CHAPTER 4

Rules Governing the Joint Participation of the EC,
Next to the Member States, in “Mixed Agreements”
and International Organizations

4.1 Introduction

In the past three decades the Community has enhanced its involvement in international environmental and ocean affairs and has participated together with its member states in all major negotiations. Currently, the Community and its member states speak with one voice on a growing number of marine environmental issues and have become one of the most influential players on the international scene. Nevertheless, their joint participation in international decision-making still creates practical problems and raises issues both under EC and international law. The purpose of this Chapter is to outline the general rules governing the accession to and joint participation of the Community and the member states in so-called “mixed agreements” and international organizations (IOs).

This Chapter begins by discussing the division of external competence between the Community and the member states and its legal implications. Since there is copious literature on this topic, the analysis does not pretend to be exhaustive. The EC Treaty does not contain clear rules on how to divide the respective spheres of power and how things should work in areas outside the exclusive competence. To fill these gaps, the Court has developed a rather ambiguous doctrine, which does not provide any clear-cut and uniform answers, but requires case-by-case solutions. This is among the most critical and disputed aspects of EC law and is particularly complicated in relation to ocean matters. The jurisprudential rules, indeed, have been developed by the Court in a different context and it is not always clear to what extent they may be applicable to marine environmental issues.

To overcome the difficulty in drawing a clear allocation of external competence, the Court has pointed attention to the conclusion by the Community and the member states of mixed agreements and/or their joint accession to IOs (the so-called phenomenon of “mixity”). Although mixity has become the common way in which the Community conducts its external relations, there is still some confusion surrounding their joint action and its legal consequences. Some indications may be provided by the mixed agreement itself by means of “participation clauses”, which will be briefly discussed in section 4.3.1. Instead of establishing rigid rules on how the Community and the member states should behave at the international level, the Court has emphasised the duty of close cooperation in the various phases of the life of the mixed agreement. However, it has not shed much light on how this cooperation should work in practice and what its legal consequences are. The central part of the Chapter addresses the procedural rules, as developed in the day-by-day practice of the Community, on how to apply the duty of
close cooperation to the negotiation, conclusion, entry into force and implementation of mixed agreements. These are mainly practical rules and vary to a great extent depending on the agreement, negotiation or even meeting in question. The lack of clear and uniform rules, however, is the direct consequence of the need to ensure the maximum level of flexibility in the manner in which the Community and the member states participate in international negotiations.

4.2 The Division of External Competences between the EC and the Member States

4.2.1 The Legal Effect of EC “Exclusive” External Competence

As the Court has pointed out, in areas under the Community’s “exclusive” competence, such as fisheries, member states have “fully and definitively” transferred their power to the Community and are no longer entitled to take individual actions outside the EC framework. In these matters, therefore, member states have lost their concurrent external powers and can no longer conclude international agreements or undertake obligations with third countries or inter se, nor can they pursue their own interests or adopt positions which are different from those of the Community when they act at the international level. In areas such as fisheries, therefore, it is for the Community, represented by the Commission, to negotiate, conclude and implement international agreements or become a member of an international organization. If the Commission does not take action, the EC institutions and the member states may bring it to Court, on the basis of Article 232 EC, for not fulfilling its obligations under the Treaty. The transfer of competence is irreversible and the mere fact that the Community abstains from taking action does not mean that powers return to the member states.

1 Case C-804/79 (Fisheries Case), Paras. 17 and 18. On the legal effects of the external exclusive competence of the Community see: I. Macleod et al. (1996), pp. 61-3.
2 E.g., Case C-22/70 (ERTA Case), Para. 17. See also: Opinion 1/75, at 1364. For the sake of clarity it is worth mentioning that all those considerations do not apply in respect of the member states’ dependent territories, which remain outside the scope of the EC Treaty.
3 As a consequence, the Commission alone has become a member of most RFMOs. Conversely, the EC has become a member to the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) alongside some member states. This is because CCAMLR not only regulates fisheries, but is also involved in ecosystem management, including the conservation of species, such as penguins, which are not covered by EC wildlife legislation. In addition, the member states retain their powers to act with regard to their dependent territories. Denmark, for instance, has acceded to several fisheries agreements on behalf of the Faeroe Islands and Greenland next to the Community.
4 Case C-804/79 (Fisheries Case), Para. 20. However, according to I. Macleod et al. (1996), p. 62, the member states’ competence revives to the extent that common measures have been revoked.