from http://europa.eu.int/comm/environment/ozone/community_action_overview.htm (last accessed on 20/08/2006)
- Commission (2003g) *12th Meeting of the Parties to the Montreal Protocol. Burkina Fasso – 10-14 December 2000. Intervention by the European Community by Mr. Peter Horrocks, Head of Delegation*, Brussels: European Commission, 8 July 2003, available from <http://europa.eu.int/comm/environment/ozone/meeting.htm> (last accessed on 20/08/2006)
- Coombes, David (1970) *Politics and Bureaucracy in the European Community*, London: Allen & Unwin

- Cosbey, Aaron *et al.* (2003) *Investment, Doha and the WTO. Background Paper to the Chatham House Meeting convened by RIAA and IISD. Trade and Sustainable Development Priorities post-Doha*, 7-8 April 2003, London: Royal Institute of International Affairs, available from: http://www.iisd.org/pdf/2003/investment_riia_iisd.pdf (last accessed on 20/08/2006)
- Cottier, Thomas (1998) 'Dispute settlement in the world trade organization: characteristics and structural implications for the European Union', *Common Market Law Review*, Vol. 35, pp. 325-378
- Court of Justice (1971) 'Judgement of the Court of 31 March 1971. Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport. Case 22/70', *European Court Reports 1971*, p. 00263
- Court of Justice (1972) 'Judgement of the Court of 12 December 1972. International Fruit Company NV and others v Productschap voor Groenten en Fruit. Reference for a preliminary ruling: College van Beroep voor het Bedrijfsleven – Netherlands. Joined cases 21-24/72', *European Court Reports 1972*, p. 01219
- Court of Justice (1975) 'Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty. Opinion 1/75', *European Court Reports 1975*, p. 01355
- Court of Justice (1977) 'Opinion of the Court of 26 April 1977. Opinion given pursuant to Article 228 (1) of the EEC Treaty. 'Draft agreement for establishing a European laying-up fund for inland waterway vessels'. Opinion 1/76', *European Court Reports 1977*, p. 00741
- Court of Justice (1979) 'Opinion of the Court of 4 October 1979. Opinion given pursuant to the second subparagraph of article 228(1) of the EEC Treaty. International agreement on natural rubber. Opinion 1/78', *European Court Reports 1979*, p. 02871
- Court of Justice (1979a) 'Judgement of the Court of 20 February 1979. Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein. Reference for a preliminary ruling: Hessisches Finanzgericht – Germany. Measures having an

- effect equivalent to quantitative restrictions. Case 120/78', *European Court Reports 1979*, p. 00649
- Court of Justice (1987) Judgement of the Court of 26 March 1987. Commission of the European Communities v Council of the European Communities. Generalized tariff preferences – action for annulment – legal basis – obligation to state reasons for Community measures. Case 45/86', *European Court Reports 1987*, p.01493
 - Court of Justice (1991) Opinion of the Court of 14 December 1991. Opinion given pursuant to the second subparagraph of article 228(1) of the Treaty. Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. Opinion 1/91', *European Court Reports 1991*, p. I-06079
 - Court of Justice (1994) 'Opinion of the Court of 15 November 1994. Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty. Opinion 1/94', *European Court Reports 1994*, p. I-05267
 - Court of Justice (1996) 'Judgement of the Court of 10 September 1996. Commission of the European Communities v Federal Republic of Germany. Failure of a member state to fulfill its obligations – International Dairy Agreement. Case C-61/94', *European Court Reports 1996*, p. I-3989
 - Court of Justice (1996a) 'Judgement of the Court of 19 March 1996. Commission of the European Communities v Council of the European Union. FAO – fishery agreement – right to vote – member states – Community. Case C-25/94', *European Court Reports 1996*, p. I-01469
 - Court of Justice (1996b) 'Opinion of the Court of 28 March 1996. Accession by the Community to the European Convention for the protection of human rights and fundamental freedoms. Opinion 2/94', *European Court Reports 1996*, p. I-01759
 - Cram, L. (1994) 'The European Commission as a multi-organization: Social policy and IT policy in the EU', *Journal of European Public Policy*, Vol. 1, No. 2, pp. 195-217

- Cremona, Marise (2001) 'A policy of bits and pieces? The Common Commercial Policy after Nice', *The Cambridge Yearbook of European Legal Studies*, Vol. 4, pp. 61-91
- Croome, John (1995) *Reshaping the World Trading System: a History of the Uruguay Round*, Geneva: World Trade Organization
- Day, Paul (2003) 'At Cancun cracks emerge between developed, developing nations', *The Main Wire*, 11 September 2003
- Denny, Charlotte (2003) 'Lamy hits back at critics', *The Guardian*, 29 October 2003
- Denza, Eileen (1996) 'The Community as a member of international organizations', in: Emiliou, Nicholas and O'Keefe, David (eds) *The European Union and World Trade Law. After the GATT Uruguay Round*, Chichester: John Wiley & Sons
- Dickson, Tim (1990) 'EC seeks new ways of settling trade disputes', *Financial Times*, No. 31090, 5 March 1990
- Dinan, D. (1999) *Ever Closer Union: An Introduction to European Integration*, Basingstoke: MacMillan Press Ltd
- Docksey, C. and Williams, K. (1994) 'The Commission and the execution of Community policy', in: Edwards, G. and Spence, D. (eds) *The European Commission*, Harlow: Longman Current Affairs, pp. 125-154
- Dowding, Keith (2000) 'Institutionalist research on the European Union', *European Union Politics*, Vol. 1, No. 1, pp. 125-144
- Duff, Andrew (1994) 'Ratification', in: Duff, Andrew, Pinder, John and Pryce, Roy (eds) *Maastricht and Beyond – Building the European Union*, London: Routledge, pp. 53-68
- Dullforce, William (1990) 'World trade news: no EEC position on Gatt', *Financial Times*, 15/02/1990, p. 7
- Dullforce, William (1990a) 'World trade news: EC tables ideas for turning GATT into a permanent institution', *Financial Times*, 27/06/1990, p. 4
- Eagleton, Dominic (2003) *Chips off the Bloc: Disunity within the EU on the Singapore Issues*, London: Actionaid

- Ehlerman, C.-D. (1983) 'Mixed agreements. A list of problems', in O'Keefe, David, and Schermers, Henry G. (eds) *Mixed Agreements*, Deventer: Kluwer
- Elliott, Larry (2003) 'DTI leak blames Lamy for Cancún failure', *The Guardian*, 22 October 2003
- Elliott, Larry, Denny, Charlotte and Munk, David (2003) 'Blow to world economy as trade talks collapse', in: *The Guardian*, 15 September 2003
- Elster, J. and Hylland, A. (1986) *Foundations of Social Choice Theory*, Cambridge: Cambridge University Press
- Esty, Daniel C (2002) *Thickening the International Environmental Regime*, Robert Schumann Centre for Advanced Studies – Policy Papers, Florence: European University Institute
- Eurochambres (2003) *Position Paper: the WTO Ministerial Conference in Cancún. 10-14 Sept. 2003*, September 2003
- Eurocommerce (2003) *More Liberalisation, More Multilateralism, More Development, Less Distortion, Less Discrimination, Less Poverty. Position Paper on the 5th WTO Ministerial Conference*, August 2003, Brussels: Eurocommerce
- European Parliament (1991) *Debates of the European Parliament, 1991-1992 Session, Report of Proceedings from 18 to 22 November*, *Official Journal* No. 3-411
- European Roundtable of Industrialists (2000) *Improved Investment Conditions. Third Survey on Improvements in Conditions for Investment in the Developing World*, Brussels: The European Roundtable of Industrialists, available from http://www.ert.be/pf/enf_frame.htm (last accessed on 03/07/04)
- European Services Forum (1999) 'ESP preliminary views on "Trade and Investment"', letter to Pascal Lamy, 23 November 1999, Brussels: ESF
- European Services Forum (2003) 'ESP calls for an effective launch of negotiations of a Multilateral Agreement on Trade and Investment', letter to Pascal Lamy, 30 April 2003
- Evans, John W. (1971) *The Kennedy Round in American Trade Policy: The Twilight of the GATT?*, Cambridge, MA: Harvard University Press

- Evans, P. B., Jacobson, H.K. and Putnam, R.D. (eds) (1993) *Double-Edged Diplomacy: International Bargaining and Domestic Politics*, Berkeley, CA: University of California Press
- Evans, Phillip and Walsh, James (eds) (1994) *The EIU Guide to the New GATT*, London: The Economist Intelligence Unit
- Evenett, Simon J. (2003) (ed.) *The Singapore Issues and the World Trading System. The Road to Cancún and Beyond*, Bern: Swiss State Secretariat of Economic Affairs
- Falkner, Robert (2000) 'Regulating biotech trade: the Cartagena Protocol on Biosafety', *International Affairs*, Vol. 76, No. 2, pp. 299-313
- Featherstone, Kevin and Dyson, Kenneth H.F. (1999) *The Road to Maastricht: Negotiating Economic and Monetary Union*, Oxford: Oxford University Press
- Featherstone, Kevin and Raedelli, Claudio M. (2003) (eds) *The Politics of Europeanization*, Oxford: Oxford University Press
- Federal Trust (2003) *Expanding the WTO Rules? Should There be WTO Rules on Competition, Investment, Trade Facilitation and Transparency in Government Procurement?*, London: The Federal Trust for Education and Research
- Ferrarini, Benno (2003) 'A multilateral framework for investment?', in: State Secretariat of Economic Affairs and Evenett, Simon (eds) *The Singapore Issues and the World Trading System: The Road to Cancún and Beyond*, available from http://www.cid.harvard.edu/cidtrade/Papers/ferrarini_wti_investment.pdf#search=%22%22Benno%20Ferrarini%22%22 (last accessed on 20/08/2006)
- Finnemore, Martha (1996) 'Norms, culture, and world politics: insights from sociology's institutionalism', *International Organization*, Vol. 50, No. 2, pp. 325-347
- Foreign Trade Association (2003) *FTA Position on the 5th WTO Ministerial Meeting in Cancun*, Brussels: FTA
- Foster, Kathryn A. (1997) *The Political Economy of Special-Purpose Government*, Washington DC: Georgetown University Press

- Franchino, Fabio (2000) 'Control of the Commission's executive functions: uncertainty, conflict, and decision rules', *European Union Politics*, Vol.1, No. 1, pp. 63-92
- Friends of the Earth (1998) *License to Loot. The MAI and how to Stop it*, Washington, DC: Friends of the Earth, available from <http://www.foe.org/res/pubs/pdf/loot.pdf> (last accessed on 30/06/04).
- Friends of the Earth (2001) *The Citizens' Guide to Trade, Environment and Sustainability*, London: Friends of the Earth, available from <http://www.foei.org/trade/activistguide/index.html> (last accessed on 14/07/04)
- Fuchs, G. (1994) 'Policy-making in a system of multi-level governance – the Commission of the European Community and the restructuring of the telecommunications sector', *Journal of European Public Policy*, Vol. 1, No. 2, pp. 177-194
- Garrett, Geoffrey (1995) 'The politics of legal integration in the European Union', *International Organization*, Vol. 49, No. 1, pp. 171-181
- Garrett, Geoffrey (1995) 'The politics of legal integration in the European Union', *International organization*, Vol. 49, pp. 171-181
- Garrett, Geoffrey and Tsebelis, George (1996) 'An institutional critique of intergovernmentalism', *International Organization*, Vol. 50, No. 2, pp. 269-299
- Garrett, Geoffrey and Weingast, Barry (1993) 'Ideas, interests, and institutions: constructing the European Community's internal market', in: Goldstein, Judith and Keohane, Robert O. (eds) *Ideas and Foreign Policy*, Ithaca, NY: Cornell University Press
- GATT (1976a) *United States Tax Legislation (DISC). Report of the Panel Presented to the Council of Representatives on 12 November 1976*, 2 November 1976, L/4422-23S/98
- GATT (1976b) *Income Tax Practices Maintained by France. Report of the Panel Presented to the Council of Representatives on 12 November 1976*, 2 November 1976, L/4423-23S/114

- GATT (1976c) *Income Tax Practices Maintained by Belgium. Report of the Panel Presented to the Council of Representatives on 12 November 1976*, 2 November 1976, L/4424-23S/127
- GATT (1976d) *Income Tax Practices Maintained by the Netherlands. Report of the Panel Presented to the Council of Representatives on 12 November 1976*, 2 November 1976, L/4425-23S/137
- GATT (1987) *Negotiating Group on Dispute Settlement – Communication from the EEC*, 24 September 1987, MTN.GNG/NG13/W/12
- GATT (1988) *Submission by the European Communities*, 24 May 1988, MTN.GNG/NG12/W/10
- GATT (1988a) *Minutes of Meeting – held in the Centre William Rappard on 16 June 1988*, 11/07/1988, C/M/222
- GATT (1990) *Negotiating Group on the Functioning of the GATT System – Communication from the European Community*, 09/07/1990, MTN.GNG/NG14/W/42
- GATT (1991) *United States – Restrictions on import of Tuna. Complaint by Mexico*, circulated on 3 September 1991 (not adopted)
- GATT (1994) *United States – Restrictions on import of Tuna. Complaint by the EEC and the Netherlands*, circulated on 16 June 1994 (not adopted)
- Goldstein, Judith and Martin, Lisa L. (2000) 'Legalization, trade liberalization, and domestic politics: a cautionary tale', *International Organization*, Vol. 54, No. 3, pp. 603-632
- Goldstein, Judith; Kahler, Miles; Keohane, Robert O. and Slaughter, Anne-Marie (2000) 'Introduction: legalization and world politics', *International Organization*, Vol. 54, No. 3, pp. 385-399
- Golub, Jonathan (1999) 'The European Community as an actor in international environmental policy', *Law & European Affairs – Revue des Affaires Européennes*, Vol.9, No. 3 and 4, pp. 453-470
- Gourevitch, Peter A. (1978) 'The second image reversed: the international sources of domestic politics', *International Organization*, Vol. 32, No. 4, pp. 881-912

- Graham, Edward M. and Krugman, Paul R. (1990) 'Trade-related investment measures', in: Schott, Jeffrey J. (ed) *Completing the Uruguay Round: A Results-Oriented Approach to the GATT Trade Negotiations*, Washington DC: Institute for International Economics
- Grant, Wyn, Matthews, Duncan and Newell, Peter (2000) *The Effectiveness of European Union Environmental Policy*, London: MacMillan Press Ltd
- Greens/EFA Group (2003) *WTO and Corporate Globalisation*, Brussels: Green/EFA Group, available from <http://www.greens-efa.org/en/documents/detail.php?id=18> (last accessed on 30/06/04)
- Groux, Jean (1983) 'Mixed negotiations', in: O'Keefe, David, and Schermers, Henry, G. (eds) *Mixed Agreements*, Deventer: Kluwer
- Haas, E.B. (1963) 'Technocracy, pluralism and the new Europe', in: Graubard, S.R. (ed.) *A New Europe? A Timely Appraisal*, Boston: Beacon press, pp. 62-88
- Haas, Ernst B. (1958) *The Uniting of Europe*, London: Stevens
- Haas, Peter M. (1992) 'Introduction: epistemic communities and international policy coordination', *International Organization*, Vol. 46, No. 1, pp. 1-36
- Haigh, Nigel (1992) 'The European Community and international environmental policy', in: Hurrell, Andrew and Kingsbury, Benedict (eds) *The International Politics of the Environment. Actors, Interests, and Institutions*, Oxford: Clarendon Press, pp. 228-249
- Hall, P.A. and Taylor R.C.R. (1996) 'Political science and the three new institutionalisms', *Political Studies*, Vol. 44, No. 5, pp. 936-957
- Hayes-Renshaw, Fiona, van Aken, Wim and Wallace, Helen (2006) 'When and why the EU Council of Ministers votes explicitly', *Journal of Common Market Studies*, Vol. 44, No. 1, pp. 161-194
- Heisler, M.O. and Kvavik, R.B. (1974) 'Patterns of European Politics: The 'European Polity' Model', in: Heisler, M.O. (ed.) *Politics in Europe*, New York: David McCay, pp. 27-89
- Heliskosi, Joni (1999) 'Joint competence of the European Community and its member states and the dispute settlement practice of the world trade

- organization', *The Cambridge Yearbook of European Legal Studies*, Vol. 2, pp. 61-86
- Hilf, Meinhard (1990) 'EC and GATT: a European proposal for strengthening the GATT dispute settlement procedures', in: Rode, Reinhard (ed.) *GATT and Conflict Management. A Transatlantic Strategy for a Stronger Regime*, Boulder, CO: Westview Press, pp. 63-101
 - Hilf, Meinhard (1995) 'The ECJ's Opinion 1/94 on the WTO – No surprise, but wise?', *European Journal of International Law*, Vol. 6, No.1, pp. 1-15
 - Hilf, Meinhard, Jacobs, Francis G. and Petersmann, Ernst-Ulrich (eds) *The European Community and GATT*, Deventer: Kluwer
 - Hill, Christopher W. (1993) 'The capability-expectations gap, or conceptualising Europe's international role', *Journal of Common Market Studies*, Vol. 31, No. 3, pp. 305-328
 - Hix, Simon, Raunio, Tapio and Scully, Roger (2003) 'Fifty years on: research on the European Parliament', *Journal of Common Market Studies*, Vol. 41, No. 2, pp. 191-202
 - Hoekman, Bernard M. and Kostecki, Michel M. (2001) *The Political Economy of the World Trading System*, Oxford: Oxford University Press
 - Hoekman, Bernard M. and Saggi, Kamal (1999) 'Multilateral disciplines for investment-related policies?', World Bank Working Paper, No. 2138
 - Hoffmann, Stanley (1964) 'The European process at Atlantic cross purposes', *Journal of Common Market Studies*, Vol. 3, No. 2, pp.87-91
 - Hoffmann, Stanley (1964a) 'Europe's identity crisis: between the past and America', *Daedalus*, Vol. 95, No. 2, pp. 455-478
 - House of Commons (2003) *Trade and Development at the WTO: Issues for Cancún*, International Development Committee, Seventh Report of session 2002-2003, London: House of Commons
 - House of Commons (2003a) *Trade and Development at the WTO: Learning the Lessons of to Revive a Genuine Development Round*, International Development Committee, First Report of Session 2003-2004, London: House of Commons

- House of Commons (2003b) *Oral Answers to Questions, 17 September 2003*, Hansard, Volume No. 410, Part No. 438, column 862, available from http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030917/debt_ext/30917-04.htm#30917-04_head0 (last accessed on 01/07/04)
- House of Commons (2003c) *Oral Evidence Taken before the International Development Committee on Monday 30 June 2003*, Session 2002-2003, London: House of Commons
- House of Commons (2003d) *Select Committee on International Development. Minutes of Evidence. Examination of Witnesses*, Session 2002-2003, HC 400-II, Monday 30 June 2003, Q 517, available from <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/400/3063002.htm> (last accessed on 01/07/04)
- House of Lords, (2000) *Select Committee on European Communities, 10th Report*, 13 June 2000, available from <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldselect/ldecom/76/7601.htm> (last accessed on 10/02/2006)
- Hudec, Robert E. (1990) 'Dispute Settlement', in: Schott, Jeffrey J. (ed.) *Completing the Uruguay Round: A Results-Oriented Approach to the GATT Trade Negotiations*, Washington, DC: Institute for International Economics
- Hudec, Robert E. (1993) *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Salem, NH: Butterworth Legal Publishers
- *Inside US Trade*, 'Zoellick, Lamy clash over including Singapore Issues in Doha Round', 27 February 2004
- International Chamber of Commerce (2003) 'Vital steps after Cancún. Prepared by the commission on trade and investment policy', 22 October 2003, available from <http://www.iccwbo.org/policy/trade/id562/index.html> (last accessed on 20/08/2006)
- International Tribunal for the Law of the Sea (2000) *Case Concerning the Conservation and Sustainable Exploitation of Swordfish stocks in the South-Eastern Pacific Ocean – Constitution of Chamber*, case No. 7, 20 December 2000

- Jachtenfuchs, Markus (1990) 'The European Community and the protection of the ozone layer', *Journal of Common Market Studies*, Vol. 28, No. 3, pp. 261-277
- Jachtenfuchs, Markus and Huber, Michael (1993) 'Institutional learning in the European Community: the response to the greenhouse effect', in: Liefferink, J.D., Lowe, P.D. and Mol, A.P.J. (eds) *European Integration and Environmental Policy*, Chichester: John Wiley & Sons, pp. 36-58
- Jackson, John H. (1979) 'Governmental disputes in international trade relations: a proposal in the context of GATT', *Journal of World Trade Law*, Vol. 13, pp.1-25
- Jackson, John H. (1983) 'GATT machinery and the Tokyo Round agreements', in: Cline, William R. (ed.) *Trade Policy in the 1980s*, Washington DC: Institute for International Economics, pp. 159-187
- Jackson, John H. (1990) *Restructuring the GATT System*, London: Royal Institute of International Affairs
- Jackson, John H. (1991) *The World Trading System: Law and Policy of International Economic Relations*, Cambridge, MA: MIT Press
- Jackson, John H. (1998) *The World Trade Organization. Constitution and Jurisprudence*, London: Royal Institute of International Affairs
- Jackson, John H. (2000) *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, Cambridge: Cambridge University Press
- Jackson, R. and Sørensen, G. (1999) *Introduction to International Relations*, Oxford: Oxford University Press
- Jawara, Fatoumata (2003) *The Cunning Bully – EU Bribery and Arm-Twisting at the WTO*, position paper for the European Corporate Observatory, September 2003
- Jervis, Robert (1976) *Perception and misperception in international politics*, Princeton, NJ: Princeton University Press
- Jølstad, Finn O. (1997) 'Interactive levels of policy-making in the European Union's common commercial policy', *Arena Working Paper*, WP 97/13
- Jonquières, Guy de (2003) 'Crushed at Cancún', *Financial Times*, 16 September 2003

- Jonquières, Guy de (2003a) 'Lamy feels the sting of Cancún's failure', *Financial Times*, 31 October 2003
- Jonquières, Guy de (2003b) 'Business leaders urge EU to revive trade talks', *Financial Times*, 30 October 2003
- Jordan, Andrew (1999) 'Editorial introduction: the construction of a multilevel environmental governance system', *Environment and Planning C: Government and Policy*, Vol. 17, No. 1, pp. 1-18
- Jordan, Andrew and Liefferink, Duncan (eds) (2004) *Environmental Policy in Europe. The Europeanization of National Environmental Policy*, London: Routledge
- Jorgensen, Knud E. and Laatikainen, Katie V. (2004) 'The European Union and the United Nations: multilateralism in a new key?', conference paper presented at the second pan-European conference in Bologna, 24-26 June 2004, available from <http://www.jhubc.it/ecpr-bologna/docs/293.pdf> (last accessed on 20/08/2006)
- Jupille, J. and Caporaso, J.A. (1999) 'Institutionalism and the European Union: beyond international relations and comparative politics', *Annual Review of Political Science*, Vol. 2, pp. 429-444
- Kahler, Miles (2000) 'Conclusion: The causes and consequences of legalization', *International Organization*, Vol. 54, No. 3, pp. 661-683
- Kentin, Esther (2002) 'Prospects for rules on investment in the new WTO round', *Legal Issues of Economic Integration*, Vol. 29, No. 1, pp. 61-71
- Keohane, Robert O. (1984) *After Hegemony: Cooperation and Discord in the world Political Economy*, Princeton, NJ: Princeton University Press
- Keohane, Robert O., Moravcsik, Andrew and Slaughter, Anne-Marie (2000) 'Legalized dispute resolution: interstate and transnational', *International Organization*, Vol. 54, No. 3, pp. 547-488
- Kerremans, Bart (1996) 'Do institutions make a difference? Non-institutionalism, neo-institutionalism and the logic of common decision-making in the European Union', *Governance. An International Journal of Policy, Administration and Institutions*, Vol. 9, No. 2, pp. 217-240

- Khor, Martin (2003) 'EC's shift on Singapore Issues sours WTO green room meeting on trade facilitation', Geneva: Third World Network
- Kiewiet, D.R. and McCubbins, M.D. (1991) *The logic of delegation: Congressional parties and the appropriation process*, Chicago, IL: University of Chicago Press
- Kingdon, J.W. (1995) *Agendas, Alternatives, and Public Policies*, 2nd ed., New York, NY: HarperCollins College Publishers
- Kohler-Koch, B. (1996) 'Catching up with change: The transformation of governance in the European Union', *Journal of European Public Policy*, Vol. 3, No. 3, pp. 359-380
- Krugman, Paul R. and Obstfeld, Maurice (1997) *International Economics: Theory and Policy*, Reading, MA: Addison Wesley
- Kuyper, Pieter-Jan (1995) 'The new WTO dispute settlement system: the impact on the Community', in: Bourgeois, Jacques H.J. *et al.* (eds) *The Uruguay Round Results. A European Lawyers' perspective*, Brussels: European University Press
- Kydland, Finn and Prescott, Edward (1977) 'Rules rather than discretion: the inconsistency of optimal plans', *Journal of Political Economy*, Vol. 86, pp. 473-490
- Lalumière, Catherine, Landau, Jean-Pierre and Glimet, Emmanuel (1998) *Rapport sur l'Accord Multilatéral sur l'Investissement (AMI)*, available from http://www.finances.gouv.fr/pole_ecofin/international/ami0998/ami0998.htm (last accessed on 14/07/04)
- Lamy, Pascal (2004) 'WTO: the road ahead', Speech to the CII Conference in New Delhi on 19 January 2004, available from http://europa.eu.int/comm/commissioners/lamy/speeches_articles/spla206_en.htm (last accessed 15/07/04)
- Lamy, Pascal and Fischler, Franz (2004) 'Letter from Commissioners Pascal Lamy and Franz Fischler on the Doha Development Agenda', available from <http://trade-info.cec.eu.int/doclib/html/119454.htm> (last accessed on 16 June 2005)

- Lang, Winfried (1997) 'Trade and environment: progress in the World Trade Organization?', *Environmental Policy and Law*, Vol.27, No. 4, pp. 275-283
- Larson, Alan P. (1997) 'The move toward global rules on investment', *Economic Perspectives. Electronic Journal of the U.S. Information Agency*, Vol. 2, No. 2
- Leal-Arcas, Rafael (2001) 'The European Community and mixed agreements', *European Foreign Affairs Review*, Vol. 6, No. 4, pp. 483-513
- Lehmann, Jean-Pierre (2003) 'Letters to the editor: Lamy must get serious on multilateral trade', *Financial Times*, 30 October 2003
- Lindberg, Leon N. (1963) *The Political Dynamics of European Integration*, Stanford, CA: Stanford University Press
- Lindberg, Leon N. and Scheingold, S.A. (1970) *Europe's Would-Be Polity. Patterns of Change in the European Community*, Englewood Cliffs, N.J.: Prentice-Hall
- Long, Oliver (1985) *Law and its Limitations in the GATT Multilateral Trade System*, Boston: Kluwer
- Macrory, Richard and Hession, Martin (1996) 'The European Community and climate change. The role of law and legal competence', in: O'Riordan, Tim and Jäger, Jill (eds) *Politics of Climate Change. A European Perspective*, London: Routledge, pp. 106-154
- Majone, G. (2001) 'Two logics of delegation: Agency and fiduciary relations in EU governance', *European Union Politics*, Vol. 2, No. 1, pp.103-122
- March, J.G. and Olsen, J.P. (1984) 'The new institutionalism: organizational factors in political life', *American Political Science Review*, Vol. 78, pp. 734-749
- Maresceau, Marc (1993) 'The concept "Common Commercial Policy" and the difficult road to Maastricht', in: Maresceau, Marc (ed) *The European Community's Commercial Policy after 1992. The Legal Dimension*, Dordrecht: Kluwer Academic Publishers
- Marks, G., Hooghe, L. and Blank, K. (1996) 'European integration from the 1980s: state-centric v. multi-level governance', *Journal of Common Market Studies*, Vol. 49, Vol. 1, pp. 341-377

- Marzano, Antonio (2003) 'Euromed: Marzano, do not expand WTO agenda', *AGI*, Euromed meeting in Palermo, 7 July 2003
- Mattila, M. and Lane, J.E. (2001) 'Why unanimity in the Council? A roll call analysis of Council voting', *European Union Politics*, Vol. 2, No.1, pp. 31-52
- Mazey, S. and Richardson, J. (1995) 'The Commission and the lobby', in: Edwards, G. and Spence, D. *The European Commission*, 2nd ed., London: Cartermill International Ltd
- McCubbins, M.R. and Schwartz, T. (1984) 'Congressional oversight overlooked: police patrols versus fire alarms', *American Journal of Political Science*, Vol. 28, No. 1, pp. 165-179
- McCubbins, M.R., Noll, R. and Weingast, B. (1987) 'Administrative procedures as instruments of political control', *Journal of Law, Economics, and Organization*, Vol. 3, No. 2, pp. 243-277
- McCubbins, M.R., Noll, R. and Weingast, B. (1989) 'Structure and process, politics and policy: administrative arrangements and the political control of agencies', *Virginia Law Review*, Vol. 75, pp. 431-482
- MCGovern, Edmond (1986) 'Dispute settlement in the GATT – adjudication or negotiation?', in: Hilf, Meinhard, Jacobs, Francis G. and Petersmann, Ernst-Ulrich (eds) *The European Community and GATT*, Deventer: Kluwer
- McGowan, L. (2000) 'Safeguarding the economic constitution: The Commission and competition policy', in: Nugent, N. (ed.) *At the Heart of the Union. Studies of the European Commission*, 2nd ed., London: MacMillan Press Ltd, pp. 147-169
- McKelvey, R. (1976) 'Intransitivities in multidimensional voting models and some implications for agenda control', *Journal of Economic Theory*, Vol. 12, No. 3, pp. 472-482
- Meunier, Sophie and Nicolaïdis, Kalypso (1999) 'Who speaks for Europe? The delegation of trade authority in the EU', *Journal of Common Market Studies*, Vol. 37, No. 3, pp. 477-501
- Meunier, Sophie (2000) 'European institutions and EU-US trade negotiations', *International Organization*, Vol. 54, No. 1, pp. 103-135

- Meunier, Sophie and Nicolaidis, Kalypso (2001) 'Trade competence in the Nice treaty', available from www.eustudies.org/NiceTreatyForum.html (last accessed on 10/06/2005)
- Meunier, Sophie (2005) *Trading Voices: The European Union in International Commercial Negotiations*, Princeton, NJ: Princeton University Press
- Milner, Helen V. (1997) *Interests, Institutions, and Information: Domestic Politics and International Relations*, Princeton, NJ: Princeton University Press
- Mitrany, David (1943) *A Working Peace System*, London: Royal Institute of International Affairs
- Mitrany, David (1965) 'The prospect of integration: federal or functional', *Journal of Common Market Studies*, Vol. 4, No. 2, pp. 119-149
- Mizumoto, Natsumi (2001) 'WTO set to launch new round to tear down trade barriers', *Japan Economic Newswire*, 13 November 2001
- Moe, Terry M. (1987) 'An assessment of the positive theory of congressional dominance', *Legislative Studies Quarterly*, Vol. 12, No. 4, pp. 475-520
- Moe, Terry M. (1995) 'The politics of structural choice: Toward a theory of public bureaucracy', in: Williamson, O. (ed.) *Organization Theory from Chester Barnard to the Present and Beyond*, 2nd ed., Oxford: Oxford University Press, pp. 116-153
- Møller, Per Stig (2003) 'Singapore Issues', available from the website of the Danish Ministry of Foreign Affairs at [http://www.um.dk/en/menu/ForeignPolicy/InternationalTradePolicy/Singapore Issues/](http://www.um.dk/en/menu/ForeignPolicy/InternationalTradePolicy/SingaporeIssues/) (last accessed on 20/08/2006); these comments were allegedly first made immediately after the parliamentary debate on the Singapore Issues in the Folketing on 6 November 2003
- Moravcsik, Andrew M. (1991) 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community', *International Organization*, Vol. 45, No. 1, pp. 19-56
- Moravcsik, Andrew M. (1993) 'Preferences and power in the European Community: a liberal intergovernmentalist approach', *Journal of Common Market Studies*, Vol. 31, No. 4, pp. 473-524

- Moravcsik, Andrew M. (1993a) 'Introduction: Integrating international and domestic theories of international bargaining', in: Evans, P.B. *et al.* (eds) *Double-Edged Diplomacy: International Bargaining and Domestic Politics*, Berkeley, CA: University of California Press, pp. 1-42
- Moravcsik, Andrew M. (1995) 'Liberal intergovernmentalism and integration: A rejoinder', *Journal of Common Market Studies*, Vol. 31, No. 4, pp. 473-524
- Moravcsik, Andrew M. (1998) *The Choice for Europe. Social Purpose and State Power from Rome to Maastricht*, Ithaca, NY: Cornell University Press
- Mörth, Ulrika (2000) 'Competing frames in the European Commission- the case of the defence industry and equipment issue', *Journal of European Public Policy*, Vol. 7, No. 2, pp. 173-189
- Moyer, Wayne H. (1993) 'The European Community and the GATT Uruguay Round: preserving the Common Agricultural Policy at all costs', in: Avery, William P. (ed.) *World Agriculture and the GATT*, Boulder, CO: Lynne Rienner Publishers
- Murphy, Anna (1990) *The European Community and the International Trading System. Vol. I. Completing the Uruguay Round of the GATT*, Brussels: Centre for European Policy Studies
- Murphy, Anna (1990a) *The European Community and the International Trading System. Vol. II. The European Community and the Uruguay Round*, Brussels: Centre for European Policy Studies
- Muttimer, D. (1989) '1992 and the political integration of Europe: neofunctionalism reconsidered', *Journal of European Integration*, Vol. 13, No. 1, pp. 75-101
- Narbrough, Colin (1993) 'Free trade, not fine detail, is the real boost from Gatt', *The Times*, 15 December 1993, p. 25
- Neill, Patrick (1995) *The European Court of Justice: A Case Study in Judicial Activism*, London: European Policy Forum
- Neyer, Jürgen (2004) 'Weak states in interaction – the EU and the US in international trade dispute settlement', paper presented at the biennial ECSA-C conference in Montreal, 27-29 May 2004

- NGO email (2003) *Information about UK NGO Meeting with UK Ministers on 1st December, 4 December 2003*, available from www.investmentwatch.org/articles/email4dec.html (last accessed on 01/07/04)
- Nielson, Daniel L. and Tierney, Michael J. (2003) 'Delegation to international organizations: agency and world bank environmental reform', *International Organization*, Vol. 57, No. 2, pp. 241-276
- Nollkaemper, André (1987) 'The European Community and international environmental co-operation: legal aspects of external Community powers', *Legal Issues of European Integration*, Vol. 2, pp. 55-91
- Nugent, Neill (1995) 'The leadership capacity of the European Commission', *Journal of European Public Policy*, Vol. 2, No. 4, pp. 603-623
- Nugent, Neill (2001) *The European Commission*, Basingstoke: Palgrave
- Nugent, Neill (2003) *The Government and Politics of the European Union*, 5th ed., New York, N.Y.: Palgrave Macmillan
- Oberthür, Sebastian (2001) 'Linkages between the Montreal and Kyoto Protocols. Enhancing synergies between protecting the ozone layer and the global climate', *International Environmental Agreements: Politics, Law and Economics*, Vol. 1, pp. 357-377
- OECD (1996) *Towards Multilateral Investment Rules*, Paris: Organisation for Economic Co-operation and Development
- OECD (1998) *Ensuring Compliance with a Global Climate Change Agreement*, Paris: OECD information paper, ENV/EPOC(98)5/REV1
- O'Keefe, David, and Schermers, Henry G. (eds) (1983) *Mixed Agreements*, Deventer: Kluwer
- O'Keefe, David and Emiliou, Nicholas (1996) *The European Union and World Trade Law. After the GATT Uruguay Round*, Chichester: John Wiley & Sons
- Osborn, Andrew (2003) 'Brussels softens stance on WTO talks', *The Guardian*, 27 November 2003, available from <http://www.guardian.co.uk/business/story/0,3604,1093923,00.html> (last accessed on 01/07/04)
- Ostry, Sylvia (2006) 'The world trading system: in the fog of uncertainty', *The Review of International Organizations*, Vol. 1, No. 2, pp. 139-152

- Ozone Secretariat (2000) *The Montreal Protocol on Substances that Deplete the Ozone Layer as Either Adjusted an/or Amended in London 1990, Copenhagen 1992, Vienna 1995, Montreal 1997, Beijing 1999*, Nairobi: Secretariat for the Vienna Convention for the Protection of the Ozone Layer & the Montreal Protocol on Substances that Deplete the Ozone Layer
- Paemen, Hugo (1995) 'The significance of the Uruguay Round', in: Bourgeois, Jacques H.J. et al. (eds) *The Uruguay Round Results. A European Lawyers' perspective*, Brussels: European University Press
- Paemen, Hugo and Bensch, Alexandra (1995) *From the GATT to the WTO. The European Community in the Uruguay Round*, Leuven: Leuven University Press
- Palmeter, David N. and Mavroidis, Petros C. (1999) *Dispute Settlement in the World Trade Organization: Practice and Procedure*, The Hague: Kluwer Law International
- Patterson, Gardner (1983) 'The European Community as a threat to the system', in: Cline, William R. (ed.) *Trade Policy in the 1980s*, Washington DC: Institute for International Economics, pp. 223-242
- Patterson, Lee Ann (1997) 'Agricultural policy reform in the European Community: a three-level game analysis', *International Organization*, Vol. 51, No. 1, pp. 135-165
- Peel, Quentin (2004) 'Euroscepticism spreads West', *Financial Times*, December 2 2004, p. 19
- PES Group (2003) *A Long and Winding Road: From Doha to Cancun. Addendum to the April 2001 PES Groups Position Paper "A New Direction in World Trade"*, Brussels: PES Group
- Pescatore, Pierre (1999) 'Opinion 1/94 on "conclusion" of the WTO agreement: is there an escape from a programmed disaster?', *Common Market Law Review*, Vol. 36, pp. 386-405
- Peters, Guy B. (1992) 'Bureaucratic politics and the institutions of the European Community', in: Sbragia, Alberta M. (ed.) *Institutions and Policymaking in the "New" Community*, Washington DC: The Brookings Institute
- Peters, Guy B. (1999) *Institutional Theory in Political Science: the 'New Institutionalism'*, London and New York: Pinter

- Petersmann, Ernst-Ulrich (1983) 'Participation of the European Communities in the GATT: International law and Community law aspects', in: O'Keefe, David, and Schermers, Henry G. (eds) (1983) *Mixed Agreements*, Deventer: Kluwer
- Petersmann, Ernst-Ulrich (1986) 'The EEC as a GATT member – Legal conflicts between GATT law and European Community law', in: Hilf, Meinhard, Jacobs, Francis G. and Petersmann, Ernst-Ulrich (eds) *The European Community and GATT*, Deventer: Kluwer
- Petersmann, Ernst-Ulrich (1996) 'The GATT dispute settlement system as an instrument of the foreign trade policy of the EC', in: Emiliou, Nicholas and O'Keefe, David (eds) *Legal Aspects of Integration in the European Union*, London: Kluwer International
- Peterson, John (1991) 'Technology policy in Europe: Explaining the framework programme and EUREKA in theory and practice', *Journal of Common Market Studies*, Vol.39, No. 3, pp. 269-290
- Peterson, John (1995) 'Policy networks and EU policy making', *West European Politics*, Vol.18, No.2, pp. 389-407
- Peterson, John (2002) 'The college of Commissioners', in: Peterson, John and Shackleton, Michael (eds) *The Institutions of the European Union*, Oxford: Oxford University Press, pp. 71-94
- Phan Van Phi, Raymond (1987) 'Les relations économiques et commerciales Communauté Européenne – États-Unis. La perspective Européenne', in: Bourrinet, Jacques (ed) *Les Relations Communauté Européenne États-Unis*, Paris: Economica
- Pierson, Paul (1996) 'The path to European integration: a historical institutionalist analysis', *Comparative Political Studies*, Vol. 29, No. 2, pp. 123-163
- Pierson, Paul (2000) 'The limits of design: explaining institutional origins and change', *Governance: An International Journal of Policy and Administration*, Vol.13, No. 4, pp. 475-499
- Pierson, Paul (2000a) 'Increasing returns, path dependence, and the study of politics', *American Political Science Review*, Vol. 95, No. 2, pp. 251-267

- Pollack, Mark A. (1996) 'The new institutionalism and EC governance: the promise and limits of institutional analysis', *Governance: An International Journal of Policy and Administration*, Vol. 9, No. 4, pp. 429-458
- Pollack, Mark A. (1997) 'Delegation, agency and agenda setting in the European Community', *International Organization*, Vol. 51, No. 1, pp. 99-134
- Pollack, Mark A. (2000) 'The Commission as an agent', in: Nugent, Neill (ed.) *At the Heart of the Union. Studies of the European Commission*, 2nd ed., London: MacMillan Press Ltd, pp. 111-130
- Pollack, Mark A. (2003) *The Engines of European Integration : Delegation, Agency and Agenda-Setting in the EU*, Oxford: Oxford University Press
- Pollack, Mark A. (2003a) 'Control mechanism or deliberative democracy? Two images of comitology', *Comparative Political Studies*, Vol. 36, No. 1/2, pp. 125-155
- Preeg, Ernst (1995) *Traders in a Brave New World*, Chicago: University of Chicago Press
- Press Association (2004) 'Questions and answers on the EU constitution' by Geoff Meade, October 29 2004
- Putnam, Robert D. (1988) 'Diplomacy and domestic politics: the logic of two-level games', *International Organization*, Vol. 42, No. 3, pp. 427-460
- Raghavan, Chakravarthi (1987) 'GATT's creaking machinery needs improvement, but how?', *SUNS 11 April 1987*, Geneva: Third World Network
- Raghavan, Chakravarti (1990) 'Negative to institutionalising GATT as the ITO', *SUNS 14 March 1990*, Geneva : Third World Network
- Raghavan, Chakravathi (1990a) 'An international trade organization to protect TNC's?', *SUNS 14 February 1990*, Geneva: Third World Network
- Raghavan, Chakravathi (1990b) 'New institutional mechanism needs wider perspective', *SUNS 14 March 1990*, Geneva: Third World Network
- Raghavan, Chakravarthi (1990c) 'Environment and sustainable development', *SUNS 12 October 1990*, Geneva: Third World Network
- Raghavan, Chakravarthi (1991) 'GATT consultations on environment & trade', *SUNS 18 February 1991*, Geneva: Third World Network

- Raghavan, Chakravarti (1992) 'Europe: narrow French 'Yes' keeps integration moves alive, but...', *SUNS 22 September 1992*, Geneva: Third World Network
- Reinhardt, Eric R. (1996) *Posturing Parliaments: Ratification, Uncertainty and International Bargaining*, PhD Dissertation, New York, NY: Columbia University, 11/12/1996
- Richardson, Jeremy (1996) 'Policy-making in the EU', in: Richardson, J. (ed.) *European Union: Power and Policy-Making*, London: Routledge, pp. 3-23
- Rieger, Elmar (2000) 'The common agricultural policy. Politics against markets', in: Wallace, Helen and Wallace, William (eds) *Policy-Making in the European Union*, 4th ed., Oxford: Oxford University Press
- Riker, W. (1980) 'Implications from the dis-equilibrium of majority rule for the study of institutions', *American Political Science Review*, Vol. 74, pp. 432-447
- Rittberger, Berthold (2003) 'The creation and empowerment of the European Parliament', *Journal of Common Market Studies*, Vol. 41, No. 2, pp. 203-225
- Roessler, Frieder (1987) 'L'attitude des États-Unis et de la CEE devant le droit du GATT', in: Bourrinet, Jacques (ed) *Les Relations Communauté Européenne États-Unis*, Paris: Economica
- Rosas, Allan (2003) 'International dispute settlement: EU practices and procedures', *German Yearbook of International Law – Jahrbuch für Internationales Recht*, Vol. 46, pp. 284-322
- Sandholtz, Wayne (1992) *High-Tech Europe: The Politics of International Cooperation*, Berkeley, CA: University of California Press
- Sandholtz, Wayne (1993) 'Institutions and collective action: The new telecommunications in Western Europe', *World Politics*, Vol. 45, No. 2, pp. 242-270
- Sandholtz, Wayne and Zysman, John (1989) '1992: recasting the European bargain', *World Politics*, vol. 42, No. 1, pp. 95-128
- Sands, Philippe (1993) 'Enforcing environmental security: the challenges of compliance with international obligations', *Journal of International Affairs*, Vol. 46, No. 2, pp. 367-390
- Sapir, André (2002) 'Old and new issues in EC-US trade disputes', paper prepared for the conference on "Transatlantic Perspectives on US-EU

- Economic Relations: Convergence, Conflict & Cooperation”, Harvard University, 11-12/04/2002
- Sbragia, Alberta M. (1998) ‘Institution-building from below and above: The European Community in global environmental politics’, in: Sandholtz, Wayne and Stone Sweet, Alec (eds) *European Integration and Supranational Governance*, Oxford: Oxford University Press
 - Sbragia, Alberta M. and Hildebrand, Philipp M. (1998) ‘The European Union and compliance: a story in the making’, in: Brown Weiss, E. and Jacobson, H.K. (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords*, Cambridge, MA: The MIT Press
 - Sbragia, Alberta M. and Damro, C. (1999) ‘The changing role of the European Union in international environmental politics: institution building and the politics of climate change’, *Environment and Planning C: Government and Policy*, Vol. 17, No. 1, pp. 53-68
 - Schalatek, Liane (2001) *Trade and Environment. The WTO and MEAs*, 2 November 2003, Washington, DC: Heinrich Böll Foundation
 - Scharpf, Fritz W. (1988) ‘The joint-decision trap: lessons from German federalism and European integration’, *Public Administration*, Vol. 6, pp. 239-278
 - Scharpf, Fritz W. (1997) *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*, Oxford: Westview Press
 - Schmitter, Philippe (1969) ‘Three neofunctional hypotheses about international integration’, *International Organization*, Vol. 23, No. 1, pp. 161-166
 - Shapiro, Martin (1991) ‘The European Court of Justice’, in: Sbragia, Alberta M. (ed.) *Euro-Politics. Institutions and Policy-Making in the “New” European Community*, Washington DC: The Brookings Institution
 - Shepsle, Kenneth A. (1979) ‘Institutional arrangement and equilibrium in multidimensional voting models’, *American Journal of Political Science*, Vol. 23, No. 1: pp. 27-59
 - Shepsle, Kenneth A. and Weingast, Barry R. (1987) ‘The institutional foundations of committee power’, *American Political Science Review*, Vol. 81, pp. 85-104

- Shepsle, Kenneth A. (1989) 'Studying institutions: some lessons from the rational Choice approach', *Journal of Theoretical Politics*, Vol. 1, No. 2, pp. 131-147
- Skogstad, Grace (2001) 'The WTO and food safety regulatory policy in the European Union', *Journal of Common Market Studies*, Vol. 39, No. 3, pp. 485-505
- Smith, Michael (1995) 'The Commission and external relations', in: Edwards, G. and Spence, D. (eds) *The European Commission*, 2nd ed., London: Cartermill International Ltd
- Smith, Karen E. (2006) 'Speaking with one voice? European Union co-ordination on human rights issues at the United Nations', *Journal of Common Market Studies*, Vol. 44, No. 1, pp. 113-137
- Spence, David (1997) 'Staff and personnel policy in the Commission', in: Edwards, G. and Spence, D. (eds) *The European Commission*, 2nd ed., London: Cartermill International Ltd, pp. 68-102
- Spinelli, Altiero (1972) *The European Adventure – Tasks for the Enlarged Community*, London: C. Knight
- Steinbruner, John D. (1974) *The Cybernetic Theory of Decision: New Dimensions of Political Analysis*, Princeton, NJ: Princeton University Press
- Stevens, A. and Stevens, H. (2001) *Brussels Bureaucrats? The Administration of the European Union*, Basingstoke: Palgrave
- Stewart, Terence P. (ed.) (1993) *The GATT Uruguay Round: A Negotiating History*, Vol. I: Commentary, Deventer: Kluwer Law and Taxation
- Stewart, Terence P. (ed.) (1993a) *The GATT Uruguay Round: A Negotiating History*, Vol. II: Commentary, Deventer: Kluwer Law and Taxation
- Stoler, Andrew L. (2004) 'The WTO dispute settlement process: did the negotiators get what they wanted?', *World Trade Review*, Vol. 3, No. 1: pp. 99-118
- Széll, Patrick (1997) 'Compliance regimes for multilateral environmental agreements – a progress report', *Environmental Policy and Law*, Vol. 27, No. 4, pp.304-309
- Taylor, P. (1983) *The Limits to European Integration*, London: Croom Helm

- Taylor, P. (1993) *International Organization in the Modern World. The Regional and Global Process*, London: Pinter
- Taylor, Paul (1975) 'The politics of the European Communities: the confederal phase', *World Politics*, Vol. 27, No. 3, pp. 336-360
- Tenner, Clare (2000) 'Multilateral environmental agreements: trends in verification', in: Findlay, Trevor (ed.) *Verification Yearbook 2000*, London: VERTIC, pp. 133-149
- Thatcher, Mark (2001) 'The Commission and national governments as partners: EC regulatory expansion in telecommunications 1997-2000', *Journal of European Public Policy*, Vol.8, No.4, pp. 499-518
- Thelen, K. and Steinmo, S. (1992) 'Historical institutionalism in comparative analysis', in: Steinmo, S., Thelen, K. and Longstreth, F., *Structuring Politics: Historical Institutionalism in Comparative Analysis*, New York, NY: Cambridge University Press
- TN SOFRES Consulting (2000) *Survey of the Attitudes of the European Business Community to International Investment Rules. Final Report*, available from http://europa.eu.int/comm/trade/issues/sectoral/investment/docs/finreps_of_en.pdf (last accessed 24/06/04)
- Tranholm-Mikkelsen, J. (1991) 'Neofunctionalism: obstinate or obsolete? A reappraisal in the light of the new organism of the EC', *Millennium: Journal of International Studies*, Vol. 20, No. 1, pp. 1-22
- Tsebelis, George (1994) 'The power of the European Parliament as a conditional agenda setter', *American political Science Review*, Vol. 88, No. 1, pp. 129-142
- Tsebelis, George (2000) 'Veto players and institutional analysis', *Governance. An International Journal of Policy and Administration*, Vol. 13, No. 4, pp. 454-458
- Tsebelis, George (2002) *Veto Players: How Political Institutions Work*, Princeton, NJ: Princeton University Press
- Tsebelis, George and Yatağan, X. (2002) 'Veto players and decision-making in the EU after Nice: Policy stability and bureaucratic/judicial discretion', *Journal of Common Market Studies*, Vol.40, No. 2, pp. 283-307

- UNCTAD (1999) *Lessons from the MAI*, UNCTAD Series on issues in international investment agreements, United Nations: Geneva and New York, UNCTAD/ITE/IIT/MISC.22
- UNCTAD (1999a) *Foreign Direct Investment and Development*, UNCTAD Series on issues in international investment agreements, United Nations: Geneva and New York, UNCTAD/ITE/IIT/10 (Vol. 1)
- UNCTAD (1999b) *Trends in International Investment Agreements: An Overview*, UNCTAD Series on issues in international investment agreements, United Nations: Geneva and New York, UNCTAD/ITE/IIT/13.
- UNEP (1991) *Non-Compliance Procedure. Proposal Made on Behalf of the European Economic Community*, 8 April 1991, Ad-Hoc Working Group of Legal Experts on Non-Compliance with the Montreal Protocol, UNEP/OzL.Pro/WG.3/2/CRP.1
- UNEP (1992) *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 25 November 1992, UNEP/OzL.Pro.4/15
- UNFCCC (2000) *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol. Report of the Joint Working Group on Compliance on its Work During the Second Part of the Thirteenth Session of the Subsidiary Bodies*, UN doc. FCCC/SB/2000/CRP.15/Rev.2, 20 November 2000
- UNICE (2001) *New WTO Round. UNICE Fact Sheet on Trade and Investment*, 25 September 2001, Brussels: UNICE
- UNICE (2003) *UNICE Position on a WTO Framework for International Investment*, 18 May 2003, Brussels: UNICE
- UNICE (2003a) *UNICE: Post-Cancun Trade and Investment Strategy*, 5 December 2003, Brussels: UNICE
- United Nations Reports of International Arbitral Awards (1941) *Trail Smelter Arbitration (USA/Canada)*, 11 March 1941, R.I.A.A., III, 1905
- Vahl, Remco (1997) *Leadership in Disguise. The Role of the European Commission in EC Decision-Making on Agriculture in the Uruguay Round*, Aldershot: Ashgate

- Vallianatos, Mark (1998) *Update on MAI Negotiations*, Washington, DC: Friends of the Earth, 2 April 1998, available from <http://www.flora.org/flora/archive/mai-info/update01.htm> (last accessed on 30/06/04)
- Vallianatos (1998a) *Update of MAI Negotiations*, Washington, DC: Friends of the Earth, 27 October 1998, available from <http://www.cb3rob.net/~merijn89/nieuws/27-10-98.html> (last accessed on 30/06/04)
- Van den Bossche, Peter L. H. (1997) 'The European Community and the Uruguay Round agreements. Confusion and controversy over the competence and conduct of the European Community in international economic relations: the bittersweet experience of the Uruguay Round', in: Jackson, John H. and Sykes, Alan (eds) *Implementing the Uruguay Round*, Oxford: Clarendon Press
- Van den Hoven, Adrian (2002) 'Interest group influence on trade policy in a multilevel polity: analysing the EU position at the Doha WTO Ministerial Conference', EUI Working Paper, RSC No. 2002/67, Florence: European University Institute
- Van Dok-van Weelen (1995) report to the Dutch parliament of November 1995, p. 4
- Victor, David G. (1996) *The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure*, Laxenburg: International Institute for Applied Systems Analysis
- Wallace, Helen (2000) 'The policy process: a moving pendulum', in: Wallace, W. and Wallace, H. (eds) *Policy-Making in the European Union*, 4th ed., Oxford: Oxford University Press, pp. 39-64
- Wallace, William (1983) 'Less than a federation more than a regime: the Community as a political system', in: Wallace, H., Wallace, W. and Webb, C. (eds) *Policy-Making in the European Community*, London: John Wiley and Sons
- Walter, Andrew (2001) 'Unravelling the Faustian bargain: non-state actors and the multilateral agreement on investment', in: Josselin, Daphne and Wallace, William (eds) *Non-State Actors in World Politics*, New York: Palgrave

- Walter, Andrew (2001a) 'NGOs, business and international investment: MAI, Seattle and beyond', *Global Governance*, Vol. 7, No. 1, pp. 51-73
- Waltz, Kenneth N. (1954) *Man, the State, and War*, New York, NY: Columbia University Press
- Waltz, Kenneth N. (1979) *Theory of International Politics*, Reading, MA: Addison Wesley
- Weiler, Joseph (1980) 'The European Parliament and foreign affairs: external relations of the European Economic Community', in Cassese, Antonio (ed) *Parliamentary Control over Foreign Policy. Legal Essays*, Alphen aan den Rijn: Sijthoff & Noordhoff
- Weiler, Joseph (1993) 'Journey to an unknown destination: a retrospective and prospective of the European Court of Justice in the arena of political integration', *Journal of Common Market Studies*, Vol. 31, No.4, pp. 417-446
- Wiczorek-Zeul, Heidemarie (2003) *Trade and Development. Making the Development Round a Reality in Cancún*, speech delivered at the UNCTAD Special Meeting in Geneva, 22 July 2003, Palais des Nations, Room XVII, available from <http://www.bmz.de/en/press/speech/rede22072003.html> (last accessed on 01/07/04)
- Williams, Frances (1993) 'The Gatt deal: WTO, a new name heralds new powers – US gets its own back on the European Union', *Financial Times*, 16/12/1993, p. 5
- Woolcock, Stephen (2000) 'European trade policy. Global pressures and domestic constraints', in: Wallace, William and Wallace, Helen (eds) *Policy-Making in the European Union*, 4th ed., Oxford: Oxford University Press, pp. 373-399
- WTO (1996) *European Communities – Customs Classification of Some Computer Equipment. Request for Consultations by the United States*, WT/DS62/1, 14 November 1996
- WTO (1996a) *Singapore WTO Ministerial 1996: Ministerial Declaration*, 18 December 1996, WT/ MIN(96)/DEC
- WTO (1997) *Dispute Settlement Body. Minutes of Meeting, Held in the Centre William Rappard on 20 March 1997*, WT/DSB/M/30

- WTO (1997a) *Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights. Request for Consultations by the United States*, WT/DS86 – IP/D/8, 22 May 1997
- WTO (1997b) *Denmark – Measures Affecting the Enforcement of Intellectual Property Rights. Request for Consultations by the United States*, WT/DS83 – IP/D/9, 21 May 1997
- WTO (1997c) *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights. Request for Consultations by the United States*, WT/DS86 – IP/D/10, 2 June 1997
- WTO (1997d) *United States – Tax Treatment for “Foreign Sales Corporations”*. Request for Consultations by the European Communities, WT/DS108 – G/L/212 – G/SCM/D18, 28 November 1997
- WTO (1997e) *Ireland – Customs Classification of Certain Computer Equipment. Request for Consultations by the United States*, WT/DS68/1-G/L/153, 19 February 1997
- WTO (1997f) *United Kingdom – Customs Classification of Certain Computer Equipment. Request for Consultations by the United States*, WT/DS67/1-G/L/152, 20 February 1997
- WTO (1998) *United States – Import Prohibition of Certain Shrimp and Shrimp Products. Report of the Appellate Body*, WT/DS58/AB/R, 12 October 1998
- WTO (1998a) *Canada – Patent Protection for Pharmaceutical Products. Request for Consultations by the European Communities*, WT/DS114/1 – IP/D/11 – G/L/221, 12 January 1998
- WTO (1998b) *European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs. Request for Consultations by the United States*, WT/DS124 – IP/D/13, 7 May 1998
- WTO (1998c) *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs. Request for Consultations by the United States*, WT/DS125 – IP/D/14, 7 May 1998
- WTO (1998d) *European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights. Request for Consultations by the United States*, WT/DS115 – IP/D/12, 12 January 1998

- WTO (1998e) *United States - Tax Treatment for "Foreign Sales Corporations"*. *Request for the Establishment of a Panel by the European Communities*, WT/DS108, 9 July 1998
- WTO (1998f) *Belgium – Certain Income Measures Constituting Subsidies*. *Request for Consultations by the United States*, WT/DS127, 5 May 1998
- WTO (1998g) *Netherlands – Certain Income Measures Constituting Subsidies*. *Request for Consultations by the United States*, WT/DS128, 5 May 1998
- WTO (1998h) *Greece – Certain Income Measures Constituting Subsidies*. *Request for Consultations by the United States*, WT/DS129, 5 May 1998
- WTO (1998i) *Ireland – Certain Income Measures Constituting Subsidies*. *Request for Consultations by the United States*, WT/DS130, 5 May 1998
- WTO (1998j) *France – Certain Income Measures Constituting Subsidies*. *Request for Consultations by the United States*, WT/DS131, 5 May 1998
- WTO (1998k) *Dispute Settlement Body. Minutes of Meeting, Held in the Centre William Rappard on 22 January 1998*, WTO: Geneva, WT/DSB/M/41
- WTO (1999) *Working Group on the Relationship between Trade and Investment. Report on the Meeting of 22 and 23 March 1999*, WTO: Geneva, WT/WGTI/M/8
- WTO (1999a) *Dispute Settlement Body. Minutes of Meeting, Held in the Centre William Rappard on 28 April 1999*, WT/DSB/M/60
- WTO (1999b) *Dispute Settlement Body. Minutes of Meeting, Held in the Centre William Rappard on 26 May 1999*, WT/DSB/M/62
- WTO (1999c) *United States – Section 211 Omnibus Appropriations Act of 1998*. *Request for Consultations by the European Communities and their member States*, WT/DS176/1 – IP/D/20, 15 July 1999
- WTO (1999d) *United States – Section 110(5) of the US Copyright Act. Request for Consultations by the European Communities and their Member States*, WT/DS/160 – IP/D/16, 4 February 1999
- WTO (1999e) *WTO Briefing Note – Ministers Start Negotiating Seattle Declaration*, 1 December 1999
- WTO (1999f) *WTO Briefing Note – Ministers Consider New and Revised Texts*, 2 December 1999

- WTO (1999g) *WTO Briefing Note – 3 December – The Final Day and What Happens Next*, 3 December 1999
- WTO (2000) *Dispute Settlement Body. Minutes of Meeting, Held in the Centre William Rappard on 27 July 2000*, WT/DSB/M/86
- WTO (2000a) *Dispute Settlement Body. Minutes of Meeting, Held in the Centre William Rappard on 26 September 2000*, WT/DSB/M/89
- WTO (2000b) *Dispute Settlement Body. Minutes of Meeting, Held in the Centre William Rappard on 11 September 2000*, WT/DSB/M/88
- WTO (2000c) *Chile – Measures Affecting the Transit and Importation of Swordfish. Request for Consultations by the European Communities*, WT/DS193/1, 26 April 2000
- WTO (2000d) *United States – Section 337 of the Tariff Act of 1930 and Amendments thereto. Request for Consultations by the European Communities and their Member States*, WT/DS186/1, 18 January 2000
- WTO (2001) *Doha WTO Ministerial 2001: Ministerial Declaration*, 20 November 2001, WTO: Geneva, WT/MIN(01)/DEC/1
- WTO (2001a) *A Historic Moment: ‘May I Take it that this is Agreeable?’ Gavel, Applause, Congratulations ..., available from http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_chair_speaking_e.htm#clarification (last accessed 29/06/04)*
- WTO (2001b) *Dispute Settlement Body. Minutes of Meeting, Held in the Centre William Rappard on 21 November 2001*, WT/DSB/M/113
- WTO (2001c) *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements. Note by the WTO and UNEP Secretariats*, WT/CTE/W/191, 6 June 2001
- WTO (2002) *The Legal Texts. The Result of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge: Cambridge University Press
- WTO (2002a) *Working Group on the Relationship between Trade and Investment. Communication from the European Community and its Member States*, WTO: Geneva, WT/WGTI/W/110

- WTO (2002b) *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding. Communication from the European Communities*, 13 March 2002, TN/DS/W/1
- WTO (2003) *Committee On Trade and Environment. Report to the 5th Session of the WTO Ministerial Conference in Cancún. Paragraphs 32 and 33 of the Doha Ministerial Declaration*, 11 July 2003, WT/CTE/8, Geneva: World Trade Organization
- WTO (2004) *Trade and Environment at the WTO: Background Document*, Geneva: WTO Secretariat
- WTO (2004a) *General Council 15-16 December 2003. Minutes of Meeting Held in the Centre William Rappard on 15-16 December 2003*, 27 February 2004, WT/GC/M/84, Geneva: World Trade Organization, in particular paragraph 56
- WWF (2003) *A League of Gentlemen. Who really Runs EU Decision-Making?*, November 2003, London: WWF-UK, available from www.wwf.org.uk/filelibrary/pdf/leagueofgentlemen.pdf (last accessed on 20/08/2006)
- Yerkey, Gary G. (2003) 'US official says EU isolated', *International Trade Daily*, 5 September 2003
- Yerkey, Gary G. (2003a) 'Rangel, Levin send letter', *International Trade Daily*, 5 September 2003
- Yoshida, O. (2001) *The International Legal Régime for the Protection of the Stratospheric Ozone Layer. International Law, International Régimes and Sustainable Development*, The Hague: Kluwer Law International
- Young, Alasdair R. (2002) *Extending European Cooperation: The European Union and the 'New' International Trade Agenda*, Manchester: Manchester University Press
- Young, Alasdair R. (2003) 'What game? By which rules? – Adaptation and flexibility in the EC's foreign economic policy', in: Knodt, Michèle and Princen, Sebastiaan (eds) *Understanding the European Union's External Relations*, London: Routledge, pp. 54-71

- Young, Alasdair R. (2003a) 'Trade wars and the war on terrorism: transatlantic economic relations after September 11 2001', paper presented at the 8th EUSA conference in Nashville, Tennessee, March 27-29 2003
- Young, Alasdair R. (2004) 'The incidental fortress: the Single European Market and world trade', *Journal of Common Market Studies*, Vol. 42, No. 2, pp. 393-414
- Zimmermann, Thomas A. (2005) 'WTO dispute settlement at ten: evolution, experiences and evaluation', *Aussenwirtschaft – The Swiss Review of International Economic Relations*, Vol. 60, No. 1, pp. 27-61

ANNEX 1: List of people interviewed (alphabetical order)

- Amarasinha, Stefan: official, European Commission, DG Trade, unit F1
 ‘Coordination of WTO, OECD, trade-related assistance, GATT, 133 Committee’
 Represented the Danish government in the OECD Negotiations on a Multilateral Agreement on Investment
Date, place and mode of interview: face-to-face interview, 16 June 2005, Brussels
- Carden, Richard: Department of Trade and Industry, UK
 seconded to the European Commission, DG Trade in 2003
Date, place and mode of interview: face-to-face interview, December 2003, London
- Eggers, Barbara: official, European Commission, Legal Service, External Relations unit
Date, place and mode of interview: face-to-face interview, 31 August 2004, Brussels
- Ehring, Lothar: official, European Commission, DG Trade, unit F2 ‘WTO dispute settlement and trade barriers regulation’
Date, place and mode of interview: face-to-face interview, 20 June 2005, Brussels
- Horrocks, Peter: official, European Commission, DG Environment, Climate Change and Energy unit
Date, place and mode of interview: face-to-face interview, 20 December 2004, Brussels as well as follow-up email conversations
- Kiener, Christophe: official, European Commission, DG Trade, unit G1 ‘Trade in Services and Investment’
Date, place and mode of interview: face-to-face interview, 20 June 2005, Brussels
- Maenaut, David: diplomat, Flemish Government representative to the WTO
Date, place and mode of interview: email conversation between 10 and 11 January 2005

- Mahieu, Henk: diplomat, Belgian Foreign Office
deputy member of the 133-Committee for Belgium
Date, place and mode of interview: email conversation
between 12 and 13 January 2005
- Ratchford, Robin acting head of unit, European Commission, DG Trade,
unit G3 'Sustainable development (including trade and
environment)'
Date, place and mode of interview: face-to-face interview,
22 June 2005, Brussels
- Rosas, Alan: judge at the European Court of Justice
former principal legal advisor at the legal service of the
European Commission and deputy director-general of the
legal service
Date, place and mode of interview: face-to-face interview,
29 May 2005, Montreal
- Sauve, Pierre : official, OECD, trade directorate
Date, place and mode of interview: email conversation
between 9 and 10 June 2004
- Schonberg, Soren: official, European Commission, DG Trade, unit F2
'Dispute Settlement and Trade Barriers Regulation'
Date, place and mode of interview: face-to-face interview,
27 June 2005, Brussels
- Széll, Patrick: former member of the legal service of the UK Department
of the Environment, Transport and the Regions
Chairman of the *Working Group of Legal Experts* of the
Montreal Protocol and of the Committee on non-
compliance of the Kyoto Protocol
Date, place and mode of interview: email conversation
between 26 April and 13 May 2005
- Van den Hoven, Adrian: official, UNICE, responsible for WTO matters and
trade-environment issues
Date, place and mode of interview: face-to-face
interview, 3 August 2005, Brussels

- Victor, David: Director Programme of Energy and Sustainable
Development at Stanford University
Author of an influential study on the Montreal Protocol
Date, place and mode of interview: email conversation
between 7 and 9 July 2005
- Wallström, Margot European Commissioner for the Environment
Date, place and mode of interview: 11 May 2004, London.
Roundtable at the London School of Economics, organised
by Chatham House